THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Bill C-20, Public Complaints and Review Commission Act

CANADIAN BAR ASSOCIATION
IMMIGRATION LAW SECTION

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA Immigration Law Section, with assistance from the Advocacy Department at the CBA office. The submission has been reviewed by the Criminal Law Section, Law Reform Subcommittee and approved as a public statement of the CBA Immigration Law Section.

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I. INTRODUCTION

We write on behalf of the Immigration Law Section of the Canadian Bar Association (CBA Section) to comment on Bill C-20, the *Public Complaints and Review Commission Act*.

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 Immigration Law Section has approximately 1,200 members across Canada practicing in all areas of immigration and refugee law.

The *Immigration and Refugee Protection Act*[1] (IRPA) grants the Minister of Public Safety and Emergency Preparedness important jurisdiction in immigration matters. These include: examinations at ports of entry; enforcement (arrest, detention, and removal); establishing policies respecting enforcement and inadmissibility on grounds of security; organized criminality; human or international rights violations; and, subject to certain conditions, examining petitions from persons seeking admission to Canada deemed inadmissible on one or more of the latter three grounds.

Under the *Canada Border Services Agency Act*[2] (CBSA Act), the Minister of Public Safety and Emergency Preparedness is responsible for the Canada Border Services Agency (CBSA).

As immigration law practitioners, and recognizing the important role played by CBSA officers and employees in immigration enforcement-related matters, our comments focus on Bill C-20 provisions relating to the CBSA in 11 key concerns:

1. Service standards for time limits – s. 8 (2)
2. Information Provisions – ss. 17-19
3. National Security – s. 31(1) vs. s. 52(8)
4. One-year delay to submit complaint – s. 33(3)
5. Complaints that are "trivial, frivolous, vexatious or made in bad faith" – s. 38(1)(a)
6. Informal resolution – s. 43
7. Delay for CBSA President to respond to Commission's initial report – s. 64
8. Prohibition against judicial review – s. 65
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1 Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 4(2).

2 Canada Border Services Agency Act, S.C. 2005, c. 38, s. 2 and 6(1).

10. Informing individuals of their rights – s. 86
11. Agreements with provinces – s. 110

Our summary of recommendations for each of these concerns is found in Part III of this document.

1. Service standards for time limits – s. 8 (2)

The CBA Section is concerned that under s. 8(2), the Public Complaints and Review Commission in tandem with CBSA would be empowered to set time limits to resolve complaints, exceptions to the time limits, and circumstances under which delays could be extended.

It seems inevitable that as the Commission's workload increases, delays will grow. The Commission's work could then be portrayed as being "efficient" in dealing with complaints, when in fact the goal lines have been moved. The Bill imposes a one-year delay for a complainant to file a complaint. Thus, it is reasonable that the Commission be required to conclude its work in a fixed timeframe as well. (See discussion on s. 33(3) below.)

2. Information Provisions – ss. 17-20

Section 17(2) provides that the Commission is entitled to privileged information from the CBSA when "that information is relevant and necessary" to conduct a review of CBSA activities or an investigation, review, or hearing of a complaint. Sections 19 and 20 set out a long list of exceptions to the right of the Commission to access privileged information and Cabinet confidences.

It is not clear what recourse, if any, the Commission would have in instances where the CBSA President informs the Commission pursuant to s. 17(6) that access is denied because the President deems the information "is not relevant or necessary" and the Commission is of a contrary opinion. As well, there appears to be no mechanism for a complainant to dispute the President's refusal to disclose information to the Commission.

3. National Security – s. 31(1) vs. s. 52(8)

Section 31(1) provides that the Commission will not have jurisdiction to conduct a review of specified activities of the CBSA "related to national security." These matters must be referred to the National Security and Intelligence Review Agency.

In contrast, s. 52(8) indicates that the Commission must refuse to consider a *complaint* and refer the matter to the National Security and Intelligence Review Agency, "if it concerns an activity that is *closely* related to national security." (Emphasis added) Similarly, the French

text, s. 31(1) speaks of « activités liées à la sécurité nationale » vs. 52(8) « concernant des activités *étroitement* liées à la sécurité nationale » (Emphasis added.)

It is unclear whether the "related" vs. "closely related" terminology is a drafting oversight, or if the distinction is intended. It would be a matter of interpretation and debate as to how a complaint would be deemed "closely related" to national security. We question whether this interpretation would fall under the scope of the Rules that the Commission could adopt under s. 10(1)(c) and (e).

The extent to which a complaint will be interpreted as related to national security issues before it ventures into "closely related" territory must be clarified. The CBA Section questions whether this involves a qualitative or quantitative assessment, or a combination of both. On the qualitative front, we urge you to clarify the criteria to establish being "closely related" as opposed to being peripheral, for example. The focus might be on the nature of the activities under possible review, rather than the characteristics of the person making the complaint. For example, if a person were alleged to be inadmissible to Canada for security reasons by virtue of IRPA s. 34(1), would any consideration of the person's complaint automatically be deemed to be "closely related" to national security?

On the quantitative front, we urge you to clarify how many national security concerns it will take to automatically deem the complaint to be considered "closely related."

As lawyers dealing with ATIP requests on behalf of clients, we note that government officials tend to give a wide berth to any statutory provision mentioning matters analogous to security or national security as a reason to refuse access to parts or all of a client's file, including for example officers' notes in IRCC / CBSA computer records.[3] Without clear guidelines setting out criteria for being "closely related" to national security, the same tendency will operate under the Bill.

4. One-year delay to submit complaint – s. 33(3)

Section 33(3) indicates that complaints against the conduct of a CBSA employee or former employee must be made "within one year after the day on which the conduct is alleged to have occurred."

This could be extended by the Commission or the CBSA President if either is "of the opinion that there are good reasons for doing so and that it is not contrary to the public interest" (s.

[3] See *Access to Information Act*, RSC 1985, c A-1, s. 16.

33 (5)). Likewise, the Commission would be empowered to extend the 60-day delay to refer a complaint to the Commission for review for the same reasons (s. 56(2)).

Complainants would have two hurdles to overcome: they must have good reasons and be able to show that extending the delay was not contrary to the public interest. The terms "good reasons" and "public interest" are not defined in the Bill.

It is unclear whether complainants have to establish facts deemed reasonable on a balance of probabilities, or whether "good reasons" will require a higher benchmark.

We also question whether "public interest" will be roughly analogous to the interests of justice or fairness, or is something distinct. It may be seen from s. 51(1) that the Commission would be obliged to investigate a complaint or institute a hearing "if the Chairperson is of the opinion that it would be in the public interest" to do so. This makes one believe that "public interest" is an overarching concept, but that is something to be determined.

The CBA Section also notes that, in immigration-related matters, conduct that might constitute a possible ground for complaint may not be evident to the individual concerned when it occurs. Further, it may not become known to the person concerned until after one year has elapsed.

Consider the example of a refugee claimant who suffers from serious physical and mental health issues.

- While attending an interview at the CBSA for an eligibility interview for their refugee claim, the Officer allegedly ignores medical documents the claimant attempts to present and proceeds to aggressively interview the claimant. At the end of the interview, the Officer decides to detain the claimant. While being transported, the claimant complains of chest pains and says they need their medicine. Officers take the claimant to hospital.
- Once discharged, the Officers again allegedly interview the claimant aggressively at the holding centre. This exacerbates the physical and mental health issues. Claimant is unable to retain a lawyer until the third detention review (48 hours + 7 days + 30 days later).
- The lawyer is not made aware of the incidents, as the Minister's counsel either was not aware of them or opted not to disclose them because of potential "media interest" this could raise.
- Claimant also does not raise what happened due to mental health issues which are now exacerbated to the point where they need medical supervision and a Designated Representative. Lawyer requests ATIP from CBSA as complete file could assist refugee matter.
- Lawyer gets notes through ATIP one year later. The claimant states that due to mental health issues they have a hard time remembering the interviews, but does

> recall some of the events. Claimant did not know of the complaint mechanism. As well, due to the way law enforcement officials operate in their home country, claimant did not know that the Officers' alleged aggressive conduct constituted grounds for complaint.

Under Bill C-20, the claimant in this example would have no complaint mechanism or remedy even though this statutory scheme was created to protect individuals from such situations. A special request would have to be made to extend the delay, creating additional burden and stress.

Instead of requiring special requests for extensions of time, which likely will place an administrative burden on the Commission to adjudicate, and also delay the start of any investigation into the alleged conduct, a parallel may be drawn with IRPA s. 72 (2)(b) on the legal delay to institute an application for leave and for judicial review before the Federal Court. In IRPA, the key indicator is that the time delay counts from "after the day on which the applicant is notified of *or otherwise becomes aware of the matter.*" (Emphasis added.)

5. Complaints that are "trivial, frivolous, vexatious or made in bad faith" – s. 38(1)(a)

The CBSA President will be empowered to direct the CBSA not to investigate a complaint if the President deems it is "trivial, frivolous, vexatious or made in bad faith" (s. 38(1)(a)). The Commission itself may refuse to deal with a complaint for the same reasons (s. 52(1)(a)).

These will be important grounds for screening out potential complaints, but no definitions are included in the Bill for these terms. Section 87 lists matters subject to Regulations under the Bill, but ss. 38(1)(a) and 52(1)(a) are not mentioned directly. Presumably, definitions might be created under a Regulation pursuant to the umbrella wording at the beginning of s. 87 or in s. 87(p). These matters are unlikely to fall under the scope of Rules the Commission could adopt under s. 10(1)(c) and (e).

It is not clear if the intent is that the CBSA President or the Commission will base the criteria applying these terms using guidelines or case law from other federal commissions dealing with public complaints or case law from courts in damage or other civil claims, or a combination of these.

6. Informal resolution – s. 43

The Bill would establish a mechanism for informal resolution of disputes. Section 43(1) specifies that the option must be considered "as soon as feasible" following receipt of a complaint. Consent of the complainant and of the CBSA employee would be required to explore this possibility.

The CBA Section is concerned that the "as soon as feasible" criterion is too vague. If delays are long and/or unpredictable to begin the process, potential complainants or CBSA personnel may not consider informal resolution to be a viable option. As well, parties should have a reasonable time limit to respond that they either accept or refuse informal resolution in a particular file, to avoid delaying complaint files unduly.

7. Delay for CBSA President to respond to Commission's Initial Report – s. 64

Section 64(1) indicates that, following an investigation or hearing, the Commission must prepare an initial report to the CBSA President, who in turn must give their written response to the Commission within six months (s. 64(2)). In the context of immigration law, a six-month timeline for the CBSA President to give a written response may prove excessively long and detrimental to individuals with a precarious status in Canada.

8. Prohibition against judicial review – s. 65

Section 65 effectively prevents judicial review of "all of the findings and recommendations" in a final report of the Commission following the response of the CBSA President to the Commission on a complaint or in the final report of the Commission following an investigation or a hearing.

The reasons justifying this ban against judicial review are not apparent from the Bill. We understand that the role of the Commission will be to fact-find, issue reports and submit recommendations, including recommendations of disciplinary action in certain cases. However, the Commission will not be in a position to make binding decisions.

The CBA Section is troubled to see this proposal, in light of the principle of administrative law that government actors are subject to the general superintending and reforming powers of the superior courts and, in the case of federal jurisdiction, confirmed by the *Federal Courts Act*.

Many CBSA activities concern immigration matters. The legislative authority for all immigration matters emanates from the IRPA and IRPR.

IRPA s. 72(1) permits judicial review, subject to obtaining leave, "with respect to any matter – a decision, determination or order made, a measure taken or a question raised – under this Act." The existence of a "decision" is not a pre-condition to seek judicial review. Bill C-20 is at variance with a fundamental principle of Canadian immigration law by prohibiting judicial review.

9. No stay of removal, etc. – s. 84

Pursuant to s. 84(c) and (e), the investigation, or the review thereof, will not have the effect of staying removal of the individual under IRPA or permitting that person to enter or remain in Canada beyond the expiry of their status document.

The CBA Section is concerned that this provision will diminish the practical value of the complaints process if a person is removed before having the opportunity to complete their file, which would already have been made difficult if that person was previously detained. Moreover, under s. 56(1), the Commission is obliged to consider any complaint referred to it. We fail to see how the Commission will be able to carry out its legislated responsibilities if individuals are removed before it may fully undertake its review.

10. Informing individuals of their rights – s. 86

The CBA Section is pleased to see an obligation for CBSA employees and officers to inform persons detained and arrested of their right to file a complaint and how to do so.

Nevertheless, we wish to point out that detainees in immigration law-related situations are most often not accustomed to being held in detention and may not have in their cultural experience facility in legal jargon and procedures, particularly in the Canadian context. Explanatory materials and oral explanations given to detainees should include awareness of cultural differences and appreciations. As well, it is unproductive to inform individuals about their rights if they are not given the means to exercise them.

11. Agreements with provinces – s. 110

An important consequential amendment to s. 13 of the *CBSA Act* would enable the CBSA to enter into an agreement with provinces for the detention of individuals if the Minister is of the opinion that there is in the province "an independent individual or body that is empowered to receive and deal with complaints about the treatment and conditions of detention of detained persons." (Proposed s. 13(3) of the *CBSA Act*) However, this requirement could be waived if there is "an urgent need to provide for detention" in the province. (Proposed s. 13(4))

The CBA Section is concerned that these sections read together will permit the Minister to effectively bypass the purpose of the Act, rather than ensuring that provinces have similar provisions in their own jurisdictions. In addition, we submit that what constitutes an "urgent need to provide for detention" is too open-ended conceptually, and no parameters prevent such a situation to continue indefinitely. This compromises the entire rationale of Bill C-20 in the context of Canadian immigration law.

II. CONCLUSION

Bill C-20 represents an important reform of mechanisms to make complaints about the conduct of CBSA officers and employees and a process for their consideration. However, the Commission's role will be limited to an advisory one, even if its recommendations might prove forceful on the overall activities of the CBSA and where complaints have been found to be credible. We trust that our comments will give greater insight into the mandate proposed for the new Public Complaints and Review Commission, particularly in the context of Canadian immigration law and practice.

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

III. SUMMARY OF RECOMMENDATIONS

1. **Service standards for time limits – s. 8 (2): The CBA Section recommends that the Regulations contemplated in s. 87(a) of the Bill "respecting the establishment of service standards under section 8" include definite timelines as part of the standards.**
2. **Information Provisions – ss. 17-20 : The CBA Section recommends that the Governor-in-Council give clear guidelines in the Regulations per ss. 17(8) and 87(c) on how potential differences between the Commission and the CBSA President may be resolved. We also recommend that the situation of potential complainants whose complaint files may be forestalled unreasonably if the exceptions are applied overly broadly be taken into consideration.**
3. **National Security – s. 31(1) vs. s. 52(8): The CBA Section recommends that Regulations adopted under the Bill should give guidance on what criteria will be applied to determine if a complaint is "closely related" to national security.**
4. **One-year delay to submit complaint – s. 33(3): The CBA Section recommends that the Commission be empowered to receive a complaint "within one year after the day on which the conduct is alleged to have occurred *or otherwise becomes aware of the matter".* (Additional wording in italics.) Jurisdiction to extend the delay further could remain in the Bill, as in IRPA for judicial review applications. Requests would probably be less numerous under these criteria.**

5. **Complaints that are "trivial, frivolous, vexatious or made in bad faith" – s. 38(1)(a): The CBA Section recommends that definitions and guidance be added to the Regulation to help establish clarity for complainants in formulating their complaints as well as for CBSA officers and employees in responding.**

6. **Informal resolution – s. 43: The CBA Immigration Law Section recommends that a fixed delay be set in the Act on the expiry of which an informal resolution will be deemed refused by the complainant or the CBSA employee. This would encourage resolutions to be reached efficiently when the complainant and CBSA employee are both acting in good faith, as well as helping ensure the Commission is effective in fulfilling its mandate.**

7. **Delay for CBSA President to respond to Commission's Initial Report – s. 64: The CBA Immigration Law Section recommends that measures be adopted for the Commission to prioritize these files and the Bill be amended to permit the Commission to require a shorter delay in these circumstances.**

8. **Prohibition against judicial review – s. 65: The CBA Immigration Law Section recommends that Bill C-20 be amended to permit applications for judicial review against final reports of the Commission, and to clarify whether these applications should parallel the administrative scheme established in IRPA and require that leave be obtained from the Federal Court.**

9. **No stay of removal, etc. – s. 84: The CBA Immigration Law Section recommends that the Commission be empowered to request the CBSA to suspend removal in files where the complainant is still in Canada, or, if the person has been removed, to request to the CBSA that the person be permitted to return to Canada for purposes of pursuing the complaint or attending a hearing, if in the Commission's view the complaint appears to be credible or the allegations made are particularly serious.**

10. **Informing individuals of their rights – s. 86: The CBA Section recommends that s. 86 also require that detained and arrested persons be granted reasonable access to computer services to file their complaint. Otherwise their right will be illusory.**

    We also recommend that the Commission ensure that materials presented to detained and arrested persons be in plain words, available in multiple languages, including braille, and that the detaining or arresting official be

required to ensure that the person concerned fully understands their right to file a complaint.

11. **Agreements with provinces – s. 110: The CBA Immigration Law Section recommend that the term "urgent need" be defined narrowly and that the Minister be required to ensure that the situation be resolved in a short duration.**