THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

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Via email: Engagement@irb-cisr.gc.ca

Salim Saikaley
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Immigration and Refugee Board of Canada
344 Slater Street
Ottawa ON K1A 0K1

Dear Mr. Saikaley:

Re: Written Consultation: Review of Chairperson Guideline 8

We write on behalf of the Immigration Law Section of the Canadian Bar Association (CBA Section) in the context of Phase 2 of the Written Consultation and Review of Chairperson Guideline 8 (Procedures With Respect to Vulnerable Persons Appearing Before the IRB).

The CBA is a national association of 37,000 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 Immigration Law Section has approximately 1,100 members across Canada practicing in all areas of immigration and refugee law.

The CBA Section is pleased to see that many of its recommendations from Phase 1 of the consultation have been incorporated. We appreciate this second opportunity to comment on Guideline 8. The responses to the consultation questions can be found in attachment.

The CBA Section appreciates the opportunity to raise concerns on this issue. We would be pleased to discuss our recommendations in greater detail.

Yours truly,

(original letter signed by Véronique Morissette for Lisa Middlemiss)

Lisa Middlemiss
Chair, Immigration Law Section

Written Stakeholder Consultation (Phase 2)

Review of Chairperson Guideline 8

Consultation Questions

Organization name: Canadian Bar Association, Immigration Law Section (CBA Section)

The results of the environmental scan and case law reviews, as well as the external consultations, demonstrated that the revised Guideline should:

- Focus on accommodations rather than on vulnerable persons.

Question 1:
The revised Guideline is now focused on issues such as on identifying barriers and assessing their impact on a person's ability to fully participate in the proceedings and trauma-informed adjudication. Do you think the revised Guideline now offers the practical guidance needed when dealing with accommodations for those appearing before the Board?
Response: We appreciate that the Board incorporated the CBA Section's recommendation to keep the term vulnerable and refer to and apply the Convention on the Rights of Persons with Disabilities. The Guideline should be client-centric, not procedure-centric. Clients should not be made invisible due to a lack of proper terminology. Naming clients "vulnerable" acknowledges that they are seen. The CBA Section fears that by concentrating only on accommodation, the Board is missing important considerations. There should be more flexibility. Designated representatives should be able to testify in certain situations. For example: when a family member is the best or only witness for vulnerable individuals such as elderly clients suffering from trauma and prevented from testifying before the Board, forcing the nomination of another designated representative so that they may act as a witness. In this example, the focus of the procedure is on accommodation as opposed to the vulnerable client. Accommodations should be flexible, and people should not be reproached for not requesting accommodations earlier. The Board should recognize that accommodation is a fluid concept that often varies with an individual's particular needs at a given time. Where an individual is a self-represented vulnerable person, it is incumbent on the Board to vet the file in a timely manner for possible accommodations, including where there is a designated representative. Individuals may not be aware of the types of accommodations that may be offered to vulnerable people who appear before the Board despite their elevated status. We also encourage the Board to address privacy concerns experienced by vulnerable people who appear. For instance, the Board should add a section on how vulnerable people can request a private hearing (for hearings that are generally open to the public and media), and state the factors considered when entertaining the requests. The Board should also incorporate guidance on how individuals can apply to have their matter anonymized (for matters that are not already automatically anonymized), including the factors considered for approval of the requests. The threshold for granting requests should be lower for vulnerable people, as it is a form of accommodation. Transparency about the factors considered for

requests is critical so people appearing before the Board can easily identify the test applied. The ability to provide evidence fully and freely in the pursuit of fairness and justice should also be ensured.

In addition to respecting a vulnerable person's right to privacy, the ability to request anonymization and a closed-door hearing will offer a more secure environment for witnesses and help ensure their safety by reducing potential retaliation. Witnesses come forward and share evidence more easily if their identity and testimony are protected. This is particularly relevant in cases involving vulnerable people testifying about individuals with a history of violence or intimidation, including matters before the ID and IAD.

Respecting a vulnerable person's right to privacy will also encourage a more honest, candid and detailed account of events, as witnesses may feel more comfortable sharing sensitive or personal information without fear of judgment, public scrutiny or external influence. To illustrate, an individual affected by a mental illness might not want their health condition disclosed to the public, family members and potential employers. This includes matters before the IAD involving children 22 years of age or older who depended substantially on financial support of a parent since before age 22, and are unable to provide for themself because of a medical condition. It should also include vulnerable individuals appearing before the ID.

While lawyers are familiar with the process to make these types of requests, self-represented individuals and designated representatives may not. Accordingly, the ability to anonymize a hearing or to have it in a private setting should be clearly communicated in this Guideline.

While we appreciate that our recommendation would result in the Board may receiving more applications, we believe vulnerable persons' ability to access accommodations should prevail. We also believe that the ability to request anonymity and a closed-door hearing will strike the right balance between respecting the privacy rights of vulnerable people and the right to access information about matters that may be of public interest as these decisions may still be accessible online through CanLII and the Board's website.

Question 2:

Does the revised Guideline offer sufficient practical advice on the applications for accommodations? Would you instead recommend a more specific application process?

Response: More examples would be helpful. Clients should be consulted on their needs to feel comfortable, which can vary depending on their condition:

- They have rare or uncommon mental medical conditions, such as being afraid to go to unknown places, which could trigger a post traumatic stress disorder.
- They can be triggered by a board member with certain characteristics, or a boardroom without a window.
- An elderly client on medication may need to lie down when they feel unwell.
- In certain situations, an online hearing is safer than an in-person hearing.

Members should be alert and attentive to the client's specific needs when offering accommodations and understand that increased flexibility is required to fully account and consider the very wide array of situations that can become triggers for a vulnerable client.

Individuals should be notified of their right to request accommodation from the onset. We recommend that this be included in initial correspondence. In the application process, while s. 6.5 acknowledges that there may be barriers to making written applications for some individuals, it should include mechanisms to

access their right to request accommodations. Mechanisms can include an informal application process where an individual can contact the case manager to arrange a pre-hearing conference where the individual's situation and possible accommodations are discussed. The ability to make an informal application should be explicitly entrenched in the Guideline with mechanisms as this failure may have particularly severe impacts on unrepresented individuals or those who may not be able to interpret the Guideline or Rules. Mechanisms allowing informal applications should be clear as the detention review or hearing process is often an overwhelming process for individuals.

Section 6.3 states that an individual must specify the type of accommodation needed and give as much detail on their barriers to participation. Again, the section does not account for individuals who are unrepresented or may not be able to interpret the Guideline. An informal process including a pre-hearing case conference would be beneficial to ensure that an individual's specific needs are met and fairness is maintained in the hearing process. The Guideline should expressly give an informal option so individuals are aware that the mechanism exists.

Question 3:

The revised Guideline provides a list of potential accommodations.

Are additional examples required in section 5.4 section or does providing too many examples risk having a limiting effect, leading to the perception that the examples provided are the only options available to members and those appearing before the Board?

Response: Accommodations that are flexible and really take into account all types of triggering situations should be considered. In clinical psychology, this could be a very long list.

The Guideline should specify that this list is not meant to be exhaustive.

The listed examples of accommodations in section 5.4 are useful for illustrative examples, particularly for unrepresented individuals. We do not support its removal. While the section reads "including, but not limited to," further clarity would help to ensure the list does not have a limiting effect. The section should include text at the end of the list reiterating that it is non-exhaustive and serves only to identify examples of accommodations. Possible wording for the addition: "The above list is non-exhaustive and should not be considered limiting."

The list should include other examples such as the ability to request an in-person hearing and the ability to request a private hearing. While these issues may be dealt with in other sections, including them in section 5.4 would reiterate an individual's right to privacy and to be heard in person.

Question 4:

Regarding guidance applicable to all proceedings, do you think that any substantive issues are missing? Do you think there is anything that does not need to be there and should be removed?

Response: One missing example is the usage of designated representatives instead of lawyers. The Court of Appeal of Quebec recently held that in all cases dealing with the liberty of a person suffering from a mental disability, the person has a right to be represented by a lawyer in all detention review hearings. The same rights should be afforded to clients before the ID who are detained, as they are appearing before a tribunal that upholds human rights.

Avoidance of stereotypes should be in favour of the client. For example, a board member should not think an illiterate client is not vulnerable if they have a supervisory position at work, owned a successful business or purchased property. Members should treat clients with compassion and generosity, and be open-minded in their perceptions. It is not helpful if the Board minimizes the client's vulnerability because it is invited to avoid stereotyping. Illiterate clients will experience different challenges when preparing for a hearing, writing their stories, receiving correspondence from the board, researching online, etc. The fact that they own a home and have a successful business, for example, does not take away the challenges they face during a hearing.

The substantive law guidance offered for the IFA test under section 10.4 requires further clarity. Sections 10.4.1 and 10.4.2 explain that, when assessing the reasonableness of an IFA, members must consider the specific circumstances of the claimant, including disabilities and vulnerabilities. While this is correct, consideration of vulnerabilities and disabilities is also relevant to the assessment under the first prong of the IFA test, not just the reasonability analysis.

The IFA analysis consists of two prongs: 1) no serious possibility of persecution; and 2) reasonableness. As noted in section 10.2 of the Guideline, cumulative discrimination arising out of vulnerabilities and disabilities is relevant when assessing future risk and may amount to persecution. It is equally relevant under the risk analysis of the first prong of the IFA test.

Section 3.8 indicates that where a member manager grants an accommodation, the assigned member is not bound by that decision and may grant additional accommodations, modify or discontinue them. "Changes to accommodations previously granted should only be done after the individual being accommodated is given notice and an opportunity to respond" should be changed to "Changes to accommodations previously granted should only be done after the individual being accommodated is given notice with reasons detailing the reason for the proposed change and an opportunity to respond". A member who proposes to discontinue or modify an accommodation to an individual's detriment should be required to provide justification for the proposal in sufficient detail for the individual to properly respond.

The Federal Court has held that applicants are entitled, as a matter of fitness, to an explanation why a member reviewing the same documents on the same issue could reach a different conclusion. (Siddiqui v Canada (Minister of Citizenship and Immigration), 2007 FC 6 at para 18; See also, Mendoza v Canada (Minister of Citizenship and Immigration, 2015 FC 251 at para 26).

Question 5:

Section 7.2 provides guidance to members regarding supporting documentation to request an accommodation, emphasizing that expert evidence is generally not required to support a request for procedural accommodations.

Is there additional guidance which should be offered here?

Response: Clients face financial and language barriers to access a psychologist. They often are ashamed and do not want people in their community to act as translators.

Members should ask clients if this is a problem and accept alternative evidence when this is the case. Canadians have difficulty accessing a doctor or psychologist in a timely fashion. The situation is even worse for clients without status or waiting for status in Canada. Members should be mindful of this when reports are produced late or not at all.

Clients should not be penalized because they do not have an in-person hearing. Members should be proactive in asking to see scars when clients mention they have scars on their bodies. This evidence is often central to the claim but not seen currently with online hearings. Clients with scars should be able to be seen by the Board member. Clients should not have to obtain medical records before or after a hearing to substantiate a scar that can be seen by a Board member.

While it is encouraging to see a more flexible approach when considering what type of supporting evidence would be helpful to a Board Member, this flexible approach is contradicted by the onerous content requirements for expert reports under section 8. Please see our comment below on section 8.

We recommended that the wording be modified in section 7.2.2 to highlight that a Board Member can give individuals an opportunity to explain and to supply the requested document. It is sometimes unclear to counsel or an unrepresented individual why the Board Member would require a specific document until this is made clear at the hearing or a case conference. We recommend the following modification:

> 7.2.2 If a member needs supporting documentation to assess the request for accommodation and it has not been provided, the member should give the individual requesting accommodation an opportunity to explain why it was not provided and an opportunity to provide it.

Question 6:

Have we captured everything in section 15, or do we need to make any adjustments?

Response: It is excellent to see trauma-informed adjudication explicitly highlighted in the Guideline. However, while section 15.3.1 (c) acknowledges the need to create an emotionally and physically safe environment, and directs members to be sensitive with respect to the nature and type of questions asked, the section should also acknowledge how a Board Member's tone and demeanor can impact trauma-informed adjudication. We suggest importing the wording from Guideline 4:

> Members should respond to the individual's verbal cues and body language in a way that creates a safe space to facilitate the giving of testimony. This can be achieved through rapport-building, explaining the context of questioning, and timing of breaks responsively. A calm and sensitive approach can enhance the flow of communication, build trust, and assist in the recollection of details.

Question 7:
The draft revised Guideline offers examples of myths, stereotypes, and incorrect assumptions relating to disability and vulnerability. Are there other examples which should be added to this section?
Response: As stated above, when avoiding stereotyping, members should favour the client in their thought process. It is not helpful if the Board minimizes the client's vulnerability in an attempt to avoid stereotyping. Illiterate clients will experience different challenges when preparing for a hearing, writing their stories, receiving correspondence from the board, surfing the internet, and so on. Another unfortunate stereotype is that people who suffer from cognitive impairments or mental illness are incapable of entering into a genuine relationship for spousal sponsorship purposes, or are being taken advantage of by their spouse. We encourage the Board to take a holistic and objective approach to such relationships, and not rely on common biases and unfair stereotypes.
Question 8:
Are there any other points you would like us to consider, in addition to what you included above or what you previously shared during the first phase of consultation?
Response: One example is use of designated representatives instead of lawyers. The Court of Appeal of Quebec recently held that in all cases dealing with the liberty of a person suffering from a mental disability, the person has a right to be represented by a lawyer in all the detention review hearings. The same level of rights should be afforded to clients before the ID that are detained, considering they are appearing before a tribunal that upholds human rights. The IRB should set exemplary practices similar to human rights tribunals. Designated representatives seem to think they are immune. When there is a conflict between a lawyer and a designated representative, there is a problematic assumption that the lawyer needs to withdraw. Lawyers have an ethical obligation to be independent. Clients should benefit from the lawyer's guidance. When designated representatives fail to serve the best interest of clients, they must be replaced with the help of the lawyer who knows the file. This is a question of access to justice for vulnerable clients. **Section 3 Early Identification** Section 3.5 acknowledges that a Member may come across information suggesting that an individual may face challenges to their full participation. The section states that members "may act on its own initiative" to grant accommodations or contact the individual. Given the emphasis on reducing barriers, it would be appropriate to recognize that when a Member identifies a barrier early on, they have a heightened responsibility to ensure options for accommodations are made available to the individual, especially when the individual is unrepresented. It would be beneficial to make this acknowledgement explicit.

Section 3.8 states that an assigned Member is not bound by accommodation requests granted by a member manager. The section explains that an accommodation change should only be done once the individual affected is notified and given an opportunity to respond. It should state that in most cases it would be inappropriate to discontinue an accommodation if the barrier persists and a change to that request would require full justification.

Section 8.4 Expert Evidence

Section 8.4 imposes onerous content requirements on Expert Evidence reports. The wording "should contain" implies that if the listed information is not included or addressed in an expert report, the report will be given less weight. Section 8.4.5. states that expert reports that do not include this content should not "necessarily be discounted." It should state that not all reports will contain the content outlined in section 8.4.4.

Expert reports may not contain the listed information because it may not be appropriate for the expert to address that information (i.e. not within their scope of services). For example, a social worker is not providing "treatment" the way a psychologist is and would therefore not use that language. Even when individuals have access to an "expert," they may not receive treatment. Treatment can be a question of financial resources, availability of treatment in the region, etc. Without explicit stating that some reports will not contain all the listed information, a report may be discounted or the Member may draw unfair negative inferences, for example, in rehabilitation cases before the IAD or in RPD cases.

Section 8.4.6 states that "The recounting of events to an expert does not, by itself, affirm the credibility of the events." The section cites Egbesola 2016 FC 204.

Although reports cannot establish facts recounted by individuals to the expert, the section should acknowledge that reports can establish factual information about health issues, barriers, vulnerabilities, and impact of health and trauma on the ability to testify. For example, in Egbesola, the Federal Court determined that "what can be reasonably taken from the report is that the principal applicant suffers from PTSD, and that she requires medical treatment for it" (at para 54).

Section 10.4.5

The CBA Section is concerned with the wording of this section. We acknowledge that if an expert opines in their report on an issue they are not qualified to give an opinion on, such as availability of care in the proposed IFA or the risk faced by the claimant if returned, the Member is entitled to give little weight to that opinion. However, the current wording suggests that the entire report could be given little weight. The Member must still give the appropriate weight to the report's evidence in areas that the expert is qualified to opine on.

The CBA Section is also concerned with the general use of the word "risk" in the third bullet point. This suggests that experts cannot address any "risk" when some experts are qualified to address a risk of deterioration of a certain mental health condition should a person be returned to their home country, for instance. It should be clear which "risk" the Guideline refers to here.

Section 9 Credibility

Section 9.3 states that the presence of the listed factors (medical or psychological conditions, cognitive difficulties, etc.) does not prevent members from making adverse credibility findings. This section also says that the principles from this Guideline should be considered when assessing credibility and not separately after the credibility assessment. For clarity, we recommend that the Guideline acknowledge a heightened obligation to carefully assess whether the vulnerability or other factor is causing credibility concerns.

Section 9.10 cautions members to avoid basing credibility findings on the absence or presence of behaviour "when recounting traumatic experiences." This is in line with the directive to avoid stereotypes and myths under section 14. While this is encouraging to see, it is too narrow. This section should apply generally to the whole proceeding and not just when the individual is testifying about traumatic experiences. Suggested modified wording:

> 9.10 Members should not expect a person appearing before the IRB to behave in a certain way when recounting traumatic experiences *or throughout the proceedings*, and credibility findings should not be based on the absence or presence of such behaviours. *Please refer to section 14 about myths, stereotypes and incorrect assumptions.*

Section 12.3.8

The Guideline should specifically address people detained in criminal facilities, where it is apparent on the facts that there is a disability or vulnerability, such as psychosis or substance abuse, and the detention is hindering efforts at receiving treatment or rehabilitation. For instance, jails were not able to offer rehabilitation programming during COVID. Another example is detained appellants with conditions that involve psychosis, the treatment for which would involve mediation as well as supportive counseling and CBT. Detained persons would not have access to the necessary treatments in prison as they would if involved in an intervention/prevention program at CAMH. In evaluating a person's risk of re-offending and rehabilitation efforts, the Board should consider whether the detained persons actually had meaningful options at the time.

Similarly, the Guideline states that the members can consider whether an appellant has the necessary supports in place to assist with rehabilitation or treatment (e.g. family members or friends) but should recognize that limited access to these supports during detention can hinder a person's efforts to seek treatment or rehabilitation.