THE CANADIAN BAR ASSOCIATION
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Via email: Jennifer.Irish@cic.gc.ca

Jennifer Irish
Director
Asylum Policy and Programs
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Citizenship and Immigration Canada
365 Laurier Avenue West
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Dear Ms. Irish,

Re: Immigration and Refugee Protection Regulations Amendments, Canada Gazette, Part I: Notices and Proposed Regulations, March 19, 2011

On behalf of the Citizenship and Immigration Law Section of the Canadian Bar Association (CBA Section), I am writing to comment on the above-noted proposed regulations. The regulations seek to implement a "Designated Country of Origin Policy" arising out of amendments to the *Immigration and Refugee Protection Act* (IRPA) made by the *Balanced Refugee Reform Act,* which came into effect on June 29, 2010. Our main concern relates to the requirement in proposed s.159.95(1) that appeals to the new Refugee Appeal Division (RAD) be filed and perfected within fifteen working days from the date that the Refugee Protection Division (RPD) decision is communicated to the appellant. This time limit is too brief to permit counsel, whether acting for a refugee claimant or the government, to competently prepare submissions. Further, in our view, establishing this deadline would be *ultra vires* the powers given to the Governor in Council in IRPA.

Preparation of an appeal requires ordering and listening to the recording of (often) hours of testimony from the RPD, analysis of the documentary evidence and the law, and preparation of detailed submissions. Refugee claimants must find counsel to represent them on the appeal and, if it is available, applying for legal aid. The process to get legal aid approval is often a month for judicial review litigation. This is barely manageable under the current system, which permits fifteen days to register notice of the Federal Court application, and a further 30 days to complete arguments.

A fifteen day deadline to file and perfect a RAD appeal also does not adequately take into account the many barriers refugees often face in tribunal proceedings, such as traumatization, language limitations, lack of access to qualified counsel or funding for litigation. For government, it is also unlikely that Justice Canada lawyers can be notified of a contentious decision, obtain the recording and prepare competent submissions within 15 days. To provide meaningful access to the RAD, we

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recommend adopting the existing practice in Federal Court, namely, permitting 15 days to file notice, and an additional 30 days for submissions to be completed.

In our view, the proposed narrow time limits are so extreme that they defeat the purpose of the legislation, and are therefore *ultra vires*. In other words, a 15 day time period for filing *and* perfecting the appeal is so arbitrary and unrealistic so as to make the appeal itself nugatory. Either appeals would not be filed in time, or crafted so hastily so as not to constitute a true appeal on the merits. It is therefore beyond the authority of the Governor in Council to enact it. The RAD would effectively become a tribunal with no substantive function if appeals to it cannot be competently prepared and filed within the required time frame.

Generally speaking, the courts will defer to the Governor in Council in promulgating regulations. There is a presumption that regulations are valid, but they can be reviewed by the Courts to determine whether they are inconsistent with the purpose of the statute or where some condition precedent to the issuance of the regulation has not been met.[1]

There are several examples where courts have struck down time limits for these reasons. In *Re Attorney-General of Canada and Public Service Staff Relations Board* (1977), 74 D.L.R. (3d) 307 (Fed. C.A.), the Federal Court of Appeal set aside a time limit that fettered or hindered the substantive ability of a tribunal to hear appeals. In *Re Cardona Alvarez and Minister of Manpower and Immigration* (1978), 89 D.L.R. (3d) 77 (Fed. C.A.), the Court of Appeal held that where a rule setting a time limit "purports to have been made in the exercise of this [*legislative*] authority" but "is inconsistent" with the legislation's purpose, it is *ultra vires*. In *Morine v. L & J Parker Equipment Inc.*, 2001 NSCA 53 the Nova Scotia Court of Appeal held that:

> [T]here is strong judicial authority for the proposition that regulations cannot impose time limits which have the effect of taking away rights conferred by the parent legislation.

The Court of Appeal further noted that a remedial statutory purpose should be taken into consideration in analyzing the lawfulness of the regulation. As the purpose of having a RAD is to allow parties to present substantive arguments on the merits of a refugee determination, an unrealistic time limit would likely be recognized as beyond the legitimate authority of the Governor in Council.

The issues raised at the RAD will be similar to those currently raised before the Federal Court. The material required will be the same, as in both cases it is anticipated that the application initially will be in writing. There is no principled reason why the time limits at the RAD should be dramatically shorter than those at the Federal Court. We have not found such constrained time limitations in other tribunal appeals with similarly complex records and issues. Even appeal tribunals and courts with arguably simpler factual records generally have more generous time limits.

The proposed provision does permit some discretion to deviate from the 15 days:

> **159.95** (2) If, for reasons of fairness and natural justice, the appeal cannot be filed and perfected within the time referred to in subsection (1), the Refugee Appeal Division may extend the time limit for filing and perfecting the appeal by the additional number of working days that is appropriate in the circumstances.

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[1] *Ontario Federation of Anglers and Hunters v. Ontario (Ministry of Natural Resources)* [2002] O.J. 1445 (Ont. C.A.); *De Guzman v. M.C.I.,* 2004 FCJ 1557 (F.C.A.).

The proposed provision makes clear that that the 15 day deadline would ordinarily be applied, subject to exceptions on the basis of fairness and natural justice. Discretion to extend the time in exceptional cases cannot make a regulation that is fundamentally inconsistent with the purpose of the legislation lawful. A constrained time limit would also work against administrative efficiency, as it would likely result in higher volume of applications for extensions taking up additional resources and time, whether the extensions were granted or not.

Therefore, the CBA Section recommends that the time limit be amended as follows:

> **159.95** (1) Subject to subsection (2), for the purpose of subsection 110(2.1) of the Act, the time limit for a person or the Minister to file and perfect an appeal to the Refugee Appeal Division from a decision of the Refugee Protection Division is not later than 45 working days after the day on which the person or the Minister receives written reasons for the decision.

The four month time limit for rendering a decision under s. 159.96(1)(b) is indicative of the anticipated complexity of appeals to the RAD. In the event that proposed s.159.95(1) is amended to permit 45 days to file and perfect the appeal, the time to render an appeal decision under s.159.96(1)(b) could be reduced to three months to maintain the time frame the government has set for appeals.

We would be pleased to discuss our submission with you in greater detail and answer any questions you may have.

Yours truly,

(original signed by Chantal Arsenault)

Chantal Arsenault
Chair, National Citizenship and Immigration Law Section