Submission on Bill C-31

Immigration and Refugee Protection Act

CITIZENSHIP AND IMMIGRATION LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing over 36,000 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 Citizenship and Immigration Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement by the Citizenship and Immigration Law Section of the Canadian Bar Association.

Submission on Bill C-31
Immigration and Refugee Protection Act

I. INTRODUCTION AND EXECUTIVE SUMMARY

Bill C-31 is a comprehensive rewriting of the *Immigration Act*, the first since the 1976 Act. As the most important legislation in the immigration field in more than twenty-five years, it deserves critical evaluation.

Bill C-31 is the culmination of the three-year legislative review project commenced in 1997 with the study of the Legislative Review Advisory Group (LRAG)[1], followed by public consultations by then-Minister Robillard and the resulting Minister's policy paper (the 21st Century Report)[2]. In light of the comprehensive discussions that have preceded the legislation, the National Citizenship and Immigration Section of the Canadian Bar Association (the Section) regrets that Bill C-31 would have such a negative impact on rational and defensible immigration policies and practices.

The Bill provides a disappointing and unacceptable *Immigration Act*. It would bring little improvement over the current Act, and cause considerable harm to established and proven processes and rights. The legislation is particularly enforcement-oriented, attacking the rights and status of immigrants in Canada, the function of

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1 Immigration Legislative Review Advisory Group, *Not Just Numbers: A Canadian Framework for Future Immigration*. *(Ottawa: Minister of Public Works and Government Services Canada, 1997).*

2 Citizenship and Immigration Canada, *Building on a Strong Foundation for the 21st Century: New Directions for Immigration and Refugee Policy and Legislation*. *(Ottawa: Minister of Public Works and Government Services Canada, 1998).*

independent tribunals in enforcement and review processes, and the role of discretion in ensuring that denial of applications or revocation of status are appropriate to the individuals affected.

No legislation package is wholly bad — elements of Bill C-31 attract favourable comment:

- The Bill is concise and organized rationally, separating refugee and protection matters from immigration concerns.
- Consolidating processes for protection review in the independent protection tribunal is appropriate and administratively advantageous.
- Raising the age of family class dependents to 22 years, recognizing common law relationships, and raising the threshold for removal of permanent residents on grounds of criminality (more consistent with the *Criminal Code*) are examples of positive changes to current legislation.

The positive changes are, however, unfortunately overshadowed by the extensive and more profound changes to the rights of immigrants and the processes for determining those rights.

The impact of Bill C-31 is substantial. At the general level, the Bill would:

- Redefine immigrant status such that permanent residents cease to have distinct or permanent status. Bill C-31 does not regard immigrants as members of the "Canadian" community, but rather of the community of visitors, foreign students, refugees and refugee claimants, "illegals" and other "foreign nationals".

- Transfer review and enforcement powers from independent tribunals and the Court to the Minister and the Department, leaving immigrants and persons in need of protection vulnerable to loss of status and denial of applications without meaningful recourse, and in particular cases without any review at all. Decisions on status can be determined through inflexible rules that are

incapable of intervention by the court or tribunals, regardless of compelling circumstances of the case.

- Empower officers to deny right of entry to permanent residents without hearing, to compel administrative examination of residents at any time on mere suspicion of inadmissibility, and to make determinations of inadmissibility or loss of status insulated from review or for which review provisions are inadequate.

- Systematically remove discretion from the decision-making processes. The humanitarian and compassionate discretion of the Minister, an essential tool to accommodate unforseen or deserving cases of admission or removal, is redefined to be available only in limited cases. Access to this discretion is not only limited to particular cases, but the Minister is given the extraordinary authority to ignore any application.

A. Bill C-31 abandons established principles

Previous legislative packages (Bills C-55, C-86, C-44) provided substantial amendments to corners of the 1976 Act, addressing specific issues such as refugee determination, immigrant selection and enforcement, but did not alter the basic framework or principles that guided the content of the legislation and subsequent amendments. Those principles were that:

- Immigrants and refugees have meaningful rights.

- Immigrants have a right of entry to Canada and security of status to pursue livelihood, schooling, and raising their families without threat of refusal of entry or sudden deportation without fair and proper consideration of the balance between their establishment and the security of society.

- Refugees have the right of access to independent determination hearings and protection from deportation to country of persecution, except in accordance with Convention provisions for paramountcy of security of Canada.

- Loss of immigrant and refugee status is of such significance that each immigrant or refugee should have the circumstances of their case reviewed by an independent tribunal to assess the appropriateness of deportation.

- General and wide discretion should be available to accommodate unforeseen or deserving circumstances. Discretion may facilitate entry of individuals for temporary or permanent purposes notwithstanding provision of the Act or regulations, or may facilitate persons remaining in Canada, upon consideration of all the circumstances of the case.

These are fundamental principles on which to build an effective and fair *Immigration Act*. The independent review of decisions to remove or deny status, and the use of discretion to facilitate appropriate decisions, are a recognition that immigration decisions affect lives in substantial and permanent ways. Where the substantial rights of immigrants and refugees are put in issue, the strict letter of an inflexible statute cannot do justice to every case. Discretion and the independent consideration of the circumstances of the case safeguard the integrity of decisions to refuse entry, deny or strip status, and deport.

Bill C-31 punctures these principles in a piecemeal fashion, collectively resulting in serious impairment of fair processes for selection and enforcement, entry and re-entry of immigrants and even of permanent residents.

The main thrust of Bill C-31 is enforcement through fast decision-making in preference to fair decision-making. Laws which eliminate discretion, end or diminish review, and consolidate decision-making in the Department will undoubtably expedite difficult processes of defending refusals, or removing status

and effecting deportation, just as they will undoubtably result in unwarranted, inappropriate and harmful consequences. Bill C-31 is replete with provisions that "shortcut" important decision making processes. Amongst other things, it would:

- require leave of the Federal Court for all applications for judicial review of **any** decision under the *Immigration Act;*
- allow port of entry officers to determine inadmissibility and to deny entry of permanent residents, without adequate appeal;
- allow deportation of permanent residents without discretion and without any hearing or independent review on equitable grounds, based solely on a statutory definition of "serious criminality";
- impose mandatory two year penalty of inadmissibility for officer determinations of misrepresentation, without right of review;
- allow loss of status through counting days of residence, rather than determining intent to abandon;
- allow deportation of permanent residents without any independent appeal in law or equity following determination of security, human rights, or organized criminality inadmissibility;
- allow deportation of permanent residents and refugees before judicial review of Department or tribunal determinations;
- increase use of *in camera* hearings without disclosure of evidence to the person concerned., to obtain removal orders; and
- presume loss of status upon mandatory expiry of PR status documents, expected to be every five years.

The Section recognizes that efficiency in determining issues of status or loss of status has political and fiscal value. There must, however, be a balance between expediency and preservation of sufficient process to ensure the appropriateness of often difficult decisions. Parliament, the Minister and the Department have a responsibility to ensure that these decisions are made fairly. Bill C-31 seeks to achieve a false efficiency by sacrificing review processes and role of discretion in a manner inconsistent with the responsibility for fair and defensible decision making.

It is the Section's opinion that this approach is manifestly harmful to the principles of fairness, to the respect that should be accorded to the status of immigrants or persons in need of protection and, not in the least, to the persons who will be genuinely harmed in the consequences.

The Section maintains that the proposed legislative framework does not address Canada's need to compete in the international arena for qualified immigrants, foreign workers, and foreign capital. Canada is not meeting current immigration targets and is suffering reduced levels of independent and business immigration in particular. The 2000 Report of the Auditor General of Canada highlights serious concerns with the level of resources and quality of processes for selection[3], yet Bill C-31 offers no structure addressing the need to restore levels of qualified and valuable immigrants.

Canada is considered an attractive destination for immigrants. It is consistently designated by the United Nations as one of the top countries to live in. However, in the new knowledge-based economy, skilled workers and business people will migrate to those countries which are easiest to access, and which facilitate and respond to the needs of those willing to relocate internationally. The enforcement focus of Bill C-31, and the significant stripping of permanent resident rights and protections sends a negative message to the global community, that Canada is not willing to provide immigrants with the rights and protections of permanent status, in exchange for their skills, capital and commitment.

With Canada now competing for globally skilled talent, international investment and human capital, the Section believes that careless application of overly broad inadmissibility and enforcement provisions in Bill C-31 will neutralize efforts to make Canada competitive in the global economy. We suggest that the Bill sends the

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[3] *Office of the Auditor General of Canada, Report of the Auditor General of Canada - April 2000. (Ottawa: Minister of Public Works and Government Services Canada, 2000), at 3-13 to 3-22.*

message that Canada is not open and ready to engage in the competitive international business arena.

B. Bill C-31 is "tough" legislation

The Minister describes Bill C-31 as "tough" legislation, citing the recent experience of organized people smuggling and criminal abusers of our immigration system as targets of the legislation. The Bill predictably creates new offences and grounds of inadmissibility for participation in organized schemes of human smuggling, increases in the financial and incarceration penalties for engaging in schemes of illegal entry, and broadens the authority to detain individuals whose identities are unproven.

In response to this public justification of the "tough" approach, the Section notes:

- The Fujian migrants have been dealt with forcefully and effectively under current legislation, which has not been found lacking. Since the second boatload, all adult migrants have been detained without release and, save for the few who successfully pursued refugee claims, are now being deported in considerable numbers. The challenge to processing of the "boat" migrants is not the law, but failure to have adequate resources for efficient processing of a sudden and public influx of migrants. The solution is resource based, not law based.
- As of date of drafting this submission (mid-summer 2000) there has been no repeat of the Fujian boatload arrivals. Application of existing law has accommodated the interests of the Government in dissuading further landings and the obligation to process the migrants according to the rule of law.

The promotion of Bill C-31 as tough legislation in response to illegal migration or criminal abusers is insufficient justification for the whole legislative package. It is inexplicable that, in a year with so much public and political focus on organized illegal migration and the refugee determination process, it is permanent residents

(and their children) who are the focus of Bill C-31 and who would suffer the greatest loss of rights and procedural protections. The Section cannot find just rationalization for the scope and substance of these changes. The existing Act balances the interests of society in preserving safety and security and the interests of the individual in preserving established rights much better than the proposed scheme.

C. Bill C-31 is framework legislation, with unlimited regulatory powers

Bill C-31 is characterized as "framework" legislation — providing the basic framework of rights, obligations and processes, with details to be filled in later through regulations. The Government asserts that this is consistent with the current Act and Regulations, which must be read together for complete rendering of the immigration scheme. However, Bill C-31 is markedly different from the existing Act in its scope of authority to make regulations. Section 114(1) of the current Act follows the conventional format of specifying discrete matters for which the Governor in Council may make regulations. The listed areas are specific and delineated. Cabinet is limited to making regulations within those specific areas, and not beyond. The authority to regulate does not extend to modification of substantive rights attached to status, such as right of entry, grounds of inadmissibility, or grounds for loss of status.

Bill C-31 empowers the Governor in Council to regulate broadly in matters directly defining rights of status. The Section strongly objects to the proposed framework structure, which leaves too much to be determined by subsequent regulatory packages. Bill C-31 gives the Governor in Council unfettered power to regulate fundamental rights of immigrants and others — rights presently entrenched in the Act. The power to regulate is expansive — the Governor in Council can usurp the role of Parliament in modifying legislation respecting substantial rights attached to status.

Specifically, Bill C-31 empowers the Governor in Council to regulate with respect to:

- any matter relating to application of the power of officers to compel examinations of any foreign national (including permanent residents) at any time, on mere belief of inadmissibility. (section 17)
- any matter relating to the application of provisions for the right of entry of permanent residents into Canada, and the power of officers to deny entry on mere belief of not meeting the requirements of the Act. (section 23)
- circumstances under which status may or shall be issued, renewed or revoked. (section 28)
- application, exemption and definition of grounds of inadmissibility or removal. (section 38)
- circumstances under which discretion may be exercised to not terminate status, or which removal may be stayed, or for which status may be reinstated. (section 49)
- application of the power to arrest, detain, review and release persons from detention, including permanent residents, and directing factors to be considered by an independent tribunal or officer in determining release. (section 55)

In addition to these specific regulatory powers, the Governor in Council is generally empowered to "make any other regulations that the Governor in Council considers necessary..." (section 5)

These are substantial matters relating to fundamental status rights of individuals in Canada, particularly permanent residents, which have not previously been subject to regulatory amendment. These matters are properly entrenched, clarified and defined in the Act, and subject to Parliamentary review, rather than left to the shifting tenor of successive Cabinets and Ministers.

D. Bill C-31 limits use of discretion

Discretion is the oil that keeps the machinery of immigration law turning smoothly. Discretion allows the immigration processes to accommodate circumstances that should properly not be subjected to the strict reading of the law. Under the current Act, discretion is delegated to officers, to supervisors and managers abroad and in Canada, to senior officials and to the Appeal Division. Discretion can facilitate the temporary or permanent entry into Canada of persons who would otherwise be inadmissible or outside of selection criteria, and discretion can relieve individuals within Canada from strict provisions for loss of status or removal.

The availability and exercise of discretion is essential to the proper and fair operation of immigration law. In its absence, the law becomes inflexible and the inadequacies of the strict letter of the law become glaring. It is nature of immigration law that human situations regularly arise that require the exercise of discretion for resolution. The exercise of the discretion is not avoidance of the law, it is rather the proper administration of the law.

The cornerstone provisions for the availability and exercise of Minister's discretion under the current Act are found in s.114(2) of the Act and Regulation 2.1:

> s.114(2)
>
> The Governor in Council may, by regulation, authorize the Minister to exempt any person from any regulation made under subsection (1) or otherwise facilitate the admission of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.
>
> Regulation 2.1
>
> The Minister is hereby authorized to exempt any person from any regulation made under subsection 114(1) of the Act or otherwise facilitate the admission to Canada of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

These provisions emphasize that the current Act provides for the possibility of exercise of discretion in **any case**, with respect to **any person**. The Act imposes no

restraint on the decision maker. All circumstances are taken into account and best judgement exercised.

The exercise of the discretion is often mis-stated. An applicant requesting the consideration does not prevent or delay removal. The application has no effect on a valid removal order. The Minister is free to proceed with removal before determining the application. The Minister is only obliged to consider the application within a reasonable period of time, whether before or after removal. No Court and no person can compel the Minister or their delegate to exercise the discretion one way or another.

The Section strongly objects to the language of Bill C-31 respecting the availability of discretion, and the apparent intent to narrow its availability. Limiting the general availability of discretion (or even the possibility of discretion being considered) will have profound impact on the operation of the legislation and its ability to deal adequately with cases requiring and deserving the exercise of discretion.

Careful reading of Bill C-31 discloses that discretion is intended to be constrained, perhaps severely. The hallmark of discretion is that it is an unfettered and unconstrained consideration of whether the circumstances warrant relief. Sections 21 and 22 of the Bill give the initial impression that the broad discretion to grant temporary or permanent entry is continued, but section 23 then provides that regulations can be made respecting any matter relating to the exercise of discretion. Section 21(2) expressly fetters the discretion of officers considering temporary entry by requiring them to act in accordance with Minister's instruction. Section 22, respecting Ministerial discretion to facilitate permanent entry, empowers the Minister or her delegate to ignore an application, not even to give the application the benefit of consideration. These are unacceptable constraints on the need for flexibility and the unfettered discretion available under the current Act.

The Section has often repeated that hard and fast rules, however cleverly crafted, will inevitably work an injustice in the field of immigration law. The 21st Century Report stated the same:

> 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.[4]

Placing front-end restrictions on the availability of discretion brings no benefit, only detriment. Bill C-31 strongly suggests that the availability of discretion may be fatally constrained, but does not tell how, or to what degree, or in what circumstances. The Section **strongly opposes** the fettering of discretion, and finds the language of Bill C-31 unacceptable for its failure to clarify and define the intentions concerning discretion. The Section is apprehensive that the intentions are to deny consideration of discretion to individuals who are without status in Canada, or who are already under a removal order. These are precisely the cases where the need for discretion can be most compelling, and where favourable discretion has been and should continue to be exercised in appropriate circumstances.

Exercise of discretion to facilitate temporary or permanent entry into Canada in appropriate circumstances is a vital and necessary tool in immigration law. There is no requirement for restricting access to discretion or fettering of discretion. The authority is already controlled by the fact that only the Minister or delegates can exercise the authority, and cannot be compelled to do so in any particular direction.

E. The Missing Law

The Bill C-31 "framework" lacks critical detail necessary to fully appreciate the scope of legislation. The framework is also lacking reference to key provisions

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4 *Supra*, note 2 at 57.

promised by the Minister when the legislation was tabled. We quote two passages from the Minister's April 6, 2000 communiqué:

> The immigration system will also be bolstered by denying sponsorship to those convicted of spousal abuse, those in default of spousal or child support payments and those on social assistance.[5]

The Bill provides no language of these intended provisions, or the rationale underlying them. They are matters apparently left to yet undisclosed regulation. The scope and discretion for application of the provisions are matters of considerable importance. In circumstances of marital breakup, allegations of abuse may be genuine or fabricated. Genuine abuse may be modest or severe, and in either case may be isolated and unrelated to the circumstances of current sponsorship of a spouse. Circumstances of social assistance or failure of support may be explainable, temporary and without fault of the intended sponsor.

> The Minister also promised supporting regulations over the coming months. . . These will include . . .new selection criteria to attract more highly skilled and adaptable independent immigrants, and the creation of an "in-Canada" landing class for temporary workers, foreign students and spouses already established in Canada. . . The expanded family class will . . .allow spouses and children to apply for permanent residence from within Canada. . .

Selection criteria for classes of immigrants are currently covered by regulation and so are not expected to be reflected in Bill C-31. The entitlement of Canadians and permanent residents to have spouses and dependent children processed for landing within Canada is a substantial amendment to the Act that should be covered within the Bill, but is not.

The Section recommends that these substantial rights for reunification of the family within Canada be recognized and defined within the Act. The Section has concern

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[5] Citizenship and Immigration Canada, News Release 2000-09, *Caplan Tables New Immigration and Refugee Protection Act*, April 6, 2000.

that the "in-Canada" landing class may have restrictions that are not apparent from the news release.

Unlike the current Act, Bill C-31 has no provisions on the important issues of the circumstances under which removal orders shall be deportation orders as opposed to departure orders, and the circumstances under which the orders can be issued by an officer without hearing, even to permanent residents. These are fundamental issues covered by the current Act but omitted entirely by Bill C-31. The Section strongly recommends that the Act be amended to provide for these matters.

F. Transitional Provisions

The Section is perplexed by the inconsistent treatment of refugee claimants and permanent residents engaged in tribunal proceeding when the legislation comes into force. Sections 186 and 190 provide that refugee claimants engaged in refugee determination hearings under the current Act continue under the current Act upon coming into force of this Bill. On the other hand, persons engaged in Appeal Division proceedings (such as permanent residents appealing deportation) apparently have their right of appeal terminated, by the new legislation coming into force.

The general principle governing the impact of new legislation is that vested rights should not be affected. An appellant who has exercised the right of appeal, and is engaged in proceedings through submission of evidence, is exercising a vested right that should not be prejudiced by the passage of new law. Immigration has respected the principle of vested rights, for instance by applying prior selection law in immigration applications postmarked prior to a new law coming into force. Most recently, in Bill C-86 appellants before the Appeal Division were entitled to continue the exercise of the vested right so long as evidence had been adduced prior to the new law coming into force.

There is no justification for inconsistent treatment between refugee claimants and persons before the Appeal Division, and their entitlement to continue proceedings when any new law comes into force. There is obvious prejudice to persons who have committed finances, energy and time to their appeal and who have little control over the timing of either the Appeal Division schedule or the coming into force of legislation.

The Section strongly recommends that appellants before the Appeal Division be entitled to continue proceedings under the current Act if substantive evidence has been adduced before the new legislation comes into force.

G. Specific areas for discussion

The balance of the submission addresses specific areas of the proposed legislation that raise considerable concerns and require detailed response. The balance of this introduction summarizes these areas of concern.

i) Judicial Review

Review of overseas decisions, requirement for leave to commence judicial review of any decision under the Act. (Division 8, sections 66 - 69)

Deportation of permanent residents and refugee claimants before judicial review proceedings

Bill C-31 imposes new requirements and enforcement provisions that will prevent or significantly impair the right of persons to seek judicial review of immigration decisions. Immigration decisions become insulated from processes of corrective judicial review.

The Section recommends, *inter alia*, that

- no requirement for leave should be imposed on applicants seeking judicial review of overseas decisions;

- the Department adopt overseas processes that include taking a proper record and accommodating the presence of counsel at interview (as in Quebec selection interviews), with the intent of reducing circumstances giving rise to contested decisions; and
- at a minimum, the leave process require the Department to provide an adequate record of the proceedings, and provide adequate time frames to retain and instruct counsel and prepare adequate affidavit and supporting documentation.

Part II includes comprehensive recommendations on judicial review.

ii) Permanent Residents

Bill C-31 is enforcement legislation. Its severest impact would be on the rights and status of permanent residents. The proposed legislation attacks the very meaning of immigrant status in Canada, the function of independent tribunals in enforcement and review processes, and the role of discretion in ensuring that denial of applications or revocation of status are appropriate to the individuals affected.

The Section recommends that permanent residents be guaranteed the right of entry to Canada and not be subject to deportation without an independent review on the merits of the case, with consideration of the circumstances of both the individual and the events giving rise to the removal order. Part III is a comprehensive discussion of the impact of Bill C-31 on permanent residents.

iii) Inadmissibility and Offence Provisions

Bill C-31 creates new categories of inadmissibility and offences, generally applicable to "foreign nationals", including permanent residents, visitors, workers, students and claimants and illegals. The new grounds and offences are broadly drafted, carry more severe consequences and are applied with less or no flexibility.

The Section recognizes the need for enforcement action to preserve public safety and deterrence, and supports enforcement process when conducted for proper purposes, through clearly defined laws, and in accordance with the *Charter of Rights* and principles of fundamental justice. We have concerns, though, with the broad language used to describe offences in Bill C-31. Our detailed comments are in Part IV.

iv) Protection of Information

Bill C-31 replaces the existing scheme for *in camera* inadmissibility proceedings against permanent residents with the scheme previously applied against persons with temporary or no status. The scheme diminishes the ability of persons to respond to evidence of inadmissibility based on security or criminality grounds. The Section believes that Division 9 of the Bill contravenes recognized principles of procedural fairness and is fatally flawed.

v) Protection and Refugees

Part 2 of Bill C-31 provides the scheme for determining protection and refugee status. It creates new tribunals and new provisions for access to determinations and termination of claims or status. Canada's refugee determination system should be based on four objectives: it should be fair; simple, comply with international law standards; and be consistent and integrated – not working at cross purposes. The Section's recommendations, in Part VII of this submission, flow from these objectives.

II. JUDICIAL REVIEW OF IMMIGRATION DECISIONS

A. Review of overseas decisions

i) Overview

When an overseas visa officer refuses an applicant for immigration in the independent or business (economic) categories, the applicant can seek judicial review in the Federal Court of Canada. This is not an appeal, it is a review of the decision by the Federal Court for errors of law or breach of fairness.

Bill C-31 will insulate visa officer refusals from judicial review by imposing a Federal Court leave requirement for all refused applicants. The leave requirements are unfairly difficult for overseas applicants to meet, so that judicial reviews will be dramatically reduced simply by denying access to the process.

The 2000 Report of the Auditor General noted that decision-making abroad in the selection of immigrants was open to criticism of the consistency and quality of decisions made. The *Report* noted that

- employees were overtaxed;
- the Department did not have the resources and operational capacity to carry out required tasks;
- 210 Canadian officers and 980 locally engaged staff are employed in 81 offices, processing annually 900,000 applications for immigration, visiting, working and studying;
- backlogs and delay were impairing the effectiveness of officers; and
- a framework for quality assurance was essential to ensure the quality and fairness of decisions, but that the Department had no such framework.[6]

[6] *Supra, note 3, at 3-7, 3-18 to 3-18, 3-21.*

In these circumstances, imposing a leave requirement to shield officer refusals from review is a glaringly inappropriate response to the problem of inconsistent quality and fairness of decisions, and the Auditor General's recommendations for improved resource allocation, improved training of officers and increased number of officers. Imposing the leave requirement denies recourse to the refused applicant and does not address the root causes of the serious concerns with quality.

Federal Court statistics disclose that, in 1999, the number of challenges initiated to visa officer decisions was only 813, compared to 4,471 challenges to inland refugee decisions and 1,014 challenges relating to other inland decisions. As of June 30, 2000, the number of initiated challenges to visa officers' decisions was 439, compared to 2,288 for refugee determinations and 674 for other inland decisions.

Department statistics disclose that refusals of overseas applications have been increasing yearly. In 1997 and 1998, of 5,582 and 6,587 immigrant visa applications rejected abroad, Federal Court challenges numbered only 405 and 687, respectively. Only 10% of overseas refusals are challenged by judicial review proceedings.

Denial of access to the judicial review process will remove from overseas decisions the only effective mechanism for review or quality assurance. Judicial review performs the dual purpose of relieving applicants from the consequences of bad decisions and providing guidance to the Department officers in fair processing and application of the law. Until adequate resources and infrastructure are provided to visa offices, a mechanism for ensuring quality and fairness of decisions is essential.

ii) Bill C-31 proposals

In section 66, Bill C-31 imposes a leave requirement prior to judicial review of any decision under the Act, including decisions by overseas officers. While the leave requirement exists currently for decisions made by inland immigration officers or tribunals, it has never applied to overseas visa decisions. The leave requirement will effectively prevent access by overseas applicants to the judicial review process.

Difference between inland and overseas decisions

The Department suggests that the requirement for leave is simply aimed at creating consistency for challenges to all immigration matters. This is a superficially attractive argument, but there are marked differences between inland and overseas decision-making processes that prevent overseas applicants from meeting the challenge of obtaining leave:

- Inland decisions are mainly before tribunals where the person concerned is represented by counsel, who is present throughout. A Department representative or Refugee Hearings Officer is also present. Proceedings are controlled by an independent decision-maker. Proceedings are recorded, so transcripts and records of evidence are available to the Court and parties.

- In overseas decisions, the applicant is not allowed to have counsel present and there is no recording of proceedings. The only parties involved are the applicant and the officer/decision-maker. The visa office file can often be a partial and inadequate record of the proceeding.

- The Federal Court has commented that review of overseas decisions would be assisted greatly by a record of proceedings, even if by simple tape recording. Often the dispute is grounded in situations exacerbated by lack of knowledge of proper legal procedures, or where there may simply be a dispute in what was said and what was heard. Often it is the applicant's word against the Visa Officer's. Yet the Department has not adopted recording of proceedings and has discouraged the participation of counsel. In a March 2000 *Operations Memorandum* (OP 00-04) the Department stated, *inter alia*:

PRESENCE OF COUNSEL
The general approach is to limit attendance at interviews to the individual applicants and visa officers should follow this approach which appears to be supported by case law in the Federal Court. The doctrine of fairness does not require that counsel be present at interviews nor does the Immigration Act provide the right to counsel in this context.

RESPONDING TO CASE STATUS INQUIRES
Any complex or in-depth inquiry or discussion related to an individual case should be accepted and responded to in writing only.

- The difference in overseas and inland procedures makes it extremely difficult for the overseas applicant to meet the filing and documentary requirements to obtain leave. The same difficulties are not faced by inland applicants. Under current legislation (where no leave is required) the overseas office must provide the Court and applicant with its overseas file, shortly after judicial review is commenced. Both the applicant and visa officer then file affidavits, upon which each may be cross examined. Cross examination is generally where the merits of the review become fully apparent — it is necessary to overcome the insufficiencies of the record and to resolve conflicts of evidence.

- Under the leave process, there is no requirement for the overseas office to provide its file, no cross examination on affidavits, and a much reduced time frame for filing affidavits and perfected written argument. The applicant faces the challenge of generating a record from unavailable sources, drafting and swearing sufficient affidavits for filing in a foreign land, often prepared through translation and requiring delivery from thousands of miles away, and perfecting the written argument and documentary evidence within a mere 30 days of commencing the judicial review. The challenge is enough for inland applicants, where translation of evidence or affidavits is less required or demanding, where the record of proceeding is full and available, and where the applicant has ready access to counsel. For overseas applicants, the challenge is prohibitive and simply denies access to the judicial review process.

The imposition of the leave requirement does not bring consistency or fairness. For overseas applicants, imposing the same leave requirement as for inland applicants is an unfair and prohibitive barrier to judicial review that is certain to significantly eliminate review of Visa Officer decisions.

Nor can the imposition of leave requirement be justified as a limit on uncontrolled resort to judicial review. Only 10% of overseas refusals are taken to judicial review, constituting less than 20% of the Federal Court immigration caseload.

We note the Auditor General's observation that, as overseas applications become backlogged and refusals rise, judicial review applications increase the workload on officers who must defend their refusals and participate in the judicial review process.[7] The Section submits that it is reduction of that workload, and a strategy to insulate all Immigration decisions from Federal Court review, that motivates the imposition of the leave requirement.

RECOMMENDATION:

The Section recommends that:

- **No requirement for leave should be imposed on applicants seeking judicial review of overseas decisions.**
- **The Department adopt effective alternative mechanisms for review of overseas refusals. The adoption of less formal Alternative Dispute Resolution (ADR) processes, or utilization of an Ombudsman with review and binding recommendation authority may provide an effective alternative to the expensive, time consuming and labour intensive process of judicial review.**
- **The Department adopt overseas processes that include taking a proper record and accommodating the presence of counsel**

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7 *Supra*, note 3, paragraphs 3.39 and 3.88.

at interview (as in Quebec selection interviews), with the intent of reducing circumstances giving rise to contested decisions.

- **The question of imposition of leave requirement be revisited only after adoption and assessment of alternative review mechanisms and processes for generation of adequate records of determinations.**
- **If a leave requirement for overseas decisions is imposed, it be structured to accommodate the particular circumstances of overseas applicants and the overseas decision-making process. At a minimum, the leave process should require the Department to provide an adequate record of the proceedings, and provide adequate time frames to retain and instruct counsel and prepare adequate affidavit and supporting documentation. The time available to instruct counsel in section 66 (3)(b) should be increased from 15 days to 30 days, with 60 days thereafter for completion of affidavits and filing of supporting documentation.**

B. Deportation of permanent residents and refugee claimants before inland judicial review proceedings

i) Overview

For permanent residents and refugee claimants facing deportation from Canada, application for Federal Court judicial review of tribunal or officer decisions is the last, and under Bill C-31 perhaps the only, opportunity for challenge to the legality or fairness of decision to remove. The rights and entitlements lost by permanent residents through removal, and the risk of harm to a wrongfully denied refugee claimant, can be substantial. Judicial review of the processes and determinations is accordingly an important avenue for protection against flawed determinations and prevention of inappropriate harm.

Bill C-31 provides for the expeditious execution of removal orders against all "foreign nationals", without regard to whether judicial review proceedings are commenced or in process. No special consideration is given to permanent residents or refugee claimants relying on judicial review to challenge the lawfulness or fairness of the decisions and processes undertaken to effect loss of status.

For permanent residents in particular, removal without opportunity to seek judicial review can mean removal without any judicial or independent review process at all, and without opportunity to seek intervention of the Court for even a temporary stay of the removal pending judicial review process.

This expedited removal of permanent residents and claimants deliberately impairs or prevents these persons from exercising their lawful right to seek judicial review of decisions that remove significant rights and have significant impact upon their security of person. The expedited removal casts doubt on the sincerity of government assurances that these individuals have recourse to judicial review to challenge decisions made through processes that themselves are being "streamlined" by Bill C-31, to the detriment of procedural safeguarding.

This issue of removal of immigrants and claimants prior to judicial review overlaps a number of areas of concern. The issue is relevant to discussion of grounds of inadmissibility, to the sufficiency of processes for determining and reviewing loss of status or grant of protection to persons in need, and to the processes for issuing and enforcing removal orders. Bill C-31 brings substantial enforcement-driven changes to each of these areas, and accordingly places higher value on the need for accessible review by judicial authority.

ii) Current Law

Immigrants and refugee claimants facing removal can apply to Federal Court for judicial review of the removal or denial of appeal (if any), but must first obtain leave

of the Court. The leave process is summary, determined without oral hearing and without written reasons, and requires written materials and supporting documentation to be filed and served against a strict timetable set by the *Federal Court Immigration Rules*. The process is fast — application must be commenced within 15 days and perfected within the next 30 days. Denial of leave is final — there is no further recourse. If leave is granted, the judicial review may proceed for hearing and determination by the Court. A review that discloses errors of fact, law or breach of fairness results in the decision to remove being set aside and a new determination being ordered, in accordance with direction of the Court.

The considerable majority (approximately 90%) of leave applications are denied, without reasons, in a timely manner. The leave process is a court management tool, defended as preventing frivolous cases from clogging the system. The Section has long criticized the leave requirement for its inability to justify denial of leave to applications of apparent merit.

The current Act recognizes that removal orders are issued to claimants and immigrants at an early stage of enforcement proceedings, before intended review and appeal processes are undertaken, and before judicial review proceedings. The Act provides that removal orders against claimants and immigrants shall not be executed (are "stayed") while determination and appeal processes are ongoing. Section 49 of the Act then protects classes of claimants and immigrants from removal during the process of leave application to Federal Court, by extending the statutory stay. If the leave application is denied, the removal order is enforceable. If leave is granted, then the stay continues during the Court's consideration of the judicial review.

For immigrants and claimants who do not benefit from the statutory stay provided by section 49, an application for a "judicial" stay can be made, asking the Court to order a stay of removal while judicial review or leave is undertaken. These are most difficult applications, usually brought at the eleventh hour and requiring an emergency hearing before a Judge, often in evening hours. Where the review

concerns legitimate issues and established immigrants facing loss of status and family separation, or claimants asserting a risk of persecution, the Court can maintain the *status quo* by ordering a stay of removal pending the judicial review process.

The end result is that by statute (section 49), by judicial order, or by decision of the Department to not rush enforcement pending judicial review, immigrants and claimants engaged in judicial review proceedings are often not removed from Canada pending judicial review proceedings.

660 ***iii) Bill C-31 proposals***

Bill C-31 does not provide for any stay of removal order for permanent residents or claimants, pending judicial review proceedings. The provisions of section 49 are deleted, including provisions that allowed permanent residents and claimants at least a seven day stay, to allow instructing of counsel and application for judicial stay.

The Bill does not distinguish between enforcement of removal orders against permanent residents and claimants, and against "foreign nationals" generally.

The Bill encourages the execution of removal orders expeditiously, before permanent residents have had opportunity to pursue or complete judicial review proceeding, by:

1. making removal orders enforceable on failure of appeal, or immediately if no
670 appeal is available. "Appeal" does not include judicial review. [section 43(1)];
2. providing that removal orders "must" be enforced as soon as is reasonably practicable [section 44(1)]; and
3. providing that a permanent resident loses status (and so is unable to continue employment, or have any right in Canada) upon the removal order being enforceable, (before judicial review).

iv) CBA concerns with the removal of permanent residents or refugee claimants prior to judicial review proceedings

The blanket denial of statutory stays of removal pending judicial review of permanent resident removals will have serious consequences, and is inadequate fair process for three reasons:

1. Review processes under Bill C-31 are inadequate

Bill C-31 is enforcement legislation that has its hardest impact on permanent residents. Enforcement powers are consolidated in the Department and away from the judiciary or independent tribunals, discretion is reduced, jurisdiction of review tribunals is diminished or removed altogether, the grounds for removal are increased and access to humanitarian and compassionate discretion reduced or eliminated altogether. **Under Bill C-31 it is possible for permanent residents to be ordered deported and removed from Canada without any access to review of circumstances, or appeal of fact or law, whatsoever, by anybody.** The enforcement scheme contemplated by Bill C-31 will lead to harsh decisions and inappropriate removals due to failure of adequate process. In these circumstances the value and necessity of judicial review, **before removal**, is manifest. For prevention of unfair and inappropriate removals, and for the purpose of monitoring and assessing the Bill C-31 enforcement scheme, access to judicial review must be enhanced, not diminished.

2. Permanent residents have the least protection from inappropriate removal

At best (when Bill C-31 does not remove altogether the right of appeal), permanent residents have but one hearing to have their removal reviewed in law and equity — the "appeal" to the new Immigration Appeal Division. It is a misnomer to refer to the hearing as an "appeal" as it is the only opportunity for consideration of the circumstances of the case and determination whether removal is appropriate. The only mechanism for review of an Appeal Division decision is by Federal Court

judicial review, by leave. Denial of access to the Federal Court through expeditious removal results in removal being determined in a single hearing, without review.

Contrast this with the reviews available to refugee claimants under Bill C-31. The claimant first presents their case to the Refugee Division, for determination in full hearing. If the claim is denied, the claimant has a right to review by the Refugee Appeal Division. This is essentially a judicial review proceeding before a specialized tribunal, rather than the Federal Court. The Refugee Appeal Division can redetermine the claim and grant protection status, or return the claim for a new hearing. If the Appeal fails, the claimant still has recourse to a Minister's pre-removal risk assessment for need of protection.

The single hearing for determination of removal of permanent residents is miserly by comparison. The consequences of inappropriate removal may not involve risk of persecution, but can be compelling nevertheless. Permanent residents come to Canada through application and selection. They relocate to Canada, establish homes, school their children, take on employment and establish themselves to degrees that may far exceed their connection to country of nationality. This is particularly so with those who come as children of immigrant parents. For permanent residents who may face removal after five, ten, or even over twenty years of establishment in Canada, the forbearance of removal for the sake of summary judicial review is a minimal concession to respect for fair processing.

3. Claimants may be denied access to refugee determination by the specialized Refugee Division

Refugee claimants may be denied access to refugee determination through erroneous officer determinations of ineligibility, or through wrongful officer determinations of misrepresentation. These claimants face removal to countries from which they have an undetermined claim of persecution. Judicial review is the only mechanism for review and correct erroneous decisions to deny the claimant's access to the

specialized determination tribunal. Removal before judicial determination of the decision to deny access places the genuine claimant at risk of persecution.

For permanent residents facing deportation, and for claimants denied access to the refugee determination tribunal, the judicial review process provides a final measure of assurance that determinations have been made fairly and lawfully. Bill C-31 provisions for faster non-discretionary decisions to remove and fewer avenues for appeal render judicial review more valuable and necessary than ever before. Expedited removals prevent these persons from a meaningful, and possibly only, avenue of review of process and circumstances. This is an unacceptable sacrifice of protection from inappropriate state action, for the sake of marginal expediency.

RECOMMENDATION:

Permanent residents facing removal and refugee claimants denied access to the determination process must have a statutory stay of removal order pending application for leave to Federal Court, and for judicial review.

Bill C-31 be amended to include a provision for stay of execution of removal orders, consistent with the following:

Stay of removal order
The execution of a removal order with respect to

(a) permanent residents subject to a removal order that but for this section becomes executable under this Act; and

(b) claimants who are determined ineligible for referral of claim for refugee protection to the Refugee Protection Division, or whose claims are terminated without decision under this Act, and who would but for this section becomes subject to an executable removal order
is stayed:

(i) where the person against whom the order was made files an application for leave to commence a judicial review proceeding under the Federal Court Act or signifies in writing to an immigration officer an intention to file such an application, until the application for leave has been

heard and disposed of or the time normally limited for filing an application for leave has elapsed and where leave is granted, until the judicial review proceeding has been heard and disposed of,

(ii) in any case where the person has filed with the Federal Court of Appeal an appeal of a decision of the Federal Court - Trial Division where a judge of that Court has at the time of rendering judgment certified in accordance with subsection 68(d) that a serious question of general importance was involved and has stated that question, or signifies in writing to an immigration officer an intention to file a notice of appeal to commence such an appeal, until the appeal has been heard and disposed of or the time normally limited for filing the appeal has elapsed, as the case may be, and

(iii) in any case where the person files an application for leave to appeal or signifies in writing to an immigration officer an intention to file an application for leave to appeal a decision of the Federal Court of Appeal on an appeal referred to in subparagraph (ii) to the Supreme Court of Canada, until the application for leave to appeal has been heard and disposed of or the time normally limited for filing an application for leave to appeal has elapsed and, where leave to appeal is granted, until the appeal has been heard and disposed of or the time normally limited for filing the appeal has elapsed, as the case may be.

C. Miscellaneous Provisions

i) Return after successful judicial review

Section 48 suggests that a "foreign national" removed from Canada before a subsequently successful judicial review will be returned to Canada at the expense of the Minister. The language of the section is confusing and renders the section meaningless. The section applies only to persons subject to removal orders "that could not be appealed" and only if the judicial review sets aside "the removal order". Judicial reviews often concern the quality of decision to deny relief, not the validity of the removal order. It is not clear who is meant by persons subject to "removal orders that could not be appealed". Does it mean deported visitors (who have no right under the law to appeal decisions to remove, but who rarely bring judicial review proceeding) and why would they be returned to Canada? The section appears

to have no application to most permanent residents or failed claimants, those with the most need to return to Canada as result of decisions to remove being set aside in judicial review.

The fact that the legislation anticipates removals resulting from flawed decision making is considerable support for the argument that removal should be stayed by statute pending judicial review proceedings by permanent residents and claimants denied access to tribunal determination of claims.

RECOMMENDATION:
Section 48 should be deleted and be redrafted for clear application. Meaningful protection from the consequences of flawed decisions for removal is the provision of proper safeguards before removal, and not the offer of airfare back to Canada.

ii) Stay of execution where other proceedings

The current Act provides that removal orders are stayed where the execution would directly contradict orders of another judicial body or officer:

> 50 (1) A removal order shall not be executed where
> (a) the execution of the order would directly result in a contravention of any other order made by any judicial body or officer in Canada; or . . .

The section commonly has application to persons subject to orders of the criminal courts, including orders for incarceration. Section 44(2) modifies the provision by providing:

> A removal order is stayed if, in a judicial proceeding at which the Minister shall be given the opportunity to make submissions, a decision is made that is inconsistent with the enforcement of the order.

The section provides that removal orders shall take precedence and not be stayed if the Minister was not given the opportunity to make submissions in the other judicial

proceedings. The operation of this provision requires clarification. Will removal orders take precedence over orders of the criminal courts, if the Minister wasn't
830 invited to attend the trial or other proceedings? Is it intended that the opportunity for submissions be systematically extended to the Minister in all criminal proceedings?

RECOMMENDATION:

The Section recommends that section 44(2) be redrafted for clarity of purpose and for application.

III. PERMANENT RESIDENTS — LOSS OF STATUS AND DEPORTATION PROCEEDINGS

A. Overview

The severest criticisms of Bill C-31 regard the treatment of permanent residents facing loss of status, and the processes for issuing and executing deportation orders.
840 Bill C-31 enlarges the grounds of inadmissibility (events which trigger issuance of a removal order) and systematically eliminates or limits the review process (the only avenue for considering all the circumstances of the case to determine the appropriateness of execution by the removal order).

The proposed scheme for enforcement proceedings is in Part I, Division 4 (inadmissibility provisions), Division 5 (loss of status and removal), Division 7 (right of appeal) and Division 9 (protection of information). The scheme is surprisingly and unnecessarily harsh and devoid of flexibility. It provides for:

- Mandatory deportation in predefined cases of "serious" criminality, without any hearing whatsoever into the circumstances of the offense or of the individual.

850 • Appeal from loss of status through non-residency in which the permanent resident can not attend and cannot submit any new evidence to confirm compliance with the Act.

- Loss of appeal rights (on any issue of fact, law or equity) in all cases of inadmissibility on security grounds or serious criminality, without the requirement to obtain a certificate reviewed by the Federal Court or SIRC.

- Appeal Division hearings in which Minister's evidence may not be disclosed to the person concerned, and right to respond is denied.

- Removal of permanent residents and protected persons before judicial review proceedings, even in cases where the person has had no hearing or appeal whatsoever.

- For sponsors seeking to appeal refusals of family class applications from abroad, limitation of appeal rights with respect to refusals on financial grounds, or misrepresentation.

- Compelled examination of permanent residents at any time, not limited to processes of entry or application, and under penalty of $100,000 fine and five years' incarceration.

Most of these changes are well beyond technical adjustments or administrative streamlining — fundamental restructuring eliminates flexibility and fairness, which will inevitably lead to unfair and inappropriate decisions respecting deportation.

B. Need for flexibility

Stripping permanent resident status and executing deportation orders are matters of grave consequence. Deportations can and do result in separation of spouses, including spouses who are Canadian citizens or permanent residents, separation of parent from children, including children who are Canadian citizens, and up-rooting long term permanent residents who may have been resident and raised in Canada from early years and who face return to a country for which they have little connection other than nationality. The barrier of requiring Minister's Consent to return to Canada can effectively result in permanent exile for the deportee.

Removal orders against permanent residents may be issued on a variety of grounds. A resident's record of criminal conduct may give rise to a removal order and consideration of whether public interest in safety outweighs the circumstances of the individual concerned. There may be no criminal conduct whatsoever, but rather

failure to meet terms and conditions of landing, whether innocent or malicious, or determinations that landing was obtained through misrepresentation, which themselves may range from innocent misrepresentations of a technical nature through to serious misrepresentations going to the heart of assessment. Just as the grounds justifying issuance of a removal order vary across a spectrum of serious to non-serious, so the circumstances of individual permanent residents vary dramatically. At one end of the scale, residents may face deportation proceedings almost immediately upon landing in Canada, while in other cases the proceedings may commence years and even decades later, after the person has become firmly established in Canada.

For the past thirty years, the *Immigration Act*, has accommodated the variety of circumstances giving rise to removal orders and the variety of circumstances of individual permanent residents, through a two step process that first considers the narrow grounds for issuing a deportation order, followed by review of the circumstances of the permanent resident concerned. These are the processes of Inquiry and Appeal. In the Inquiry process, only the lawful grounds for issuing the removal order are considered. The order is issued regardless of the surrounding circumstances of criminal offense, regardless of the degree of misrepresentation or breach of terms and conditions and particularly without regard to the individual circumstances of the permanent resident themselves. In the Appeal process in the Immigration and Refugee Board, the particular circumstances of breach and circumstances of the individual are considered. In this manner, our system provides for flexibility of response and exercise of discretion. In appropriate cases, the conduct of the individual and the degree of establishment in Canada will be found insufficient to justify interference in the removal process. In other cases, the independent tribunal may find that the particular circumstances of the individual justifies stay of the removal order, usually on terms and conditions for a number of years. In this manner, our system allows the circumstances of each case to be uniformly considered before determining that execution of the removal order is appropriate.

The process is structured to allow flexibility of response, because justice demands that it be so. The law describes grounds of inadmissibility in broad terms, intended to capture a broad range of conduct by a broad range of individuals. The ease of issuance of removal orders was intended to be tempered by the availability of a review capable of considering all the circumstances of the case in order to separate situations deserving of stay from situations that did not. When the grounds of inadmissibility are severed from the right of review, the system becomes imbalanced, inflexible and unfair.

The recognition of need for balance through consideration of circumstances of the case are by no means unique to Canada. In its 1998 report to Parliament, the Australian Joint Standing Committee on Migration reviewed existing processes for deportation arising from criminality (processes which, unlike Canada, provided for absolute protection against deportation for long term residents) and concluded that provisions for mandatory deportation could not be supported, that the consequences of deportation were so serious as to continue warranting consideration on the merits of each individual case. Under UK law, a deportation order against a person with indefinite leave to remain can only be made after taking into account all relevant factors, including age, length of residence in the UK, strength of connections with the UK, personal history, domestic circumstances, previous criminal record, compassionate circumstances and any representations received on the person's behalf.

In its response to the 21st Century Report, the Section outlined a proposal for enforcement policy.[8] The Section argued for retaining a fair and flexible system of review that need not involve any unwarranted delay.

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[8] *Response to* Building on a Strong Foundation for the 21st Century: White Paper for Immigration and Refugee Policy and Legislation Canadian Bar Association, National Citizenship and Immigration Law Section, (Ottawa: Canadian Bar Association, March 1999), Annex 2.

> 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.[9]

The consequences of implementing Bill C-31 as drafted will be increased deportations, increased applications to Federal Court for reviews that will prove fruitless in the face of strict legislation, and most unfortunately, stripped status and removal of permanent residents who need not be deported from Canada.

We will review specific grounds of inadmissibility and the avenues for review contemplated in the Bill.

C. Misrepresentation as a ground of inadmissibility [section 36]

36.(1) A Foreign National is inadmissible for misrepresentation
(a) For directly or indirectly making a material misrepresentation or withholding information on a relevant matter that induces or could induce an error in the administration of this Act;

"Foreign National" refers to both permanent residents and persons with temporary or no status (visitors, students, workers, illegals, applicants for status). Department officials have acknowledged that the intent is to define circumstances under which misrepresentation by a permanent resident would trigger deportation proceedings, with all other categories of individuals being generally subject to the consequences of misrepresentation in virtually any circumstance. By using the term "foreign national", and with "inadmissibility" referring to both grounds for removal of a permanent resident and denial of entry of all other persons, this section creates confusion. The section needs to distinguish between the cases, firstly with reference to foreign nationals who are not permanent residents, and secondly to permanent

[9] *Ibid*, at 79.

residents, for whom the consequences of misrepresentation trigger removal proceedings.

Under the current Act, a permanent resident who obtains permanent resident status through misrepresentation faces removal proceedings. The Department intends to continue the possibility of removal on these grounds, and to further include a second ground of misrepresentation in the course of a sponsored application. The particular "mischief" relates to permanent residents who participate in submitting fraudulent documents and misrepresenting family membership to achieve otherwise unobtainable immigration for individuals falsely claiming to be family class members. The Section takes no position on this policy decision. There may well be cases where misrepresentation by the sponsoring resident, taken into account with the circumstances of the case, justify a conclusion to deport. In other cases, deportation may not be appropriate. The Inquiry and Appeal processes are the appropriate avenues for determining these issues.

If misrepresentation in the course of obtaining landing or in the course of a sponsored application are to be triggering events for deportation proceedings against permanent residents, then the Act should specifically say so. It is not a matter to be left to regulation.

The current Act and this provision are broadly drafted without reference to the willfulness of a misrepresentation. In judicial interpretation of the existing provisions, the Court has concluded that even innocent misrepresentations of a non-determinative nature are captured by the Act. Given that the consequences of misrepresentation can be deportation proceedings, or a two-year ban on future admissibility, it is appropriate that the act of misrepresentation be defined in more precise terms, without impairing the objectives of the Department. The Section suggests language such as that in the UK Immigration Rules for the offense of "false statements", by a person who "makes or causes to be made . . . a representation

which he knows to be false or does not believe to be true." Such language ensures that innocent misrepresentations are not captured.

RECOMMENDATION:

The Section recommends that section 36(1)(a) be amended as follows:

(1) A Foreign National who is not a permanent resident is inadmissible for misrepresentation for making a material misrepresentation which they know to be false or does not believe to be true or withholding information on a relevant matter that induces or could induce an error in the administration of this Act.

(2) A Foreign National who is a permanent resident is inadmissible for making a misrepresentation which they know to be false or does not believe to be true on a relevant matter that induces or could induce an error in the administration of the Act with respect to the Foreign National's own obtaining of permanent resident status, or with respect to the Foreign National's sponsorship and application for permanent residence by a person sponsored by the Foreign National,

with other provisions of the section revised accordingly.

36 (1) A Foreign National is inadmissible for misrepresentation

(b) if the Foreign National was sponsored by a person who is determined to be inadmissible for misrepresentation, and the Minister is satisfied that the facts of the case justify the inadmissibility of the Foreign National.

This provision allows the Minister, or her delegated officers to extend the finding of inadmissibility to all sponsored dependents of a permanent resident who themselves have been found to be inadmissible through misrepresentation. The Section has considerable concerns with the scope of this provision.

Nothing links the misrepresentation of the sponsoring resident to the obtaining of status by the sponsored dependent. It is one thing to consider dependents or false dependents who wrongfully obtain landing through the direct misrepresentation of their sponsor, it is quite another to consider legitimate dependents whose obtaining

of status was far removed from the misrepresentation of the sponsor. For example, permanent resident may obtain status through misrepresentation which goes undetected for a number of years. They may subsequently marry and legitimately participate in sponsorship of their spouse's dependents (parents, grandparents, and dependent siblings). When the resident is subsequently found to have obtained landing through misrepresentation, the status of the spouse and the dependent family members suddenly becomes vulnerable, notwithstanding their complete lack of participation in the original misrepresentation. The Section appreciates the mischief which the Minister seeks to address, but we are not satisfied that leaving the scope of the provision to the exercise of discretion by delegated officers is sufficient control for the enforcement mechanism.

It is not difficult to imagine circumstances where it would be manifestly unfair for the sponsored relative to suffer the consequences of a sponsor's misrepresentation, even in the case where the misrepresentation is close. A resident in Canada may misrepresent in the sponsorship application that he or she has never been declared bankrupt under the *Bankruptcy Act*. The sponsored mother has no knowledge of the misrepresentation, let alone knowledge that the representation is false. Although the sponsor made misrepresentation and may be determined to be inadmissible accordingly, it is manifestly unfair to extend that inadmissibility to the mother.

RECOMMENDATION:

The Section recommendations that:

(i) section 36(1)(b) be deleted. The Department can rely on the provision respecting direct misrepresentation by the person concerned in their own application, which will be sufficient in the majority of cases;

(ii) alternatively, the provision be limited to application in cases where a sponsored applicant's landing was a direct consequence of the misrepresentation by the sponsor;

(iii) there be a five year limitation period on actions to extend inadmissibility to sponsored relatives, from the date of misrepresentation by the sponsor; and

(iv) the power to extend an inadmissibility to sponsored person be vested in the adjudicator determining misrepresentation by the sponsor, to be exercised with discretion where the adjudicator is satisfied that the facts of the case justify the inadmissibility of the sponsored person.

36 (1) A Foreign National inadmissible for misrepresentation. . .
(c)If Refugee protection is finally determined to be vacated in accordance of Section 104

The Section has no position with respect to this provision. The provision provides that where a refugee obtains their protection status as a result of misrepresentation in the protection proceedings, and obtains permanent residence as a result, the permanent residence status is lost upon determination of the misrepresentation. This provision is similar to loss of Canadian citizenship arising from proof of misrepresentation in the initial permanent resident application. Again, the Inquiry and Appeal processes applicable to permanent residents facing removal, with jurisdiction to fact, law and equity, will be appropriately called upon to determine appropriateness of deportation.

36 (2) A Foreign National continues to be inadmissible for a period of two years following a final determination of inadmissibility under subsection (1).

The intent of this provision is that, where an applicant for status (permanent resident or temporary status) is determined to have engaged in misrepresentation that, person shall suffer a two year period of deemed inadmissibility. The provision does not make sense if "foreign national" is intended to include a permanent resident. For permanent residents, the consequences of certain misrepresentations are

commencement of deportation proceedings and possible removal. The Section questions whether the intent of the provision would be better expressed by reference to a Foreign National, other than a permanent resident.

The idea that misrepresentation should carry continuing consequences is not objectionable in principle. The issue is whether the consequences are appropriately set. A two year inadmissibility ban can have significant consequences for all manner of persons seeking entry to Canada, whether as family members seeking permanent residence through sponsored application, or business visitors. The consequences are such that there must be certainty that the determination of misrepresentation is correctly made. This raises the question of the avenues available to a person wrongfully accused of misrepresentation. In cases involving sponsored relatives, there may be Appeal Division proceedings where the issue of misrepresentation can be considered. For all other applicants, including non-sponsored applicants for permanent residence, applicants for student authorizations, visitor visas or employment authorizations, a finding of misrepresentation may be made by the overseas or port of entry officer, and the applicant is without any avenue of appeal. There is only the possibility of judicial review, which would require leave. The leave process is exceptionally difficult and not well suited to the circumstances of overseas applications.[10]

Applicants who may be unfairly and improperly accused of misrepresentation by overseas or port of entry officers are without meaningful recourse to challenge that determination. Given the consequences of a two year ban on inadmissibility for any purpose, this is an unsatisfactory state of affairs.

RECOMMENDATION:

The Section recommends that section 36 (2), imposing a two-year inadmissibility ban following determination of misrepresentation,

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[10] See discussion above under Part II, Judicial Review of Immigration Decisions.

not be implemented until there is a meaningful avenue for appeal of such determination. The judicial review process, with requirement for leave, is not an appropriate avenue of appeal.

Alternatively, where judicial review is the only avenue for review of determination of misrepresentation, the applicant should have a right of access to the judicial review process without leave.

D. Loss of Status through non-compliance — Residency Requirement [sections 24, 27, 56(4) and 58(2)]

Bill C-31 imposes two new requirements on permanent residents, the combination of which are bound to create problems. The problems will exacerbated by a wholly inadequate appeal process which will fail to remedy wrongful loss of status, and the lack of provision for Returning Resident Permits (RRPs), which assist the entry of residents after lengthy absences.

The new requirements imposed on permanent residents are the residency requirement (section 24) in which permanent residents must physically reside in Canada for two
1120 years out of the five year period of their residency, and the requirement that proof of residence (the permanent resident card) be renewed at regular intervals, anticipated to be every five years (section 27). Under the current Act a record of landing has no expiry date. It is valid until loss of status through enforcement proceedings. The combination of these requirements will lead to additional administrative and processing infrastructures both in Canada and abroad, as well as the potential for erroneous determinations of loss of status requiring remedy.

i) Current Law

Under the current *Immigration Act* and Regulations there is no residency requirement of fixed days in Canada. A person ceases to be a permanent resident when they leave
1130 or remain outside of Canada with the intent of abandoning Canada as their place of permanent residence. A permanent resident who is outside of Canada for more then 183 days in any 12 month period has the onus to demonstrate no intent to abandon.

All permanent residents of Canada have the absolute right to enter and appear before an adjudicator who will determine whether they have abandoned Canada as their place of permanent residence. Exemptions from the presumption of abandonment are provided to certain permanent residents who wish to maintain their permanent resident status in Canada but must be outside of Canada for more than six months in

a year. These exemptions are found in R. 26. Permanent residents able to satisfy an Immigration Officer that they fall within one of the exemptions in R.26 will receive a Returning Resident Permit (RRP. This will generally permit them to return to Canada as permanent residents, regardless of absence.

ii) Proposed Residency Test

The Bill replaces the subjective test with a simpler objective test, requiring permanent residents to have physical presence in Canada for two years out of five to maintain status.

Under Bill C-31, permanent residents will be issued a PRCard on acquiring permanent residency status. The PRCard would be valid for five years and could be renewed. The PR card is proof of status. Permanent residents travelling outside Canada will be required to present the PRCard to transportation companies in order to be allowed boarding for return travel to Canada. RRPs will be eliminated. However, facilitation documents may be issued in certain circumstances, for example in the case of lost or stolen cards.

Under Bill C-31 permanent residents will be required to be physically present in Canada for two years of each five year period. Permanent residents are therefore able, for any reason, to spend three years of each five year period outside Canada without jeopardizing their status. The Bill also defines absences that are deemed to be time spent in Canada:

(a) accompanying a Canadian citizen who is their spouse or common-law partner or, in the case of a minor child, their parent;

(b) employed on a full-time basis by a Canadian business or in the public service of Canada or of a province; or

(c) accompanying a permanent resident who is their spouse or common-law partner or, in the case of a minor child, their parent and who is employed on

a full time basis by a Canadian business or in the public service of Canada or a province.

iii) Analysis

Simpler and objective is not necessarily better. Cases will arise where individuals with clear establishment in Canada and without any intent of abandonment will nonetheless be unable to meet the two year residency test. The Act attempts to overcome this shortcoming by providing for deemed residence. The exemptions are unnecessarily narrow, recognizing but impairing the reality that permanent residents may be required to travel and reside abroad for business purposes. For example, the "Canadian business" exemption would not encompass those transferred temporarily to a subsidiary or parent company abroad. Students are notably missing from the deemed residency exemptions. Children who are permanent residents and who take temporary absences for studies abroad may find it very difficult to maintain the residency requirement, and risk losing status.

To avoid loss of status, section 24(3(b requires a permanent resident to be "employed on a full-time basis by a Canadian business" to be deemed physically present in Canada. "Canadian business" will presumably be defined within the regulations. Yet many permanent residents are transferred abroad by a Canadian based company through an intra-company transfer and, in most instances, do not remain on the Canadian company's payroll. As such, they may not meet the requirement of "employed on a full-time basis" if it is restrictively defined. The definition in the regulations should not unduly restrict the usefulness of this provision by restricting it to individuals paid or remunerated solely by Canadian corporations.

Designated officers, either abroad or in Canada, will have discretion to continue permanent resident status on humanitarian and compassionate grounds notwithstanding technical breach, but this is an uncertain discretion [sections 42 and

56(4]. In our view, "humanitarian and compassionate considerations" will not adequately cover the circumstances in which discretion should be exercised. Currently, Returning Resident Permits (RRPs give certainty of continuing status, before absence or return to Canada. RRPs would not continue under Bill C-31.

iv) Automatic Expiry of Permanent Residence Cards

The Bill contemplates that permanent resident cards (PRCards will have a built in expiry date, requiring application for renewal, either within Canada or abroad. The Minister contemplates expiry every five years.

The Section has considerable concern with this concept. While the Bill does not require permanent residents who remain in Canada to possess a valid PRCard, the practical effect of the Bill will be to make it mandatory. Travel outside Canada without a PRCard would be inadvisable at best. Reentry without it would be uncertain, if not impossible. It is not difficult to foresee that the PRCard will be required by Canadian employers, financial institutions and other agencies wanting assurance that a person is in valid status. We can see no valid reason to compel all permanent residents to undergo a process of renewal of PRCards, other than to compel reassessment of status every five years. Although the Department wishes to encourage permanent residents to obtain citizenship as soon as possible, many will not, because they cannot meet the requirements, do not wish to forfeit their original citizenship or for other reasons. It is anticipated that the vast majority of permanent residents will meet the residency requirements, and so we question the need for this administrative process. At an estimate, there may be 60,000 applications for renewal annually, either from within Canada or abroad, an average of 250 applications per working day. The processes will undoubtedly involve considerable delay, with the result that permanent residents awaiting the renewal determination will be unable to travel, notwithstanding that they are in fact permanent residents in good standing.

In our view, the processing standards anticipated by the Department are not realistic. Applications will require evidence for proof of compliance, and assessment. Compare current applications to vary and cancel terms and conditions, with a processing standard of 30 working days, provided there is no referral to a local office for assessment. If a referral is initiated by the Central Processing Centre in Vegreville and a local office must deal with the application, the processing standards are extended to 60 working days.

Adequate and effective resources must be dedicated to processing of applications. Strict guidelines must also be enforced for time lines for processing applications.

v) Applications for renewal from abroad and the appeal process

The worst problems will arise for permanent residents who are abroad when their permanent resident card inadvertently expires, or is lost or stolen. The Bill contemplates that these residents will not be allowed to return to Canada until they a new PRCard is applied for and issued from a mission abroad. The limited number of missions abroad are already burdened with the challenge of efficient processing of applications for permanent resident visas, student authorizations, employment authorizations and the like. For permanent residents whose PRCard expires through inadvertence, loss or theft during temporary absence such as vacation, applying at a foreign mission and providing satisfactory evidence of residency and other requirements may prove extremely burdensome. In the worst case scenario, the overseas office may refuse renewal, leaving the permanent resident stranded abroad, notwithstanding that they still hold permanent resident status under the law.

The problem of stranding creates an inequity between permanent residents who are nationals of countries that are visitor visa exempt, and those from countries that are not. Individuals from visitor visa exempt countries may apply for entry at a port of entry as a visitor, and can enter the country pending the formal appeal process. Individuals from countries that require visitor visas to enter Canada will not be so

treated. These individuals cannot enter Canada without either a visitor visa or facilitation visa and are thus barred from entry until their appeal is resolved.

The appeal process is wholly unsatisfactory, particularly for permanent residents abroad but also for individuals from within Canada whose applications for renewal are turned down. Under sections 56(4) and 58(2) the permanent resident has an appeal to the Immigration and Refugee Board to prove compliance with the Act or to seek continuation of status on humanitarian and compassionate grounds. The permanent resident cannot attend to give evidence — in fact no witnesses are called because there is no hearing. The only evidence before the Appeal Division is the record of whatever was before the officer who made the decision.

The Section finds it unacceptable that the permanent resident is neither able to attend nor able to produce new or complete evidence to verify compliance with the Act. The purpose of the appeal is to determine whether the permanent resident has met the requirements of the Act, and there is no loss of status until that determination is made. The appeal should be conducted in the usual manner, allowing witnesses to attend as necessary, including the person concerned and allowing full admission of evidence for the Appeal Division to make a proper determination on status.

Under the current Act a permanent resident has an absolute right of entry to Canada until status is lost through the inland determination processes. Under Bill C-31 there is no loss of permanent resident status until the Appeal Division has rendered its determination. The Section recommends that permanent residents have the right of entry to Canada until loss of status is finally determined.

These problems would be alleviated if there were no automatic expiry of PRCards. The residency requirement could remain and determinations of loss of status would continue as under the current Act — through inland determination processes.

RECOMMENDATION:

The Section recommends that:

- **residency provisions in sections 24(2) and (3) be amended to extend the instances of deemed residence to include, for example, students studying abroad and intra-company transferees from Canadian businesses;**
- **the concept of automatic expiry of permanent residence cards be abandoned; and**
- **the power to determine loss of status or no residence be solely vested with the inquiries at Appeal Division of the Immigration and Refugee Board as under the current Act. Alternatively, the power to determine loss of status should be reviewable in a full oral hearing before the Appeal Division.**

E. Mandatory Deportation of Permanent Resident for "Serious Criminality" [section 59]

Section 59 of the Bill provides that a permanent resident convicted and sentenced in Canada to a term of imprisonment of two years or more will have no appeal from a deportation order, on any grounds. The provision applies to any offense carrying a potential penalty of ten years' incarceration or more.

The effect is mandatory deportation without consideration of the circumstances of the offense, without distinguishing between offenses which are an isolated incident as opposed to a component of a recurring pattern of criminal behaviour, and without 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.

The National Section cannot support any provision where a permanent resident in Canada is stripped of status and deported without any exercise of discretion

or review on the merits of the case. The "two year sentence" rule is a simplistic and arbitrary response to situations requiring balanced consideration. While imposition of a two year sentence reflects the commission and punishment of a serious offense, it is a grave error to presume that deportation must irrevocably follow.

It has always been a mainstay of Canadian immigration policy and legislation that deportation of permanent residence requires consideration of the circumstances of both the individual and the events giving rise to the removal order. Deportation processes of other countries with immigrant populations offer similar or stronger protection against deportation to its immigrants. The philosophical underpinnings arise from the appreciation that permanent residents may establish themselves in the country for scores of years, without attaining the protection of citizenship. At some point the establishment of the immigrant becomes so strong that the immigrant may be regarded as a *de facto* citizen with minimal ties to the country of nationality. This is particularly the case for immigrants who land as dependant children of immigrating parents and who are established in Canada for five, ten or twenty years before criminal conviction arises.

Different countries have adopted different mechanisms to distinguish between permanent residents who should be deported, and those who should not. In Australia, there is absolute protection against deportation of immigrants with a ten year history of residency, except in certain cases of conviction for stipulated offenses. In those cases the immigrant has a right of review before an independent tribunal which may consider all the merits of the case. France 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 defence citizens who are the parents of a French child. The United Kingdom legislation requires that public interest be balanced against compassionate circumstances of the case, in recognition that one case will rarely be identical with another in all material respects. No decision to deport can be taken without

consideration to the age of the individual, their length at residence, strength of connections with the UK, personal history, domestic circumstances, previous criminal record, compassion of circumstances and representations received on the person's behalf.

These processes share an appreciation that there is no simple rule to avoid the necessity of conducting a proper review of the circumstances of individual cases. Mandatory deportation is simply insufficient and unfair. In it's 1998 report concerning deportation of non-citizen criminals, the Australian Joint Standing Committee on Migration responded to the Minister's request for consideration of expedited processes for removal of immigrants convicted of serious criminality. The Committee rejected the concept of mandatory deportation in the following terms:

> 4.93 The Committee believes that the consequences for an individual facing deportation are so serious as to warrant consideration on the merits of each individual case. Mandatory provisions could act harshly and unfairly in (the) some circumstances by requiring the deportation of persons who, for compelling compassionate reasons, should be allowed to stay in Australia. DIMA records established that a small number of non-citizens have received multiple warnings which suggest that, when their cases were considered on their merits, countervailing grounds existed for allowing them to remain in Australia.
>
> 4.94 Mandatory deportation would not allow other interested parties like family a forum to express their views. Mandatory deportation would not take account of actual community ties and contribution of a non-citizen where the system considered only criminal offenses.
>
> 4.95 Furthermore, as a number of international conventions (See Appendix 9AN) impose obligation upon Australia to provide a formal hearing and arguably, merits consideration. A mandatory deportation system, therefore, would require a number of exceptions or procedural safeguards to avoid breaching those conventions.
>
> 4.96 Finally, the Committee concludes that mandatory deportation is repugnant to a society which considers reform and rehabilitation as an integral part of our criminal deportation policies.

Until 30 years ago, Canadian legislation protected permanent residents from deportation by granting "domicile" after five years' residence. For the past 30 years and under current law, Canada does not provide any specific protection against

deportation of permanent resident. All permanent residents, regardless of their establishment in Canada, are vulnerable to deportation. The critical balance between the public interest and humanitarian and compassionate considerations relevant to individual cases is accomplished through Appeal Division review. The Appeal Division has jurisdiction to consider issues of law, in fact and most importantly, equitable jurisdiction to consider "all the circumstances of the case". This has proven to be an effective means of distinguishing between cases where permanent residents should be deported as a result of criminal conduct, and cases where deportation should be deferred.

As recently as 1998 the Standing Committee on Citizenship and Immigration reviewed the issue of deportation of long term permanent residents and recommended that cautious consideration be given to restoring protection under the law against deportation of long term permanent residents:

> We are aware that the *Immigration Act* makes no distinction between permanent residents who arrived 6 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. . .
>
> 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 English or French, do not speak that language.
>
> It seems particularly appropriate to rethink 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.[11]

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[11] Canada, House of Commons, Standing Committee on Citizenship and Immigration, *Detention and Removal: Report of the standing Committee on Citizenship and Immigration,* Section G - "Removal of Long - Term Residents of Canada".

Bill C-31 not only fails to provide the protection recommended by the Standing Committee, it removes absolutely the protection now in place.

The consequences for an individual facing deportation are so serious as to warrant a consideration on the merits of each case. Mandatory deportation in any case involving an actual sentence of two years' incarceration or more will act harshly and unfairly in certain circumstances. The system will lead to unfair and unwarranted deportations, resort to political pressures for intervention to avoid hardship, and possibly breach international treaties and conventions.

Mandatory deportation has been defended by arguing that Department officers will retain discretion to determine whether or not enforcement proceeding should be commenced. In this manner, it is argued, officers can consider relevant humanitarian and compassionate considerations. The argument fails on two counts:

- Firstly, the Department official responsible for determining whether to proceed with enforcement has little choice. When a permanent resident is sentenced for two or more years' incarceration, the only options are either to do nothing or to commence enforcement which can only lead to deportation. There is no middle ground. On the one hand the officer faces political and statutory pressure to commence enforcement against an individual statutorily deemed to be a "serious criminal". On the other, there is no discretion as to outcome. Under the current system, virtually all permanent residents are processed through the Appeal Division. The Appeal Division has jurisdiction to issue a stay order which staves off deportation, on terms and conditions to be met by the resident over two to five years. The stay order may impose conditions related to treatment for alcoholism, requirements to maintain meaningful employment, to report regularly to Immigration as to address and activities, to maintain the peace and to report all contacts with police. Breach of the conditions or repetition of criminal conduct may result

in the removal order becoming executable. The option of a stay order is a valuable tool in the enforcement arsenal. There are numerous circumstances in which the Department consents and crafts an appropriate stay order to promote rehabilitation of the permanent resident while maintaining enforcement control over the person. This option is completely removed under the scheme of mandatory deportation.

- Secondly, the internal exercise of discretion by Department officials of whether to proceed with enforcement lacks procedural safeguards that ensure a fully informed decision. There is no internal process for hearing, no access to the decision maker, no process of receiving evidence for and against the deportation and no requirement to produce reasons. These are all flaws which plagued the Minister's Danger Opinion process, which is being justifiably discontinued.

RECOMMENDATION:

The Section recommends that all permanent residents facing deportation have access to the Appeal Division for review of deportations on grounds of fact, law and equity. Only in this manner can orders for deportation be fairly determined to be appropriate. In exceptional cases where the conduct of the permanent resident is so extreme as to render the appeal process futile, the Government has the option of pursuing a security or criminality certificate from a Federal Court Judge. Issuance of the certificate is unappealable and denies access to review by the Appeal Division.

In the alternative, the Section strongly recommends that long term residents, namely those established in Canada for a period of five years or more, be protected against unappealable deportation orders,

with guaranteed access to the Appeal Division for review of deportation order on grounds of fact, law and equity.

F. Loss of Appeal Rights for Foreign Nationals inadmissible for security, violating human rights, or organized criminality [section 56]

Section 56 denies any right of appeal from deportation to a permanent resident found inadmissible on grounds of security, violating human rights or organized criminality. This is a blanket denial of access to the Appeal Division for appeal on grounds of fact, law or equity, appeal rights which exist under the current *Immigration Act*.

The Section opposes this provision as being unduly harsh, arbitrary and unnecessary.

The inadmissibility grounds of security, violating human rights and organized criminality are very broadly defined in sections 30, 31 and 33:

- an individual can be inadmissible for organized criminality without ever having been charged or convicted of an offense. All that is required is membership in an organization believed on reasonable grounds to be engaged in criminal activity involving a indictable or hybrid offense under any Act of Parliament. "Organization" is not a defined term — it could mean the Mafia or a neighbourhood gang. Membership need not be recent or current, nor must the individual knowingly be associated with an organization involved in criminality.
- Inadmissibility for security grounds need not involve any actual activity by the individual in acts of terrorism or subversion. Again, membership in an organization believed to engage, or which "will engage", in such activities is sufficient to be captured by the provision.

The legislation itself recognizes that the grounds of inadmissibility are broadly drawn — an individual may come within the definition without being a significant

threat to the security or safety of Canada — and that the statutory denial of any right of appeal against removal on these grounds is highly questionable, by providing for Ministerial discretion to overcome inadmissibility where the foreign national's presence in Canada would not be detrimental to the national interest.

Findings of inadmissibility on these grounds, and issuance of a removal order, will either be done administratively by an Immigration official without hearing, or through a Tribunal hearing in which the usual rules of evidence simply do not apply and in which there is no requirement for disclosure of evidence before hearing. The informal nature of the hearing mandates that there be a meaningful appeal process.

The Section questions that there is any necessity for a blanket denial of appeal rights. The current Act and Bill C-31 both provide a process to deny appeal rights, through issuance of a Minister's security or criminality certificate, certified by the Federal Court. The result is that the individual is order deported without appeal. The Section has reservations about the fairness of the certificate process, but at least it requires endorsement by a Federal Court Judge. Blanket denial of any appeal right in all cases is simply unnecessary and undefendable.

RECOMMENDATION:

The Section recommends that section 59 be deleted. Permanent residents ordered deported from Canada should have full right of appeal to an independent tribunal on grounds of fact, law and in equity.

G. Non-disclosure Provisions

Section 80 provides a new power to the Minister to request in any Tribunal proceeding (Immigration hearing, detention review or Appeal Division proceeding that evidence not be disclosed to the person concerned, in the interest of national

security or safety of persons. This is an authority previously only available in the course of Federal Court security or criminality certificate proceedings.

The Section is opposed to tribunal proceedings where the person concerned has no disclosure of evidence, and no opportunity to answer fully the case against them. These tribunal proceedings, certainly in the case of detention reviews and immigration hearings (inquiries), are conducted without the formality of process and rules of evidence found in regular courts. Tribunal members are drawn from the lay community. These are not appropriate tribunals to determine that there should be non-disclosure of evidence on grounds of national security or safety of persons. The provision creates a "star chamber" process.

In our view, the only venue for determinations and non-disclosure of evidence should remain the Federal Court of Canada, in certificate proceedings.

RECOMMENDATION:

The Section recommends that section 80 be deleted.

H. Compelled examination of permanent resident at any time

Section 15 authorizes an Immigration officer to examine a permanent resident in Canada at any time, on mere belief that the foreign national may be inadmissible. Under penalty of fine of up to $100,000 and five years in prison, the permanent resident is compelled to answer any questions from the officer and to produce any documents and evidence that the officer reasonably requires.

The Section opposes this provision as unwarranted and unchecked authority to Immigration officers to harass permanent residents in breach of their entitlement to quiet enjoyment of status. The provision is ill-conceived, ill-drafted and contrary to long established common law and statutory rights.

Under the current Act, any individual, whether a Canadian citizen, permanent resident or foreigner, is obliged to answer all questions truthfully when presenting themselves for entry to Canada, or upon application under the Act. This is an appropriate requirement to control border and immigration processes. Section 15 expands that power beyond proportion. Any permanent resident, at any time may be subjected to compelled compliance to Immigration scrutiny, where there is mere suspicion that the permanent resident may be inadmissible. This is an entirely inappropriate balance between state authority and the individual's entitlement to quiet enjoyment of status.

A parallel may be drawn to police investigations of criminal activity. In our society police may investigate any individual for criminal activity, but the individual is not compelled to cooperate. Police may not compel the individual to answer questions. The individual's cooperation or non-cooperation may be beneficial or not, that is a decision for the individual to make. When police investigation lead to arrest, there is absolute entitlement of the individual to maintain silence. Thus our society draws a balance between the power of the state and security of the person. Consequences of Immigration proceedings are no less grave than the consequences of most criminal proceedings. No distinction should be drawn.

Permanent residents of Canada are entitled to equality of treatment with Canadian citizens in terms of their relationship to state authorities and security of the person. There is no justification for a legislative power that would entitle state authorities to compel permanent residents to undergo examination without restriction, on minimal grounds of suspicion, under threat of significant financial penalty or incarceration. Whatever the intent behind section 15, it authorizes "police state" harassment with considerable potential for misuse and abuse. It is not difficult to imagine inappropriate exercise of this remarkable power: permanent residents readmitted to Canada after a series of lengthy business trips may be compelled to attend relentless examinations by an Immigration officer in Canada, and to produce business travel logs, income tax documents, business records, records of mortgage or rental

payments and the like, because the officer merely suspects that residency requirements may not be met. A permanent resident already engaged in inquiry or Appeal Division proceedings may be compelled to undergo daily examination by an Immigration officer on the very issues that are the subject of the tribunal proceedings.

In the Section's opinion, the authority granted to officers under section 15 is arguably in breach of the *Charter of Rights* and the *Canadian Bill of Right* protections against self-incrimination.

RECOMMENDATION:

The Section recommends that section 15 be deleted.

I. Transitional regulations for permanent resident status and retroactive application of new law

The Department recently issued a discussion document on regulations for transition from the current Act (where loss of status depends on intent to abandon) to the Bill C-31 scheme (where status is lost simply through failure to reside in Canada for two years out of five). The regulatory proposal also provides for transition from the current use of returning resident permits to the Bill C-31 scheme of requiring a valid PRCard which would expire every five years.

The regulations are important, as they establish the criteria and processes for renewing PRCards, for exercise of discretion at port of entry and abroad, and for access to air transport for return to Canada. These regulatory issues illustrate the number of concerns raised by the scheme.

The proposed regulations would allow retroactive application of the new residency law against existing permanent residents. Permanent residents who today have lawful status could lose their status because the changed law would reach back in

time. The Section opposes retroactive application of the law in the strongest terms. It is an inappropriate and harmful operation of law, contrary to common law and fair process.

Transitional provisions will need to:

- provide a period for existing permanent residents to obtain PRCards to replace existing documents which prove residency (IMM1000s and RRPs);
- specify the period during which current documents will be accepted as proof of status for travel purposes;
- specify criteria to determine residency status of existing permanent residents;
- clarify appeal provisions for existing permanent residents found no longer to be permanent residents;
- enable a transparent and fair process of transition from the current legislative provisions to those of Bill C-31.

i) Concerns with the regulatory proposals

Period of residence to be proved

Section 24(2) of the Bill requires a permanent resident to be physically present in Canada for two out of each five-year period after being granted status. The proposed regulations will require residents applying for renewal to prove residence for each five year period since obtaining status, regardless of having already proved the earlier periods in previous applications.

The requirement to prove each period is aimed at long-term absentees, but will create serious problems for all residents, especially those overseas at the time of application. Persons making overseas applications will not necessarily be equipped to provide the evidence and will be denied access to airline travel, and entry into Canada, at port of entry. These serious consequences could arise in circumstances of unanticipated expiry of the Card during temporary absence abroad.

Residents whose cards are not renewed abroad face loss of status and are stranded outside of Canada. Even if the person gathers evidence proving the residency requirement, they are not allowed to present new evidence at appeal. They are not allowed into Canada to attend the appeal, it is done on paper.

RECOMMENDATION:

The Section recommends that a permanent resident applying to renew a Permanent Residence Card need only confirm the residency requirement for the five-year period immediately preceding the date of an application for renewal.

Retroactive application of the residency test

The Section has serious concerns with retroactive application of the residency requirement to existing permanent residents.

The transitional provisions will require existing permanent residents applying for their first PRCard or facilitation document to be assessed on the basis of the previous five-year period. Once an existing permanent resident has obtained their initial PRCard or a facilitation document they will be subject to the prove of physical presence requirement for each further five-year period. Departmental officials have stated an intent to look back even to the date of landing of existing permanent residents seeking to obtain a PRCard. This is unacceptable

Because Bill C-31 looks back, residents who have lawful status under the current Act can lose their status under the new Act, based solely on the same pre-legislation lawful residence . This is not a responsible or fair legislative effect.

RECOMMENDATION:

The Section recommends that existing permanent residents, including those who have not abandoned their status under current law, be entitled to a PRCard upon application.

Effect of PRCard on employment

With the required renewal of PRCards, employers in Canada may not know if they can hire a permanent resident of Canada with an expired PRCard. Given the new employer sanctions in the Bill, this issue must be clarified.

The Section recommends that an expired PRCard continue to be proof of eligibility to gain employment. This should be expressly stated on the PRCard.

J. Treatment of same-sex relationships

The comments in this Part are provided by the Sexual Orientation and Gender Identity Conference of the Canadian Bar Association (SOGIC.

In June 2000, the government amended the Humanitarian Designated Classes Regulations (HDCR to include a definition of common law partner — a person cohabiting in a conjugal relationship with a person of the opposite or same sex for a period of at least one year. The definition is consistent with that applied generally in federal legislation, under the *Modernization of Benefits and Obligations Act.* We anticipate that the same definition is contemplated in regulations under Bill C-31.

OP 00-23 sets out guidelines for the administration of the new HDCR. It provides some limited flexibility in determining whether a person is a common law partner:

What impact do periods of separation have on a common law relationship?
Since common-law relationships are fact-based, the particular circumstances of each case must be considered to determine if the relationship has been severed. Therefore, a break in cohabitation or a period of separation will not necessarily nullify the period of cohabitation, in a similar way to married couples. For example, a couple may have been separated due to civil war or armed conflict and therefore do not cohabit at present. However, a common law relationship may exist if the couple has cohabited in the past for at least one year and intend to do so again as soon as practicable.

***De facto* common-law relationships - Administrative guidelines**
In exceptional cases, the standard established in the common-law partner definition may not be viable in the immigration context. Individuals in *bona fide* common law relationships may not be able to cohabit due to legal restrictions in their country of permanent residence. For example, this situation may arise in countries where homosexuality is illegal and cohabitation is not possible for fear of personal harm if the relationship becomes public.

Where *de facto* partners have been in *bona fide* relationships for at least one year with an HDC applicant and clearly intend to cohabit once in Canada, officers are encouraged to assess them either as HDC or refugee applicant in their own right, or on H&C grounds (R2.1)

While these guidelines may be sufficient for HDCR, they would be insufficient for situations where the lack of immigration status itself makes it impossible for the couple to cohabit because each partner is in different country. Even with flexibility to add up cumulative periods of cohabitation, applicants who can cohabit only when their partner spends a few weeks' vacation to visit them each year face a virtually insurmountable barrier to immigration.

RECOMMENDATION:

Rather than requiring prior cohabitation as a prerequisite to qualify as a common law partner, SOGIC recommends that consideration be given to the duration of the relationship, whether there is a significant degree of commitment, and whether there is intent to cohabit once the applicant is landed.

IV. OFFENCES

A. Overview

Implementation of national immigration policy requires provision for offences and enforcement of immigration law. Offence provisions prohibit and penalize conduct contrary to the integrity of immigration policy. Conviction for an immigration offence attracts penalties of significant fine, incarceration, and may form grounds for loss of status and deportation. In Bill C-31, the offence provisions are found in Part 3 (Enforcement) sections 110 - 147.

Bill C-31 generally toughens existing offence provisions, and adds new provisions, notably respecting smuggling and " ticketable offences".

The Section recognizes the need for enforcement action to preserve public safety and deterrence, and supports enforcement process when conducted for proper purposes, through clearly defined laws, and in accordance with the *Charter of Rights* and principles of fundamental justice. We have concerns with the broad language used to describe offences in Bill C-31, and we provide these comments accordingly.

B. New Grounds Of Inadmissibility

i) Human Smuggling

Sections 110 -114 deal with offences relating to human smuggling and trafficking. The changes to existing law are:

- significantly increased maximum penalties, from a fine of $500,000 and ten years' incarceration, to a fine of $1,000,000 and life imprisonment;
- direction to the Court that the penalty shall take into account the occasion of harm or death, involvement of a criminal organization, profiting or the humiliation or degrading of persons; [section 114]
- creation of a new offence of organizing the coming into Canada of one or more persons by means of "threat, force, abduction, fraud, deception or coercion."[section 111]

The Section supports the underlying policy for the punishment and deterrence of people smugglers and the guidance on sentencing provided to the court for determining appropriate sanctions to be imposed on such conduct. However, we note some lack of clarity in the proposed Bill.

The intended scope of section 111 is uncertain. It does not refer to organization of illegal entry (failure to possess a valid passport or other required travel document), and would include entries by persons in possession of proper and valid travel documents. If the intent of section 111(1) is to criminalize participation in lawful entry of persons for certain purposes ("trafficking"), then the legislation must clearly define those purposes. What is the nature or extent of threat, coercion or deception that attracts the penal sanction for legal entry? Would the section apply to sponsors who exaggerate their livelihood to an immigrating spouse, or employers who misrepresent the opportunity for job advancement?

RECOMMENDATION:

The Section recommends that section 111 be amended to define the "trafficking" intended to be deterred or punished. Application of the section should be limited to conduct involving illegal entry, that is entry without valid passport, visa or other proper documents required under the law.

ii) Offences Related to Documents [sections 115 and 116]

Section 115 (1 is too broad, in that it creates an offence for possessing or using a valid and properly issued passport or other travel document. We do not believe that this was the intended effect.

The current Act makes it an offence to enter or remain in Canada through a "false or improperly obtained" passport. This makes sense. The current Act penalizes entry or remaining in Canada through false documents and documents that were valid but

issued for another person. We believe the Bill intends to penalize possession as well as use of a false or improperly obtained document, but inadvertently makes it an offence to use a valid and proper travel document if the purpose is to contravene the Act. It is rather like charging someone for misuse of a driver's license when validly possessed during commission of a criminal offence.

RECOMMENDATION:

The Section recommends that section 115(1) be amended to say:

> **No person shall,** ***for the purpose of entering or remaining in Canada,***
>
> **(a) possess a** ***false or improperly obtained*** **passport, visa or other document . . .**

We have concern that these provisions not be used as part of the interdiction measures carried out at airports outside Canada to prevent *bona fide* refugees from making claims overseas and at ports of entry.

iii) Contraventions of Act

Sections 117 and 118 deal with penalties for offences not otherwise specifically enumerated in the legislation. We have concern with the far-reaching effect of section 117(1(a and the new offence for failure to "comply with a term or condition" imposed under the Act. Under the current Act, breach of terms and conditions would be grounds for loss of status, but not an offence, unless done "knowingly". Section 116 makes failure to meet terms and conditions an offence, regardless of reasons or equitable circumstances surrounding the breach. For example, entrepreneurial immigrants required to set up a business in Canada and create jobs for Canadians within a prescribed time frame may not have done so for just cause or without fault of their own; or a fiancé/fiancée who must marry within 90 days of landing may have failed to do so for quite acceptable reasons, including death or abuse by partner.

RECOMMENDATION:

The Section recommends that section 117 be amended to delete reference to failure to comply with terms and conditions, or alternatively, to limit offence for failure to comply with terms and conditions to cases of willful or deliberate failures, without cause.

iv) Misrepresentation

References to offences and penalties for misrepresentation throughout Bill C-31 should be centralized in sections 119-121.

Section 119 would considerably expand the provisions of the current *Immigration Act*:

- The current Act makes misrepresentation in any application, inquiry or hearing an offence. Bill C-31 applies to any misrepresentation in any relevant matter "that induces or could induce" an error in the administration of the Act, and "any communication, directly or indirectly" of false or misleading information.
- Bill C-31 creates a "counselling" offence — to knowingly counsel, induce, aid or abet any person to make a material misrepresentation or withhold information on a relevant matter that induces or could induce any error in the administration of this Act.

This provision is designed to cast the net as wide as possible to catch misrepresentations in any circumstance, and an expanding group of people who may have counselled, induced, aided or abetted an individual in making misrepresentations to an immigration or visa officer. The list now includes Canadian citizens, corporate personnel, directors, family members and employers. The medium of the misrepresentation has also expanded to include any means of communication.

The Section is concerned with the overly broad net cast by these provisions, and the likelihood of unnecessary and wasteful enforcement proceedings as the result. The provisions are so broad as to create offences incapable of meaningful limitation.

RECOMMENDATION:

The Section recommends that sections 119 and 120 be limited to misrepresentations in applications, inquiries and hearings, as constrained in the current Act.

v) Offences of Designated Officers

The Section is pleased to note the attempt in Bill C-31 to unify and strengthen the penalties for offences of designated officers. These changes were perhaps motivated by the Department's overseas problems which have been revealed through RCMP investigations at visa offices, including Hong Kong and Damascus.

vi) Proceeds of Crime

Sections 123 and 124 create offences for those holding property obtained from violations of the Act or knowingly counselling offences to the Act. Section 125 imports the proceeds of crime provisions from the *Criminal Code* into the *Immigration Act* allowing for the exercise of powers of seizure, detention, forfeiture of property, and disclosure of confidential information.

Provided that the *Charter of Rights* and rules of natural justice are followed in the implementation of these sections, the Section does not oppose them.

vii) Ticketable Offences

Section 138 introduces the concept of ticketable offences, used, for example, in by-law infractions where the violation is minor and the penalty and consequences are, for the most part, limited to fines.

Immigration officers will be empowered to issue a summons and information. Payment of a fine within the stipulated time will be an acknowledgment of guilt; non-payment leads to a court proceeding.

The offences to which this section applies are as yet unknown, as they will be set out in the Regulations. The section opposes the introduction of a summons/fine payment scheme that may minimize the eventual ramifications of a person paying a fine, not understanding that it results in the entering of a guilty plea for an offence which could potentially have far-reaching effects on the individual. For example, long-time foreign nationals, voluntarily paying a fine pursuant to a ticketable offence, could actually and unwittingly be admitting inadmissibility to Canada which could lead to their removal from Canada or to prohibition from exercising rights of appeal which would otherwise be available under the Act.

RECOMMENDATION:

The Section recommends that section 138 be deleted.

In the alternative, offences to which the section applies should be delineated in the Act, with no consequences flowing from a finding of guilt, other than the stipulated fines.

viii) Debts and Collection

Provisions for the collection of debts owed to the Crown are new in Bill C-31. These provisions allow the Minister to enforce debts owing by way of garnishment of monies owing to a debtor. Procedures are to be set out in the Regulations.

Garnishment proceedings are common in civil matters. However, strict procedures allow for sufficient monies to go to the debtor to meet critical financial needs such as accommodation, food, and basic living expenses.

RECOMMENDATION:

The Section recommends that regulations relating to the application of section 140 be modelled after provincial garnishment rules, to provide the garnishee adequate living expenses.

ix) Transportation Companies

The Section has no comment on the revisions concerning transportation companies, as the substance of these provisions will be dealt with by regulation. There appears to be a clerical error in section 147 ,which should refer to section 142, not section 87.

V. PROTECTION OF INFORMATION

A. Overview

Division 9 of Part I concerns the issuance of security certificates to effect removal of permanent residents and Convention refugees, without appeal, and without right to claim protection from persecution. Security certificates can be issued on ground of "serious criminality", violation of human rights, security or organized criminality.

The title "Protection of Information" is a euphemism for "withholding information". The Division prescribes the process for determining inadmissibility and removal without appeal, without requirement to disclose to the person concerned the evidence supporting the allegations. Division 9 permits permanent residents, Convention refugees and persons in need of protection to be stripped of rights while being denied a fundamental defence — knowing the case against them.

The right to know and respond to the case against oneself is not a convenient delay of justice. It is a safeguard against false, misleading or one-sided evidence and an assurance that decisions are reached on a balance of competing evidence. In the absence of knowing and responding to the case against oneself, the decision-maker is determining on the basis of untested evidence, without the full case.

Aspects of the proposed process should shock our sense of fairness and due process. Under the current Act, security certificates are issued against permanent residents and refugees, through a process involving a recommendation by the SIRC that can be tested in Court. This important safeguard ensures that, for residents and refugees, these extraordinary proceedings are not instigated except in compelling cases. Bill C-31 discards this process and implements a procedure currently applicable only to persons without vested rights (ie visitors, claimants and other temporary status holders). The procedure lacks safeguards of due process and strikes an inappropriate balance between the rights of the person and the interests of the state.

In brief, Division 9 uses the broad and imprecise definitions of "confidential" information and disclosure "injurious to national security or to the safety of persons" to justify withholding of evidence from the person concerned. The person is expected to defend the allegations of unappealable inadmissibility on the basis of incomplete summaries of evidence.

It is the Section's position that this Division contravenes recognized principles of procedural fairness and is fatally flawed.

B. Permanent resident

Section 2(1) of the *Immigration Act* defines a "permanent resident" as a person who:

> (a) has been granted landing,
> (b) has not become a Canadian citizen, and
> (c) has not ceased to be a permanent resident pursuant to section 24 or 25.1, and
> includes a person who has become a Canadian citizen but who has subsequently ceased to be a Canadian citizen under subsection 10(1) of the *Citizenship Act*, without reference to subsection 10(2) of that Act

Treatment of permanent residents is distinct from that of a "visitor", who is someone in Canada for a temporary purpose.

Under Bill C-31 there is no definition of "permanent resident". A permanent resident is considered to be a "foreign national" a definition that encompasses all temporary status holders. Bill C-31 defines a foreign national as "a person who is not a Canadian citizen, and includes a stateless person".

Division 9 applies to any foreign national. The process applies to visitors or illegals, and equally to permanent residents or recognized refugees, regardless of their greater substantial rights being placed in jeopardy and their likelihood of long term establishment in Canada. The Minister defends the common process for issuance of security certificates as being in the interest of "consistency". The Section's view is that this displays callous disregard for the status of immigrants and the obligation to

provide protection to persons recognized as refugees. The legislation fails to provide procedural protection commensurate with the rights and entitlements placed in issue.

RECOMMENDATION:

The Section recommends that the current definition of "permanent resident" be maintained, to preserve the distinction between individuals who have status and commitment in Canada and those who attain only temporary status in Canada.

The Section recommends adequate procedural safeguards be adopted for the determination of security certificates against permanent residents and persons in need of protection, as in the current Act.

Section 70 of Bill C-31 defines "information" so broadly that it could apply to almost any information relevant to criminal or security issues, from any source within Canada, or any institutional or government source.

Section 72 describes when such information shall not be disclosed to the person concerned. It is only required that the judge have the opinion that the disclosure "would be injurious to national security or to the safety of persons." Experience with similar provisions under the current Act demonstrate that this vague provision is broadly interpreted. The minimal requirements for threat of harm, to avoid unnecessary application of the extraordinary power to withhold evidence must be defined. Our experience with similar provisions in the current Act indicates that the legal representative of the permanent resident will never know the information being relied upon by the Court.

Certificates would apply against individuals believed to be involved in security violations, violating human rights, serious criminality, or organized criminality. There are no definitions of these terms for the purposes of Division 9. For instance, what would constitute "serious criminality"? Is the general definition of "serious criminality" outlined in section 32 of Bill C-31 sufficient? Does the law contemplate

that the security certificate process can be used with respect to an individual with a singular conviction for an indictable offence, for example, who has been convicted of possession of stolen property over $5000, received a fine or probation, but is a permanent resident who has lived in Canada for twenty years since a young age?

RECOMMENDATION:

The terms defining "information", the threshold of injury to security or danger to persons, and the grounds of inadmissibility under which security certificates may be sought must be clearly defined and constrained.

C. Process

When the certificate is initially issued by the Minister and Solicitor General, the matter is referred to a designated Justice in the Federal Court-Trial Division who has security clearance. In our view, the system of only some judges having security clearance is inconsistent with the concept of judicial independence. All judges of the Federal Court should be able to review the reasonableness of a certificate.

Section 72(e) provides that, at the request of the Minister or Solicitor General, at any time in certificate proceedings, the judge shall hear evidence in the absence of the person concerned and counsel, if the judge is of the opinion that the evidence is injurious to national security or safety of persons. In our view, this process goes beyond what is necessary to safeguard national interests. While legitimate issues of national security and safety of persons may well exist in particular cases, the broad and vague provisions of Division 9 and the blanket solution of hearing evidence in the absence of the person concerned are an inadequate solution.

Although the permanent resident is ultimately given a summary of the information, such disclosure would not include material the judge feels "would be injurious to national security or to the safety of persons".

Furthermore, section 72(j) permits the judge to receive any evidence that the judge feels is appropriate. In other words, section 72(j) provides for a complete abandonment of rules of evidence.

The effect of Division 9 is that the judge can only review and consider information that the Minister or the Solicitor General provides under the cloak of national security, much of which goes unchallenged. The government is under no onus to provide information that would counterbalance its view that the person poses a risk. In our view, the sacrifice of fundamental principles of fairness — the right to know and answer the case and the rules of evidence — are not balanced by proper limits defining the point where the interests of the state should take precedence. If the Department desires to pursue removal of an individual from Canada, the process should be consistent with fair process of law.

Pursuant to section 73(2), the Minister may issue an opinion that a person poses a danger to the public. The opinion facilitates refoulment of a refugee to a country of persecution, or denial of Ministerial risk assessment. Only after that opinion is rendered is the person concerned is given the opportunity to be heard, that is, after the opinion of the Minister is filed and before the judge resumes the hearing. In our view, the person concerned ought to be able to provide evidence and submissions before the opinion is issued, rather than after and in the absence of evidence.

The standard of review that applies for the judge to make a determination in section 74(1) is whether the certificate and the Minister's opinion, if any, is "reasonable", based on the information and evidence available. Reasonableness is a low standard of review on evidence that would be inadmissible in any other legal proceeding.

The unfairness of the proposed legislation is exacerbated by the presumption that the decision of the judge that a certificate is reasonable is conclusive proof that the permanent resident is inadmissible. Section 75(1) states that the person concerned cannot make another application for protection and that the removal order issued

cannot be appealed. Section 75(2) states that the decision of the judge is final and cannot be appealed or judicially reviewed. It is unfair to expect such legal processes which can so profoundly affect the rights of permanent residents to be insulated from any appeal or judicial review.

RECOMMENDATION:

Division 9 and its application to permanent residents and refugees is an inappropriate sacrifice of due process and the right to defend oneself from loss of status. The Section does not support its passage in present form.

1990 The Section recommends that, when the Minister seeks to suspend a hearing in order to form an opinion as to whether the person concerned poses a danger, the person be given an opportunity to provide evidence and submissions prior to the decision being rendered.

the standard of proof for certificates must go beyond the level of reasonableness and should be closer to the standard required in criminal cases, that is, beyond a reasonable doubt. This must apply to permanent residents and refugees who face such damaging consequences as a result of such a certificate being issued.

2000 ## D. Detentions

Sections 76 to 79 refer to detention of persons being considered for the issuance of security certificates. As with the current Act, all such persons (except permanent residents) are to be detained absolutely, without the issuance of a warrant.

Permanent residents can also be detained but their detention must be justified as a result of a belief on reasonable grounds that the permanent resident is a danger to

national security, is a danger to the safety of persons, or is unlikely to appear at a proceeding or for removal.

The grounds for detention confusingly use the circumstances for nondisclosure of information. The grounds for detention should continue to be the usual grounds of flight risk or danger to the public. With the ties and commitment to Canada, it is unfair to detain permanent residents during hearings under this Division. The Bill provides a review of detention only once every six months. We submit that this is far too lengthy a period without review.

RECOMMENDATION:

The Section recommends that:

- **permanent residents should not be detained except on the usual grounds provided under the current Act.**
- **the test to determine if the person is a danger to national security, is a danger to the safety of persons, or is unlikely to appear at a proceeding or for removal should require clear and compelling evidence;**
- **detention reviews be required at least every two months; and**
- **temporary status holders should be entitled to a review of their detention initially within 48 hours of detention and at least once in every three months thereafter.**

E. Immigration and Refugee Board Hearings

The Ministerial power of non-disclosure under section 72 is extended by section 80(1) to apply to any admissibility hearing, detention review or appeal before the IRB Adjudication Division or Appeal Division. Under section 81(1), it can also apply to any judicial review application from such a hearing.

The Section is strongly opposed to such decisions being made by IRB. Most IRB members are not legally trained. Even those with formal legal training are not suitably trained for such determinations, and do not have security clearance.

RECOMMENDATION:

The Section recommends that any decision under this Division be made by a judge of the Federal Court, Trial Division.

Two cases currently before the Supreme Court of Canada — **Suresh** and **Ahani** — are considering the security certificate process. The issues in those cases are:

- Can Canada deport someone to face torture?
- Can Canada deport someone who hasn't committed an illegal act?
- Can the deportation of such a person under this process violate the *Charter of Rights* and contravene Canada's obligations under the *UN Convention Against Torture*?

The provisions for issuance of security certificates under the current law are flawed. Those under Bill C-31 are even more flawed. The result will be more individuals deported as a result of questionable evidence and processes.

The Section is unequivocally opposed to the current wording of Division 9.

VI. REFUGEE PROTECTION

A. Current Law

The old Canadian refugee determination, which the Supreme Court of Canada declared unconstitutional because of its unfairness, was as complex a system as could be imagined. The system in the present Act and Regulations is an improvement, but is still both needlessly complex and needlessly unfair. The present Act creates a bifurcated road. The number of steps depends on which of the two roads the claimant is required to take.

Under the present Act, first there is a port of entry interview, where claimants are interviewed on arrival about the substance of their claims without access to counsel, a procedure the Supreme Court of Canada has decided is constitutionally valid. Second there is eligibility determination, conducted by a senior immigration officer.

A determination of eligibility puts claimants on one of the two roads. If the person is eligible, there is the refugee hearing conducted by the Refugee Division of the Immigration and Refugee Board. If the claim is rejected, the person can apply for membership in the post claims refugee determination in Canada class. The decision on membership in the post claims refugee determination in Canada class is made by a specialized corps of officers in the Department of Immigration, the post claims determinations officers (PCDOs).

A person can make a claim either in status or at an immigration inquiry. If the claim is made at the inquiry, then the adjudicator issues a conditional removal order. If the claim fails, the order becomes effective without the need to reconvene the inquiry.

Those found not eligible for determination by the Refugee Division have risk determined differently from those found eligible. One ground of ineligibility is that the person has committed an offence with a maximum punishment of ten years or more and has been determined by the Minister to be a public danger. A person found

ineligible to make a refugee claim is also ineligible to apply for membership in the post determination refugee claimants in Canada class. It is this public danger determination procedure that becomes, instead, the risk determination procedure.

The public danger procedure starts with a determination in the local immigration office to seek the advice of the Minister that the person is a public danger. The person concerned is notified of this determination with an opportunity to make written submissions that would be forwarded to the Minister. The written submissions are sent to headquarters where they are analysed and advisory opinion given. The Minister or her delegate decides.

As can be seen, in this process, there is never a stand alone risk assessment. Rather risk assessment is folded into the public danger determination. The ultimate decision is only that the person is or is not a public danger. Furthermore, the decision on public danger does not involve the Department's risk analysis specialists, the post claims determination officers.

In order to engage their involvement, the person concerned has to make a second application, this time for permanent residence on humanitarian and compassionate grounds. It is the policy of the Department, when an application is made for humanitarian landing and the application has a risk component, to refer the risk component of the application to the post claim determination officers for their advice.

The *Immigration Act*, in general, prevents removal of rejected refugee claimants pending consideration of their application to the Federal Court. There are statutory stays of execution of removal orders. However, persons found ineligible to make a refugee claim on the basis that they are public dangers are not granted statutory stays. They must apply for judicial stays. Furthermore, an application for humanitarian landing, in itself, does not prevent execution of a removal order.

In consequence, the application for a judicial stay of execution of a removal order becomes part of the process of risk determination. Recourse to the Federal Court becomes a necessary part of the process rather than a step to be taken after the process is completed. Unless a person can stay in Canada pending his or her humanitarian application, the person never gets recourse to a decision reached on the advice of the post claims determination officers. The Department does not attempt to remove some people pending their humanitarian applications. However, as the docket of the Federal Court shows, for many, it does.

2110 With this system, there is no integration with the overseas and inland systems. Indeed, though the inland system has changed substantially, the overseas system has remained much the same. There has been a broadening of the risk standards. However, other criteria remain in place, and the procedure is unchanged.

It is an underlying policy of the *Immigration Act* to have applications for immigration processed at visa posts abroad, rather than inland. Yet, the refugee determination system overseas is much more problematic than the system inland.

The system is a good deal less fair. For instance, there is no right to counsel at refugee interviews, and most visa posts, as a matter of policy, prevent counsel from attending, even if they are available at the time of the scheduled interview.

2120 The persons who decide are neither specialized nor expert in refugee matters and have only cursory training in the field. They are not independent from government and its immigration and foreign affairs objectives, but rather part of that very portion of government that pursues immigration and foreign policy objectives.

The visa posts impose criteria that are not part of the inland determination. Examples are medical admissibility, likelihood of successful establishment, and no durable solution elsewhere.

It is a good deal harder to be recognized as a refugee overseas than inland, and for all the wrong reasons. The system gives an artificial incentive for claimants to come to Canada to make their claims, working at cross purposes with the overall objective of the system to have applications processed at visa posts abroad.

The present system is fairer than the old one, for at least some people. For those found to be public dangers, the present system is as unfair as the old system, and then some. For those who are found to be eligible, there is a fair hearing before an independent expert tribunal. The system is not completely fair, because of the denial of access to counsel at the initial port of entry interview, the absence of an appeal and the impossibility of reopening to consider change of circumstances, new evidence, or old evidence not previously available.

As well, the present system is still needlessly complex. While is not as complex as the old system, there are still many unnecessary steps, consuming time and money to no apparent purpose.

B. Refugee determination under Bill C-31

The Section approaches the refugee determination system with these objectives in mind:

- The system should be fair.
- It should be simple.
- It should comply with the international law standards.
- It should be consistent and integrated, not working at cross purposes.

The system proposed in Bill C-31, though in some respects an improvement over the present law, is still not quite right. It is still needlessly complex and unnecessarily unfair. It suffers from a lack of integration. It does not fully comply with international law standards.

The proposed system, like the old one, creates a bifurcated road. Some claimants will be found eligible and go through one form of risk determination. Other claimants will be found ineligible and go through another form of risk determination.

Perhaps it is more accurate to say that the old system, like the new one, creates a trifurcated road. A third group of claimants go down a third, dead end, road. At the end of the third road is removal without any form of risk assessment whatsoever.

In terms of potential numbers, the most significant ground of ineligibility is criminality. It is an even broader ground than under the present Act.

The criterion of public danger disappears. In itself, that is a welcome step, since many, if not most, of those labelled public dangers were not public dangers in the objective sense of likelihood to reoffend. It is quite common to see people labelled as public dangers under the present system who have committed only one offence; who have been out on bail before sentencing on the ground that the courts thought that they were no danger; who have been granted parole by the National Parole Board on the ground that they were not dangerous; who were released by immigration adjudicators from immigration detention on the ground that they were not dangers to the public; who had completed a succession of rehabilitation programs and accumulated testimony from penologists and criminologists that they were not dangers to the community.

The public danger label, rather than a true determination of public danger, is a form of venting public anger against foreigners for past crimes. It is a modern form of forfeiture.

At one time criminals used to forfeit all civic rights as a penalty for their crimes. Today we consider forfeiture as cruel and inhuman punishment. So we cease to practice it against our own citizens.

Bill C-31, though removing the public danger label, makes matters worse rather than better. Rather than a double hurdle for ineligibility, of a crime with a high maximum sentence plus a public danger determination, as there is now, there will be only a single hurdle of a conviction of a crime with a high maximum sentence.

Removal of the public danger hurdle has created the "Nelson Mandela" problem. Many political refugees are convicted abroad, for political reasons, of common crimes that are also crimes in Canada. Removal of the public danger hurdle means that these political convicts would become ineligible to make a refugee claim. If one looks at the people who could have been victimized if this proposal had always been Canadian law, it includes not only Nelson Mandela, but significant elements of virtually all democratic regimes that succeeded repressive regimes.

Under the Bill, once a person is declared ineligible, they go into a different risk determination stream. Risk determination is made not by the Protection Division of the Immigration and Refugee Board, but through pre-removal risk assessment.

The Bill gives the power to decide on pre-removal risk assessment to the Minister, but also allows her to delegate that power. Presumably, the power will be delegated, but the Bill does not say to whom. Though the Bill does not create a pre-removal risk assessment corps, it would presumably consist of the present post claims determination officers.

In addition to saying nothing about who will, in fact, do pre-removal risk assessment, the Bill says nothing about pre-removal risk assessment procedure. It is possible, and indeed from discussions with officials even contemplated, that pre-removal risk assessments will be done through oral hearings, at least for some of those going through this assessment.

One can justify the current post claims determination system on the basis that is examines aspects of risk, such as risk of torture on non-refugee grounds, not

examined by the Refugee Division of the IRB. However, under the Bill, the definition of risk that both the Protection Division of the IRB and pre-removal risk assessment officials would consider is the same.

So, the Bill contemplates two streams of claimants, going into two different determination systems where the risk definition applied would be the same, and where the procedure for application of the definition could potentially be the same. Furthermore, eligible but rejected refugee claimants would be able to go into pre-removal risk assessment, in effect, getting two refugee determinations.

Under the Bill, the Protection Division of the IRB could not reopen jurisdiction to deal with change of circumstances, new evidence, or old evidence not previously available. Nor does this exist under the Act for the Refugee Division of the IRB. Yet these factors need to be examined before removal.

The Government could, of course, give the Protection Division a reopening jurisdiction. However, the Government has more confidence in the ability of its own officials to respond in a timely fashion to a risk assessment coordinated with removal than in the ability of an independent tribunal to do so. It wants to create its own tribunal for that purpose.

As problematic as fragmentation of the refugee determination system is, even more problematic is the situation of those unable to squeeze into any one of the fragments. The pre-removal risk assessment is not available to all those who cannot seek a determination by the Protection Division. There are some who are ineligible for both refugee determination and pre-removal risk review.

Indeed, the way the law is worded, everyone ineligible to make a refugee claim is also ineligible to make a claim for pre-removal risk assessment. Pre-removal risk assessment of those found ineligible to make a refugee claim on the basis of serious criminality is an exception this general rule.

For instance, those who have withdrawn or abandoned a refugee claim cannot get back into the refugee determination system. They cannot apply for pre-removal risk assessment either. The claim may have been withdrawn because the person was being sponsored by a Canadian spouse and thought the claim unnecessary. However, the relationship could collapse and the need of claim resurfaces. But there is nowhere to go.

In addition to the unnecessary steps of ineligibility and pre-removal risk assessment as a substitute for reopening, which roughly parallel steps in the present system, the Bill adds a new step not found in the present system — the need to apply for a judicial stay of execution of a removal order to keep the person in Canada pending an application for leave and judicial review of a negative refugee determination by the Refugee Appeal Division of the IRB. There is not much sense in seeking protection in Canada if your efforts are being made after you have already been returned by Canada to the country of danger fled. Yet, the scheme of the Bill contemplates exactly that sort of effort.

The present law provides, as a general rule, for statutory stays of execution of removal orders pending determination of applications before the Federal Court. The Bill does not. Everyone who applies to Federal Court for a remedy and wants to remain in Canada pending Court determination will have to apply for a judicial stay of execution of the removal order.

Presumably, the lifting of the statutory stay is a consequence of the institution of an appeal from a negative refugee determination, in itself a welcome step, which the Section commends. However, the one should not follow from the other.

Removal of the statutory stay will mean some people will leave Canada more quickly, those who lose their applications for judicial stay. However, the time saved will not be great, since the Federal Court is efficient in disposing of applications for leave. The cost to the system, including the Courts, the Justice Department, the

Immigration Department and the Immigration bar, through a sharp spike in applications for discretionary stays in Federal Court, will be great.

The Bill, like all its predecessors, does little to address the connection between the refugee determination overseas and refugee determination in Canada. Indeed, the Bill, although it provides a common definition for refugee protection, puts claimants outside Canada through the procedures and provisions of Part I of the Act dealing with immigrants and not through Part II of the Act dealing with refugees.

This may seem like a rather long preface to our recommendations, but we felt it necessary to lay out in a general way our approach to the Bill. Our specific recommendations are in line with that general approach, dividing them amongst our four objectives. Some of these recommendations, of course, serve more than one objective.

C. Recommendations

i) Simplification

Refer all claims to the Refugee Determination Division without delay.

RECOMMENDATION:

The Section recommends that, (even if the criteria of eligibility remain and remain unchanged,) the procedural step of Department determination of eligibility before referral of claim to the refugee determination be abolished. Instead, the eligibility criteria should be applied by the Protection Division of the IRB. If the criteria are met, as they would be in the vast majority of cases, the hearing on the merits of the claim would follow immediately after the eligibility determination.

This is not a radical change. The vast majority of claims are referred for determination, and the delay of two to six months in determining eligibility is time better spent commencing determination of the claim. All claims for refugee status in Canada should be promptly commenced. Claims may subsequently be withdrawn, determined in full hearing, or terminated on establishment of grounds justifying denial of access to refugee determination (ineligibility), in accordance with the law.

Bill C-31 takes a step in this direction by providing that all claims shall be deemed to be referred for determination if no determination of eligibility is made within a prescribed period, anticipated to be a matter of days. There no need for even this period of delay, claims should be referred to the tribunal forthwith.

RECOMMENDATION:

The Section recommends that all claims for refugee status be commenced upon claim, by referral to the Refugee Determination tribunal. Decisions respecting withdrawal, abandonment, or termination of claim can follow as necessary and appropriate, within the venue of the Refugee Protection Division.

Grounds of ineligibility for access to Refugee Protection tribunal should be reduced and simplified.

Section 95 of Bill C-31 lists five grounds for denying access to the Refugee Determination tribunal, including prior claims being made in Canada, prior recognition of refugee status abroad, being inadmissible on grounds of criminality, security, or human rights violations, or coming to Canada from a prescribed third country. For some of these ineligible persons there is still determination of the need for protection or of refugee status, but by an administrative process by the Minister's officers, under section 107. The officers consider exactly the same issues the Refugee Protection Division is required to do, but without being a specialized

tribunal or an objective, independent decision maker. There is no appeal from a negative decision, and no provisions for a formal oral hearing.

Ineligibility on Grounds of Criminality, human rights violations, security

Under Bill C-31 persons inadmissible on grounds of criminality, human rights violations or security grounds are not referred to the Refugee Protection tribunal. They instead have the risk assessment done by the Department officers. The risk assessment is necessary for a balanced determination in compliance with the Convention, as to whether a person in need of protection should be removed.

RECOMMENDATION:

The Section recommends that, in cases of security, human rights or criminal inadmissibility, there be continued referral to the Refugee Protection tribunal for determination whether the individual is a Convention refugee or a person in need of protection.

People ineligible because of war crimes, crimes against humanity or serious non-political crimes committed before entry can be denied refugee protection under the Convention exclusion clauses. These are decisions for which the Refugee Protection tribunal has expertise and experience.

People who have committed serious crimes in Canada and are a danger to Canada, and people who are security risks can be removed from Canada even if refugees. The risk determination assists in the decision whether to remove by providing an assessment of the gravity of risk faced on return.

Ineligibility by prior claims in Canada

Under the current Act, persons who have left Canada for more than 90 days after their claim has been denied, abandoned or not heard for ineligibility can have their claim commenced anew. To address concern with abuse through "revolving" claims, Bill C-31 takes the extreme response of allowing only one referral to the determination tribunal in the lifetime of the claimant.

Pursuant to section 95(1)(a) and (b), a claimant is ineligible for referral to the determination tribunal if a prior claim under the Act is denied, abandoned, withdrawn or not heard through ineligibility. This would include situations where the prior refusal was in an overseas application with no representation of the claimant or a hearing process, or situations where years and even decades have passed, with clear changes of circumstance giving rise to a clear and compelling need for protection. No passage of time and no change of circumstances allows the claimant to be heard in the formal and specialized protection tribunal. This is an extreme change from the provisions of the existing Act.

For persons who return to Canada within a year of the prior claim, there is no risk assessment whatsoever, regardless of change of circumstances. Failure to provide for any risk assessment is a breach of Canada's obligation to consider claims for protection and provide that protection to persons in need. Under Bill C-31, a person must be absent from Canada for one year to be eligible for even the inferior process of the Minister's pre-removal risk assessment.

RECOMMENDATION:

The Section recommends that:

- **there be no ground of ineligibility based on prior claims under the Act. Persons returning to Canada and making a claim for protection should be referred to the Refugee Protection tribunal for determination of the claim. Abuse through "revolving claims" can be dealt with**

expeditiously through the doctrine of *res judicata*, which prevents re-litigation of the same issues on the same evidence.

- **if there is to be a ground of ineligibility based on prior claim under the Act, that there is always available a process for risk assessment, even if under a pre-removal risk assessment process. For example, persons returning within a year of the prior claim would have risk assessment by the Department, persons returning after the year would be referred to the Refugee Protection tribunal.**

Ineligibility because of grant of refugee status in another country

The rule in the present Act that a person is ineligible to make a claim if they have Convention refugee status in a country to which they can be returned has a certain logic because the Refugee Division of the IRB is limited to applying the Refugee Convention and this ineligibility rule in the Act is not to be found in the Convention. Risk in a country to which a person can be returned, but of which the person is not a national, is not relevant to the Convention refugee definition. The logic for the current procedure disappears with the creation of the Protection Division of the IRB, which has an expanded risk jurisdiction. Yet, the old procedure remains. The Bill should take advantage of the expanded risk jurisdiction in the Protection Division to consider risk in any country to which a person can be returned.

The Bill should require the Protection Division to consider risk in all countries to which a person could be returned. For each country, the Protection Division would state that there is risk or no risk on return. A positive risk determination for any country would bring the person for that country under the umbrella of the Bill provision that a person found either to be a Convention refugee or a person in need of protection cannot be returned to a country of risk [section 108(1)]. If the person

is at risk in all countries to which they could be returned, then we assume that regulations would provide that they would fall within either the Convention refugees in Canada class or the persons in need of protection class for which there is provision in section 12 (3) of the Bill.

RECOMMENDATION:

The Section recommends that:

- **there be no ground of ineligibility based upon grant of refugee status by another country to which the person can be returned. There must remain the means of assessing risk of harm through persecution in countries that previously have granted protection and to which the person can be returned.**
- **risk assessment for those recognized as refugees by other countries to which the persons can be returned be done through the established risk assessment mechanism. Such persons should be eligible to make a protection claim from the country which has granted them refugee status;**
- **Section 90(2) of the Bill be amended to read: "A person in need of protection is a foreign national in Canada whose removal to any country to which the person can be removed would subject them personally. . ."**

There is no ground of ineligibility under the current or proposed legislation that cannot be dealt with by the specialized tribunal for determining need for protection. The tribunal can refuse claims where there is meaningful protection abroad, or where there is no new evidence to support a repeated claim. For persons inadmissible on grounds of security, human rights or criminality, the assessment is a required precursor to decision to remove. Ineligibility based on prescribed third country has

had no effect as no third countries have been prescribed and, in the view of the Section, should not be.

RECOMMENDATION:

The Section recommends that:

- **all claims for protection be referred to the Protection Determination tribunal;**
- **issues relevant to current provisions for ineligibility be determined by the tribunal in the course of determination of need for protection; and**
- **section 95 grounds for ineligibility be deleted.**

Jurisdiction to reopen Protection tribunal proceedings

If all eligibility issues are considered within the Protection Division, then pre-removal risk assessment becomes redundant, except for the possibility of change of circumstances (new evidence, or evidence not previously available) between the tribunal hearing and process for removal giving rise to need for protection. There is no current jurisdiction for application to reopen a refugee determination, nor does Bill C-31 contemplate such jurisdiction.

RECOMMENDATION:

The Section recommends that the pre-removal risk assessment procedure be abolished and replaced by a reopening jurisdiction in the Protection Division of the IRB parallelling the existing reopening jurisdiction of the Appeal Division of the IRB (and not the reopening jurisdiction proposed for the Immigration Appeal Division by section 65 of the Bill). That is to say, there should be a power to reopen, on application, where there is a change of circumstances in the country of claim, new evidence in support of the claim or old evidence not previously available.

Statutory stay of removal pending judicial review

RECOMMENDATION:

The Section recommends that the necessity to apply for a discretionary stay to the Federal Court should be replaced by the present statutory stay pending applications for leave.

ii) Fairness

RECOMMENDATION:

The Section recommends that:

- **there should be a right to counsel at port of entry interviews;**
- **as long as pre-removal risk assessment remains, the Bill require an oral hearing under this procedure, at the very least, for those who had no oral hearing from the Protection Division of the IRB;**
- **the Bill allow a reopening jurisdiction in the Board to consider new evidence or old evidence not previously available, even if the pre-removal risk assessment remains and considers change of country conditions; and**
- **the government legislate a transparent, professional and accountable selection procedure for members of the IRB, to ensure a refugee determination procedure with no bias, or reasonable apprehension of bias.**

RECOMMENDATION:

The Section recommends that the Bill allow for appeals from abandonment decisions under section 105(2).

Abandonment can be hotly contested. Claimants may not show up for a prior hearing because they never received notice of the hearing. The Board must then decide whether the claimant's actions to maintain contact with the Board in order to receive notice were reasonable in the circumstances. An appeal from a contested abandonment decision where risk is at issue, is as appropriate as an appeal from the risk decision itself.

RECOMMENDATION:

The Section recommends that a person be allowed to make a refugee claim regardless of whether they are under a removal order.

Section 93(1) of the Bill now prohibits such a claim, as does the present Act. The Bill allows for such a person to apply for pre-removal risk assessment. Often whether such a claim is made or not depends on the person's awareness of his or rights at the time of removal proceedings. A removal order can be made on arrival, at the port of entry, before the claimant has had access to counsel. The denial of substantive rights should not depend on procedural vagaries.

iii) Compliance with international law

RECOMMENDATION:

The Section recommends that, as long as the eligibility stage and the pre-removal risk assessment stage remain, everyone ineligible for consideration by the Protection Division of the IRB be eligible for consideration under the pre-removal risk assessment procedure. No one at risk should be removed from Canada without assessment of that risk.

RECOMMENDATION:

The Section recommends that the definition of risk in section 90(2)(b) be amended to delete the phrase "the risk would be faced by the foreign national in every part of that country and is not faced generally by other individuals in or from that country".

Section 44(3) in Part I, Division 5 (Loss of Status and Removal) confusingly allows the Minister to stay removals of nationals to designated countries. This power now exists in regulation 27(1)(b). The power can be used to prevent removal to generalized risk, and has, in fact, been used for that purpose over the years.

The risk may not be so general as to put everyone at risk, but general enough to be faced "generally by other individuals in or from that country", that is to say those similarly situate to the claimant. The risk may not be faced by the foreign national in every part of the country, but in the part of the country to which the Department would remove the applicant, the place where the international airport is found. As well, because it is not based on the application of individuals, the Ministerial suspension of removals may be unresponsive to the testimony that individual refugee claimants have to give.

RECOMMENDATION:

The Section recommends that the Bill prohibit the removal of anyone to torture or arbitrary execution. In particular, the exceptions for criminality or security in section 108(2) should be deleted. International law prohibits such removal, in absolute terms without qualification.

iv) Integration with the system overseas RECOMMENDATION:

The Section recommends that refugee determinations overseas be done by the Protection Division of the IRB, using the same procedures as in Canada.

In the interim, the Section recommends that Bill C-31 recognize a right to counsel at refugee interviews at visa posts abroad.

The Section recommends that persons who are recognized as refugees at visa posts
2520 abroad and who come to Canada be entitled to landing. Right now such a person is not eligible to apply for landing within Canada. The person is ineligible to make a refugee claim, and the person is ineligible for consideration under pre-removal risk assessment. In themselves, these risk assessments may not be necessary given the visa office determination. However, they trigger eligibility for landing that, for the person recognized as a refugee at a visa post abroad, might not otherwise be available. The way the Act reads now, a person recognized as a refugee abroad, but not given an immigrant visa, but who nonetheless shows up in Canada, will be removable from Canada.

V. SUMMARY OF RECOMMENDATIONS

The Citizenship and Immigration Law Section of the Canadian Bar Association recommends that:

1. **No requirement for leave should be imposed on applicants seeking judicial review of overseas decisions.**

2. **The Department adopt effective alternative mechanisms for review of overseas refusals. The adoption of less formal Alternative Dispute Resolution (ADR) processes, or utilization of an Ombudsman with review and binding recommendation authority may provide an effective alternative to the expensive, time consuming and labour intensive process of judicial review.**

3. **The Department adopt overseas processes that include taking a proper record and accommodating the presence of counsel at interview (as in Quebec selection interviews), with the intent of reducing circumstances giving rise to contested decisions.**

4. **The question of imposition of leave requirement be revisited only after adoption and assessment of alternative review mechanisms and processes for generation of adequate records of determinations.**

5. **If a leave requirement for overseas decisions is imposed, it be structured to accommodate the particular circumstances of overseas applicants and the overseas decision-making process. At a minimum, the leave process should require the Department to provide an adequate record of the proceedings, and provide adequate time frames to retain and instruct counsel and prepare adequate affidavit and supporting documentation.**

The time available to instruct counsel in section 66 (3)(b) should be increased from 15 days to 30 days, with 60 days thereafter for completion of affidavits and filing of supporting documentation.

6. Permanent residents facing removal and refugee claimants denied access to the determination process must have a statutory stay of removal order pending application for leave to Federal Court, and for judicial review.

7. Bill C-31 be amended to include a provision for stay of execution of removal orders, consistent with the following:

Stay of removal order

The execution of a removal order with respect to

(a) permanent residents subject to a removal order that but for this section becomes executable under this Act; and

(b) claimants who are determined ineligible for referral of claim for refugee protection to the Refugee Protection Division, or whose claims are terminated without decision under this Act, and who would but for this section becomes subject to an executable removal order

is stayed:

(i) where the person against whom the order was made files an application for leave to commence a judicial review proceeding under the Federal Court Act or signifies in writing to an immigration officer an intention to file such an application, until the application for leave has been heard and disposed of or the time normally limited for filing an application for leave has elapsed and where leave is granted, until the judicial review proceeding has been heard and disposed of,

(ii) in any case where the person has filed with the Federal Court of Appeal an appeal of a decision of the Federal Court - Trial Division where a judge of that Court has at the time of rendering judgment certified in accordance with subsection 68(d) that a serious question of general importance was involved and has stated that question, or signifies in writing to an immigration officer an intention to file a notice of appeal to commence such an appeal, until the appeal has been heard and disposed of or the time normally limited for filing the appeal has elapsed, as the case may be, and

(iii) in any case where the person files an application for leave to appeal or signifies in writing to an immigration officer an intention to file an application for leave to appeal a decision of the Federal Court of Appeal on an appeal referred to in subparagraph (ii) to the

Supreme Court of Canada, until the application for leave to appeal has been heard and disposed of or the time normally limited for filing an application for leave to appeal has elapsed and, where leave to appeal is granted, until the appeal has been heard and disposed of or the time normally limited for filing the appeal has elapsed, as the case may be.

8. Section 48 be deleted and be redrafted for clear application. Meaningful protection from the consequences of flawed decisions for removal is the provision of proper safeguards before removal, and not the offer of airfare back to Canada.

9. Section 44(2) be redrafted for clarity of purpose and for application.

10. Section 36(1)(a) be amended as follows:

(1) A Foreign National who is not a permanent resident is inadmissible for misrepresentation for making a material misrepresentation which they know to be false or does not believe to be true or withholding information on a relevant matter that induces or could induce an error in the administration of this Act.

11. ***(2) A Foreign National who is a permanent resident is inadmissible for making a misrepresentation which they know to be false or does not believe to be true on a relevant matter that induces or could induce an error in the administration of the Act with respect to the Foreign National's own obtaining of permanent resident status, or with respect to the Foreign National's sponsorship and application for permanent residence by a person sponsored by the Foreign National,***

with other provisions of the section revised accordingly.

12. (i) section 36(1)(b) be deleted. The Department can rely on the provision respecting direct misrepresentation by the person concerned in their own application, which will be sufficient in the majority of cases;

(ii) alternatively, the provision be limited to application in cases where a sponsored applicant's landing was a direct consequence of the misrepresentation by the sponsor;

(iii) there be a five year limitation period on actions to extend inadmissibility to sponsored relatives, from the date of misrepresentation by the sponsor; and

(iv) the power to extend an inadmissibility to sponsored person be vested in the adjudicator determining misrepresentation by the sponsor, to be exercised with discretion where the adjudicator is satisfied that the facts of the case justify the inadmissibility of the sponsored person.

13. Section 36 (2), imposing a two-year inadmissibility ban following determination of misrepresentation, not be implemented until there is a meaningful avenue for appeal of such determination. The judicial review process, with requirement for leave, is not an appropriate avenue of appeal. Alternatively, where judicial review is the only avenue for review of determination of misrepresentation, the applicant should have a right of access to the judicial review process without leave.

14. Residency provisions in sections 24(2) and (3) be amended to extend the instances of deemed residence to include, for example, students studying abroad and intra-company transferees from Canadian businesses;
the concept of automatic expiry of permanent residence cards be abandoned; and
the power to determine loss of status or no residence be solely vested with the inquiries at Appeal Division of the Immigration and Refugee Board as under the current Act. Alternatively, the power to determine loss of status should be reviewable in a full oral hearing before the Appeal Division.

15. All permanent residents facing deportation have access to the Appeal Division for review of deportations on grounds of fact, law and equity.

Only in this manner can orders for deportation be fairly determined to be appropriate. In exceptional cases where the conduct of the permanent resident is so extreme as to render the appeal process futile, the Government has the option of pursuing a security or criminality certificate from a Federal Court Judge. Issuance of the certificate is unappealable and denies access to review by the Appeal Division. In the alternative, the Section strongly recommends that long term residents, namely those established in Canada for a period of five years or more, be protected against unappealable deportation orders, with guaranteed access to the Appeal Division for review of deportation order on grounds of fact, law and equity.

16. Section 59 be deleted. Permanent residents ordered deported from Canada should have full right of appeal to an independent tribunal on grounds of fact, law and in equity.

17. Section 80 be deleted.

18. Section 15 be deleted.

19. A permanent resident applying to renew a Permanent Residence Card need only confirm the residency requirement for the five-year period immediately preceding the date of an application for renewal.

20. Existing permanent residents, including those who have not abandoned their status under current law, be entitled to a PRCard upon application.

21. Rather than requiring prior cohabitation as a prerequisite to qualify as a common law partner, SOGIC recommends that consideration be given to the duration of the relationship, whether there is a significant degree

of commitment, and whether there is intent to cohabit once the applicant is landed.

22. Section 111 be amended to define the "trafficking" intended to be deterred or punished. Application of the section should be limited to conduct involving illegal entry, that is entry without valid passport, visa or other proper documents required under the law.

23. Section 115(1) be amended to say:
No person shall, *for the purpose of entering or remaining in Canada,*
(a) possess a *false or improperly obtained* passport, visa or other document . . .

24. Section 117 be amended to delete reference to failure to comply with terms and conditions, or alternatively, to limit offence for failure to comply with terms and conditions to cases of willful or deliberate failures, without cause.

25. Sections 119 and 120 be limited to misrepresentations in applications, inquiries and hearings, as constrained in the current Act.

26. Section 138 be deleted. In the alternative, offences to which the section applies should be delineated in the Act, with no consequences flowing from a finding of guilt, other than the stipulated fines.

27. Regulations relating to the application of section 140 be modelled after provincial garnishment rules, to provide the garnishee adequate living expenses.

28. The current definition of "permanent resident" be maintained, to preserve the distinction between individuals who have status and

commitment in Canada and those who attain only temporary status in Canada.

29. Adequate procedural safeguards be adopted for the determination of security certificates against permanent residents and persons in need of protection, as in the current Act.

30. T he terms defining "information", the threshold of injury to security or danger to persons, and the grounds of inadmissibility under which security certificates may be sought must be clearly defined and constrained.

31. Division 9 and its application to permanent residents and refugees is an inappropriate sacrifice of due process and the right to defend oneself from loss of status. The Section does not support its passage in present form.

32. When the Minister seeks to suspend a hearing in order to form an opinion as to whether the person concerned poses a danger, the person be given an opportunity to provide evidence and submissions prior to the decision being rendered. the standard of proof for certificates must go beyond the level of reasonableness and should be closer to the standard required in criminal cases, that is, beyond a reasonable doubt. This must apply to permanent residents and refugees who face such damaging consequences as a result of such a certificate being issued.

33. Permanent residents should not be detained except on the usual grounds provided under the current Act.

34. The test to determine if the person is a danger to national security, is a danger to the safety of persons, or is unlikely to appear at a proceeding or for removal should require clear and compelling evidence, detention reviews be required at least every two months, and temporary status holders should be entitled to a review of their detention initially within 48 hours of detention and at least once in every three months thereafter.

35. Any decision under this Division be made by a judge of the Federal Court, Trial Division.

36. Even if the criteria of eligibility remain and remain unchanged, the procedural step of Department determination of eligibility before referral of claim to the refugee determination should be abolished. Instead, the eligibility criteria should be applied by the Protection Division of the IRB. If the criteria are met, as they would be in the vast majority of cases, the hearing on the merits of the claim would follow immediately after the eligibility determination.

37. All claims for refugee status be commenced upon claim, by referral to the Refugee Determination tribunal. Decisions respecting withdrawal, abandonment, or termination of claim can follow as necessary and appropriate, within the venue of the Refugee Protection Division.

38. In cases of security, human rights or criminal inadmissibility, there be continued referral to the Refugee Protection tribunal for determination whether the individual is a Convention refugee or a person in need of protection.

39. There be no ground of ineligibility based on prior claims under the Act. Persons returning to Canada and making a claim for protection should

be referred to the Refugee Protection tribunal for determination of the claim. Abuse through "revolving claims" can be dealt with expeditiously through the doctrine of *res judicata*, which prevents re-litigation of the same issues on the same evidence.

40. If there is to be a ground of ineligibility based on prior claim under the Act, there should always be available a process for risk assessment, even if under a pre-removal risk assessment process. For example, persons returning within a year of the prior claim would have risk assessment by the Department, persons returning after the year would be referred to the Refugee Protection tribunal.

41. There be no ground of ineligibility based upon grant of refugee status by another country to which the person can be returned. There must remain the means of assessing risk of harm through persecution in countries that previously have granted protection and to which the person can be returned.

42. Risk assessment for those recognized as refugees by other countries to which the persons can be returned be done through the established risk assessment mechanism. Such persons should be eligible to make a protection claim from the country which has granted them refugee status.

43. Section 90(2) of the Bill be amended to read: "*A person in need of protection is a foreign national in Canada whose removal to any country to which the person can be removed would subject them personally. . .*"

44. All claims for protection be referred to the Protection Determination tribunal, issues relevant to current provisions for ineligibility be

determined by the tribunal in the course of determination of need for protection, and section 95 grounds for ineligibility be deleted.

45. The pre-removal risk assessment procedure be abolished and replaced by a reopening jurisdiction in the Protection Division of the IRB parallelling the existing reopening jurisdiction of the Appeal Division of the IRB (and not the reopening jurisdiction proposed for the Immigration Appeal Division by section 65 of the Bill). That is to say, there should be a power to reopen, on application, where there is a change of circumstances in the country of claim, new evidence in support of the claim or old evidence not previously available.

46. The necessity to apply for a discretionary stay to the Federal Court should be replaced by the present statutory stay pending applications for leave.

47. There should be a right to counsel at port of entry interviews.

48. As long as pre-removal risk assessment remains, the Bill require an oral hearing under this procedure, at the very least, for those who had no oral hearing from the Protection Division of the IRB.

49. The Bill allow a reopening jurisdiction in the Board to consider new evidence or old evidence not previously available, even if the pre-removal risk assessment remains and considers change of country conditions.

50. The government legislate a transparent, professional and accountable selection procedure for members of the IRB, to ensure a refugee

determination procedure with no bias, or reasonable apprehension of bias.

51. The Bill allow for appeals from abandonment decisions under section 105(2).

52. A person be allowed to make a refugee claim regardless of whether they are under a removal order.

53. As long as the eligibility stage and the pre-removal risk assessment stage remain, everyone ineligible for consideration by the Protection Division of the IRB be eligible for consideration under the pre-removal risk assessment procedure. No one at risk should be removed from Canada without assessment of that risk.

54. The definition of risk in section 90(2)(b) be amended to delete the phrase "the risk would be faced by the foreign national in every part of that country and is not faced generally by other individuals in or from that country".

55. The Bill prohibit the removal of anyone to torture or arbitrary execution. In particular, the exceptions for criminality or security in section 108(2) should be deleted. International law prohibits such removal, in absolute terms without qualification.

56. Refugee determinations overseas be done by the Protection Division of the IRB, using the same procedures as in Canada. In the interim, Bill C-31 should recognize a right to counsel at refugee interviews at visa posts abroad.