May 5, 2000

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Citizenship and Immigration Canada
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Dear Ms. Sussman,

Re: Bill C-31, *Immigration and Refugee Protection Act*

I am writing on behalf of the National Citizenship and Immigration Law Section of the Canadian Bar Association (the Section). We are profoundly concerned about key provisions in Bill C-31 and their underlying policies. The Bill is complex and broad legislation that cannot be fully reviewed in the scope of this document. For that purpose, the Section is developing a full brief for presentation to the House of Commons Standing Committee on Citizenship and Immigration.

The Section agrees with some aspects of the Bill, such as extending sponsorship to common-law partners and consolidating processes for refugee and protection determinations. However, it has serious concerns which far outweigh its agreements. Here, we identify key issues that are representative of the flaws of the legislation.

As the April 2000 Auditor General's report noted, immigration has contributed significantly to our population growth. Almost five million of the Canadians surveyed in the 1996 census were born in other countries. This represents more that 17 percent of the population – the largest proportion in over 50 years. Given Canada's aging population and dropping birth rate, immigration is expected to continue playing a key role in our economic and demographic growth.

Immigration legislation necessarily addresses two main areas: selection and control.

Selection involves Canada's choices:

- to select immigrants in furtherance of social, cultural and economic benefits;
- to fulfil our international obligations and give expression to our humanitarian ideals through granting of protection to Convention refugees and others in need of protection; and
- to promote trade, commerce, cultural and economic health through admission of visitors, students and temporary workers.

Control involves the ability:

- to deny selection and entry of individuals in the interests of preserving the health, safety, security or economic interests of Canadians;
- to remove from Canada those who are without legitimate status; and
- to strip status and remove from Canada those whose conduct justifies our ultimate non-criminal sanction – exile from Canada through deportation.

The integrity of our immigration system is determined by the processes that we use to achieve selection and control. At the heart of decisions to deny access or to pursue removal is the reality that these decisions can and do affect the quality and security of individual human lives. Enforcement of immigration law can and does result in loss of legitimately acquired status. It causes separation of parents from children, spouses from one another, and individuals from the country that has been their home.

These are difficult and unavoidable decisions. In keeping with the significant loss of rights or status in issue, we place our faith in processes that maximize prospects for fair, full and impartial decision-making and ensure that these decisions are just and defensible. The protection of these processes *is* protection of the integrity of the immigration program.

Bill C-31 fails to preserve the processes which are essential for reliable and just decision-making in cases of selection and removal. The Bill strips existing review processes and limits existing access to review tribunals to the point that unfair and unjust determinations are inevitable. This is particularly true for procedural protections presently afforded permanent residents and refugees.

The Section is especially concerned about provisions of C-31 that specifically diminish the rights of permanent residents to enter and remain in Canada and that deliberately weaken the security of permanent resident status. The Bill also systematically reduces or removes existing rights with respect to sponsorship, right of entry, security of the person and review of determinations to strip status and remove from Canada. Bill C-31 is not legislation that commits to respect for the status of immigrants. Rather, it is more concerned with enforcement at the expense of immigrant rights.

Key Concerns

The Bill would:

1. Redefine the status and right of entry of permanent residents and deny residents entry into the country before their loss of status is determined.

2. Allow for the deportation of permanent residents – without appeal and without consideration of their circumstances – as result of a single criminal sentencing.

3. Deny access to Federal Court review without leave, in all decisions under the *Act*.

4. Raise the barriers for access to the refugee determination process.

5. Allow for the deportation of permanent residents and refugee claimants before hearing of judicial review in Federal Court.

1. The status of permanent residents

Permanent residents are people who permanently reside in Canada but who have not obtained Canadian citizenship. Many permanent residents have lived in Canada for a long time. Many come to this country as children. In virtually all respects, they can be indistinguishable from Canadian citizens. They work, they pay taxes, they raise families and they contribute to our communities like anyone else. They are our co-workers, our neighbours and our friends. Failure to obtain citizenship may be the result of oversight, lack of appreciation for ramifications, parents' failure to include minor children in their own applications for citizenship, or concern with the loss of original citizenship through the operation of foreign law.

Under the current *Act*, permanent residents have a defined status and a guaranteed right to enter Canada until their loss of status is determined through inland processes.

Under the Bill, there is no defined status for permanent residents. Permanent residents, temporary workers, visitors, students, refugee claimants and illegals are collectively defined as "foreign nationals", a term that emphasizes their foreign origins rather than their immigration and establishment in Canada.

The fundamental right of permanent residents to enter Canada is significantly qualified under the proposed legislation. Proof of resident status would depend upon the carrying of a status card that expires and must be renewed every five years. On every re-entry, the permanent resident would be required to produce the valid card and be prepared to satisfy an immigration officer that they have physically resided in Canada for two years in the five-year period and have complied with the provisions of the *Act*.

Under the Bill, permanent residents who are outside Canada when their card has expired (or is lost or stolen) are presumed to not be permanent residents. They would not be permitted to board flights to Canada until successful application for renewal. Permanent residents who appear at border ports of entry without valid cards and without satisfying an officer of their residency would be denied entry.

The potential for erroneous denials of entry is considerable. Port of entry and overseas officers will make determinations that permanent resident status has not been satisfactorily proved, thus disentitling the resident to return to Canada. The appeal process is entirely unsatisfactory. A permanent resident who is denied re-entry or renewal is permitted only a paper appeal, without being entitled to attend in person or to call any witnesses. Further, the resident would not be allowed to produce any new evidence to demonstrate that they have legitimately been residing in Canada and meeting the requirements of the *Act*. Under the Bill, the appeal tribunal is entitled to look only at the information that was before the officer when making the decision that residence was not satisfactorily proved. Failure of the appeal means loss of permanent resident status.

The current legislation permits permanent residents who must be absent for compelling business, family or other needs, but who have no intention of abandoning Canada as their home, to apply for a returning resident permit before leaving Canada, or from abroad. This procedure provides flexibility, and peace of mind for returning residents. The new bill eliminates this process in favor of an inflexible and arbitrary "one size fits all" standard full of uncertainty for the resident. Nor does the bill guarantee that the promises contained in existing valid permits will be honoured.

The Bill sets out new powers for a designated officer to compel any foreign national to, at any time, participate in an examination and answer all questions put to them. It is accepted and already required that anyone (including citizens) must examined on entry to Canada or on application abroad, but this new power allows the right to examination to carry on without end. At any time, under penalty of jail or fine, permanent residents may be called in for examination. This new power is capable of much abuse and is a significant infringement upon the right against self-incrimination, the right of privacy and of quiet enjoyment of status. The potential for harassment is clear, particularly with respect to permanent residents engaged in an appeal from a deportation order, or currently on a stay.

The above changes are obviously unfair and unwarranted. They would lead genuine permanent residents to face hardship and abuse.

Recommendation:

> The Section recommends that the right of entry into Canada of permanent residents be guaranteed until inland determination of loss of status, with full appeal rights to the Immigration Appeal Division. The existing provisions for returning resident permits should be restored. The provisions for compelled cooperation in investigations should be deleted.

2. Deporting permanent residents without appeal process and without consideration of their circumstances, as result of a single criminal sentencing.

Under the Bill, a permanent resident who is convicted of a "serious" criminal offence and who receives a sentence of two years incarceration would have no appeal whatsoever from a removal order.

The issue is not whether serious criminals should be deported from Canada or whether permanent residents should be immune from deportation. For more than 20 years, Citizenship and Immigration Canada has had the power to deport any permanent resident on grounds of criminality, subject to an independent review process that allows consideration of the resident's circumstances before determining that deportation is appropriate. These include whether the resident has resided in Canada for 25 years after landing as a child, whether the offence was an isolated incident or part of a pattern of criminal activity or whether there is likelihood of re-offending or rehabilitation.

Bill C-31 has no provision for independent review of such considerations – all of which safeguard against unnecessary removals. Indeed, the Bill uses a simplistic and arbitrary rule to avoid consideration of relevant circumstances.

This is unacceptable. Permanent residents generally, and long-term permanent residents in particular, deserve proper consideration before the government decides to strip them of their status and deport them. The Bill's approach is contrary to the recommendation of the June 1998 report of the House of Commons Standing Committee on Citizenship and Immigration that the government should seriously consider protecting long-term permanent residents, particularly those that came to this country as children, from deportation determinations.

The denial of a right to appeal based on an arbitrary rule that does not distinguish between permanent residents who arrived six months ago, and those who arrived 20 years ago, or as children, is fundamentally flawed and unfair.

Recommendation:

The Section recommends that permanent residents not be subject to loss of status and removal without access to a legitimate process for considering all the circumstances of their case. Permanent residents of five-year establishment should be given an absolute right of review before the Immigration Appeal Division with jurisdiction to review equitable considerations.

3. Requirement for leave for Federal Court judicial review of all determinations under the Act.

"Judicial review" refers to the right of any individual to ask the Federal Court to review a government decision on grounds of legality and fair process. It is not an appeal, but instead is a review of the legality of the decision. It is available to any person affected directly by any government decision.

More than 10 years ago, the government imposed a requirement that an applicant must obtain "leave" of the Court before they can apply for judicial review of an immigration decision made in Canada. An application for leave is a paper application which does not provide for cross-examination on affidavits. The Court decides these applications without reasons and the parties cannot appeal.

The Section has long criticized the leave process as an unfair barrier to challenging immigration decisions made within Canada. The vast majority of leave applications are denied, with no judicial review or further appeal being allowed.

Bill C-31 extends the leave requirement to decisions made overseas by visa officers. Indeed, under the Bill, no decision made under the *Act* can be judicially reviewed without first obtaining leave.

For most overseas visa applicants, there is no review process other than judicial review. Judicial reviews are an effective means of requiring visa officers to reconsider bad decisions. In this respect, the April 2000 Auditor General's report has confirmed the inconsistent quality of decision-making by visa officers, and the lack of any process for quality assurance. The report noted that consistency in decision making and legal training are lacking in the Department.

These concerns will, no doubt, be compounded by the imposition of the new *Act* and selection criteria. By imposing a leave requirement, the government is essentially removing a valid correction process and is insulating its decisions from review. The imposition of the leave requirement is consistent with the overall thrust of Bill C-31 to remove review processes or access to appeal mechanisms throughout the system. This betrays a policy objective, very worrying to the Section, of removing immigration decisions from meaningful or fair challenge and of leaving department administrators as sole deciders of the fate of individuals.

The time and technical requirements for obtaining leave are strict and unrealistic. If the applicant does not retain counsel in Canada, receive advice and apply to the Canadian court within 15 days of the decision, the leave opportunity is lost.

Recommendation:

> The Section recommends that the requirement for leave be removed for all judicial reviews of determinations under the *Act*. A leave requirement should not be imposed until the Department has met the Auditor General's concerns respecting mechanisms for quality assurance in decision making by overseas officers. Such mechanisms may include a process for Alternate Dispute Resolution (ADR), allowing presence of counsel at overseas interview, recording of interviews, or maintaining provision for examination of officers on affidavits in the leave process

4. Raising the barriers for access to the refugee determination process.

The Bill purports to reaffirm the objective of providing protection to persons entitled to refugee determination, but its provisions actually limit or prohibit access to the inland refugee determination process.

Access to the inland refugee determination system will be restricted by:

- Preventing claimants with improper documents from boarding aircraft to Canada;
- Imposing stricter barriers to referral of claims to the determination process; and
- Allowing only one application to the inland determination process in the lifetime of the claimant.

Under the current *Act*, a failed refugee claimant who leaves Canada and is absent for at least 90 days can initiate a new claim upon return to Canada. To curb abuse of this provision, Bill C-31 extends the absence period to one year and disallows any further claim to a specialized and independent tribunal. The claimant is allowed only a determination by the Minister and is not allowed to present new evidence that could reasonably have been obtained for the prior hearing.

These provisions are excessive and will prevent genuine refugees from having access to proper determination processes. At the moment, legitimate claims are denied at first instance for a variety of reasons: they may not be referred through error of fact, they may be withdrawn or declared abandoned through inadvertence or through poor counseling, or they may be denied through insufficiency of evidence notwithstanding that the claimant has a well-founded fear of persecution. Also, a change of circumstances in the country of nationality may turn a marginal claim into a strong claim.

Bill C-31 does not provide for an overseas determination process parallel to the inland process. Until such overseas process is provided, there will continue to be a flow of claimants seeking access to the inland process, and improper denial of access will place genuine refugees at risk.

Recommendation

The Section recommends that the provisions of Bill C-31 limiting access to the inland refugee determination process to once in a lifetime be revoked and reconsidered.

5. Removal before Federal Court Review.

Bill C-31 provides for removal of permanent residents and failed refugee claimants prior to completion of the judicial review process before the Federal Court. This is unacceptable.

The requirement for leave provides for summary disposition of applications and removes any argument that judicial review unnecessarily delays removal. For refugee claimants, the risks of being returned to the country of potential persecution, before any Federal Court review, outweighs any benefits of potential removal. For permanent residents, the dislocation, hardship and cost of removal are substantial and should not be undertaken before the final determination of a person's status.

Summary

Bill C-31 is flawed legislation that seriously and negatively diminishes established rights of immigrants and refugees in Canada. It is aimed at reducing established rights of status and diminishing processes designed to protect those rights. It is aimed at leaving the fate of individuals to practically unchallengeable determination by department officials and is for that reason inconsistent with the image of fair-minded reasonableness which we want to project to ourselves and to the world.

Yours truly

Elizabeth D. Chow-Bryson,
Chair, National Citizenship and Immigration Section

c.c. Joan Atkinson, A/Assistant Deputy Minister, Policy and Program Development