

Submission on
Redesign of the Immigrant Investor
Program

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NATIONAL CITIZENSHIP AND IMMIGRATION LAW SECTION
THE CANADIAN BAR ASSOCIATION



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TABLE OF CONTENTS

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PREFACE	- i -
I. OVERVIEW	1
II. SUMMARY OF PROPOSED CHANGES	2
III. THE CURRENT INVESTOR PROGRAM	3
IV. THE PROPOSED REGULATION	4
A. General Comments	4
B. Threshold Increases	5
C. Single Federal Window	7
D. Rate of Return	8
E. Provincial Allocation	9
The Allocation Period	9
The Allocation Formula	10
F. Additional Considerations	10
V. CONCLUSION AND RECOMMENDATIONS	11

PREFACE

The Canadian Bar Association is a national association representing over 35,000 jurists, including lawyers, notaries, law teachers, students and judges across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Citizenship and Immigration Law Section of the Canadian Bar Association. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Citizenship and Immigration Law Section of the Canadian Bar Association.

Submission on Immigrant Investor Program

I. OVERVIEW

The National Citizenship and Immigration Law Section of the Canadian Bar Association (the Section) is pleased to provide this commentary on the regulatory package pre-published in *Canada Gazette, Part I* on December 19, 1998. The Section comprises lawyers practicing all aspects of immigration law across Canada. We have provided ongoing input to Citizenship and Immigration Canada (CIC) on its legislative, regulatory and policy initiatives. The Section provides these comments with a view to assisting CIC in developing sound, effective, transparent immigration policies, practices and procedures which conform to the goals and objectives of the *Immigration Act*.

The proposed regulatory package would replace the current program of attracting experienced business persons and new investment capital to Canada through private sector, provincially administered venture capital funds under two investment tiers, with a single Canada-wide investment amount remitted through a single federal window. The investment and personal net worth amounts, important criteria of selection, would be significantly increased to \$500,000 and \$1 million, respectively. The guaranteed investment under Tier III would be abolished.

The proposed regulatory modification has been presented by CIC as an improved redesign of existing rules, emphasizing increased economic benefits for the provinces under a simplified, more efficient format.

The Section believes, however, that the proposed rule change is fundamentally flawed. As subordinate legislation to the existing *Immigration Act*, the regulatory package is premature in that it precedes the White Paper tabled in January 1999. The White Paper proposes a legislative overhaul of the *Immigration Act*, including the business program. The White Paper proposals for reform of the business program include introduction of the definition of significant business experience, increased education and language skills and a provision addressing the origin of funds under the investor program. In our view, all these elements constitute issues of selection, as are investment and personal net worth amounts.

Given that the Government intends to proceed with imminent replacement of the current *Immigration Act*, to be preceded by extensive public consultations, we submit that this regulatory change is premature. The Section urges the Government to

extend the existing program and address the proposed regulatory modification following the White Paper review.

The Section also believes that raising investment and personal net worth thresholds at this time will likely result in a significant reduction of applicants who qualify under the immigrant investor program.

The Section is of the view that the proposed rule change significantly reduces the role of the private sector to market and administer the program, which may also contribute to a reduction in immigrant investors under the federal program.

The Section believes that a number of issues arising from the proposed modification require further examination and or clarifications.

Finally, the rule change of the nature proposed presents a further example of *ad hoc* amendments, a practice the Minister has specifically sought to end through upcoming legislative reform.

II. SUMMARY OF PROPOSED CHANGES

The proposed regulatory package would present the following changes:

- Increased eligibility net worth requirement to \$1 million from \$500,000 and increased amount to be invested to \$500,000 from \$250,000 (under Tier I) or from \$350,000 (under Tier II). Both tiers would therefore be eliminated. The guaranteed investment under Tier III would also be abolished.
- CIC designated as the depository for all investments and CIC role expanded to administer multifarious aspects of the program including the allocation of immigrant investment to provincial or territorial funds according to an allocation formula.
- The federal selection process applied exclusively to those who participate in the federal program.
- The Quebec selection process applied exclusively to those who participate in the Quebec program.
- Immigrant investor would receive from each approved fund, a provincial guarantee representing the portion of the investor's investment in the approved fund.
- Zero percent rate of return on investment to the immigrant investor.
- The five-year allocation period beginning on the first day of the second month after CIC informed the fund that the investor has landed.

III. THE CURRENT INVESTOR PROGRAM

The current business immigration program seeks to promote economic development and employment by attracting international business people to Canada, based on their ability to successfully establish themselves in Canada. The primary objective of the business immigration program is to develop new economic opportunities for Canadians, and to improve Canada's access to global markets by permitting people familiar with those markets to make Canada their new home.

The business immigration program was developed to further the objective stated in section 3(h) of the *Immigration Act*:

It is hereby declared that Canadian immigration policy and the rules and regulations made under this Act shall be designed and administered in such a manner as to promote the domestic and international interests of Canada recognizing the need [...]

(h) To foster the development of a strong and viable economy and the prosperity of all regions in Canada.

By way of summary, the current federal investor program provides for admission to Canada under the federal selection criteria. Investments are made with provincial government-administered funds. Most investors select financing provisions which enable them to deposit approximately \$80,000 for Tier I investments or approximately \$120,000 for Tier II investments and borrow the remainder for a total investment of \$250,000 or \$350,000. Loans to investors are secured by the investment in the eligible corporation. The investor is liable for repayment of the loan in the event of the failure of the investment. Investors must transfer their investment to a fund prior to visa issuance. The five-year investment period begins when funds are invested in the eligible corporation. Investment in an eligible corporation may take place prior to visa issuance. Investors proceeding with a financing option, typically receive a reimbursement of approximately \$10,000 at the conclusion of the investment period. Irrespective of the investment vehicle selected, the return of the principle and/or interest cannot be subject to a guarantee.

Approved funds are independently managed and marketed. Commissions ranging from 5% to 10% are typically paid when the Escrow Agent releases the investment to the fund. Applicants proceeding under the federal selection criteria may participate in a Quebec based program.

Quebec (which promotes its own immigrant investor program under the authority of the *Canada-Quebec Accord Relating to Immigration and Temporary Admission of Aliens*), operates a \$350,000 program with licensed investment dealers and financial institutions acting as fund managers. Most investors select financing provisions that

will enable the investor to deposit between \$88,000 and \$97,000 and borrow the remainder for a total investment of \$350,000. In a maximum financing arrangement, the investor will typically receive no return of capital at the end of the investment period. Loans to investors are secured by the investment in the eligible corporation. The investor is liable for the repayment of the loan in the event of the failure of the investment. Unlike the federal model, investors receive security on their investment, which conventionally takes the form of assets of the eligible corporation, pledged as collateral to the investor in the event of a default by the corporation. The assets pledged are generally in the form of an instrument such as commercial paper. Investors destined to Quebec must transfer their investment prior to the issuance of a Quebec Certificate of Selection. Investors participating in the Quebec program destined outside Quebec must transfer their investment prior to visa issuance. The five-year investment period begins when funds are invested in the eligible corporation. Investment in an eligible corporation may take place prior to visa issuance.

Approved funds are independently managed and marketed by the investment dealer. Commissions generally ranging from 6% to 8.5% are payable by the fund investment dealer in whole or in part following the investment in an eligible corporation. Investors investing in a Quebec program may be assessed under the Quebec or the federal selection criteria, depending on the intended destination.

IV. THE PROPOSED REGULATION

A. General Comments

The Regulatory Impact Analysis Statement (RIAS) describes the proposed regulation as a redesigned, simplified version of the existing rules which retain the fundamental intent of the original Program of attracting qualified business people who, in exchange for admission to Canada, will make substantial investments in Canada.

The RIAS further stipulates that simplification will occur by eliminating complex rules governing the use of investors' monies and by introducing a role for CIC to act as agent for approved provincial funds who will in turn invest their funds according to their own independent priorities. After five years, the funds will repay CIC and CIC will repay investors.

In our view, the RIAS does not objectively reflect the true impact of the proposed changes. To the contrary, we firmly believe that the impact will be at variance with the specific objectives of the *Immigration Act*, Regulations and stated Ministerial policy in the following respects:

- Immigration levels for the immigrant investor component of the 1998 Immigration Plan will be significantly reduced.

- Regional disparities, for a foreseeable period of time, will continue to exist between the provinces participating in the new federal model and the Province of Quebec.
- Certain regions will incur a substantial reduction of economic benefit as a result of the new program.

Moreover, the Section observes that the RIAS provides no insight as to why the investment threshold, a critical component of program re-design, is being increased at this time.

B. Threshold Increases

Since its inception in 1986, Canada's immigrant investor program while accounting for \$4.22 billion in investment (RIAS statement), has proven to be a model of success which other countries such as Australia, Singapore, New Zealand and the United States have reviewed with interest in devising their investment programs. Indeed, these programs present viable alternatives to potential investors. The future success of the Canadian model requires a keen awareness of all factors that affect the choices and qualifications of investors.

The proposed regulations stem in part from the *Not Just Numbers* report released by the Legislative Review Advisory Group in January 1998. The commentary in that report was based on economic indicators that were applicable well before the Asian Economic Crisis took effect.

Since the release of the report, the economic performance of leading source countries in Asia and Eastern Europe, has declined considerably, along with the personal net worth and investment capability of many potential applicants. This factor has translated into a precipitous decline in immigrant investor applications to Canada in 1998.

Similarly, the value of the Canadian dollar on the international market has declined considerably relative to many of the leading currencies, particularly the United States and to a lesser extent, Australia, countries that offer competing immigrant investor programs. An eventual recovery in the value of our dollar relative to these currency's would increase the cost of the Canadian product, relative to these competing products, assuming all other related factors remain unchanged.

Additionally, evidentiary documentation and program integrity is a major concern for CIC under the current program. Obtaining evidentiary documentation that satisfies recently implemented program integrity initiatives, proving both personal net worth under existing thresholds and satisfactory linkage between the accumulation of \$500,000 and an applicant's own endeavours is becoming increasingly difficult for many applicants world-wide, given that documentation now being requested did not even exist in some source countries until the mid 1990's.

Moreover, the manner in which personal net worth is calculated in the assessment of an application varies significantly between missions. These issues are critical to the qualification of a prospective applicant and must be satisfactorily addressed in a regulatory enactment of this nature, before thresholds are increased.

Current federal investment options have evolved over the past number of years into complex financing formulas designed to reduce the cost of investment and minimize the element of risk for the investor, within the prescribed limits of the regulations. Although the return of capital and interest cannot be subject to a guarantee (except under a Tier III investment), for all practical purposes there is minimal element of risk of return of capital and, where applicable, interest, in the existing program.

One raises the question, therefore, as to the rationale for the proposed investment increases, which we believe can be explained only perhaps by the misconception that the redesigned program provides investors with increased prospects of a return of capital from the current program.

The Section believes that proceeding with regulatory threshold increases in any form at this time, without further assessing the impact of these issues beforehand, will likely discourage and disqualify a substantial number of source country applicants. This in turn will severely hinder the stated objectives of section 3(h) of the Act, by significantly reducing the number of business immigrants seeking admission to Canada. The Section therefore opposes any increase to the investment or personal net worth thresholds.

In the event that CIC decides to proceed with some form of threshold increase, the Section has differing views on the extent to which an increase should materialize. With respect to investment the Section believes, for reasons outlined above, that any increase from the current level should be modest at best. For example, some members are of the view that an investment requirement of \$350,000 would be a suitable amount as this represents a 40% increase in investment over the current Tier I investment level which has historically accounted for a substantial portion of immigrant investment to Canada.

Other members believe that an investment requirement of \$400,000 represents a proper balance between the preference to increase the stature of the program and the importance of acknowledging the factors outlined above.

With respect to personal net worth criterion, should CIC proceed with an increase contrary to the Section's recommendations, the Section recommends the inclusion of all assets, including joint marital property, accumulated through lawful economic activities in the calculation of personal net worth.

C. Single Federal Window

The Section fully supports initiatives aimed at streamlining the administrative infrastructure of the program and increasing economic benefit. Indeed by all accounts, the current rules governing the creation of investment funds and the use of investors' monies have proven to be highly complex, inefficient and largely ineffective in achieving program objectives.

Many of our members argue, however, that the Province of Quebec under the single federal window system will maintain distinct advantages over the federal program allowing Quebec to continue to retain a substantial share of the immigrant investor market. In such a case, the problem of regional disparities would persist, vis-à-vis the unequal benefit the program now provides to "all regions in Canada" within the meaning of section 3(h) of the Act. This assumes that the Quebec government will continue to market its own independent investor program. On the basis of current practices, advantages favouring the Quebec program will include without limitation, a less expensive overall cost of investment, a secured investment, flexible/efficient processing service standards and freedom of inter-provincial mobility provided by the *Canadian Charter of Rights and Freedoms* to permanent residents.

The role of the private sector to effectively market the immigrant investor program is one of the major factors that has enabled Quebec to maintain a substantial share of the Canadian immigrant investor market. The Section therefore, urges the Government to undertake efforts to include the private sector in an incentive, commission structured capacity to market the redesigned federal program, an element which is linked to the success of a business related undertaking of this nature.

Additionally, some Section members believe the redesigned program should also include an administrative initiative allowing for fast track processing of selected applications, in a designated Regional Processing Centre inside Canada, to increase efficiency and reduce processing times of the federal program. Current federal processing delays for business applications exceed processing delays for Quebec business applications on average, where applicants undergo a two step approval process.

Procedurally, applications filed at any existing area business centre would be pre-screened for qualified applicants who would be issued a notice with a choice to attend an interview inside Canada where delays to interview would be less than six months from submission, or at the mission where the application is submitted where delays would be longer.

A minority of our members suggest, however, that the single federal window system may result in a substantial decline in the number of investor applicants choosing the Quebec program. Reasons in support of this position pertain to a conceptually more secure program that will arise from CIC's new role as the depository for all investments, a provincial guarantee provided to applicants participating in the federal

program and the Quebec selection system being applied exclusively to those who participate in the Quebec program and who intend to reside there.

The Section believes, therefore, that proceeding with a single federal window program at this time is premature, and should be delayed to permit further consultations between CIC and the Quebec government, an influential participant in the current Canadian market, with the objective of harmonizing the two programs to safeguard the objectives of the Act.

D. Rate of Return

The Section has serious concerns with a zero rate of return on investment to the immigrant investor, under the proposed changes. In addition to being financially harsh to those who seek admission under the program, the use of capital by the Government of Canada during processing may inadvertently become an incentive by CIC to prolong immigration processing periods. Indeed the potential benefit to the Government is significant. By way of illustration, a delay of only six weeks in the processing period for immigrant investors at any given time would provide the Government with a financial gain exceeding \$4 million. This illustration is based on short-term interest rates in Canada of 4%, with an active inventory of 1800 business immigrant investor applications.

In an effort to eliminate such a possibility, and to encourage efficiency and accountability to the applicant by CIC, the Section urges CIC as a minimum, to prescribe an annual rate of return on immigrant investor capital during the period prior to visa issuance. Thereafter, interest should be paid by each participating approved fund in accordance with the prorated share of an investor's investment in the approved fund. The interest rate would be prescribed by regulation and set periodically to reflect prevailing rates and other factors.

Additionally, and from a marketability perspective, this mechanism could be advantageous to CIC in that it would also allow the program to become more competitive while lowering the cost of the Canadian product relative to other programs in the immigrant investor market, should interest rates eventually exceed current levels.

E. Provincial Allocation

The Allocation Period

The Section, in reviewing the provisions defining "allocation period" in section 1. (1) of the amending regulations, is concerned that the allocation period described as five-years will in fact result in a substantially longer period exceeding six years. Section 1(1) provides:

Allocation period means, with respect to the provincial allocation of an investor, the period of five years beginning on the first day of the second month after the month in which the investor informs the approved fund, through the agent, that the investor or any accompanying dependant was granted landing.

Funds are not transferred to the provinces until the investor has landed. The delay between the transfer of an investor's investment to the depository (CIC), and the landing of the investor (or any accompanying dependant) may be substantial, representing a lost opportunity cost of capital (raising the overall cost of the Canadian option) to the investor and an increased financial benefit to the Government.

To address this concern, and irrespective of whether our above noted comments regarding interest rates are persuasive, the Section recommends the inclusion of a deemed allocation notice provision in favour of the investor allowing for the five-year allocation period to begin when the investor's funds are initially transferred to the Government.

The Allocation Formula

The proposed compensation mechanism between CIC and the provinces allocates immigrant investor capital to the provinces based on a fixed point in time. The reality is that investor immigrants are mobile inter-provincially over the five-year term of the investment. A more equitable method of allocation may be achieved by implementing a formula that reflects the mobility patterns of the investor throughout the entire five-year investment period.

F. Additional Considerations

The following comments represent additional considerations raised by the Section:

- Although financing is permitted, a clarification is required on the nature, timing and modalities of the investment to ensure that an investor will be permitted to finance the investment prior to visa issuance.
- The provinces must undertake to act responsibly to ensure that provincial allocations are used towards job creation and not used to replace existing debt financing.
- Consideration may be given to ensure that marketing and promotion expenditures by or on behalf of the approved funds are regulated.
- The transitional provisions require investor applicants to sign a subscription agreement or an investment agreement as the case may be, in order to benefit

from the application of this grandfather clause. The Section recommends a modification to require a completed application and applicable filing fees.

- Some applicants who perceive the Quebec program to be advantageous may apply through the Quebec program without intending to reside in Quebec.
- Initiatives should be undertaken to require approved funds to adhere to periodic audit practices.
- The Section perceives a contradiction between the RIAS which states that "Canada welcomes immigrant investors, who can now be assured of the financial security of their investment under the new program" and the White Paper which conveys under the business immigration commentary section, that "Simply requiring capital to invest, directly or indirectly, is not sufficient".

The Section provides the following alternative models for consideration by the Government:

- Introduce an investment model providing for a \$200,000 non-refundable prescribed investment payable prior to visa issuance. This model is consistent with the government guarantees of investment reimbursement provided to investors under the re-designed program and will eliminate the government infrastructure required to monitor and thereafter refund a five-year investment.
- Introduce an investment model that replicates the Quebec immigrant investor program across Canada as initially presented in *Canada Gazette, Part I* on March 22, 1997, with additional considerations not referenced in that proposal.
- Introduce an investment model that permits individual provinces to market their own Provincial Immigration Bonds.
- Introduce a \$200,000 investment model that reimburses the investor the capital after five-years and prohibits financing. This approach will increase the benefit to the program in accord with CIC objectives.

V. CONCLUSION AND RECOMMENDATIONS

Delay Implementation

The Section recommends that implementation of any proposed modification to the investor immigrant program be delayed until after completion of the White Paper review, subsequent replacement of the current *Immigration Act* and further consultations with the Province of Quebec. The Section further recommends an extension of the existing immigrant investor program during this interim period.

Threshold Increases

The Section recommends no increase to the investment or personal net worth thresholds. Should CIC proceed contrary to the Section's recommendations, the Section recommends that any increase from the current investment or personal net worth levels should be modest.

As well, the Section recommends the inclusion of all assets including joint marital property accumulated through lawful economic activities, in the calculation of personal net worth.

Marketing and Commissions

The Section recommends inclusion of the private sector in an incentive, commission structured capacity to market the redesigned program.

Regional Processing Centre

The National Immigration Law Section recommends an administrative initiative under a redesigned program, providing for fast track processing of selected applications, in a designated Regional Processing Centre inside Canada.

Rate of Return

The Section recommends that an annual rate of return be paid by the Government, prescribed by regulation, on immigrant investor capital during the period prior to visa issuance. Thereafter, interest should be paid by each participating approved fund in accordance with the prorated share of an investor's investment in the approved fund.

Provincial Allocation

The Section recommends inclusion of a deemed allocation notice provision in favour of the investor allowing for the five-year allocation period to begin when the investor's funds are initially transferred to the Government.

The Section further recommends a more equitable method of allocation be achieved by implementing a formula that reflects the mobility patterns of the investor throughout the entire five-year investment period.

Additional Considerations

The National Immigration Law Section recommends that clarification is required on the nature, timing and modalities of the investment to ensure that an investor will be permitted to finance the investment prior to visa issuance.

The Section recommends that initiatives be taken by CIC to ensure that provincial allocations are used towards job creation and not used to replace existing debt financing.

The Section recommends that additional consideration be given to ensure that marketing and promotion expenditures by or on behalf of the approved funds are regulated.

The Section recommends that initiatives be taken by CIC requiring approved funds to adhere to periodic audit practices.

The Section recommends that the transitional provisions enable investor applicants to receive assessment under the current program who submit a completed application and applicable cost recovery fees and allow for the submission of the subscription agreement or investment agreement as the case may be, during the period of processing.

The Section recommends that CIC further evaluate the merits of alternative models which may include:

- An investment model providing for a \$200,000 non-refundable prescribed investment payable prior to visa issuance.
- An investment model that replicates the Quebec immigrant investor program across Canada as initially presented in the Canada Gazette on March 22, 1997, with additional considerations not referenced in that proposal.
- An investment model that permits individual provinces to market their own Provincial Immigration Bonds.
- An investment model providing for a \$200,000 five-year investment which prohibits financing by the investor.

In conclusion, the members of the National Citizenship and Immigration Law Section would be pleased to discuss any aspect of these recommendations and to consult at greater length on any further proposals from the Department.