THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

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Via email: iepu-upeli@cbsa-asfc.gc.ca

Edward Ludwig
A/Manager
Immigration Enforcement Policy Unit
Immigration Enforcement, Customs, and External Review Policy Directorate
Canada Border Services Agency
100 Metcalfe St
Ottawa ON K1A 0L8

Dear Mr. Ludwig:

Re: Potential Amendments to Transfer the Authority to Issue Removal Orders for Select Inadmissibilities to the Minister's Delegate

I write on behalf of the Immigration Law Section of the Canadian Bar Association (CBA Section) to comment on the Canada Border Service Agency's consultation notice of August 26, 2020.[1] The consultation notice considers potential amendments to sections 228 and 229 of the Immigration and Refugee Protection Regulations (Regulations) that would transfer the authority to issue a removal order for select inadmissibility provisions from the Immigration Division of the Immigration and Refugee Board to the Minister's Delegate. Our comments pertain to the first two circumstances described in the consultation notice.

The CBA is a national association of over 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 has approximately 1,200 members across Canada practising in all areas of immigration and refugee law.

The first circumstance described in the consultation notice in which the Regulations will transfer the authority to render inadmissibility decisions and issue removal orders to the Minister's Delegate is confusing and poorly phrased. The notice refers to "[m]isrepresentation of visa-exempt status pursuant to paragraph 40(1)(*a*) of the IRPA [Immigration and Refugee Protection Act] to obtain an electronic travel authorization (eTA)." One possible interpretation is that CBSA has the power to issue removal orders to a foreign national entering Canada on an eTA where it discovers on or after the applicant's entry that they misrepresented themselves on their eTA application. Another interpretation is that CBSA is seeking to issue removal orders to a foreign national who needed a visa to travel to Canada but was instead issued an eTA. The French version of the

[1] Canada Border Service Agency's (CBSA) consultation notice of August 26, 2020

consultation notice is also open to both interpretations. Whichever interpretation is correct, the consultation notice fails to clearly explain the intent and scope of the proposed amendment and does not clearly articulate the proposal on which it seeks feedback.

If CBSA's intent is in line with the first interpretation, then the misrepresentations in question are complex matters that call for a thorough examination and assessment. They are not the "relatively more straightforward cases" that CBSA is targeting with its proposed amendment.

If CBSA's intent is consistent with the second interpretation, then the rationale is perplexing. Why did Immigration, Refugees and Citizenship Canada (IRCC) issue an eTA to a person travelling on a passport that is not eligible for eTAs? Why is the applicant at fault if IRCC issued the eTA? If the eTA application instructions and/or the processing were so deficient as to result in issuance of an eTA, then these are not "straightforward" cases for CBSA to determine.

Generally, findings of fact and applicants' explanations and arguments on allegations of misrepresentation are complex and call for careful and measured assessments. The law on misrepresentation extends beyond the wording of section 40 of the IRPA. In particular, a defence to misrepresentation for a reasonably held mistaken belief has been developed through case-law. The Immigration Division is better positioned than a Minister's Delegate to assess allegations of misrepresentation against applicable law, given their legal training and the time allocated to deal with a matter.

We also have concerns about the second circumstance described in the consultation notice: "[n]on-compliance with the requirement to undergo a medical examination pursuant to paragraph 16(2)(*b*) of the IRPA." Has the Immigration Division ever issued a removal order on this basis? Section 229 of the Regulations does not explicitly accord this power to the Immigration Division. We do not see that this power is explicitly given to the Immigration Division, unless the non-compliance in question falls under section 41 of the IRPA.

A common penalty for the failure to undergo a medical examination is the refusal of the application. There is no reason to add another punitive measure or give an explicit power to CBSA for an issue that can already be dealt with through the refusal of an application. If the application is refused and the applicant remains in Canada without status, then CBSA already has the power to issue an exclusion order pursuant to section 228(1)(c) of the Regulations.

The CBA Section appreciates the opportunity to comment on CBSA's consultation notice. We would be pleased to discuss our comments if you have any questions.

Yours truly,

(original letter signed by Nadia Sayed for Mark Holthe)

Mark Holthe
Chair, Immigration Law Section