THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

February 17, 2010

Suzanne Piccini
Policy and Procedures Advisor
Policy and Procedures Directorate
Operations Branch
Immigration and Refugee Board

Dear Ms. Piccini:

Re: Consultation on Guideline 6 – Scheduling and Changing Date and Time of a Proceeding

I am writing on behalf of the National Citizenship and Immigration Law Section of the Canadian Bar Association (CBA Section), regarding the Immigration and Refugee Board's January 2010 draft of Guideline 6, Scheduling and Changing Date or Time of a Proceeding.

We note that some of the recommendations in our September 30, 2009 submission, responding to the proposed revisions to Guideline 6 circulated in August 2009, are reflected in the January 2010 draft. We are pleased that the January 2010 draft of Guideline 6 now reflects the IRB's practice of consulting with counsel prior to scheduling hearings. We do, however, continue to have concerns about the language of the draft, particularly its impact on a party's right to counsel and the obligation of the IRB to provide reasonable notice of hearings.

Right to counsel before the IRB is guaranteed under s.167 of the *Immigration and Refugee Protection Act.* Canadian courts have held that the right to counsel forms part of a duty of fairness owed to an applicant under the law. It is also fundamental constitutional right that cannot not be undermined for administrative expediency. Practically speaking, counsel assist applicants in presenting their cases clearly, streamlining the hearing process and clarifying any misconceptions or misunderstandings that otherwise might result in decisions being appealed or judicially reviewed.

Reasonable Notice

As we noted in our September 2009 letter, there is a need to set clear parameters on what constitutes "reasonable notice," which remain absent in the January 2010 draft.

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Section 3.2.1 has been amended to remove the presumption that the IRB provides reasonable notice in every case:

> The IRB makes the effort to provide the parties with reasonable notice of the date and time of a proceeding in every case; the length of notice will vary depending on the type of proceeding i.e. review of decision for detention before the Immigration Division.

While we appreciate this change, stating that the IRB "makes the effort" to provide reasonable notice may give the impression that it is not under an obligation to give reasonable notice in all cases, and that the IRB is entitled to provide unreasonably short notice in some cases. The word "must" is used elsewhere throughout Guideline 6. For example, in section 3.1.3, the IRB "must" take into account its obligation to deal with proceedings as quickly as possible. In the same way, the IRB's obligation to provide reasonable notice should be made clear by amending section 3.2.1 to state: "The IRB must provide the parties with reasonable notice of the date and time of a proceeding in every case." We recommend a similar change to section 3.2.2, concerning reasonable notice to unrepresented parties.

Right to Counsel

The January 2010 draft contains no changes to sections 2.4 or 2.7. Section 2.4 still instructs parties to choose counsel based on availability to attend the proceeding date. Section 2.7 still does not allow newly-retained counsel to change the date or time of proceeding based on prior commitments. Thus, these sections still unreasonably restrict an individual's right to counsel. As we stated in our previous letter, an individual's right to counsel includes the right to choose counsel.

No change has been made to Section 3.2.1 of the Guideline, which places an unreasonably high burden on counsel to arrange for alternate counsel.

Section 3.3.3 has been changed to acknowledge that where the IRB fails to provide reasonable notice of a proceeding, the fact that a party is waiting for a legal aid application to be approved may be sufficient to allow an application to change the date or time of a hearing. However, under the amended section, waiting for legal aid approval would not be sufficient reason if the IRB *has* provided reasonable notice.

This has the potential to create a great deal of unfairness, and deny poor people the right to counsel of choice. Legal aid programs in each province are separate bodies with their own procedures, over which neither the IRB nor the parties have any control. A delay in legal aid approval could make it impossible for a party to be prepared at the time of a hearing, even with reasonable notice of the hearing date. For example, processing legal aid applications may be delayed, or a change in counsel may require legal aid's approval. As we noted in our previous letter, in many cases, the practical reality is that counsel will not go on record until a legal aid certificate for their representation is obtained. We recommend amending section 3.3.3 to use of

the same language as amended Section 3.3.2: "The fact that a party is waiting for an application for legal aid to be approved will need to be fully substantiated before an application to change the date or time of a proceeding may be allowed."

The fact that there is no consistent recognition of the right to counsel throughout the January 2010 draft means that there are now contradictions. Specifically, Section 3.2.3 and the amended Section 3.3.2 are now in conflict:

3.2.3 When parties are given reasonable notice of the date and time of a proceeding, there is no basis for allowing an application to change the date or time of the proceeding if parties have not arranged to have counsel, or if counsel is not prepared to proceed with the case on the date set by the IRB.

3.3.2 The argument that parties have not had enough time to prepare or have not been able to prepare adequately will need to be fully substantiated before an application to change the date or time of a proceeding may be allowed. Parties will need to explain to the decision-maker the efforts they have made to prepare and be ready for that proceeding and why the delay could not have been foreseen earlier.

Section 3.3.2 was amended to recognize that the lack of time to adequately prepare a case may be a reason to allow an application to change the date or time of a proceeding – even when reasonable notice has been provided. However, Section 3.2.3 continues to state that, where reasonable notice has been provided, there is *no basis* to allow such an application when a party has not been able to prepare adequately. In light of Section 3.3.2, we recommend that the conflicting Section 3.2.3 should be deleted altogether, or at the very least, significantly amended.

Thank you for the opportunity to respond to your consultation and we look forward to hearing from you. These changes to reflect the right to counsel will work to meet our shared goal of fairness to applicants before the IRB.

Yours truly,

(*Original signed by Kerri Froc for Stephen Green)*

Stephen Green
Chair, National Citizenship and Immigration Law Section