THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

January 11, 2019

Via email: IEPU-UPELI@cbsa-asfc.gc.ca

Manager
Immigration Enforcement Policy Unit
Enforcement and Intelligence Programs
Canada Border Services Agency
100 Metcalfe Street
Ottawa ON K1A 0L8

Dear Manager:

Re: Proposed Amendments, Immigration and Refugee Protection Regulations Sections 45-49 (Deposits or Guarantees)

I am writing on behalf of the Canadian Bar Association Immigration Law Section (CBA Section) to comment on the Canada Border Services Agency consultation[1] on proposed amendments to the *Immigration and Refugee Protection Regulations*[2], clarifying the requirements of bondspersons.

The CBA is a national association of 36,000 members, including lawyers, notaries, academics and students across Canada, with a mandate to seek improvements in the law and the administration of justice. The CBA Section is comprised of over 1,000 lawyers, practicing all aspects of immigration law and delivering professional advice and representation on the Canadian immigration system to clients in Canada and abroad.

The CBA Section supports this initiative to ensure consistent, transparent and uniform application of a minimum baseline of factors by all decision-makers with respect to bondspersons. We offer the following comments and recommendations regarding the proposed Regulations.

Quantum

One of the proposed factors for consideration is "the bondsperson's financial situation." The meaning of this phrase should be clarified. We recommend that there be no maximum or minimum

1 Consultation on Proposed Amendments to the Immigration and Refugee Protection Regulations Sections 45-49 (Deposits or Guarantees)

2 Immigration and Refugee Protection Regulations, SOR/2002-227

amount required to post for bond so long as the decision-maker is satisfied that the bond is significant for the bondsperson, and that the bondsperson has the capacity to pay the amount. [3]

Release should not be reserved for the wealthy.[4] The Regulations and associated guidelines should not include a set formula for the quantum of bond proposed, so long as the amount is meaningful for the bondsperson. A formulaic approach unduly fetters discretion.

"Own Bail"

The Regulations should permit the possibility of a detained person posting their own bond, without the need for a bondsperson. In the criminal context, "own bail" is a well-established practice. If the sum posted is meaningful for the detainee, this option offers a strong incentive for compliance.

"Own bail" can also be combined with a separate bondsperson, with the monetary bond posted by the detainee and the bondsperson identified for other purposes such as living arrangements and ensuring compliance.

Community Groups

The Regulations should permit institutions and community groups to act as bondspersons, without the need to post a pecuniary bond. Such organizations – social services or mental health groups for example – may not have the monetary capacity or legal ability to post bonds for individual detainees but may otherwise be able to serve as a reliable source of support. This can be especially important when the detainee has no connection to a specific individual in Canada. Release should not be reserved for those with a network of family or friends in the country.

Relationship to Detainee

The proposed factor "the relationship of the proposed bondsperson to the person concerned", needs to be clarified. The CBA Section assumes and recommends this will be interpreted to mean that the closer the relationship, the better the bondsperson. It is well-established that a bondsperson must have sufficient knowledge of and connection to a detainee to provide the support and supervision required and to ensure compliance.[5]

Conversely, the closeness of the relationship should never be used to impugn the bondsperson for not having previously ensured compliance. A common illustrative is a spouse who lived with the person prior to detention and is sponsoring them for permanent residence. Barring an adverse criminal or immigration history, the spouse should be considered a strong candidate for bondsperson. It should not be held against the spouse that they did not proactively ensure the detainee's compliance prior to detention.

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3 See *MPSEP v. Sall,* 2011 FC 682 (de Montigny J.) at para. 48: "the theory behind the requirement for a security deposit or a performance bond is that the person posting the bond or deposit will be sufficiently at risk to take an interest in seeing that the release complies with the conditions of release including appearing for removal." See also *Wang and Yan v. MPSEP*, 2015 FC 79 (Phelan J.) at para. 27: "unless the Applicants were putting up their own money, the issue is not whether their failure to comply hurts them financially but whether it would hurt the bondsman sufficiently that the risk of non-compliance is minimalized."

4 See *R. v. McCullough*, [2001] O.J. No. 4774 (C.J.) at para. 16: "Bail in Canada discourages the concept of 'buying' a person's release. The well-to-do or those with well to do friends ought not in principle to be favoured parties in the pre-trial release system. In my view, the bail posted is not and ought not to be the complete focus of a surety's responsibility." Also the source of the funds is not relevant: see *Moscicki v. MCI*, 2014 FC 993 (Hughes J.) at para. 5

5 *Muhammad v. MCI*, 2013 FC 203 at para. 10; *Canada (Attorney General) v Horvath*, 2009 ONCA 732 (CanLII) at para 40; *MCI v. B147*, 2012 FC 655 at para. 51

Criminal Record

We recommend that the requirement to consider the bondsperson's "criminal record and potential criminal associations" be amended to mandate consideration of "prior criminal convictions" only, not "potential criminal associations." The factor must be based on verifiable facts and evidence of a conviction, not evidence that an individual was merely present at a certain place and time but never convicted of an offence. The law must eschew vicarious liability and should not impugn a bondsperson based on association or charges that were later stayed, withdrawn or dismissed.[6]

Alternatives to Detention

The CBA Section recommends that the Regulations affirm that release should be ordered at the earliest possible opportunity and on the least onerous grounds. A non-exhaustive list of alternatives to be considered would include but is not limited to halfway houses, house arrest, curfew, electronic reporting, voice reporting, GPS tracking and release to community agencies. Consideration of these alternatives is important for all detainees, especially those who are vulnerable or indigent. This approach is consistent with the Immigration and Refugee Board's findings following an external audit commissioned in September 2017 of cases where immigration detention had exceeded 100 days.[7]

Forfeiture Proceedings

Section 49(4) of the Regulations states: "A sum of money deposited is forfeited, or a guarantee posted becomes enforceable, on the failure of the person or any member of the group of persons in respect of whom the deposit or guarantee was required to comply with a condition imposed." This leaves open the possibility of the entire bond being forfeited for a minor breach of a condition (for example, failure to report an address change before a move as opposed to one day after a move).

We recommend establishing a formal process under the administrative immigration scheme, in line with bail forfeiture proceedings in the criminal context. Under a formal process, the Immigration Division would determine whether the magnitude of the breach justifies forfeiture of the whole bond or a partial amount, considering the history of compliance and any mitigating factors in connection with the breach.[8]

The CBA Section appreciates the opportunity to comment on these proposed Regulations. Please let us know if you have any questions about our recommendations.

Yours truly,

(original letter signed by Sarah MacKenzie for Marina Sedai)

Marina Sedai
Chair, CBA Immigration Law Section

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6 *Scotland v. Canada (AG), 2017 ONSC 4850,* para 76: "arrest and criminal charges without a conviction amount to innocence; a breach of bail conditions that turn out to no longer be in force is a non-breach of bail; pre-trial custody is not a change of address; an inadvertent error is not an intentional, morally culpable act. These cannot logically and legally be held against a detainee on an ongoing basis. At some point, the adjudicator hearing a detention review under the IRPA must step back from the thick foliage of technical enforcement and have look at the trees."

7 IRB Report of the 2017/18 External Audit (Detention Review)

8 A similar estreatment process occurs in the criminal realm. In Ontario, this is conducted at a hearing before the Superior Court of Justice, where the surety is a participant. The Court, *inter alia,* considers the level of supervision the surety was required to provide and the degree of fault that may be ascribed to the surety.