Submission on

Draft Guidelines on the Exercise of Discretionary Jurisdiction in Removal Order Appeals by Permanent Residents

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CITIZENSHIP AND IMMIGRATION LAW SECTION
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PREFACE

The Canadian Bar Association is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the Citizenship and Immigration Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement by the Citizenship and Immigration Law Section of the Canadian Bar Association.

Submission on

Draft Guidelines on the Exercise of Discretionary Jurisdiction in Removal Order Appeals by Permanent Residents

I. INTRODUCTION: THE DRAFT GUIDELINES ARE UNACCEPTABLE

The Citizenship and Immigration Law Section of the Canadian Bar Association (the Section) is pleased to comment on the Chair's Draft Guidelines on Section 70 Removal Order Appeals. Members of the Section play an integral role in the adjudicative process before the Immigration Appeal Division (IAD) and have first hand experience with the workings of its exercise of positive discretion in removal order appeals. This power is a critical area of the Appeal Division's jurisdiction. It has been used effectively by the Appeal Division and its predecessor, the Immigration Appeal Board, to assist appellants who have breached Canada's immigration law but whose individual circumstances are such that they should not be removed from Canada.

The Section finds the draft Guidelines to be seriously flawed and threatening to the integrity of the Appeal Division. In directing Appeal Division members as to how to weigh or apply various factors to case types, the Draft Guidelines compromise the independence of members and the integrity of the Appeal Division process. It is the Section's opinion that the Draft Guidelines seek to interfere with the legislated independence and jurisdiction of the Appeal Division and, in doing so, usurp the role of Parliament and the Courts. The misdirection of the Draft Guidelines is evident in the opening paragraph, where the

objective found in section 3(i) of the *Immigration Act*, "to maintain and protect the health, safety and good order of Canadian society", is metamorphosed into "public safety and the integrity of the Immigration statutory scheme", with direction that these public interests are to be balanced against "the interest of the individual". This is a narrow and inappropriate characterization of the Appeal Division's equitable jurisdiction and process. Integrity of the Immigration scheme is but one component of the "health, safety and good order of Canadian society", and not necessarily an overriding one. It is an error to dictate that exercise of the Board's equitable jurisdiction requires that public safety and integrity of the Immigration scheme be necessarily balanced against "the interest of the individual".

The response of the Section has been developed through consultation amongst members in the provincial sections, most notably in British Columbia, Alberta, Ontario and Quebec. The consistent and strongly felt response is that the Draft Guidelines are an unnecessary and inappropriate to direct the exercise of equitable discretion by individual members without regard to particular circumstances of individual cases. It is noteworthy that during the course of review that even Minister's representatives in regional Consultative Committee meetings expressed the opinion that the Draft Guidelines were both unnecessary and inappropriate.

Section members have considerable respect for the IAD and its record of dealings with cases involving removal of permanent residents, Convention refugees and persons with valid visas. Board members have developed expertise in process and issues of law. While Board determinations may be challenged from time to time by either party in Federal Court, the record of the Appeal Division is that its decisions withstand review by a considerable margin. Board decisions are defensible and the process has integrity.

While the Section recognizes that Guidelines may be helpful, we reject <u>these</u> Draft Guidelines for their persistent and prevailing directions which fetter IAD members' equitable discretion by attempting to direct the exercise of discretion in various types of cases. The weight given to relevant factors will vary in the circumstances of individual cases, and which should not be the subject of guidelines respecting types of cases. On the

whole, the tenor of the Draft Guidelines is to direct IAD members not to give weight to mitigating factors in the cases of removal based on serious criminality (heinous crimes), to impose an onerous burden to prove rehabilitation in cases of removal arising from criminality, and not to grant equitable relief in the case of removals based on inadvertent misrepresentations providing the Appellant with an immigration advantage. These illustrate the serious and inappropriate attempt, prevalent throughout the Draft Guidelines, to fetter the statutory discretion of Board members. The Section rejects any attempt to direct Members on how to exercise their discretion in various types of removal cases. This is more properly the role of the Legislature and the Courts.

A further criticism is that provisions of the Draft Guidelines, such as those regarding stays of execution, make substantive changes to the law. The Board lacks jurisdiction to make Guidelines that alter the substantive laws dealing with appeals by permanent residents.

The Section would not oppose summaries of the present law on various issues before the Immigration Appeal Division, provided that:

- it was recognized that the law before the IAD steadily evolves; and
- the summaries accurately reflected the law as it stands at the time of writing.

The Draft Guidelines purport to reflect the law, but lack any citations and are selective in their reflection. If the law was as clear as the drafters maintain, the Guidelines would not be necessary.

The remainder of this submission comments on specific provisions of the Draft Guidelines. The omission of comments on particular provisions does not reflect our acceptance, but rather a focus on other aspects. Nor does commentary on specific provisions reflect an acceptance of the Draft Guidelines as a whole. The Section wishes to express in the clearest possible terms that the Draft Guidelines are unacceptable in their entirety, due to the intent to interfere with members equitable jurisdiction and directions that are clearly intended to prejudice appellants in particular case types. We do not perceive any need for Guidelines on weighing factors to be considered in exercising equitable jurisdiction.

II. BACKGROUND TO THE GUIDELINES

The objectives underlying an appeal of a removal order involve weighing broad individual interests with broad public interests in the maintenance and protection of the health, safety and good order of Canadian society. Support for this proposition comes from MacGuigan, J.A. in *Canepa*:

> The second objection had to do with the Board's statement that "in these cases the Board is required to carefully weigh the interests of Canadian society against the interests of the individual". This, it is submitted, is a different test from that mandated by statute, viz., whether having regard to all the circumstances of the case, the person should not be removed from Canada.
>
> I cannot accept that the phrase "having regard to all the circumstances of the case" means that a tribunal should, to make such a judgment, abstract the appellant from the society in which he lives. The statutory language does not refer only to the circumstances of the person, but rather to the circumstances of the case. **That must surely be taken to include the person in his total context, and to bring into play the good of society as well as that of the individual person**. I cannot accept that the social considerations had been taken account of once and for all by the order of deportation itself. In my view paragraph 70(1)(b) of **the Act requires that they be considered again, but this time along with every extenuating circumstance that can be adduced in favour of the deportee**. Both the law and the treatment received under it in my view meet the standards of section 12. (emphasis added)[1]

The Background section of the Guidelines and the introductory paragraphs respecting types of appeal reflect in part the comments of the Court in *Canepa*, but with a significant shift of emphasis favouring "public" interest over "individual" interest. The Section views this shift as not only as fettering the broad discretion of the Board, but directing the discretion to be exercised in ways prejudicial to appellants. On a case by case basis, the public interest may prevail over the individual interest on some occasions and not on others. *Ribic*[2] establishes the principle that the weight given to factors will vary in the circumstances of individual cases. To suggest that in all cases of criminality there is an

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1 *Canepa v. Canada (Minister of Employment & Immigration)*, [1992] 3 F.C. 270 (C.A.)

2 *Ribic v. Canada (Minister of Employment of Immigration)*, [1985] I.A.D.D. No. 4 (I.A.B.) (Q.L.)

"overriding" favouring of the public interest inappropriately prevents proper consideration of all the circumstances of the particular case.

The public interest, and the objectives of section 3(i) of the Act, are not limited to the integrity of the immigration scheme or public safety. Similarly, the interests of individuals will legitimately encompass interests of their spouse and children, other family member in Canada, employers and other members of the Canadian community who would be affected by the person's removal. The Section strenuously objects to the attempt by the Guidelines to elevate "integrity of the immigration scheme" to a dominating status, and to limit the factors that should properly be weighed in exercise of the Board's equitable jurisdiction.

III. GENERAL PRINCIPLES RELATED TO THE EXERCISE OF DISCRETIONARY JURISDICTION

The Section would delete "fundamental values of Canadian society" from paragraph 2, as the concept is too vague and not defined. It is not possible that all tribunals will agree on what constitutes "fundamental values".

IV. PRINCIPLES RELATED TO "ALL THE CIRCUMSTANCES OF THE CASE"

A. Removal Order Appeals Based on Criminality

1. Seriousness of appellant's conduct

The Section agrees that protection of the safety and good order of Canadian society is an important consideration in any appeal of this nature. However, to say that "the overriding concern of the Appeal Division is to ensure the protection of the safety and good order of Canadian society" amounts to a fettering of Appeal Division discretion.

> **"For the Appeal Division to exercise its discretionary jurisdiction favourably, it must be able to conclude that the appellant, on balance, is not likely to reoffend"**.

While a tribunal may legitimately conclude that there is a likelihood of reoffending, the Draft Guidelines would impose a burden on the appellant to prove a negative. To prove a negative in law, i.e. a likelihood of not reoffending, is an impossibility. The Section finds the Guideline's language too narrow and not sufficiently forward looking. Better to examine removal orders based on criminality from the perspective of whether there is a reasonable possibility that the appellant can be rehabilitated. This is consistent with the language of *Ribic* and the factors enumerated in the Draft Guidelines.

Moreover, there are cases where it may be appropriate to exercise positive discretion even though it is likely that the appellant will reoffend. For example, the appellant may have come to Canada as a child and may suffer from a mental illness or condition which predisposes them to be unable to avoid conflict with the law. Such individuals may be pursuing and continuing legitimate programs for treatment. These cases are exceptional, but recurring.

Clause 1.1.1: nature of the appellant's conduct

The Section does not favour the statement, "An offence where violence was used or threatened should weigh heavily against the appellant. The possession or use or threatened use of a weapon or an imitation weapon in the commission of an offence should be considered violent behavior." We would prefer a more general statement that an offence where violence was used or threatened against a third person could be considered a factor against the exercise of positive discretion, depending on all the circumstances of the case.

The Section does not support the statement, "There may be cases where the heinous nature of the crime will suggest to the Appeal Division that the appeal be dismissed even though there may be other factors that weigh in the appellant's favour including rehabilitation.", if the intent is to suggest that the heinous nature of a crime will generally outweigh other factors. This fetters the Appeal Division discretion and is contrary to the test set out in s. 70(1)(b) of the *Act*. Complete rehabilitation ought to be a significant compelling factor that could outweigh even the most heinous of crimes. As stated in the Draft Guidelines, deportation is not punishment. In circumstances where the crime was situational and unlikely to be repeated, where there is considerable evidence of rehabilitation or possibility of rehabilitation, it is inappropriate to suggest a fixed rule that the heinous nature of crime cannot be outweighed by individual considerations.

The Section deplores the implicit intent underlying this Draft Guideline, that, contrary to general principles relating to the exercise of discretionary jurisdiction, deportation should be used as a punishment in certain cases, regardless of compelling evidence of rehabilitation, likelihood to not reoffend, establishment in Canada and the necessity of protecting the public safety.

Clause 1.2.1: fact of conviction

The Section is wary of the suggestion that the fact of conviction must take precedence over any protestation of innocence. One must only have regard to recent well known cases of wrongful conviction (Marshall, Milgaard and Morin) to understand that credible evidence of innocence may be exceptionally relevant to determinations of the Appeal Division. While the fact of conviction is a matter of record, the circumstances of conviction may appropriately be highly relevant.

Clause 1.2.3: outstanding criminal charges

The Section agrees that evidence of outstanding charges must not be considered. This is consistent with Federal Court caselaw that the only relevant use of evidence of outstanding charges is in consideration of application for postponement. It is open to an appellant to raise issues of outstanding charges, but otherwise the matter may not be raised.

Clause 1.2.4: judicial comments on sentencing

The Section would amend the last sentence in the paragraph as follows: "When entered into evidence, the Appeal Division should take into account those comments including findings of fact and accord them significant weight, whether for or against the appellant".

2. Possibility of Rehabilitation

The Section is in general agreement with the enumeration of factors relevant to assessment of rehabilitation. Remorse, appreciation of conduct, change of lifestyle and absence of further convictions, amongst others, are commonly regarded factors.

The Section is concerned with the various expressions of the test to be met by the appellant: the Draft Guidelines speak of "possibility", "proof of rehabilitation" and the onus to establish that the appellant is "not likely to reoffend". The test is best expressed in *Ribic*, being the "possibility of rehabilitation" with weight to be given to the factor varying in the circumstances of the case.

"Proof of rehabilitation" is an inappropriately high standard that represents a substantive change in the law. An incarcerated appellant may be able to demonstrate appropriate evidence supporting the possibility of rehabilitation, but few could prove rehabilitation, particularly from within detention. In cases where the Board finds a likelihood of reoffending, a decision to deny the appeal may be appropriate. However, the onus on the appellant is not to prove rehabilitation, but rather to provide evidence to assist the tribunal to assess the possibility of rehabilitation.

The Section does not agree that an isolated serious offence necessarily imposes a higher burden of proof of rehabilitation on the appellant, as opposed to an individual with a longer record of less serious offences. *Archibald*[3] is an example of an appellant with a singular serious conviction where the Court was satisfied that reoffence in like manner was unlikely. It does not follow that the Board should presume otherwise.

3. Establishment in Canada

Clause 3.1: length of residence in Canada

Clause 3.2: age at which appellant came to Canada

The Section is of the view that "The fact that an appellant has lived most of his or her life in Canada is not in and of itself a valid reason for the granting of discretionary relief" serves no useful purpose and should be deleted. Similarly, the comment in Clause 3.2 respecting age of landing in Canada. These comments may be misinterpreted to suggest diminishment of the factor of establishment. The length of time in Canada and the degree of establishment are relevant and important factors to consider. The relative weight can not be predetermined, but again must be considered together with all the circumstances of the case.

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3 *Archibald, Russell v. Minister of Citizenship and Immigration* (F.C.T.D. no. IMM-4486-94) Reed, May 10, 1995

Clause 3.4: integration in community

We recommend that the Draft Guidelines recognize Canada as a multicultural society and that successful establishment may be evidenced through involvement of the appellant in his or her cultural community. Knowledge of one of the official languages may not be a reliable indicator of integration.

Clause 3.7: assets

These comments are unclear and vague. We have difficulty contemplating any case that has been determined on the factor of "assets in Canada" and wonder why it is necessary to direct the Draft Guideline to this area at all.

Clause 3.9: significant periods of imprisonment

Whether time of incarceration may be regarded favorably in terms of establishment will depend on assessment of the circumstances of the individual case. Again, it is inappropriate for the Draft Guidelines to direct that such evidence should not be accepted as a mitigating factor. This error is repeated persistently throughout the Draft Guidelines. It is inappropriate for Guidelines to direct weighing of factors in general directive terms that are intended to cover all cases of similar circumstances, rather than the particular circumstances of the case.

Clause 3.10: time of first offence

Without regard to the broader context, this is misleading. It is inappropriate for Guidelines to state that commission of a criminal act within a short period of time of arrival in Canada "should" be weighted against the appellant. Examination of all circumstances of the case will determine the appropriate weight to be given to the timing of the conviction.

4. Presence of family in Canada and impact of removal

Clause 4.2: hardship to family

We do not see why the extent of financial, psychological and emotional dependence on the appellant by family members, including those named in the removal order, on the appellant should not be a consideration in the exercise of equitable jurisdiction. It may not be given much weight in the majority of cases, but it is inappropriate to limit consideration of hardship only to those family members not named in the removal order.

5. Impact of removal on the appellant

The Section is of the opinion that any statement regarding consideration of conditions in the country to which the appellant may be removed, whether or not the appellant is a Convention refugee, should not be included in the Draft Guidelines until such time as the Supreme Court of Canada resolves this issue. Leave to appeal has been granted by the Supreme Court of Canada in both *Chieu*[4] and *Al Sagban*[5]. Until this issue is resolved, any Guidelines should simply indicate that evidence should emphasize the impact on the appellant of removal from Canada. It would be acceptable to say that this type of evidence could include difficulty in adapting to any country other than Canada as well as whether employment skills acquired by the appellant are transferable to employment outside Canada.

B. Removal Order Appeals Based on Misrepresentation

Preservation of the integrity of the statutory scheme is an important consideration in any appeal of this nature. However, any suggestion that, ". . . the overriding concern of the

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4 *Chieu v. Canada (Minister of Citizenship and Immigration)*, [1997] 1 F.C. 605 (C.A.)

5 *Al Sagban v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1775 (C.A.) (Q.L.)

Appeal Division is preservation of the integrity of the statutory scheme" amounts again to a fettering of the Appeal Division discretion. It runs counter to the test set out by the Federal Court of Appeal in *Canepa*, and to the plain language of the Act, which envisions full rights of appeal regardless of misrepresentation. The general thrust of the Draft Guidelines is to strongly suggest that there should be limited relief from removals arising from misrepresentation. Such direction is contrary to the *Act*.

1. Seriousness of conduct

It is not apparent why there should be a general rule that misrepresentations made prior to visa issuance are more serious than those made after.

While it may be found that a misrepresentation giving immigration advantage is more serious than one that does not, this is not always the case. For example, a common misrepresentation is failure of a teenaged son to disclose a secret marriage to a sweetheart, prior to immigration as an accompanying dependent. The misrepresentation gave the son an immigration advantage, but the circumstances may be that the son continued as a *de facto* family member of his birth family, the secret marriage did not lead to cohabitation, it was in the nature of a show of commitment, with intent to sponsor the wife at a later date, after establishment. Such a misrepresentation should not necessarily result in removal. The motivation and credibility of the appellant must be ascertained at hearing, and considered together with current family relationship and establishment in Canada. These are cases that many immigration officers will have considerable sympathy for. Why should the Board presume otherwise?

2. Establishment in Canada

The statement "Where there is advertent misrepresentation, little weight should be given to establishment" is, again, inappropriate fettering of IAD discretion. An objective of the *Immigration Act* is to promote immigration where the immigrants do establish themselves, and this factor should be considered without any limitation on its weight. Virtually all

misrepresentations are advertent, but the *Act* contemplates this and grants appeal for consideration of all the circumstances of the case, including factors of establishment.

The area of misrepresentation is varied and does not lend itself easily to rules of general application. It is not the fact of advertence or timing of the misrepresentation, but the nature and seriousness of the misrepresentation, the motivation behind it, the surrounding circumstances, and the individual's character that will determine whether the individual should be removed. To dictate that establishment carry little weight in assessing any case of advertent misrepresentation is simply wrong. The advertence is one factor of many to be considered, and to be given weight appropriate to the all the circumstances of the case. The wisdom of *Ribic* applies.

Similarly, whether the establishment occurs before or after the misrepresentation is discovered is a distinction with no substantive basis.

C. Removal Order Appeals Based on Failure to Fulfil Conditions of Landing - Entrepreneurs

Again, while preservation of the integrity of the statutory scheme is an important consideration in any appeal of this nature, saying that ". . . the overriding concern of the Appeal Division is preservation of the integrity of the statutory scheme" amounts to fettering Appeal Division discretion.

1. Seriousness of conduct

With respect to Clause 1.1.2, an explanation for the failure to contact CIC officials prior to the expiry of the time in which the conditions were to be fulfilled should be considered and may mitigate the failure to report.

2. Establishment in Canada

The statement "Where the appellant had no intention to fulfill the entrepreneur terms and conditions, little weight should be given to establishment", again, a fettering of Appeal Division discretion. The Section repeats its comments on establishment in A (3), above, and recommends that this clause be reworked or deleted.

There is no question that intent to fulfil terms and conditions is a relevant factor to consider, but the question also involves examination of the appellant's understanding of their obligations as an entrepreneur. The processing, imposition of terms and conditions, and monitoring of entrepreneurs has had very uneven practice in CIC. While lack of intent to comply may be given considerable weight in a given case, it is not appropriate to stipulate the weight to be given relative to establishment.

D. Removal Order Appeals Based on the Failure to Fulfil Condition of Landing - Failure to Marry

Our objection to the statement ". . . the overriding concern of the Appeal Division is preservation of the integrity of the statutory scheme" continues here.

1. Establishment in Canada

Our comments in A (3) and C (2) above apply equally to the statement, "Where the appellant had no intention to fulfil the term and condition of marriage, little weight should be given to establishment".

V. STAYS OF REMOVAL

A. Removal Order Appeals Involving Criminality

The Section is of the opinion that this clause sets too high a standard regarding the achievement of full rehabilitation, and leaves a Member little flexibility in exercising discretion. Given that the question of recidivism is forward looking, the standard should be set in terms of the reasonable possibility of achieving rehabilitation, as outlined in discussion above. The reference to "full rehabilitation" is inconsistent with much of the discussion under the heading "Criminality".

VI. APPENDIX: STANDARD TERMS AND CONDITIONS

Terms and conditions should be specific and clear to avoid uncertainty and unfair R.33 applications down the road. This is particularly so in light of CIC's stated intent to legislate that breach leads to automatic setting aside of the stay order.

In paragraph 2, delete "other relevant changes of personal circumstances" as being too vague and uncertain. If there are changes of personal circumstances that should be reported, the Board should specifically identify those to be added to the list under item 2.

In paragraph 7, the reference to "reasonable efforts" to "maintain yourself in such condition" that your "condition" will not "cause" you to conduct yourself "in a manner" dangerously or such that you are "not likely" to commit further offences" is so vague and uncertain that it should be deleted.

VII. CONCLUSION

The Section finds the draft Guidelines to be seriously flawed and threatening to the integrity of the Appeal Division. In directing Appeal Division members as to how to weigh or apply various factors to case types, the Draft Guidelines compromise the independence of members and the integrity of the Appeal Division process. It is the Section's opinion that the Draft Guidelines seek to interfere with the legislated independence and jurisdiction of the Appeal Division and, in doing so, usurp the role of Parliament and the Courts.