Response to
Building on a Strong Foundation for the 21st Century: White Paper for Immigration and Refugee Policy and Legislation

[99-14]

NATIONAL CITIZENSHIP AND IMMIGRATION LAW SECTION
CANADIAN BAR ASSOCIATION

March 1999

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Building on a Strong Foundation for the 21st Century:
White Paper for Immigration and Refugee Policy and Legislation

PREFACE

The Canadian Bar Association is a national association representing over 35,000 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 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.

Response to *Building on a Strong Foundation for the 21st Century: White Paper for Immigration and Refugee Policy and Legislation*

I. GENERAL COMMENTS AND SCOPE OF COMMENTARY

The National Citizenship and Immigration Law Section of the Canadian Bar Association (the Section) is pleased to offer comments on the Citizenship and Immigration Canada (CIC) report entitled, *Building on a Strong Foundation for the 21st Century: White Paper for Immigration and Refugee Policy and Legislation* (the White Paper). The White Paper responds to the recommendations of the Legislative Review Advisory Group Report, *Not Just Numbers: A Canadian Framework for Future Immigration,* (the LRAG Report) which was released in January 1998, and the Minister's comprehensive consultations following the LRAG Report. The White Paper is a prelude to further consultation and, ultimately, draft legislation. We understand that the Minister intends to commence drafting legislation this spring, and to introduce legislation in Parliament by late 1999.

In our view, the issues raised in the White Paper must be discussed in the context of other current initiatives. These include proposed changes to the

Citizenship Act introduced in December 1998 (Bill C-63), changes to the investor immigration program in effect April 1999, and the November 1998 CIC Selection Branch paper on skilled worker immigrants entitled *Toward a New Model of Selection — Current Selection Criteria: Indicators of Successful Establishment*?. Finally, within the period for comment on the White Paper, CIC officials have held nationwide consultations with invited participants, with further written proposals addressing matters in the White Paper.

This approach has led to a fragmented review of key immigration programs and policies. Responding to the White Paper and the materials from the CIC consultations seminars is not unlike trying to take aim at a moving target. It is in this context that the Section provides its comments. The Section is encouraged that the Minister and CIC officials are prepared to engage in further consultation. We welcome this opportunity for open consultation, and urge the Minister to engage in further public consultations throughout the legislative drafting process.

II. DIRECTIONS FOR REFORM

The White Paper outlines the following principles for reform:

- accountability and transparency
- supporting family reunification
- upholding Canada's humanitarian tradition
- balancing privileges and responsibilities
- enriching our human resources
- promoting public safety

- fairness, effective, and integrity

While the Section agrees with these general principles for reform, we are concerned that the specific proposals which follow in each chapter do not necessarily meet the objectives. We will address this on a chapter by chapter basis.

The Section also notes that the White Paper makes no mention of the issue of resources. A review of the legislation alone is insufficient to remedy current problems with immigration program delivery. Indeed many of the proposals in the White Paper have huge potential resource ramifications. For any new *Immigration Act* to be properly implemented, adequate resources must be allocated to the immigration delivery system.

III. ADJUSTING OBJECTIVES IN A CLEARER, SIMPLER AND MORE COHERENT *ACT*

The Section agrees that the *Immigration Act* is in need of revision, particularly in that it is complex and not easily understood. The Section supports drafting legislation in plain language and clearly articulating provisions in positive language.

The White Paper proposes that the new *Act* would have two distinct sections, dealing in turn with the immigration program and with the refugee protection program. By contrast, the LRAG Report suggested two separate *Acts*: a combined *Immigration and Citizenship Act*, and a distinct *Protection Act*

dealing with refugee matters. While the Section makes no particular comment as to the format of delineating the separate areas of concern, we support clarifying the distinction between the immigration process and the refugee process.

The White Paper states that proposed policy directions would be clearly set out in the *Act* in understandable language, specifically delineating the objectives of the respective programs, the components of the programs, principles and policies concerning entry to Canada and obtaining status in Canada, and principles for determining inadmissibility and offences in Canada. The Section notes that, while many of these initiatives sound laudable in general terms, it would be difficult to ascertain the merits of these suggestions without specific draft legislation.

IV. STRENGTHENING PARTNERSHIPS

The Section endorses greater strengthening of partnerships within the Canadian community for greater understanding in the immigration process. The White Paper mentions enhancement of federal, provincial, and territorial relations in addition to municipal consultations. The government further proposes enhancing stakeholder relations through a more structured dialogue. Finally, it proposes that a broader public consultation on immigration and refugee matters be introduced. The Section supports all these proposals.

V. STRENGTHENING FAMILY REUNIFICATION

The White Paper notes that family reunification will continue to be the cornerstone of the immigration program, yet will endeavour to balance the need for maintaining close family relationships with the need for families to be responsible for one another.

A. Definition of Family Class

The White Paper proposes to change the definition of family class to specifically recognize same sex and common-law couples. The Section notes that this would simply codify what has been CIC policy and practice for several years, and endorses this formality. However, ***the Section urges the Minister to reject cohabitation as a strict criterion to prove the bona fides of a same sex or common law relationship. Further, we urge the Minister to reject provincial governments definitions of common law, which rely heavily on varying periods of cohabitation to determine the bona fides of a common law or same sex relationship.*** Cohabitation of same sex and common law partners can be impossible in many jurisdictions of the world due to illegality of homosexual acts, illegality of non-marriage – adulterous – acts, or cultural reasons such as careers and family obligations. ***The Section also recommends that common law and same sex spouses not have to satisfy a financial means test to sponsor spouses and children and that their spouses and children are exempt from excessive medical demand as well.***

The Section supports the recommendation that the age of dependent children be increased to 22 and to allow for continued sponsorship of children in full-time attendance at education or otherwise dependent.

B. Restrictions on Discretion on Humanitarian and Compassionate Grounds

The White Paper notes that many family class applications for spouses and dependent children are routinely landed within Canada under the humanitarian and compassionate application process. The White Paper proposes to allow formal inland applications for spouses and dependent children, specifically excluding people who are inadmissible, without status, or under a removal order. ***While the Section supports formalizing the inland process for these types of applications, we do not agree that the inland process should exclude people that are inadmissible, without status, or under a removal order.*** Unfortunately, there is no comprehensive discussion of the humanitarian and compassionate process in the White Paper. In 1998, CIC released a proposal for humanitarian and compassionate applications entitled IP-5, on which the Section provided a formal submission. IP-5 processing formally took effect on March 31, 1999, within the White Paper commentary period. We will address all matters relating to humanitarian and compassionate grounds here.

It is the Section's view that the current inland process is an essential part of the immigration process. The essence of the inland process is its discretion. The White Paper would eliminate much of that discretion based on

inadmissibility, lack of status, or being under a removal order. It is the Section's position that the current discretionary jurisdiction must be maintained within Canada's inland application process. In some areas, we would propose to expand it further, for example, for persons employed in Canada for an extended period. While the Section recognizes the need to emphasize immigration from overseas it is also imperative that there remain an avenue for discretionary consideration within Canada. It appears from the White Paper and the CIC consultations that, notwithstanding the adoption of IP-5, much – if not most – of the inland processing system will be eliminated..

Under current law and process, spouses and dependent children can apply for permanent residence within Canada, as a matter of discretion based on humanitarian and compassionate grounds. Last year, 15,000 landings in Canada were processed on humanitarian and compassionate grounds, 11,000 of which were based on spousal sponsorship. Similarly, as a matter of policy, CIC recognizes same sex or common-law relationships on a discretionary basis. Each case is assessed according to its merits.

Any person may apply to seek the Minister's exercise of discretion, but the Minister is under no obligation to exercise that discretion favourably. Indeed, submitting an application has no bearing on a person's status, nor does it prevent execution of a valid removal order. The provision for discretionary approval on humanitarian and compassionate grounds is neither a convenience nor a thoughtless appendage to the *Act*. It serves the vital function of alleviating unnecessary hardship where circumstances warrant. It permits flexibility where the strict provisions of the *Act* do not. The

integrity of a legal process is measured by the ability to accommodate circumstances not covered by legislative provisions. A system inflexible and incapable of responding to humanitarian and compassionate or individual circumstances lacks integrity.

The White Paper is vague and imprecise respecting access to humanitarian and compassionate discretion and therefore government intentions are uncertain. For instance, it appears that one proposal would limit access to inland processing solely to spouses and dependent children of Canadian citizens or permanent residents, with the added restriction that only those children or spouses who are in status (visitors, students, workers), not under a removal order and not inadmissible on criminal or security provisions would be eligible to apply. Though it is not clear, it would appear that no other individuals would be eligible to apply for inland processing, on humanitarian and compassionate grounds or otherwise, whether or not in they were in status, under a removal order or inadmissible.

- *Spouses and Dependent Children*

Spouses are spouses, and dependant children are dependant children whether or not they are out of status or under a removal order. Lack of status or presence of a removal order may be factors to consider in determining whether to exercise discretion, but should not be determinative or prohibitive on their own.

For example, if a woman is in Canada for a number of years without status, married to a Canadian citizen, parent of Canadian children, in a legitimate

family unit, why would should the strictness of law deny her an opportunity to legitimize her status? What interest would be served by separating this woman from her children and spouse to undertake notoriously lengthy overseas processing? If a Canadian resident falls in love with a visitor to Canada, develops a meaningful relationship, marries and has a family, why would we deny opportunity for that visitor to obtain legitimate status in Canada simply because of a possibly minor, not recent conviction. If the visitor was the working spouse, with the Canadian spouse and children dependant for financial support, why would we insist that strict adherence to the law be followed with resulting loss of financial and emotional support? Is it in the public interest for a Canadian family to resort to public assistance while awaiting the return of a foreign spouse; particularly where the spouse may not be able to return for months or even years?

- *Cases Other Than Spouses and Dependant Children*

If the intent of the policy proposals is for no possibility of inland relief on humanitarian and compassionate grounds, other than for spouses and dependant children, then the Section is strongly opposed.

Exercise of the Minister's discretion on humanitarian and compassionate grounds has been controlled through guidelines in the Immigration Manual, particularly IE9 and chapter IP-5. These guidelines generally describe circumstances where humanitarian and compassionate discretion may be exercised, without fettering of the scope of that discretion. Examples include cases in which the Minister has exercised humanitarian and compassionate discretion in circumstances of emotional and financial dependency between

the applicant and residents and citizens in Canada, where country circumstances abroad would result in hardship if the applicant were required to apply from outside of Canada, or where the applicant has established long-term *de facto* residence in Canada or commitment to Canada sufficient to justify inland consideration

By way of specific examples, it may be appropriate to facilitate inland admission in the following circumstances:

- Where death of close family members abroad renders an elderly parent financially or emotionally dependent on adult children in Canada;
- Where a long-term *de facto* resident in Canada suffers loss of a Canadian or permanent resident spouse such that acquisition of status is no longer available through family sponsorship;
- Where political turmoil or national disaster render it impossible for the applicant to return home for application from abroad without the suffering of considerable hardship or danger to self;
- Where a long-term permanent resident in Canada loses status due to a removal order, yet there is either a change of circumstances or circumstances not appreciated in review tribunals which justify that the deportation not proceed.

These examples are by no means exhaustive, but illustrate the circumstances under which exercise of the Minister's discretion may legitimately be granted. Other circumstances, including presence of grounds of inadmissibility, presence of a removal order, or lack of status, may be legitimately considered in determining whether to favourably exercise discretion. Whether such factors will be determinative will vary with the circumstances of the case.

The Section strongly advocates that the availability of discretionary relief on humanitarian and compassionate grounds be continued, without statutory fettering of discretion. We can think of no reasonable basis to deny relief where there are humanitarian and compassionate considerations, subject to consideration of all surrounding circumstances.

We find expressed rationales for considering limitation of access to discretionary relief to be inadequate and unconvincing.

In the consultations, CIC officials referred to failed refugee claimants who submit humanitarian and compassionate applications in an effort to avoid removal. However, filing an application does not change the status of the failed refugee nor stay the execution of the removal order. To the extent that these applications create uncertainty as to whether enforcement should be undertaken or provide support for a stay application in Federal Court, the solution is to require failed claimants to submit applications in a timely manner, and to consider the applications efficiently. There is no need to abrogate a sound process and principles for the sake of a limited mischief.

CIC officials also referred to the need to reinforce the intent of Parliament that applications for permanent residency be made from abroad. However, Parliament also specifically provided that all requirements of the *Act* and *Regulations* may be avoided to facilitate admission to Canada where there are sufficient humanitarian and compassionate grounds or where otherwise justified. In a given year, landings in Canada facilitated through exercise of humanitarian and compassionate discretion account for approximately 7% of

the immigrant flow. This would not appear to indicate that Parliament's primary intent is being overridden through abuse of discretionary powers.

The limitation of access to humanitarian and compassionate considerations is a dramatic change in policy with enormous ramifications. The Section is concerned that the White Paper is misleading as to the Minister's intentions concerning this important area of immigration policy. ***We urge the government to retain humanitarian and compassionate jurisdiction along the proposals of the newly implemented IP-5.***

C. Excessive Demand

The Section supports the consideration of eliminating the excessive demand provision for spouses and dependent children of Canadian citizens and permanent residents.

D. Adoption

The Section supports the White Paper proposals for streamlining applications through adoption. The issue of adoption is concurrently addressed in the proposed *Citizenship of Canada Act* (Bill C-63), and it is important to distinguish when the immigration process would apply as opposed to the citizenship process. We refer to the Section's recent submission on Bill C-63.

E. Sponsorship

The Section generally supports initiatives to strengthen the integrity of sponsorship undertakings. ***The Section supports the initiative to reduce the duration of sponsorship for spouses and children***. However, the Section notes that the Quebec immigration program limits sponsorship to three years in these cases. In the interest of consistency, ***we recommend that the three-year standard apply to the entire immigration program. Alternatively, the Section urges a five-year period for spousal and child sponsorship, with a condition that the sponsorship be cancelled if the spouse or child obtains Canadian citizenship***. This sponsorship period would provide new permanent resident spouses and children five years to accumulate three years of domicile in Canada with which to apply for Canadian citizenship. The five-year sponsorship period and the five-year permanent residence card would provide spouses and children the opportunity to apply for citizenship within five years.

We also suggest that consideration be given to the treatment of refugees. While the White Paper proposes to enhance reunification of refugees as quickly as possible, the Section, in the absence of specific legislation, suggests that refugee sponsorships also be of lesser duration and that they apply to more extended family relationships than that set out in the family class in the absence of defined family class relations.

While the White Paper recommendations concerning family reunification of overseas refugee applicants are positive, there is no clear commitment to

equal treatment for inland claimants. In our view, sponsorship lengths should reduced. ***Enforcement of sponsorship undertakings must distinguish between situations where the sponsor is unwilling to pay and situations where the sponsor is unable to pay, and not penalize sponsors in the latter group. The recommendation to eliminate medical admissibility requirements for spouses and children is humane and welcome.***

Lastly, ***the Section endorses the initiative relating to sponsorship by persons in default of court ordered obligations and by people convicted of crimes involving domestic violence. However, we propose that the definition of "court ordered obligations" refer only to maintenance, alimony and child support. The Section requires a clearer definition of "conviction of crimes of domestic violence," before we could provide an opinion on this proposal.***

VI. MODERNIZING THE SELECTION SYSTEM FOR SKILLED WORKERS AND BUSINESS IMMIGRANTS

This chapter must be read in the context of the November 1998 CIC Selection Branch paper on skilled worker immigrants, *Towards a New Model of Selection – Current Selection Criteria: Indicators of Successful Establishment?*. It's proposals are more detailed than the White Paper proposals.

The White Paper chapter is general and vague. It proposes to base skilled worker selection on the indication of flexible and transferable skills, without

defining what these skills would be. The inference is that visa officers would interview almost all applicants to make a subjective, discretionary assessment for personal suitability. This approach contradicts the goal of "transparency." Furthermore, the potential cost ramifications are extraordinary. ***While the Section supports the general direction away from specific occupations which can be quickly outdated, we are concerned that criteria not be so general as to make selection difficult***. We reiterate the concerns set out in our response to the LRAG Report.

The Section agrees that research should be undertaken to determine the potential benefit of assessing the economic contribution of spouses.

A. Family Business Job Offers

The White Paper proposes eliminating the family business job offer program, stating that it is obsolete and does not fulfill a valid labour market need. The Section disagrees with this conclusion. The conclusion is not consistent with the stated objectives of strengthening family reunification. The family business program is essential for small business. It is a hybrid between family class and business applications. Many small businesses are unable to find employees with the dedication and sense of trust essential to this type of business. Small businesses often cannot afford to have non-family members working lengthy hours. In the Section's view, the ability to have trusted family labour available to maintain small business viability is a valid labour market need. Under the current program, only applicants within the family

or assisted relative definition meet the criteria, and they must have the necessary language and educational skills to fulfill the requirements of the business. ***The Section urges that this program be maintained.***

The Section further urges that applicants with approved family business job offers be processed without meeting the skilled worker selection criteria. The elements of this program come from family sponsorship and the business program. Canada is not selecting skilled workers through this program. If an applicant has the family relationship, language skills, and ability to meet the requirements of the position, then they should be given bonus points as a business applicant would to allow them to overcome insufficient points for education, ETF or experience. The emphasis should be on ability to facilitate legitimate family business interests.

B. Business Immigrant Programs

Very little is said specifically on the issue of business programs, but what is not said speaks volumes. Firstly, the Minister proposed changes to the investor regulations in December 1998, and these came into effect in April 1999. No discussion of the changes to the investor program is mentioned in the White Paper. The Section refers to our submission concerning the immigrant investor program.

Secondly, the White Paper repeatedly discusses the requirements for entrepreneur and investor immigrants. Yet, there is no mention of self-employed applicants, currently a category within the business program. The inference is that the self-employed category is to be eliminated. This

inference was confirmed in the CIC consultations. ***The Section strongly disagrees with the elimination of the self-employed program.*** The self-employed class provides a much-needed category of business immigration. Applicants targeted by this category, such as farmers, actors, or entertainers, would not be covered in the proposed skilled worker category. Many applicants who provide significant economic and cultural benefit to Canada would meet neither the educational requirements of the skilled worker program nor the financial requirements of the entrepreneur program. The Section urges the Department to maintain this program.

The White Paper proposes that more explicit requirements be set out to define significant business experience as well as educational and language skills. As these three criteria are currently part of the process for assessing business immigrants, it can be inferred that greater emphasis will be placed on these criteria. The nature of business applicants means that they will probably not have the same educational and language skills as skilled worker applicants. The emphasis should be on significant business experience. Certainly, lack of post-secondary education or language ability has not impeded the success of many immigrants.

While the White Paper states that language would not be made a rigid pass/fail criterion, it also implies that greater emphasis will be put on language for business applicants. ***In the Section's view there is a clear distinction between the need for language skills for the skilled worker category and the business category.*** While skilled workers must be able to function in the workplace, business applicants frequently do not; they are

able to hire the people they require for communication purposes. The Section supports a language testing option that would provide applicants with an opportunity to have their applications expedited.

The Section is concerned that the requirement for applicants to establish the origin of their funds may also be overly onerous and unrealistic. While the Section appreciates the importance of system integrity in assessing the legitimacy of an applicant's funds, the requirement that the origin of the funds be established may be so onerous as to eliminate many successful and accomplished applicants. ***The Section recommends a test to ensure that an applicant's funds do not originate from illegal activities.***

Finally, ***the Section strongly supports the initiative to open up access for applicants to trades and professions through the accreditation process.***

VII. FACILITATING THE ENTRY OF HIGHLY-SKILLED TEMPORARY FOREIGN WORKERS AND STUDENTS

The Section endorses the White Paper's recognition of the importance of enhancing the flow of temporary workers to further stimulate Canada's economy. The Section agrees that the current process is cumbersome and lengthy. While the White Paper recognizes the general process requiring validation of job offers, we note that approximately 80 per cent of all employment authorizations in Canada are currently obtained through

exemption and not through the validation process. On this basis, ***the Section supports any initiative to facilitate the process of bringing temporary skilled workers into Canada as expeditiously as possible.*** The Section strongly supports the software pilot project, which is used as a model for further initiatives. The Section also supports the concept of recognizing certain sectors that would allow for speedy entry.

The White Paper recognizes the importance of foreign students to Canada. ***The Section agrees that "the efficient, consistent, and transparent processing of students is high priority."***[1] However, the Section notes that, despite repeated government statements to this effect, ***there remain significant systemic barriers to the speedy admission of students to Canada.*** We note, for example, the perennial problem of the issuing student visas to students from China, specifically the systemic and entrenched policies for refusal from the Beijing and Hong Kong offices. If the objective of "efficient, consistent, and transparent processing of students" is to be achieved, ***it is imperative for CIC to address the significant problems from these two processing centres in issuing foreign student visas.***

VIII. INTRODUCING TRANSPARENT CRITERIA FOR PERMANENT RESIDENT STATUS

The White Paper notes that the current criteria for retaining permanent residence are subjective and that permanent residents would benefit from a

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[1] *Building on a Strong Foundation for the 21st Century*, p. 35

more transparent and objective approach including a period of physical residence in Canada. The Section takes the position that the thrust of this chapter conflicts with the general recognition in the White Paper of the significance of globalization in today's economy.

The White Paper proposes to replace the current provisions for loss of permanent resident status upon intent to abandon with a requirement that permanent resident status be lost unless a fixed period of physical presence in Canada is met. The policy paper does not suggest what the fixed period may be.

The Section is apprehensive about such a simplistic test. Inflexible rules cannot accommodate all circumstances and the result may be unwarranted loss of status. Simplicity of process is not a substitute for accuracy of result.

The current law presumes intent to abandon where a permanent resident has been absent from Canada for six months in any one year period. The onus is then placed on the permanent resident to convince an Immigration officer, an adjudicator at an inquiry or the Appeal Division on appeal that there was no intent of abandonment.

If the *Act* is amended to provide for loss of status on failure to meet a simple physical presence test, then ***the Section recommends that existing avenues for review be maintained to determine whether actual intent of abandonment was formed.***

The Section also recommends that returning residents' permits continue to be available both from within Canada and abroad, to provide security to permanent residents absences from Canada due to studies abroad, accompanying a Canadian spouse abroad, employment-related absences and, such other circumstances determined to be appropriate in the discretion of an Immigration officer.

IX. STRENGTHENING REFUGEE PROTECTION[2]

A. Refugee Processing

The Section notes with some concern the White Paper's movement away from the LRAG recommendation to eliminate the discrepancy between the inland process for refugee determination and the overseas refugee determination process, most particularly the requirement that refugees be required to settle within one year. The LRAG Report proposed eliminating this requirement completely, while the White Paper proposes to relax it. ***The Section concurs*** with the LRAG recommendation ***that the settlement requirement be eliminated from the overseas refugee determination process.***

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[2] Annex 1 provides a detailed comparison of the Section's past recommendations on refugee matters to the LRAG Report and the White Paper.

The Section believes it is absolutely necessary that the inland and overseas refugee systems be, at the very least, equal.

The Section endorses the White Paper proposal to establish procedures to allow extended refugee families to be processed together overseas and to promote the speedy reunion of families. The Section would also like to see these initiatives enshrined in the family-class reunification proposals. The Section would further suggest that, in situations where refugee claimants have no family members living within the criteria of the family class or the assisted relative class, they be allowed to sponsor whatever family members they can within more distant levels of relation, under a relaxed criteria such as the need to meet settlement arrangements or the length of sponsorship. The Section applauds the commitment to ensure immediate entry for urgent protection cases. The Section encourages CIC to establish procedures to ensure the prompt grant of permanent residence to urgent protection cases. We particularly encourage the government to allow private sponsors in Canada and other appropriate organizations to refer urgent protection cases.

The Section encourages adoption of the LRAG report recommendation to do away with medical inadmissibility for refugees overseas, which again would bring the program into line with inland practice. The Section is confident that an expanded definition of family can be achieved without working an unfairness on family-class applicants by taking account of the unique reality of involuntary migrants, thereby avoiding the sundering of essential emotional bonds and allowing faster integration.

It is the Section's position that current overseas selection processing of refugees by visa officers is inappropriate and discriminatory to refugee claimants. Furthermore, the Section strongly opposes imposition of a leave requirement on judicial reviews of refugee cases refused by visa officers. The proportion of successful judicial reviews of visa officer decisions does not justify a leave requirement. If refugees are to be encouraged to apply from abroad, their relatively fewer due process rights cannot be eroded. Decisions on refugee cases are decisions on protection: ensuring they are made correctly and that, if not, they are corrected is the absolute minimum required by fairness. If a leave requirement is imposed, refugee decisions should be exempted from it.[3]

The Section queries the White Paper recommendation that Minister have the right to intervene, and particularly the view that there is an unnecessary limitation on the Minister's participation. In our experience, wherever the Minister indicates a willingness to participate, it is granted. Indeed, many refugee matters are delayed by the increase in the number of parties to the process and having to schedule multiple parties. Frequently, the Minister's representative does not ultimately participate in the hearing. As the Minister faces no meaningful obstacle to participating in refugee hearings under the present law, there is no sufficient justification for this provision.

The Section is extremely concerned about the consolidated decision-making. The White Paper proposes to consolidate three different levels of decision

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3 See Annex 2 for a comprehensive discussion of appeals and judicial review.

making, specifically: refugee determination, risk assessment, and risk-related humanitarian and compassionate review. While the Section supports expediting the decision- making processes, and is not opposed to the Immigration and Refugee Board being the decision-making body, the Section questions whether the decision would be made by three Board members or by a single decision-maker. It is the Section's view that it would be inappropriate for all three decisions to be made by the same individual.

In no other area is the need for independent, expert decision-makers more evident. Only expert decision-makers will be able to consistently and correctly apply an expanded definition of risk, which may well include differing standards of proof and eligibility restrictions. In arriving at the expanded definition, the Section encourages the government to review relevant international instruments to which Canada is a party, and to incorporate simplified versions of the current PDRCC and humanitarian and compassionate risk definitions. Whatever the expanded definition of risk, assessment of whether an individual is a Convention refugee must come first, as Convention refugees enjoy particular rights (for example, not to be refouled, not to need a passport to be landed, to be exempt from medical admissibility requirements).

The Section generally supports a streamlined process. However, the Section is concerned about the White Paper efforts to address delay. Delay in making a claim is already taken into account at the CRDD. To deny an oral hearing based on failure to initiate the claim within 30 days may well be contrary to the requirements of *Singh*. Such a time limit will tie up resources as officers

determine whether claimants fit into the necessary exceptions. It will encourage people to destroy documents that indicate they have been here longer than they are allowed. It will induce people to make claims who otherwise would not, simply because they cannot take a chance on missing the deadline.

The Section opposes the proposal that persons who have left Canada for 90 days and then return are unable to make another refugee claim or have a protection hearing. Situations in the world change, often rapidly. The fact that an individual has made an unsuccessful refugee claim should not preclude them from making another claim later. The issue must be circumstances in the home country and not whether a previous refugee claim has been made.

B. Manifestly Unfounded Claims

The Section is extremely concerned about the issue of manifestly unfounded claims as set out in the White Paper. It is the Section's position that cases need to be dealt with on their merits and not with preconceived notions about where claims may be coming from. To expedite applications from claimants who appear to come from countries that are not refugee producing smacks of speculation, predetermination, and fettering of discretion. It is also reminiscent of the legacy of the credible basis hearing, where over 90 per cent of all cases were found to have credible basis. The cost-saving measure that the credible basis hearing was supposed to provide was non-existent.

Furthermore, the White Paper proposes to expedite those claims to refugee status, which clearly have nothing to do with the need for protection. The Section questions the basis for this proposal. What statistics indicate the number of such claims in the system? Who decides whether there is no need for protection: an immigration officer or a Board member?

Characterizing claims from any particular group or nationality as manifestly unfounded is misleading and prejudicial. Claims for otherwise safe countries can be made out, for example, in gender persecution cases. Deeming a claim manifestly unfounded before it reaches the body ostensibly charged with determining the claim is necessarily prejudicial.

C. Cessation and Vacation

The Section is extremely concerned with the proposals for Ministerial cessation and vacation in refugee claims. While we agree there may be many appropriate situations to either vacate or cease applications, it is imperative that such applications be made with leave of the Immigration and Refugee Board. The interests of the Immigration and Refugee Board are quite different from those of the government. In the interests of fairness to the claimant and in the context of Canada's international obligations, ***it is imperative that the Immigration and Refugee Board continue to determine whether such applications should be granted.***

There is rightly an obligation on the government to persuade the IRB that it should be allowed to pursue a cessation or vacation application since the IRB's resources are tied up in adjudicating such applications. The leave requirement keeps the playing field level. Elimination of the leave requirement would lead to frivolous litigation – the very concern giving rise to the recommendation for a leave requirement on overseas refusals – as the IRB and not CIC is in the best position to know whether "there was other sufficient evidence on which the determination was or could have been based."

The Section recommends that there be a time limit as to when cessation and vacation applications should be made, ie. within one to three years of determination of the claim. Refugee claimants in Canada for more than three years following a successful refugee hearing who have established themselves in Canada, in the absence any serious criminality, should be allowed to remain in Canada.

While the Minister seeks to have, as a matter of right, the opportunity to cease and vacate refugee applications, there is no reciprocal opportunity for an applicant to reopen a refugee claim where circumstances change and there is further evidence. In fairness, if the Minister is able to open a claim and provide further evidence leading to a cessation or a vacation application, the corollary should be that applicants be able to reopen claims to provide evidence that the situation may have worsened in their country.

D. Undocumented Refugees

The Section generally supports the White Paper proposal to reduce the waiting period for undocumented Convention refugees to become landed in Canada. However, the recommended three year waiting period is still too long. In the Section's view, there should be no waiting period. A refugee claimant has appeared before an independent tribunal and had their credibility assessed. If the applicant's credibility has been sufficient to make a positive finding of refugee status, it should be sufficient for processing their landing from within Canada. An applicant may be recognized as a refugee, deserving of protection, deserving of being integrated into society and having one's life back to normal as much as possible. At the same time, the government thwarts that endeavour by refusing to land the applicant, thus making it impossible to be reunited with family, proceed with education in Canada, enhance settlement and integration into the country, or sponsor relatives. If the Immigration and Refugee Board is able to make a proper finding of refugee status, then that should be sufficient for the purpose of processing landing to completion.

E. Unsuccessful Claims

The Section is concerned about the impact of providing further information on a claim for persons who have left the country for more than 90 days, if the White Paper proposal to eliminate a second claim is implemented. If a unsuccessful refugee claimant has left Canada and returns, and in the intervening time the situation in the home country has become worse, there is no mechanism for the claimant to get that information before the Board.

Absent from the White Paper recommendations is an appeal for failed inland claimants. Such an appeal was recommended in the LRAG Report. The LRAG Report also envisaged quick decisions by public service decision-makers. Time and cost appear to be the principal objections to an appeal. Fairness is either not mentioned or deemed adequately looked after in the proposed pre-removal risk assessment. ***The Section recommends an appeal process for failed inland claimants.*** Short timelines and a presumption against an oral hearing will ensure the appeal does not become a mechanism for delaying removal. Cost can be kept neutral by reducing CRDD panels from two members to one and appointment more experienced and – following the introduction of the Crepeau selection model – expert members to the appeal division. An appeal would obviously improve fairness and bring Canada into line with UNHCR recommendations. It would remedy access restrictions imposed by the Federal Court's leave requirement, reduce reliance upon second claims, and justify prompt expulsion of unsuccessful claimants.

F. Other Concerns

The White Paper makes no recommendation on a watchdog for CIC or the IRB. The Section urges that an ombudsperson be established to act on complaints about practice or procedures at CIC and the IRB.

The Section notes with concern that no gender or race analysis of the impact of the proposed policy direction was provided with the White Paper. The Section is likewise concerned about the absence in the White Paper of rights-based language and references to international obligations and standards and particularly Canada's commitments under the *Convention on the Rights of the Child*.

Lastly, the most fundamental aspect of the inland process is the quality of the members selected to serve on the IRB's Convention Refugee Determination Division. The process currently relied upon is neither transparent nor adequate. It is political and secret. Correction of both problems is urgent. Reducing to writing the methodology of the current system is not sufficient. ***The Section urges the government to implement the model of selection for IRB members developed by Professor François Crepeau.***

X. MAINTAINING THE SAFETY OF CANADIANS

While the Section endorses the principle of maintaining the safety of Canadians, we express our concern about the proposed initiatives in this chapter. In our view, many of the proposals are driven by unfounded concerns with the refugee determination system. Unfortunately, too much of the immigration system is driven by a paranoia that fake refugee claimants come to Canada to abuse the system. If this is indeed the case, it is incumbent on the government to enhance the overseas refugee selection process.

While the Section generally supports the White Paper proposals concerning people smuggling, we question the direction regarding improperly documented refugee claimants and enhanced interdiction. Enhanced interdiction may well prevent people genuinely in need of Canada's protection from receiving it. Any interdiction efforts should be undertaken in conformity with the recommendations jointly produced by Issue Group 3 in 1994. The Section is loathe to turn to a detention system as a means of enforcing compliance with documentation requirements. Firstly, legitimate refugees may be improperly and unnecessarily punished by a lengthy detention. Secondly, Canadians would have to bear the cost of additional detention facilities. Many detention centres are being closed down, because CIC does not have the budget to keep them open.

The White Paper fails to distinguish between undocumented, improperly documented, and uncooperative refugee claimants. Detention is appropriate

only is cases of undocumented or improperly documented claimants who are **also** uncooperative in establishing their identities. Refugee claimants can arrive undocumented or improperly documented for good reasons: fear of detection en route in possession of documents revealing their identity; possession of documents contradicting the false documents on which they have been compelled to travel; misleading information or threats from smuggling agents with whom the refugees are in a position of vulnerability. These are all distinct from being uncooperative. If a refugee claimant is undocumented or improperly documented **and** uncooperative in establishing their identity, the Section appreciates the need to detain. However, the current *Act* allows for detention in such circumstances and enhanced powers are not necessary. It is not prudent, consistent with UNHCR guidelines, or cost-effective to detain large numbers of refugee claimants, the inevitable result of granting port of entry officers overbroad powers of detention. ***The Section recommends against any expansion of the detention power.***

The Section is similarly concerned about the enhanced interdiction efforts, particularly as such efforts may seriously impede the ability of legitimate refugee claimants to come forward. If such initiatives are to be undertaken, we reiterate that it is incumbent on the Department to enhance the process for overseas refugee selection and determination.

The Section is equally concerned about the expansion of new inadmissible classes, in particular, the proposal to make misrepresentation a basis for inadmissibility and elimination of appeal rights concerning matters of misrepresentation. This issue is already covered under sections 9(3) and

19(2)(d) of the *Immigration Act*. The Section does not believe that this change is necessary, and further questions the possible broad use of this section. For example, what if someone states that they can speak, read, and write French well, and the officer determines that their French is poor. Does this constitute misrepresentation, making the person inadmissible? ***The Section opposes this legislative proposal.***

On the issue of removals, the Section generally agrees that removal orders should be carried out as soon as reasonably practicable, and supports clarifying procedures under which this would occur. However, ***the Section opposes transferring jurisdiction for issuance of removal orders from the Adjudication Division of the Immigration and Refugee Board to Senior Immigration Officers in "uncontested cases and in straightforward criminal cases." It is not clear which cases would be considered uncontested or straightforward.***

The Section questions giving the Adjudication Division authority to continue hearings in the absence of the person concerned where proper notice of the hearing has been given. What problem is this proposal targeted to correct?

With respect to "additional sanctions against people who contravene the *Act*", the Section has a number of queries. Firstly, what kind of penalties are envisioned in proposal to provide stiffer penalties for inadmissible persons who repeatedly turn to Canada? At whom is a new offence for people who alter or counterfeit immigration documents targeted — those who counterfeit

Canadian documents, or foreign documents? — those who themselves counterfeit or those for whom an agent did it?

The chapter on maintaining safety raises a number of matters relating to enforcement. Enforcement issues are raised throughout the White Paper. The Section's commentary on enforcement matters are consolidated in Annex 2.

XI. IMPROVING THE EFFECTIVENESS OF THE IMMIGRATION APPEAL SYSTEM

The Section strongly supports the White Paper proposal to retain the Immigration Appeal Division as the appropriate body to hear matters dealing with loss of permanent resident status. At the same time, the Section vehemently opposes the proposed limitations on jurisdiction of the Appeal Division. The result of these proposals would be to maintain the form of a tribunal with no power in substance.

The White Paper purports that current delays show the need to severely curtail IAD jurisdiction, and to limit the review of visa officer decisions to judicial review. Delay, in and of itself, is an insufficient reason to curtail the jurisdiction of the Immigration Appeal Division. While expediency in the immigration process is a commendable goal, expediency at the expense of individual rights is inappropriate.

A. Serious Criminals

While the Section supports removal of serious criminals from Canada, we strongly oppose the direction of the White Paper to eliminate any opportunity for consideration before the Immigration Appeal Division of those convicted of criminal offences. While the White Paper proposals may be more efficient, they would hardly maintain fairness when they propose to remove the very right to be heard. We refer to Annex 2 for a detailed discussion of this issue.

B. Leave for Judicial Review

The Section strongly opposes the White Paper recommendation to provide a leave requirement for judicial review of visa officer decisions. Currently, applicants for permanent resident status who are refused have an automatic right of appeal to the Federal Court. Both the White Paper and the LRAG Report proposed eliminating this on the basis of the considerable volume of applications. In the Section's view, a far more effective means of controlling volume would be a mediation model for alternate dispute resolution and better training for officers.

Ironically, the White Paper refers to consistency of treatment as the basis for implementing this draconian measure, given that there is currently a leave requirement for judicial review applications in refugee matters. We note, however, that no other area of jurisdiction before the Federal Court – maritime law, aboriginal law, tax law, or trademark law, for example – has a leave requirement. Indeed, the only area before the Federal Court in which there is currently a leave requirement on applications for review are in

immigration matters. The government cannot credibly promote the values of procedural fairness and justice, and at the same time eliminate the right to recourse to the Federal Court in only one jurisdictional area of law. Again, Annex 2 discusses these issues in greater detail.

The Section opposes the White Paper proposal to eliminate an appeal to the Immigration Appeal Division arising from refusal on financial grounds for family class sponsorship. The Minister implemented dramatic changes to the family class program in 1997, which reduced the ability of applicants to sponsor family members and placed greater emphasis on the fiscal responsibility of sponsors. It is the Section's position that there remains a need for discretion in some cases, notwithstanding financial limitations.

XII. REFOCUSING DISCRETIONARY POWERS

The White Paper proposes to curtail severely the exercise of discretion in the immigration process. This chapter recognizes many areas in which discretion plays a significant role in the determination process: minister's permits; landing by order in council; humanitarian and compassionate considerations; rehabilitation and pardons; discretionary temporary entry; and positive or negative discretion for independent immigrants. While the White Paper promotes "transparency" and "effectiveness," the manner of achieving those goals is to eliminate the use of discretion. Ironically, this chapter begins with the recognition that immigration is a fundamentally human process, yet it

proceeds to drastically curtail the ability for unique human situations to be assessed and compassionately dealt with.

The Section reiterates its position that ***it is essential that the humanitarian and compassionate inland process be retained***, and it refers specifically to its submissions on IP-5. Unfortunately, much said about humanitarian and compassionate applications in the White Paper (and much of what is not said), appears to diverge drastically from the proposals elicited in IP-5. Indeed, it would appear that the processes elicited in IP-5 would be greatly reduced or eliminated. The Section strongly opposes this action.

The Section supports the White Paper recommendation to eliminate the right of humanitarian and compassionate review to war criminals, people who committed crimes against humanity, people who are a danger to national security, members of criminal organizations, members of governments who engage in systematic or gross violations of human rights, and people convicted of serious crimes. However, determination of these offences must be made by the provincial or superior court systems and must be based on actual sentence by the court, not on potential sentencing provisions of the Criminal Code or other statutes.

The Section is concerned about the White Paper proposals relating to managing residual cases more consistently. The proposals may not be practical, given demands on the Minister's time. In our experience, delegation of this authority from the Minister to CIC officials has worked effectively and has not led to inappropriate use of discretion. For Minister's

permits or Governor-in-Council landing to be provided only from the Minister will lead to considerable delay.

The Section supports the proposal to extend the authority to grant discretionary entry to a wider range of inadmissible persons and to authorize periods of stay longer than 90 days.

XIII. CONCLUSION

As stated at the outset, we find the White Paper to be deceptive in that much has been left out of the discussion. It has not addressed other legislative initiatives, such as the proposed new *Citizenship of Canada Act* or changes to the investor regulations. Other issues been left out: there is no discussion of issues relating to consultants, live-in caregivers or self-employed applicants. Absence of these issues raises the question of whether they are to be eliminated from the immigration program.

The White Paper must be read critically and carefully. While many of its policy statements that are positive and specific, others are vaguely presented. The paper's positive tones often belie proposals that would seriously curtail fairness, transparency and consistency in the system.

The White Paper contains some commendable suggestions that represent positive developments, for instance, recognition in law the bona fides of the common-law and same sex relationships, and the desire to find resolution to difficult situations such as spouses and children denied emigration to Canada on medical grounds. It is easy to focus on the simple, concrete elements of the paper, such as whether language ability should be mandatory for business immigrants, or whether dependents should include children up to and including the age of 21, and to lose sight of the more subtle but very significant direction taken throughout the White Paper.

The White Paper would move Canada's immigration refugee system from legislation and processes that allow discretion and flexibility, to administrative processes and laws that limit flexibility and discretion. If the proposed policies are implemented in the restrictive language suggested by the paper, Canada's *Immigration Act* will be cold and harsh. Unduly harsh criteria will result in persons losing permanent resident status on a mere counting of days, long-term permanent residents being deported without any consideration of equitable factors, without right of appeal or access to humanitarian and compassionate considerations, and the inability of individuals in Canada to make application for relief from the strict consequences of the law.

Strict laws need not be unfair or unjust. The strictness of the law can be compensated through review mechanisms and discretionary powers to remedy unfairness or injustice in appropriate cases. The White Paper advocates strict, clear-cut, objective legislation with diminished or negated opportunities for review and correction. The potential for bad decisions, without flexibility or consideration of relevant human circumstances, is promoted rather than discouraged. This is inconsistent with the government's recognition that the immigration process is a very human one, deserving of flexibility.

ANNEX 1 — REFUGEE DETERMINATION

A. Objectives

Respecting human rights

The Section recommended that one of the *Immigration Act* objectives should be to ensure that any person who seeks admission to Canada on either a permanent or temporary basis or whom CIC seeks to remove is subject to standards and procedures that do not violate the *Charter of Rights and Freedoms*, the *International Bill of Rights*, or any other international human rights instrument by which Canada may be bound. The Section further recommended that Canadian legislation should adopt and incorporate international human rights standards relevant to visitors, immigrants and refugees. The White Paper states as one of its directions "a value based society" (page 9).

Section 3(f) of the current *Immigration Act* refers to the *Charter* obligation not to discriminate, but to none of the other provisions of the *Charter*. The only reference in the *Immigration Act* to international human rights is the recognition of the need to fulfil Canada's international legal obligations with respect to refugees. ***The Section recommends the Act state as a general objective respect for both domestic and international human rights standards.***

Ensuring due process

The Section recommended that one of the *Immigration Act* objectives should be to ensure respect for due process and fundamental justice in all immigration and refugee proceedings. The White Paper states that "fairness in decision making must and will remain a key principle of reform of the immigration and refugee system." ***The Section endorses that statement and recommends that it be introduced as a an objective in the new legislation.***

Facilitating freedom of movement

The Section recommended that the objective in the current *Act* of the need to facilitate the entry of visitors into Canada should be replaced by the broader objective of the need to facilitate international freedom of movement. The White Paper notes: "The current *Immigration Act* does not respond well to the needs of a world that has change dramatically in the past 20 years. In human history, the movement of people across international borders has never been as extensive." ***The Section recommends that the objectives of the Act recognize this need by articulating the objective of facilitating the movement of people across international borders.***

B. Refugee Claims at Visa Posts Abroad

Interviews

The Section recommended that regulations provide that there be a visa officer interview for every Resettlement from Abroad applicant who is sponsored, unless it is apparent from the documentary material that the application can be approved. The White Paper states: "Where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the

basis of an in-person hearing before a decision maker." (page 40) Consistently with that observation, ***the Section recommends that there be a visa officer interview for every Resettlement from Abroad applicant who is sponsored, where a serious issue of credibility is involved.***

Pre-screening refugees

The Section recommended that the regulations entitle every Resettlement from Abroad Class applicant who is interviewed to be assisted by counsel at the interview, at the very least, when that counsel is a member of the bar of any Canadian province or territory. The White Paper proposed "working more closely with non-governmental organizations in identifying, pre-screening and resettling refugees". (page 43) It is inconsistent with that recommendation to exclude from screening interviews anyone trying to assist a refugee. ***The Section recommends that either counsel who is a member of the bar of any Canadian province or territory or a representative of a non-governmental organization be permitted to assist refugee applicants at a visa office interview.***

Successful establishment

The Section recommended that the criterion of likelihood of successful establishment be dropped from the Resettlement from Abroad Class regulations. The White Paper proposes "shifting the balance toward protection rather than the ability to settle successfully in selecting refugees" (page 43). Earlier, the White Paper refers to a revised approach to the ability to resettle and notes that most refugees have needed a longer period than a year before they could successfully resettle in Canada. (page 41)

Government officials have indicated that they do not intend to require sponsors to sponsor for several years rather than a year. Rather what they intend is that visa officers would not insist on likelihood of successful establishment in a year, but rather likelihood of successful establishment in a longer period when deciding whether or not the criterion of likelihood of successful establishment is met.

This is not an area where one size fits all. The White Paper notes that women at risk, victims and violence and torture, the elderly and people requiring medical treatment need considerably longer than a year to resettle.

However, simply changing the time frame that visa officers are examining may do little to change visa officer decisions, little to "shift the balance". A visa officer who concludes that a refugee is not likely to establish successfully in a year will quite possibly conclude that the refugee will not likely establish successfully in three years or five years.

A more practical way of shifting the balance is to accept private sponsorship, without more, as satisfaction of the criterion of likelihood of successful establishment. This is, in effect, what happens with the family class and the low income cut off. For some family members, sponsors must meet the low income cut off. Once the sponsors meet this cut off, there is no independent power in the visa office to refuse based on the criterion of likelihood of successful establishment. The family sponsorship is admittedly longer than the refugee sponsorship. Nonetheless, the concept in the family class that

sponsorship, without more, is enough to satisfy considerations of likelihood of successful establishment, remains valid for the resettlement from abroad class, and should be transferred to that class.

One of the themes that runs through the White Paper is the need for clarity, consistency and transparency in the new *Immigration Act*. An advantage of using similar standards for family sponsorship and refugee sponsorship is the reduction of complexity, and the increase in the clarity and consistency in the *Act* that would result.

Private sponsors make their own assessments of likelihood of successful establishment in deciding whether to sponsor. It is, after all, at least initially, the sponsors who are on the line, not the government. The White Paper proposal to work more closely with non-governmental organizations in resettling refugees would be given real content if visa offices were to accept private sponsor assessments of likelihood of successful establishment. ***The Section recommends that sponsorship, without more, should be enough to satisfy the criterion of likelihood of successful establishment for resettlement of refugees from abroad.***

Consistency of Determination Procedures

The White Paper proposes judicial review of visa office decisions only with leave of the Federal Court (page 54). This proposal is justified by the need for consistency of treatment between applicants in Canada and abroad, and by the need to protect against unnecessary litigation.

It should go without saying that the principle of consistency has to be applied consistently. One reason for the present inconsistency in access to the Federal Court is to compensate for another inconsistency in access to a fundamentally just determination system.

The refugee determination system abroad is far different from the refugee determination system in Canada. Abroad, instead of oral hearings in front of an expert, independent tribunal, with right to counsel, there are discretionary interviews with public servants whose main tasks have nothing to do with applying the refugee definition. Policy is not to permit counsel to attend, in those cases when interviews are granted, although exceptions are sometimes made.

The contrast between refugee determination in Canada and abroad does not exist for non-refugee immigration applications. All applications as an independent immigrant must be made at visa posts abroad. Within Canada the only persons who can apply for permanent residence, besides refugees, are those who make successful humanitarian applications and those who come within either the live-in caregivers in Canada class, the post-determination refugee claimants in Canada class; or the undocumented Convention refugee in Canada class. The procedures for applying in each of these categories is not much different, in terms of due process, from the procedures at visa posts abroad.

The logic of consistency that drags access to the Federal Court from visa office decisions down to the level of access to the Federal Court from inland

decisions does not apply to visa office refugee determinations. ***While it is the general position of the Section that access, without leave, to the Federal Court from visa office decisions should remain, the Section recommends at the very least, that access, without leave, to the Federal Court from visa office refugee determinations should remain.***

The Section recommended that the Resettlement from Abroad Class risk determination at visa posts abroad should be done by the Immigration and Refugee Board. If the Government is to carry through its recommendation that there be judicial review of even visa office refugee determinations only with leave of the Federal Court, then, ***the Section recommends***, with even more reason, ***that risk determinations at visa posts abroad be done by the Immigration and Refugee Board.***

C. Other Visa Office Refugee Recommendations

The Section made a number of other recommendations about visa office refugee determinations. The White Paper does not address these recommendations. ***The Section repeats these recommendations for consideration:***

i) ***inadmissible classes for which Resettlement from Abroad Class members abroad can be denied landing be the same as the inadmissible classes for which refugees in Canada can be denied landing;***

ii) ***the definition of durable solution not include resettlement in the country of citizenship or habitual residence;***

iii) a person should be eligible for landing under the Resettlement from Abroad Class at a visa post abroad provided that there is a reasonable possibility of no durable solution;

iv) the Convention refugee and Country of Asylum regulations make no exception for those rejected under the Comprehensive Plan of Action.

D. Interdiction

The White Paper talks of the need for coherence (page 3), yet proposes an interdiction system that would make the new *Immigration Act* incoherent. The government proposal is to enhance interdiction by preventing improperly documented arrivals.

Proper documentation, in the sense used here, is not just documentation to establish identity; it is also documentation that allows legal entry to Canada, ie. an immigrant visa, or, for a person from a country with a visitor's visa requirement, a visitor's visa. Visitor visa requirements are routinely imposed on refugee producing countries. Refugee claimants are systematically denied visitor visas to come to Canada to make refugee claims.

The type of documentation a person needs to get to Canada is not essential to establish that a person is a Convention refugee. Indeed, the overwhelming majority of those recognized in Canada as refugees do not have the documents that would prevent interdiction on transit to Canada.

So, the logic of the system, as proposed by the White Paper is that if you are refugee claimant, once you get here and you can show you are a Convention refugee, you can stay; but you can't get here. That is a truly incoherent system.

This incoherence exists in the present system. The Government, by proposing to enhance interdiction, will be making this incoherence more apparent, more acute. ***The Section repeats its recommendations for reconsideration:***

i) ***if human rights violations in a country are grave, numbers entering from that country are manageable, the Canadian acceptance rate of refugee claimants from that country is high, and Canada is a logical and accessible country of refuge for claimants from that country, no visa requirement should be imposed on nationals of that country;***

ii) ***for those with prima facie refugee claims, or those who fit the profile of persons most likely in need of protection, visitor visas should be granted for the purpose of making a claim in Canada;***

iii) ***carriers should not be penalized for bringing undocumented passengers to Canada who are refugees. Liability should be suspended pending refugee determination. If the determination is positive, proceedings against the carrier should be dropped;***

iv) ***people en route to Canada to make refugee claims should not be turned away indiscriminately. There must be a mechanism in place to ensure that real refugees are not returned forcibly to the country of danger fled.***

Port of entry procedures

The Section recommended that as long as their presence would not impede or delay the examinations, counsel and other support persons such as family, friends or NGO's should be allowed access to secondary examinations at ports of entry. Officers at ports of entry should not examine claimants on arrival about the substance of their claims. The White Paper does not address this issue directly. ***The Section continues to recommend this proposal.***

Thirty day rule

The White Paper proposes a prescribed time frame of 30 days for making a claim, subject to exceptions in compelling circumstances (page 43). This proposal is a violation of international standards and should be rejected outright.

Legally, delay in presentation to the authorities may be relevant to credibility. In some cases, delay can be evidence that claimants are not really afraid, for, if they were, they would have sought the protection of the local authorities earlier. In these cases, the delay is evidence to be weighed with other evidence in final determining whether the claimant is a refugee.

However, a factor that can be adverse to claimants in some cases should not be transformed into a rule that denies status in every case. The Executive Committee of the Office of the United Nations High Commissioner for Refugees has concluded that: "While asylum seekers may be required to submit their asylum requests within a certain time limit, failure do to do so,

or the non-fulfilment of other formal requirements, should not lead to an asylum request being excluded from consideration."[4] Canada is a member of the Executive Committee and supported this conclusion at the time it was passed.

The UNHCR has commented that a provision which renders a claimant ineligible to make a claim because of missing a deadline for filing the claim "violates the basic right of a person to seek asylum. Missing the deadline for application cannot serve as a basis for excluding a person from refugee status."[5]

We refer to the Section's LRAG submissions for further discussion of this issue.

The Section recommends that the proposal for a prescribed time limit for making a claim be dropped. In the alternative, if the prescribed time limit proposal is to be retained, the Section recommends that it not apply, by way of exception, to those who:

- ***are refugees sur place***
- ***have or are seeking some other form of status in Canada***
- ***have attempted to comply with the prescribed time limit but have not been able to do so through no fault of their own***

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[4] Conclusion 15 (XXX) 1979.

[5] Comments of the UNHCR on the draft Law on Refugees of the Kyrgyz Republic, May 1997.

- *were unaware of the prescribed time limit*
- *failed to meet the prescribed time limit because of incompetence or unscrupulousness of counsel*
- *failed to meet the time limit because the trauma of persecution made the delay understandable in the circumstances*
- *failed to meet the time limit because they were waiting to see if the situation in the country fled would allow their return*
- *whose failure to meet the time limit can be explained by an abusive relationship.*

E. Criminal Ineligibility

The Section recommended that the power to deny eligibility to make a refugee claim based on a serious conviction and an opinion from the Minister that the person is a danger to the public in Canada should be repealed. The White Paper notes that the public danger system is slow and resource intensive and has led to much litigation. The White Paper proposes a deportation system that focuses on transparent objective factors such as the nature of the offence, rather than subjective factors such as the likelihood of future dangerous behaviour.(page 53)

The White Paper does not indicate exactly what the Government intends to do about criminal ineligibility to make a refugee claim once the public danger opinion procedure is gone. There are two obvious options: to abolish criminal ineligibility altogether; or to escalate criminal ineligibility to cover all

those convicted of serious crimes, whether they are dangers to the public or not.

The Section recommends the first option, abolition of criminal ineligibility. The *Refugee Convention* requires that before criminal refugees can be forcibly returned, the danger to the Canadian public on their being allowed to stay must be balanced against the danger to the refugee on forced return, a balancing that can be done only in the context of a refugee determination[6]. In principle that balancing is done now at the time of the public danger determination. If the public danger determination procedure is removed, the balancing must be done elsewhere. The most obvious place for it is the proposed Protection Division of the Immigration and Refugee Board.

The Refugee Convention allows return of refugees in some circumstances, but conviction for a serious offence alone is not one of them. In addition to having been convicted of a serious offence, the person must constitute a danger to the community. For Canada to deny eligibility and remove to danger a person based only on a serious criminal conviction would violate the Refugee Convention[7].

Furthermore, there are prohibitions on removal to risks such as torture, disappearance or arbitrary execution, that are absolute at international law.

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6 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, paragraph 156.

7 Article 33

Prohibitions on removal to these risks apply even when a person is a public danger, even when a person has committed a serious criminal offence. The White Paper proposes to consolidate jurisdiction over determination of all risks in a protection division of the Immigration and Refugee Board. It would violate international standards as well as *Charter* standards to deny eligibility to a risk determination, when a favourable decision would prevent removal both at international law and under the *Charter*.

F. Other Ineligibility Grounds

The Section recommended that the grounds of ineligibility to make a refugee claim, to be determined by a senior immigration officer, should instead become grounds of refusal of a refugee claim, to be determined by the Refugee Division of the Immigration and Refugee Board. The White Paper proposes to improve the application of existing eligibility criteria through more comprehensive front end screening of refugee claimants (page 43).

There are, admittedly, some proper grounds of ineligibility though neither a criminal conviction nor a failure to make a claim within thirty days of arrival is one of them. However, even for these grounds, it is more consistent with the overall intent of the White Paper, which is to consolidate layers of determination, to have eligibility determined by the new Protection Division of the Immigration and Refugee Board rather than by administrative officials of CIC in a separate eligibility determination procedure. Eligibility determination by the Protection Division would also offer a higher level of due process.

If eligibility were to be determined by the Protection Division, the eligibility and merits of an eligible claim could be decided in one proceeding rather than two. Since the vast majority of claims, at least in the present system, are eligible for refugee determination, the current duplication of proceedings would be avoided. ***The Section accordingly recommends that eligibility for a protection determination be decided by the Protection Division of the Immigration and Refugee Board.***

G. Access After an Order of Removal

The Section recommended that the *Act* allow a person to make a refugee claim after a removal order has been made and before it has been executed. The White Paper does not say whether the current provision preventing a refugee claim in such circumstances would be retained or abolished. It may have been assumed that this rule would be subsumed under the 30 day time limit for claims.

However, many removal orders are issued within 30 days of arrival. As well, the White Paper contemplates exceptions to the 30 day rule, and says that pre-removal risk assessments would be available in appropriate circumstances.

The Section recommended that risk determination for risks that fall outside the Refugee Convention be done by the Refugee Division of the Immigration and Refugee Board or by a newly constituted division of the Board. The Section welcomes this recommendation being accepted in the White Paper.

However, the system should not both consolidate and deconsolidate risk review. There should be but one system of risk review.

The first system of risk review the White Paper proposes, a hearing before a newly constituted Protection Division of the Immigration and Refugee Board, would meet minimal requirements of fundamental justice, fairness, due process and natural justice. A second risk determination procedure that falls short of those standards will not produce satisfactory determinations, and will generate unnecessary expense by establishing a system that could be avoided by channelling all claimants into the first system. ***The Section recommends that a person who first makes a claim of risk after a removal order has been made and before the order has been executed should be allowed access to the newly constituted protection division of the Immigration and Refugee Board for the purpose of a determination of the risk claim.***

H. Manifestly Unfounded Claims

The White Paper proposes giving priority to processing people from countries that are clearly not refugee producing (safe countries of origin) and others whose claim to refugee status is clearly related to reasons having nothing to do with the need for protection (page 44). The Section endorses the notion of priority processing based on the nature of the claims, but objects to the proposed claims that would be processed first.

The primary purpose of a protection determination system is protection, not abuse control. If there is to be priority processing, at the head of the list

should be manifestly well founded claims. Right now, the Refugee Division of the Immigration and Refugee Board practice is to expedite processing of manifestly well founded claims. The Section *recommends* that this priority processing continues.

Secondly, protection determination must always be based on individual circumstances of the case. There are safe people but there are no safe countries.

A protection decision does not just flow from government persecution. It can also flow from an inability to protect. No government is immune from human rights violations. Every government has chinks in its armour of protection.

Country designations exist, for the designated classes, for the list of countries to which Canada does not remove Designations are always months behind reality. A country may be generally safe one day and not the next. The first indication of change may be the arrival of refugees. Country designation ignores the messenger who brings tidings of the descent of the country into danger.

Labelling a claim as manifestly unfounded is prejudicial to the claimant. It becomes a prelude to the designation of a claim as having no credible basis. A claimant without credible basis is denied a statutory stay of execution of a removal order pending an application for leave and judicial review to the Federal Court. There is a reasonable apprehension that a claim designated

as manifestly unfounded, before a hearing, will later be designated as having no credible basis. Creating such an apprehension is a denial of fairness.

The point of processing priority of manifestly unfounded is to get at abuse. However, abuse in the system does not come, for the most part, from feeble claims. It comes from those within the exclusion clauses attempting to delay their removals (such as war criminals and criminals against humanity), and from the fraudulent. ***The Section recommends that processing priority to get at abuse should focus on those claims that raise exclusion issues and those claims that have been preceded by loss of either citizenship or permanent resident status by reason of misrepresentation.***

I. Ninety Day Rule/Reopening/Appeal

The Section recommended that the Refugee Division of the Immigration and Refugee Board should have the power to reopen a refugee claim where there is evidence to support a conclusion that there is a reasonable possibility that it could lead the Division to change its original decision. The Section further recommended establishing a Refugee Appeal Division of the Immigration and Refugee Board. An appeal to the Refugee Appeal Division would be initially in writing. The Refugee Appeal Division could order an oral hearing to reconsider the case. Where credibility is an issue, and where it appears on paper that there is a reasonable possibility that an error was made, the Refugee Appeal Division or a new panel of the Refugee Division should rehear the case in its entirety.

The White Paper does not directly address either the issue of reopening or the issue of appeal. It does note that the many consecutive layers of decision in the current system generate inconsistencies (page 42). It also proposes to deny those rejected protection claimants who return to Canada after more than ninety days access to the Protection Division of the Immigration and Refugee Board, but to grant access only a pre-removal risk assessment, presumably by CIC officials.

While the Section welcomes the consolidation of risk review that the White Paper proposes, one advantage of the current fragmented system, in the absence of the possibility of reopening or appeals, is the very inconsistencies it generated. Post determination risk review, humanitarian review, a second claim more than ninety days after removal were not intended as means to correct errors of the original refugee determinations, but they served that purpose. In the absence of the possibility of reopening or appeal, these other mechanisms served a quasi-appeal function.

Consolidation of these mechanisms into one risk determination means that reopening and appeal systems can no longer be fashioned indirectly by resort to other mechanisms. Reopening and appeal systems must be created directly.

The reopening system the Section recommended for the Refugee Division of the Immigration and Refugee Board is patterned after that for the Appeal Division. One advantage of such a system is that it serves the overall White Paper goals of simplicity, transparency and coherence. ***The Section***

recommends a reopening jurisdiction for the Protection Division of the Immigration and Refugee Board similar to the present reopening jurisdiction for the Appeal Division.

The Section further recommends that the Protection Division have an appeal division that can consider appeals from negative protection decisions. Finally, the Section recommends that a person who returns to Canada after ninety days be given access to the Protection Division rather than be channelled into some other form of risk determination.

J. Landing of Undocumented

The Section recommended that:

i) the requirement in the *Immigration Act* that recognized refugees need to provide satisfactory identity documents for landing should be repealed;

ii) the Department should accept refugee recognition as a satisfactory determination of identity for the purposes of landing;

iii) the undocumented Convention refugee in Canada class should be defined so that a person would be a member provided a period of two years at a maximum has elapsed since the refugee determination;

iv) the operations memorandum stating that a categorical refusal to accept a statutory declaration provided by the refugee as meeting the requirements of the *Immigration Act* is an inappropriate fettering of the officer's discretion should be reinstated;

v) the operations memorandum should state that in law, there is a presumption that a person swearing to his identity or to the identity of

another person is telling the truth. The presumption is rebuttable, if there are some facts that lead an immigration officer to think the person is lying. However, in the absence of any factors giving rise to suspicion, the presumption should be applied;

vi) the undocumented Convention refugee in Canada class should not be restricted to refugees from designated countries. It should apply to all refugees;

vii) refugees being landed under the proposed undocumented Convention refugee in Canada class should be allowed to include in their applications all dependants at home and abroad;

viii) the lock in date for determining the age of overseas dependants sponsored by members of the proposed undocumented Convention refugee in Canada class should be the date of filing of the application for landing of the parent under the *Immigration Act*;

ix) Family members of recognized refugees who have applied for landing should be allowed to come to Canada as visitors;

x) there should be no application fee required to be paid by an overseas dependent sponsored by a landed member of the undocumented Convention refugee in Canada class.

The White Paper proposes that a reduction in the period of five years to three years for those undocumented refugees unable to obtain identification documents from their country of origin because there is no central authority in that country for issuing such documents (Page 44). This recommendation is incompatible with the first three recommendations of the Section. It is

compatible with the rest. ***The Section continues to recommend, in particular, its previous recommendations iv) through x).***

Right now the undocumented refugee claimants in Canada class applies to refugees from countries designated by regulation. It is not clear from the proposal whether it is intended to maintain the designation system or state a general principle in the regulation, that the class applies to those undocumented refugees unable to obtain identification documents from their country of origin because there is no central authority in that country for issuing such documents. ***The Section recommends that the class should state a general principle rather than just apply to refugees from countries designated by regulation. Further, the Section recommends that the general principle should be that the class applies to those undocumented refugees unable to obtain identification documents from their country of origin for whatever reason. If the country fled has a central authority issuing identity documents but the authority does not wish to issue identity documents to the refugee, the refugee should not be made to suffer from that refusal.***

ANNEX 2 — PROPOSAL FOR ENFORCEMENT POLICY

A. Overview

No single chapter in the White Paper is devoted to comprehensive proposals for enforcement policy. Rather, proposals related to enforcement are found in chapters relating to particular issues. *Strengthening Family Reunification* makes reference to proposed regulations that would deny access to a new inland processing system for sponsored spouses and children to persons without legal status or otherwise inadmissible. *Maintaining the Safety of Canadian Society* contains numerous enforcement related proposals: new inadmissible classes, new criminal sanctions, and measures enhancing the ability to effect removal orders and dealing with undocumented arrivals. *Improving the Effectiveness of the Immigration Appeal System* includes proposals to limit access to the Appeal Division by persons statutorily defined as "serious criminals", administrative termination of a stay of removal order for those who subsequently commit criminal offences, and a new requirement for leave of the Federal Court to review overseas visa decisions. *Refocusing Discretionary Power* refers to proposals to limit access to the Minister's humanitarian and compassionate discretion and to restructure the Minister's Permit process.

The proposals, if implemented, do not operate in isolation and must be viewed collectively to appreciate the extent and impact of the proposals. For this reason we have consolidated the commentary on enforcement in a separate annex. As with the rest of our submission this discussion is made

in the context of policy and procedures in the current *Immigration Act* and *Regulations*, the LRAG report, previous Section submissions, and CIC consultations on the White Paper.

The impact of the White Paper proposals depends on the language of the actual legislation. The potential for dramatic shift in enforcement policies, which may be characterized as the sacrifice of individual access to meaningful review of removal orders or to discretionary relief in favour of expedient decision making based on limited, non-discretionary criteria set by legislation, is a matter of grave concern. The Section is opposed to or has grave concerns with many of the enforcement policy proposals, particularly if implemented without significant limitation.

The Section is concerned that implementation of the policy proposals will bring unfair and irresponsible decision making on matters of critical importance to individuals, particularly those facing deportation from Canada and those seeking discretionary relief in legitimate humanitarian and compassionate circumstances.

The White Paper Proposals

The policy proposals affecting enforcement are listed with reference to the White Paper or to the CIC Discussion Paper.

- Denial of access to the Appeal Division for review of removal orders against permanent residents statutorily defined to be a "serious criminal". *Page 23: White Paper, Discussion Paper*

- Denial of access to jurisdiction of the Appeal Division for review of removal orders against persons found to have obtained landing through

misrepresentation. Definition of new class of inadmissibility based upon misrepresentation. *White Paper, Discussion Paper*

- Transferring power to issue a removal order from IRB to SIOs in uncontested cases and in straightforward criminal cases where no weighing of evidence is involved, including cases where an offence is admitted and with respect to permanent residents. *Page 48: White Paper, Discussion Paper*

- Denial of access to humanitarian or compassionate jurisdiction by persons, *inter alia*, convicted of serious crimes, inadmissible under criminal or security provisions of the *Immigration Act*, persons without legal status or under a removal order. *Pages 24, 57: White Paper, Discussion Paper*

- Redefinition of provisions for loss of permanent resident status, based on residency requirements in Canada rather than intent to abandon. *Page 38: White Paper*

- Redefinition of Minister's permits by reference only to such permits as are issued by the Minister rather than by delegate. *Pages 57, 58: White Paper, Discussion Paper*

Principles Underlying the Current *Act* and LRAG Proposals

The White Paper proposals are linked by the professed need to achieve transparency. In the context of the White Paper, transparency is the use of clear and inflexible criteria, fixed by statute or regulation, to determine entitlements and rights. It would appear that the goal of achieving transparency means transferring decision-making authority from independent tribunals with the jurisdiction to consider fact, law and equitable considerations to departmental decision-makers whose jurisdiction is constrained by statutory criteria. It would also appear that the goal of transparency is largely achieved through diminishment of discretionary

authority presently vested in immigration officers under the current *Act* and *Regulations*.

To appreciate both the policy ramifications and impact on individual cases, we wish to review the fundamental principles underlying the current *Act* and supported in the LRAG report:

1. Permanent residents in Canada have obligations, rights and entitlements that are substantial. The rights and entitlements may be reflected in the long-term residence of an immigrant in Canada, history of employment in Canada, birth of children in Canada, presence of close family members in Canada and corresponding entrenchment of the immigrant's life in Canada.

2. Persons recognized as Convention refugees, and holders of valid visas at port of entry have obligations, rights and entitlements flowing from their status. A Convention refugee has a recognized well-founded fear of persecution originating in the country of nationality. The rights and entitlement of a visa holder flow from the visa holder's successful application for visa and presentation for admission at port of entry.

3. The rights and entitlements placed at risk by a decision to pursue revocation of status and removal from Canada are substantial and require that the enforcement process provide an adequate measure of procedural fairness and actual fairness.

4. The rights and entitlements of permanent residents, visa holders and Convention refugees, and the complexity of circumstances of such individuals are such that the decision to revoke status and to impose penalty of deportation should be made by an independent decision-maker, with the jurisdiction to take into account not only the bare legal foundation for issuance of the deportation order, but also the surrounding circumstances of the case.

5. The Minister, or in appropriate cases her delegate, may relieve any person from the requirements of any regulation under the *Act*, or facilitate the admission of any person into Canada on humanitarian and compassionate grounds.

These fundamental principles underlie the current *Immigration Act* and current processes relating to enforcement. For more than 20 years, they have supported the operation of the Immigration and Refugee Board and its predecessor, the Immigration Appeal Board, independent tribunals responsible for reviewing the deportation of permanent residents or Convention refugees. For such individuals, Parliament has provided that removal should not be premised solely on breach of the *Act*. For example, the requirement that "all the circumstances of the case" be considered before removing a permanent resident was not intended as means to avoid deportation, but rather as a legitimate and necessary determination before any removal order became enforceable. The initial process for issuance of a removal order and the subsequent process of review were intended to act in tandem, not in opposition to one another. The initial process for issuance of

a removal order does not take into account any factor other than the status of the individual, and proof of a violation of the law which legally supports issuance of a removal order. Only in the review process can factors such as the circumstances and seriousness of the offence, history of recidivism, degree of establishment in Canada, presence of family in Canada, likelihood of rehabilitation, hardship of removal on the person concerned and close family members, and the like be taken into account. These factors have been consistently applied in reviews of removal orders for more than 20 years.

It is deliberate and important that the current *Act* has long stipulated that the review of removal orders respecting permanent residents be carried out by an independent tribunal, currently the Appeal Division of the Immigration and Refugee Board. The formal processes within the Appeal Division ensures that both sides, the Minister advocating removal and the person concerned, are equally represented. An independent tribunal to which all appellants have access ensures uniform consideration of each case. In absence of access to an independent decision-maker, the quality of review depends on the quality of access to the Minister. The independence of the Appeal Division ensures a fair balancing of considerations, both favourable and unfavourable to the appellant. Parliament's decision to grant review jurisdiction to an independent decision-maker reflects both the appreciation of the seriousness of issues to be determined and the necessity of ensuring an unbiased decision-maker. By placing jurisdiction in the hands of an independent decision-maker, Parliament has ensured both a process and decision-maker who can fairly encourage receipt of conflicting evidence and argument, and who can fairly and equitably render a balanced decision.

The Appeal Division's jurisdiction to review removal orders is not absolute. In cases involving national security threats the Governor in Council can issue a security certificate, the effect of which is to deny Appeal Division jurisdiction over a removal order. Such a certificate can only be issued after investigation by a Review Committee under the *Canadian Security Intelligence Service Act*, an investigation subject to review by the Federal Court. Since 1995, the Minister has held the further power to issue an opinion pursuant to section 70(5) of the *Act*, with respect to permanent residents convicted of offences carrying a potential penalty of ten years or more and in respect of whom the Minister is of the opinion that they pose a danger to the public in Canada. Again, the effect of the opinion is to deny access to the appeal jurisdiction of the Appeal Division.

The Section has long defended the jurisdiction of an independent decision-maker to review deportation orders on the basis of "all the circumstances of the case" with respect to permanent residents, and on humanitarian and compassionate grounds in the case of Convention refugees and holders of valid visas. We forcefully reiterate our defence of the Appeal Division jurisdiction and the principles underlying that jurisdiction. The Section is disturbed with the apparent lack of faith which the government appears to place in the Immigration Appeal Division. We are concerned that the White Paper proposals would directly undermine the Board's jurisdiction and do not demonstrate an adequate appreciation for the soundness of the underlying principles. It is ironic that the White Paper expressly defends the high standard of fairness and inherent advantage of the Board in terms of consistency and accountability and acknowledges that "no rules can take

account of all individual circumstances"[8]. Yet the White Paper proposes precisely such inflexible rules to deny access to the Board's jurisdiction by persons most in need of a fair and comprehensive review.

It is equally disturbing to note that the widely criticized enforcement recommendations of the LRAG report demonstrate a greater appreciation of the complexities of removal proceedings than the White Paper. Chapters 8 and 9 of the LRAG report proposed a two-stage process for removals of persons holding significant status in Canada, such as permanent residents or Convention refugees. The first stage would administratively determine the existence of an offence supporting issuance of a removal order and the second stage was review before specialized officers, in which circumstances apart from the strict offence may be considered to mitigate against removal. The LRAG recommendations were criticized for suggesting to limit the circumstances which might be considered by the review officers, and for removing the review function from an independent tribunal, but at least there was a recognition that deportation of permanent residents required consideration of surrounding circumstances. The White Paper proposals are more restrictive and thus more objectionable than the LRAG recommendations. The proposals contemplate that broad classes of permanent residents may be deported from Canada through an administratively issued removal order without formal consideration of surrounding circumstances, and without involvement of an independent reviewing tribunal with jurisdiction to consider legal or equitable

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8 *Building on a Strong Foundation for the 21st Century*, pp 57 and 58.

circumstances. For such permanent residents, deportation would be determined solely through reference to objective transparent criteria set by statute. It is appropriate to refer to the White Paper at page 57.

> To be transparent, rules are required; but no rules can take account of all individual circumstances. A model under which applications from clients and situations not covered by the regulations would be refused, would create an inflexible system. The loss of flexibility would reduce the ability to respond to unanticipated situations warranting the exercise of discretion.

B. Commentary on Specific Policy Recommendations

Loss of Appeal Rights where status obtained through misrepresentation

> It is proposed to strengthen the inadmissibility provisions of the *Immigration Act* by creating new classes of people inadmissible to Canada. Admission would be denied to ... people who make false declarations on their application for permanent residence. *White Paper, page 47*

> In addition, consideration is being given to eliminating appeal rights for persons who are ordered removed on the basis that they obtained permanent resident status by misrepresentation. *Legislative Review Background Discussion Paper*

Section 27(1)(e) of the current *Immigration Act* provides that if a permanent resident is found at Inquiry to be granted landing by reason of, *inter alia,* any fraudulent or improper means or misrepresentation of any material fact, whether exercised or made by themselves or any other person, a deportation order is issued. Under section 70, the permanent resident has a right of review by the Appeal Division, where all the circumstances of the case may be considered in addition to review on legal and factual grounds.

The Section is strongly opposed to the proposal to completely deny access to the Appeal Division jurisdiction in all 27(1)(e) misrepresentation cases. Such blanket denial will result in the inappropriate deportation of permanent residents from Canada in many cases.

Judicial interpretation of the provisions for loss of permanent resident status as a result of section 27(1)(e) misrepresentation is very broad. A person may be found to have misrepresented a material fact whether or not it was intended, and whether made by the person concerned or by another. The misrepresentation need not have been determinative of the application for permanent residence. It may have been a misrepresentation with no direct bearing on the application. A misrepresentation is material solely on the basis that it may have closed off a relevant line of inquiry by an Immigration Officer.

In consultations, CIC officials have raised the example of false dependents taking advantage of a principal applicant's immigration to Canada through use of fraudulent identity. In the example, the principal applicant claims to be bringing an accompanying dependent son, when in fact the person is not a son. While this is certainly an example of misrepresentation, it is not representative of the vast majority of appeals brought to the Appeal Division following a section 27(1)(e) determination. Most cases are of a less significant nature, involving marital status, the existence of illegitimate children or prior criminality. The following are examples of cases which may result in the issuance of removal orders, but can be subsequently reviewed by the Board:

A woman obtains an employment authorization and comes to Canada pursuant to the Live-in Caregiver Program. In her initial application, she claims to be single. In fact, she is married, but was previously employed in Hong Kong where single status was necessary for issuance of the employment authorization (unlike the Canadian program, in which a married applicant can apply). She completes two years of caregiver service in Canada and applies for permanent resident status, again claiming to be unmarried. Five years after landing, when she seeks to sponsor her husband from abroad, existence of the prior marriage is disclosed. The prior marriage would not have itself prevented her from obtaining the employment authorization, participating in the live-in caregiver program or obtaining permanent resident status. However, it is a material misrepresentation, as the regulations require that her husband be determined to be statutorily admissible to Canada, even though not accompanying her at the time of her landing.

A family immigrates to Canada, the father being accepted as the principal applicant in the independent category. His qualifications are impeccable: he is the vice-president - finance for the Canadian division of a worldwide bank. He is accompanied to Canada by his wife and two children, including his 17 year old son. Unknown to all other family members at the time of application and landing, the 17 year old son is the father of an illegitimate child. The boy kept the secret from his family, due to embarrassment, and has been secretly sending money to his girlfriend abroad, to support her and their child. The boy completes university education in Canada and obtains good employment in his chosen field. On attaining a sufficient level of income, he returns to his home country, marries his girlfriend and submits a sponsorship agreement to bring her and their child to Canada. The principal applicant's failure to disclose the existence of the illegitimate child is a material misrepresentation. The child should have been examined for statutory admissibility, notwithstanding that there was no intention of the child coming to Canada at the time. The entire family in Canada are in violation of 27(1)(e) and subject to deportation.

> A Canadian woman sponsors her American husband to Canada. After five years of marriage, the husband has established himself in a good business and is sole provider for his wife and their two children, both Canadian born. One child suffers from congenital disabilities and requires continuing medical and social support. In his permanent residence application and at the time of landing, the husband denied any prior criminal conviction. In fact, 18 years ago, while a college student in the United States, he sold two "joints" to an undercover police officer and was convicted for trafficking in a narcotic. The husband served his sentence and subsequently obtained expungement of his conviction under State law. The husband honestly but erroneously believed that this entitled him to deny the fact of prior conviction.

In all these cases, a misrepresentation justifies a finding that the person concerned is described under section 27(1)(e) and that a removal order must issue. It is far less clear whether the removal order should be enforced. That is what the Appeal Division must determine in the review process, through examination of all circumstances of the case.

In some cases, the Appeal Division will determine that the misrepresentation was deliberately intended to perpetrate a fraud for the purposes of immigration, and the removal order may be upheld. In other cases, the misrepresentation will be seen as either unintentional or, if intentional, motivated by a lesser intent. In such cases, the removal order may be set aside or stayed. In some cases the conduct in Canada of the person concerned will mitigate against removal, in others not.

It is impossible to list all the circumstances that may support a finding of misrepresentation. It is equally impossible to describe the conduct or circumstances at the time of application or subsequently which would

mitigate against removal . For this reason the current *Immigration Act* allows for all permanent residents described under section 27(1)(e) to have their cases reviewed by an independent tribunal. It is no more accurate or fair to say that none of these individuals should have access to the Appeal Division than to say that none should be deported. What can be said with certainty is that, in each case, the circumstances of the misrepresentation and the circumstances of the individual in Canada must be examined to determine whether deportation is appropriate. The Appeal Division is the appropriate venue for such examination.

Bill C-63, the *Citizenship of Canada Act,* presently before Parliament, has considerable bearing on the issue of appeals against deportation arising through misrepresentation.

The current *Citizenship Act* provides for the loss of Canadian citizenship where it is determined that the citizenship has been acquired through false representation, fraud or concealing of material circumstances. Bill C-63 would remove the requirement that the misrepresentation or omission be made "knowingly", or intentionally. A misrepresentation during the process for permanent residence, whether intentional or not, may be relied on to cause loss of subsequent Canadian citizenship. Bill C-63 would further provide that the loss of citizenship may also extend to any other family member who acquired their citizenship through the person making the misrepresentation. The consequence of these amendments is that a citizen in Canada and their family members may lose both citizenship and permanent resident status through misrepresentation. The loss of status may

extend to spouse and children who did not even know of the misrepresentation.

The Section recommends that the Immigration Act be amended to provide for access to the Appeal Division jurisdiction for review of any removal order issued against a person as a result of the operation of section 16 of the amended Citizenship of Canada Act, and that all permanent residents found to be described by Paragraph 27(l)(e) of the Immigration Act maintain a right to full review by the Appeal Division.

C. Serious Criminals

"Danger to the Public" Opinion Process

The Section strongly supports the proposal to terminate the "Danger to the Public" opinion process. With other legal advocacy groups and civil liberties associations, we have strongly criticized this administrative process since its inception in 1995, for its fundamentally unfair procedure and its inability to provide a balanced defensible determination to deny appeal rights to permanent residents or Convention refugees facing deportation arising from criminality. It is the opinion of the Section that the operation of the "danger to the public" provision has resulted grave injustices to scores of permanent residents whose deportations have been effected without review by an independent tribunal. A close examination of the process since its inception demonstrates harsh lessons of the failings of administrative decision-making in the realm of deportation of permanent residents or Convention refugees, and particularly the harsh consequences of discretionary administrative

decision-making in the absence of an independent tribunal operating within the framework of a Court of record.

When the Minister's opinion process was initially proposed and enacted in 1995, CIC officials argued that it was necessary to prevent unnecessary delays of removal of dangerous criminals who were using the Appeal Division process to delay an inevitable removal. It was argued that theses appeals were without merit, that by their conduct and surrounding circumstances, there was no likelihood of a stay being granted. In the first year after enactment, close to 1000 opinions were issued. To date, we estimate that more than 2000 opinion certificates have issued. These numbers are excessive and do not conform with the expressed intention to limit use of the opinions to exceptional cases where appeals are manifestly without merit.

For the permanent resident subject to a Minister's opinion, there is not even the appearance that justice has been served. The permanent resident receives a scant 15 days' notice in which to respond to the intention to seek a danger opinion. Materials disclosed to the principal applicant are often inadequate, consisting of no more than a Certificate of Conviction, internal administrative reports from CIC and perhaps a copy of the Judge's reasons on sentencing. The permanent resident is invited to make submissions as to the danger opinion and as to humanitarian and compassionate considerations, yet there exists no definition as to what constitutes a "danger to the public". In any event, there is no response to the submissions *i* no hearing, no interview, no contact between the decision-maker and the person concerned. There is

only the final response of the decision-maker, a senior official in Ottawa, issued without reasons.

There is no appeal from issuance of a Minister's danger opinion, only judicial review by the Federal Court, and then only with leave. Approximately 80% of applications for leave are denied outright, without reasons and without avenue for further review. Thus, the vast majority of immigrants receiving a danger opinion have no review. For those who are granted leave, judicial review is not an appeal on the merits *i* the only issue is whether the government acted in accordance with the law. There is no equitable jurisdiction to consider the circumstances of the case.

Notwithstanding the Court of Appeal decision that the danger opinion process met minimum common law requirements for procedural fairness, the Federal Court has regularly set aside danger opinions. The White Paper comment that "... there have been problems with the process, which is slow and resource-intensive and has led to much litigation" is an understatement and highlights problems with the process. A brief review of recent case law discloses the grounds on which the Federal Court has set aside danger opinions:

> For failure to provide notice of intention to a 30-year resident of Canada suffering from chronic schizophrenia, resident in a psychiatric facility and found by a criminal court not to be criminally responsible for a criminal act due to mental illness. (*Da Costa*, September, 1997)

For issuance of an opinion against a permanent resident who had a single conviction for an isolated incident of sexual assault, where there was virtually nothing in the record to indicate risk of recidivism except for speculative and unsupported opinions. The danger to the public opinion was rendered without regard to material before the decision-maker in that the Immigration Officer mischaracterized evidence of rehabilitation and remorse. (*Thai*, January, 1998)

A danger opinion was issued in reliance on materials not disclosed to the person concerned, a permanent resident initially admitted to Canada at the age of two and resident in Canada for 20 years. The materials forwarded to the Minister's delegate also contained serious factual errors. (*Astudillo*, November, 1997)

Where a danger opinion was issued against a permanent resident suffering from mental illness and alcoholism in spite of evidence before the decision-maker which manifestly required a different result. In the absence of reasons to establish how the opinion was rational, the Court set aside the decision for failure to consider relevant factors. (*Holmes*, October, 1997)

A danger opinion was found to be "perverse, capricious and unsupported by evidence before the decision-maker" where the evidence revealed that the offences were committed over a short period of time, in relatively minor circumstances and were not continuing after first conviction. The opinion was issued without reference to available pre-sentence reports, the Court sentencing remarks, police reports or any victim impact statements. There was absolutely no evidence of violence. (*Reynolds*, April, 1998)

> A danger opinion was set aside where the limited evidence before the decision-maker did not reasonably support a conclusion that the permanent resident was a present or future danger to the public in Canada. Further, the decision-maker relied on materials containing evidence never disclosed to the person concerned, and the internal CIC reports improperly discounted or mischaracterized relevant evidence. (*Sam*, November, 1997)

> A danger opinion issued against a 16-year permanent resident in Canada was set aside for failure of CIC to disclose to the person concerned or counsel materials placed before the decision-maker for response by the person concerned. (*Sharkaran*, May, 1997)

> A danger opinion issued against a permanent resident was set aside as a result of the delegate's failure to consider relevant circumstances of the case. The opinion was based on erroneous and unsubstantiated information in a one-page report from an Immigration Officer. The permanent resident attempted to correct the errors, but was disadvantaged by incarceration, the 15-day time limit for response and inability to retain counsel.

These cases are representative of the problems that beset the danger opinion process. The vast majority of danger opinion cases never receive judicial review. A recent survey of a commercial computer database shows that the Federal Court considered section 70(5) in 53 cases, allowing the judicial review application in roughly half the decisions.

The danger opinion administrative process was subject to a myriad of flaws, including the inability to place before the decision-maker reliable, factual information, inability to effectively gather information relevant to both humanitarian and compassionate circumstances and the assessment of true danger to the public, and inability to provide a balanced decision. The

failings of the danger opinion process are critical to future policy decisions respecting the role of the Appeal Division (or any independent tribunal of record) and to adoption of policy that seeks to "cure" the danger opinion process by adoption of transparent, purely objective statutory criteria.

White Paper Proposal for Serious Criminals

The White Paper proposes to replace the danger opinion process by statutorily defining "serious criminal". The definition would be based on objective criteria, with no flexibility or discretion. The proposal is partly consistent with recommendation 164 of the LRAG Report, that transparent objective criteria for these types of cases be set out in the regulations. However, the White Paper would significantly extend the consequences of a designation as "serious criminal":

- A removal order may be issued by a senior immigration officer without hearing. The issuance of the removal order would be supported solely by the fact of conviction.
- The permanent resident would lose all right of review, on legal or equitable grounds, by the Appeal Division.
- The permanent resident would have no right to apply to the Minister for exercise of humanitarian and compassionate considerations.

The Section cannot support any proposal where a permanent resident in Canada could lose status and be deported without any exercise of discretion or review on the equitable merits of the case. The White Paper reference to a right of review in Federal Court is illusionary, given that judicial review does not provide for exercise of discretion.

We are drawn to page 57 of the White Paper:

> To be transparent, rules are required; but no rules can take account of all individual circumstances. A model under which applications from clients and situations not covered by the Regulations would be refused would create an inflexible system. *The loss of flexibility would reduce the ability to respond to unanticipated situations warranting the exercise of discretion.* [emphasis added]

Though written in the context of admissions policy, the warning as to the perils of inflexibility applies even more when considering deportation of permanent residents from Canada.

The Section recognizes that deportation of permanent residents is an appropriate consequence in certain circumstances. Criminal conduct may well be the foundation for deportation in appropriate circumstances. That being said, we have grave doubts that a single rule, however crafted, can fairly distinguish between appropriate circumstances to deport without any consideration of equitable relief, and circumstances where fairness requires at least some consideration of the exercise of discretion.

The LRAG discussion paper suggested that options for the criteria to define a serious crime would include use of a schedule of offences, a minimal actual sentence or a combination of these elements. In the opinion of the Section, these suggested objective criteria are not adequate. Equally significant is consideration to the circumstances of the offence, including the nature of harm occasioned, whether the offence constituted an isolated incident or a component of a recurring pattern of recidivism. Equally significant is consideration of the circumstances of the offender, including the duration of their residence in Canada, presence of family members, past record of good

conduct or likelihood of rehabilitation. These are all legitimate factors in considering the deportation of any permanent resident of Canada, yet are not mentioned in this attempt to define criteria by which deportation would take place without meaningful review.

The Section strongly opposes a policy proposal that would set inflexible, objective criteria resulting in deportation of permanent residents of Canada without exercise of any substantive review.

In January 1998, the Minister invited the House of Commons Standing Committee on Citizenship and Immigration to consider issues of detention and removal from Canada, pursuant to recommendation 155 of the LRAG report. The Standing Committee devoted a significant portion of their report to the removal of long-term residents of Canada:

The Committee wishes to address a matter that has been frequently controversial in recent years - the appropriateness of removing individuals who have been in Canada for a long period, often since the time they were very young. These people were raised here and have been shaped by their experiences in Canada. It is likely that all their ties are here. The Committee feels strongly therefore, that we should take responsibility for them.

We are aware that the *Immigration Act* makes no distinction between permanent residents who arrived six months ago, and those who arrived 20 years ago, or as children. That may be a factor to be considered in humanitarian and compassionate applications to the Department and by the Appeal Division of the Immigration and Refugee Board. Nevertheless, there remains no legal protection. We note, however, that these kinds of distinctions have been made in the past in Canadian laws, and may be found in the laws of some other countries.

For example, France has comprehensive rules. Among other categories, that country protects from deportation individuals under 18, individuals who have resided legally in the country since before they were ten years old, and, in certain circumstances, those married to French citizens or the parents of a French child.

Although the Committee does not recommend a dramatic change to Canada's law, we believe it is time to cautiously re-examine our current position, at least in relation to people who arrive as children. It is very understandable that some countries are reluctant to accept back from Canada individuals who have absolutely no ties with their country, and, where the native language is not either French or English, do not speak that language.

> It seems particularly appropriate to re-think the position of children, since their lack of Canadian citizenship is most likely due to the oversight of their parents, and in most cases, is not of their own doing. Indeed, many of these individuals have apparently thought they were Canadian citizens, having lived here all their lives.
>
> What is the connection between this topic and removals? First, by reducing the pool of people eligible for removal, we would preserve our scarce enforcement resources for those others to whom Canada owes little or no consideration. Second, as noted above, some countries resist accepting people back, and place roadblocks in the way. These countries might be more willing to receive back other nationals if we did not also try to remove individuals in this category. Third, even if countries do accept such people back, they are often displeased about it, and bilateral relations may suffer. If Canada were on the receiving end, we would no doubt feel the same way.
>
> Recommendation:
> 26. Citizenship and Immigration Canada should give serious consideration to including in the proposed revisions to the *Immigration Act* protection in law from deportation to permanent residents who have been in this country for a long period of time, particularly if they came to Canada as children.

The Section wholly supports the Standing Committee recommendation and the sensibilities implicit in it, that deportation of permanent residents involves consideration of circumstances that go beyond the mere legal fact of deportability.

Setting parameters for automatic loss of Appeal Rights

While we vigourously oppose the automatic restriction of appeal rights, we wish to comment on the criteria suggested in the CIC Enforcement Branch discussion paper.

Basing loss of appeal rights on category of offence alone is unacceptably arbitrary, as it fails to measure the seriousness of an offence or of an offender. It fails to recognize the realities of the criminal justice system:

- a person may be convicted of an offence which carries a high potential penalty, but where circumstances are relatively minor, for example, theft of the family car, or breaking into the family home;
- the choice of offence may be part of a plea bargain where the decision to plead guilty is based more on the proposed sentence than on the nature of the offence;
- a person may plead guilty to a more serious offence without the benefit of counsel in circumstances where counsel would have arranged a plea to a lesser charge;
- the offence may have been a once-in-a-lifetime occurrence, with little or no prospect of reoffending;
- a person may be convicted as a party to a serious offence where their actual participation was minimal or peripheral. Under the broad definition of the conspiracy and parties sections of the *Criminal Code,* minor players can face liability for the same offences as persons who direct and instigate the offence;
- by the time a person faces removal, there may have been complete rehabilitation.

While coupling the seriousness of the offence with consideration of the actual sentence imposed would assist in identifying more serious offenders, it still has major shortcomings:

- inequity in sentencing practices across the country. In Alberta, for instance, the Court of Appeal has introduced recommended "starting points" for sentencing which require minimum substantial periods of incarceration for sexual assault, robbery, trafficking, theft from an employer and spousal assault. These recommended minimum sentences are not followed elsewhere, and Alberta judges tend to imprison offenders more frequently and for longer periods than their counterparts in other provinces.
- A lengthy sentence may be imposed, not because of the perceived incorrigibility of the offender, but because of the judge's desire to send a message to the public. The offender may have no other convictions and be unlikely to offend again. An examples is a person unlucky enough to cause death or injury after having one drink too many before driving.

Using the above factors to deny access to the Appeal Division fails to recognize other relevant factors including long term residence, substantial ties to Canada, hardship to family in Canada, remorse and rehabilitation. If these factors are to be used, they should be limited to only the most exceptional cases. We would suggest that, at the very least, they apply only where the offence was punishable by more than 10 years imprisonment and the person received an actual sentence of four years or more.

If such criteria are to be adopted, we recommend several exceptions where individuals would still have an appeal to the IAD. These would include long term permanent residents, persons who came to Canada as children, persons

with dependants in Canada and cases where an officer could determine that the presence of exceptional factors warranted a determination by the IAD.

We recommend that:

1. *the "danger opinion" provisions be removed from the Immigration Act, and the Appeal Division be given full jurisdiction to review deportation orders issued against all permanent residents, subject only to the existing provisions respecting issuance of security certificates;*

2. *in the alternative, if a mechanism is needed to prevent appeals totally without merit, then it is necessary to ensure that the mechanisms are constrained from unwarranted application;*

3. *no limiting mechanism, whether by way of danger opinion or alternative legislative restriction, should apply to long-term permanent residents;*

4. *as an alternative, CIC should adopt a policy of fast-tracking cases involving more serious offences and offenders. Consideration might also be given to a procedure to dismiss manifestly unsupportable appeals, where CIC could apply to dismiss an appeal summarily, requiring the appellant to demonstrate an arguable case.*

Removal of People Who Commit Criminal Offences While On A Stay Of Removal

The Section supports the continuing jurisdiction of the Appeal Division to determine whether a stay should be cancelled, whether upon its own

motion or on application by the Minister. In our view, there is no compelling evidence of the current or likely future abuse of stay of removal orders. The desire to cut costs does not justify an arbitrary restriction of access to judicial process. While at first blush, reoffenders would seem undeserving of further hearing, there may be extenuating circumstances which should be weighed by a tribunal. For instance, the original offence may not have been very serious but was referred to the IAD anyway. The new offence may be serious in category, but minor in its circumstances. The individual may have been under a lengthy stay and have complied with all terms and conditions with the exception of the new offence. There may also be strong equitable factors such as strong ties to Canada, lengthy residence here, the presence of dependants, or hardship to family upon removal.

In our view it would be preferable for CIC to adopt a policy of prioritizing section 33 reopening applications.

Transferring Power to Issue Removal Orders from Adjudicators to Senior Immigration Officers

The Section strongly opposes the general policy proposal to transfer power to issue a removal order from IRB adjudicators to SIOs, notwithstanding the nominal restriction of the power to "uncontested cases and in straightforward criminal cases". This proposal would erode the function of the independent tribunal (Adjudication Division) and replace it with a system which could strip status from persons in Canada through a process that lacks procedural safeguards and meaningful avenues of review.

Under the current *Act*, SIOs have limited authority to issue exclusion orders in port of entry cases and departure orders in inland cases. The port of entry authority is limited to persons who seek to return to Canada without the required Minister's consent to overcome a previously issued deportation order, or who present themselves without a necessary visa, passport or authorization. In inland cases the authority is limited to situations involving lack of Minister's consent, visitor over-stay, failure to present oneself for examination and breach of the general provisions of section 19(2)(d). The SIO's inland jurisdiction is tempered by limiting the SIO to issuance of a departure order. If CIC seeks the more onerous deportation order, it must prove its case before an independent adjudicator.

The White Paper and Discussion Paper are very vague on this issue. The extent to which the SIO jurisdiction may be expanded is not described. From a combined reading of the White Paper and Discussion Paper it appears that the SIO jurisdiction may be extended to the issuance of deportation orders in addition to departure orders, to permanent residents as well as visitors and others in Canada (under the current law the SIO has no jurisdiction to issue a removal order against a permanent resident) and to circumstances where the need to weigh evidence is overcome by the "admissions" of the person concerned. An extension of SIO jurisdiction into these areas raises the following significant concerns:

- *Elimination of the adjudicative function of an independent tribunal.*

Minor offences of the *Immigration Act* can result in a departure order or deportation order, depending on the circumstances of the case. More serious

offences result solely in issuance of a deportation order. Where CIC seeks issuance of a deportation order, it must present evidence to an adjudicator to prove the allegation against the person concerned. The independent decision-maker determines whether the evidence is sufficient and the appropriate removal order to be issued. The inquiry process is therefore reserved for determination of more serious offences where deportation is sought. In absence of the inquiry process, there is no incentive to consider lesser, more expedient options. If it is just as easy for an SIO to issue a deportation order as to consider voluntary departure or issuance of departure order, the result will be deportation orders being issued more frequently, in circumstances which would otherwise justify a lesser outcome.

- *Casting the SIO into the role of decision-maker*.

We are disturbed by the contemplated erosion of the traditional distinction between the administrative and judicial branches. Immigration officers are trained to enforce the *Immigration Act* and *Regulations*. Playing the role of judge confuses their role and puts them into potential conflict with their enforcement mandate when they are asked to act impartially in administering the law while ensuring the maximum possible protection of the rights and interests of the individuals with whom they deal. The proposal is tantamount to giving police officers the power to enter a conviction whenever there is a "straightforward" or "uncontested" offence or where "the person admits to the allegations".

It is difficult to draw a line distinguishing between cases that require determination by weighing evidence, and cases which are "uncontested" and

"straightforward" or "where the person admits to the allegations". Such determinations will require CIC officials, and SIOs in particular, to fulfill the functions of investigator, prosecutor and decision-maker through administrative proceedings that may be limited to an interview, if there is an interview at all.

We are particularly concerned with the proposal to allow SIO removal orders where a person admits allegations to an Immigration Officer. In our experience, there is little respect for legal rights in immigration interviews. Persons concerned are often unrepresented and unaware of the potential consequences of any admission. CIC consistently refuses to accommodate counsel in immigration interviews and persons are often advised by enforcement officers that they do not need a lawyer. Such interviews are often done without qualified interpreters and statements are rarely recorded.

The "danger to the public" opinion process has demonstrated that in the absence of a screening tribunal, CIC processes for investigation and determination of status are enforcement-driven. It is no comfort to point to Federal Court review as an adequate remedy for an aggrieved individual. For visitors, employment authorization holders and students, access to the Federal Court is substantially barred by the leave requirement, the absence of a meaningful record and the reality that Federal Court review will only occur long after loss of status and removal from Canada.

Administrative Issuance of Removal Orders Against Permanent Residents

For the above reasons and particularly in light of the consequences of a removal order issued against a permanent resident, the Section strongly opposes any extension of jurisdiction which would permit the administrative issuance of a removal order against a permanent resident in Canada, on any grounds. The consequences of loss of status and removal from Canada are the most onerous and extreme penalties available under the *Immigration Act*. ***Permanent residents should not be removed from Canada except in accordance with decisions made by independent decision-makers and tribunals.***

Leave Requirement for Judicial Review of Overseas Decisions

The Section opposes any leave requirement for access to judicial review in the Federal Court of overseas decisions. If the sole issue is to remedy inconsistency between judicial review of inland and overseas decisions, then principle and past record mandate rather that the leave requirement for review of inland decisions be abandoned.

Federal Court statistics show that approximately 45% of judicial reviews of overseas decisions are resolved in favour of the applicant. By comparison, applications for leave for judicial review of inland decisions are denied without reasons in the vast majority of cases, approximately 80%. These figures indicate that imposition of a leave requirement for overseas decisions will simply serve to insulate CIC from its own poor decisions.

Leave requirements present a considerable barrier to judicial review of deserving cases. The grant or denial of leave is made without reasons and cannot be appealed. There is considerable inconsistency in decisions to grant leave. Cases with virtually identical facts, circumstances and issues will be granted leave in some cases and not in others.

As a matter of law, the threshold for granting of leave is intended to be a low standard, in practice it is a high and inconsistent standard, much to the detriment of individuals facing loss of permanent resident status and deportation, or failure of a refugee claim.

The Section recommends that the provisions for judicial review of overseas decisions be left intact, and that the leave requirement for judicial review for inland applications be abandoned.

Minister's Permits

The White Paper proposes to continue Minister's permits, but only such documents issued by the Minister personally. Documents issued pursuant to delegated authority will be renamed. Again, this proposal is vague and difficult to respond to. ***The Section supports continued use of Minister's permits or such other renamed document, to facilitate entry into Canada of persons otherwise inadmissible in appropriate cases.***

D. Summary

The Section expresses its concerns regarding the White Paper and other CIC proposals in the strongest possible terms. The LRAG report was soundly and widely criticized by the Section and other legal advocacy and NGOs for failure to appreciate the complexities and sensitivities of removal proceedings, and for failure to ensure that frameworks for enforcement process would provide adequate assurances of fairness and independence of decision-making. The White Paper proposals pay little heed to those criticisms.

On initial reading of the White Paper it might appear to have given effect to the criticisms. It quotes advocacy groups in support of the role and operation of the Appeal Division of the IRB, and assures that the Appeal Division will be retained. It speaks of the need to avoid strict rules that prevent the flexibility necessary to deal with individual cases.

Notwithstanding these words of assurance (which we believe properly reflect program integrity), the White Paper actually proposes legislative amendments which would serve to:

- impose fixed inflexible criteria to determine loss of status of permanent residents;
- remove access to independent review tribunals with jurisdiction to stay removal on equitable grounds;
- transfer decision-making from independent tribunals to Immigration officers in matters pertaining to loss of status and removal;
- apply fixed and inflexible criteria to deny access to discretionary relief on humanitarian and compassionate grounds;

- further restrict access to Federal Court judicial review proceedings by imposing a leave requirement on overseas decisions.

Implementation of these policy proposals may result in the virtual elimination of the review jurisdiction of the Appeal Division with respect to removal of permanent residents from Canada. Permanent residents in Canada, including long-term permanent residents who came to Canada as children, will face removal through a process administered by the CIC enforcement branch. The removal will be done without access to meaningful review of the circumstances of their case, let alone review by an independent tribunal, and without consideration of humanitarian and compassionate circumstances.

We emphasize in the strongest terms that jurisdiction of the independent tribunals to determine and review removal orders against persons with status in Canada is a fundamental protection against unwarranted removals. Finally, we underscore the importance of retaining discretion to overcome circumstances of inadmissibility or circumstances of removal through the mechanisms of applications for Declaration of Rehabilitation, Minister's Permits or general relief from the provisions of the *Act* and *Regulations*.