THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

November 6, 2019

Via email: Paul.Crampton@fct-cf.ca

The Honourable Paul S. Crampton
Chief Justice of the Federal Court
90 Sparks Street
Ottawa, ON K1A 0H9

Dear Chief Justice Crampton:

Re: Draft Practice Guidelines on Immigration and Refugee Proceedings Stay Motions for Removals from Canada

I write on behalf of the Immigration Law Section of the Canadian Bar Association (CBA Section) to comment on the Federal Court's *Public Working Draft Practice Guidelines – Immigration and Refugee Proceedings Stay Motions for Removals from Canada* (guidelines).[1] The guidelines intend to clarify best practices for conducting urgent stays of removal. The CBA Section is concerned that the guidelines' inflexible timelines will pose an unreasonable obstacle for applicants at risk of removal. We are pleased that the Court is reviewing the guidelines following feedback from stakeholders.

The guidelines overlook the time it takes for the Canada Border Services Agency (CBSA) to decide on a request for deferral of removal, which is a critical intervening step between when a removal date is set and a motion seeking a stay of removal is filed.

We share many of the concerns by other stakeholders on the Bench and Bar Liaison Committee on Citizenship, Immigration and Refugee Law, including two overarching issues:

1) Where the underlying judicial review will be of a decision by CBSA not to defer removal pursuant to s. 48 of the *Immigration and Refugee Protection Act*, and no other decision is being judicially reviewed, how does the timing of a delayed deferral decision by CBSA impact the times in the guidelines? For example, where a humanitarian and compassionate or spousal sponsorship application decision is outstanding and there is no other decision to judicially review, must the applicant also seek an order of mandamus for the officer to render a deferral decision? Alternatively, can the applicant deem a decision to have been refused after a specified time has passed?[2]

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1 Federal Court of Canada, October 16, 2019.

2 The Court has raised concerns with the practice of 'deeming' refusals, a practice by counsel as a result of delayed CBSA decisions which otherwise impeded their ability to bring a timely stay motion to the Federal Court: *Gomez v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010

2) The guideline is unclear on the proper process or timeline if the applicant is seeking a stay of removal based on an underlying judicial review of another decision (e.g. a negative humanitarian and compassionate or pre-removal risk assessment decision). In these circumstances, applicants should not be required to first seek an A48 deferral of removal from CBSA. Applicants and their lawyers should have the choice to decide whether to forward a separate deferral request depending on the applicant's circumstances.

These concerns arise because CBSA is not required to adhere to a timeline when deciding on deferral requests and does not always make these decisions in timely manner.[3] In practice, CBSA will only entertain a request to defer removal once a removal date is set, and the guidelines suggest that this should also be when the clock starts ticking to file a stay motion in Federal Court. If CBSA does not make a deferral decision before the applicant files the stay motion, the applicant must argue the deferral of removal orally for the first time in Federal Court. There is conflicting jurisprudence on whether the Court should accept judicial review applications or stay motions in these circumstances.[4]

Applicants seeking a stay of removal face circumstances out of their control, despite diligent efforts to maintain control over the pending litigation. CBSA and their counsel are better able to control the timing. The guidelines must reflect this difference and allow for flexibility.

Consideration should also be given to the needs of self-represented litigants, who may have difficulty complying with the guidelines. We would be pleased to work with the Court to establish separate considerations and procedures for self-represented individuals.

The guidelines do include qualifying statements such as "avoidable last minute motions are discouraged" (emphasis added) and "the Court recognizes that in immigration matters there are circumstances where an applicant has no alternative but to bring a last minute, or urgent, motion to stay their removal from Canada." However, these realities should be more explicitly addressed in the guidelines and reflected in its timelines. The guidelines should foster flexible practice for all parties.

We thank the Federal Court for the opportunity to comment on the guidelines and look forward to participating in further discussions before they are finalized.

Yours truly,

(original letter signed by Nadia Sayed for Ravi Jain)

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Chair, CBA Immigration Law Section

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FC 593, J. Zinn and *Aslam v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 416, J. Barnes.

[3] This concern has been raised previously by the CBA Section. See for example: Administrative deferral of removal for applicants in the "Spouse/Common-law Partner in Canada" class and applicants for permanent residence on H&C grounds, September 2019; *Re: Administrative Deferral of Removal applicability and Timelines for written responses of ADR denials by Canadian Border Service Agency* – at Judicial Review Applications and Stay Motions of ADR Decisions – proposal for timelines, September 13, 2016.

[4] See e.g. *Bergman v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2010 FC 1129 at para. 18.