December 20, 2000

Daniel Jean
Director General
INTERNATIONAL REGION
Citizenship and Immigration Canada
Jean Edmonds South Tower, 16th Floor
365 Laurier Avenue West
Ottawa ON K1A 1L1

Dear Mr. Jean:

RE: International Region Pilot Project for Reconsideration of Independent Applications

The National Citizenship and Immigration Law Section of the Canadian Bar Association (the Section) has reviewed the Proposed Pilot Project for Reconsideration of Independent Applications, distributed by the International Region of Citizenship and Immigration Canada. We are pleased to have an opportunity to comment on the proposal.

At the outset we wish to congratulate CIC on undertaking this initiative, particularly at a time when there is much activity in the Department.

The Section shares the concerns of CIC and the Department of Justice over the escalation of Federal Court litigation in recent years. Although it may be a good source of work for many lawyers, it is often a frustrating exercise and an expenditure of resources that could be better spent on more productive activity. There are many reasons for this escalation, and consequently many ways of dealing with the problem. We are strongly opposed to the proposed "leave" requirement at Federal Court. We believe that there are far more effective means of reducing litigation without resorting to denial of access to justice. To that end, we applaud the pilot project and hope that it will be the first step in a comprehensive approach to improved decision-making and reduced litigation. Indeed, the Section considers the proposed pilot project as a commendable first step in the evolution of a comprehensive Alternative Dispute Resolution regime (ADR) that will meet the needs of all the parties.

We believe that managerial review should not be limited to factual determinations. There are frequent decision-making errors in exercising discretion and interpreting law and policy which could be quickly and efficiently corrected by managerial review. Nevertheless, we recognize that there are valid reasons for undertaking a pilot project of limited scope. We would prefer that a more aggressive project be undertaken, but trust that the current pilot will serve as the basis for an expanded managerial review initiative covering all areas of decision-making.

The Section strongly believes that it is in the public interest that the pilot project succeeds. It is prepared to do its part to encourage its members to carefully review cases put forward to the Program Manager for reconsideration so that there is not an undue strain on scarce resources.

The Section has the following specific comments with respect to the draft pilot project:

1. We recognize that applicants who wish to preserve the option of pursuing an application for judicial review on the original decision of the visa officer should ensure that they file the application within the requisite time. However, the pilot project process should not have the effect of prejudicing any application for judicial review. If the pilot project process is engaged and fails to resolve the dispute within the time for perfection of an application for judicial review, CIC should agree to instruct its counsel at the Department of Justice to consent to applications for extension of time for the perfection of a judicial review application.

2. The Section understands that, prior to the commencement of any judicial review proceeding arising from a refusal of an application by a visa officer, lawyers can communicate directly with the Program Manager and request reconsideration of the decision of a visa officer without advising Department of Justice counsel. However, it would be helpful to have a clear written assertion that where a judicial review application has been commenced, CIC agrees to allow lawyers to have direct contact with CIC during the managerial review process. This is necessary to avoid the proscription on lawyers contacting another lawyer's client directly during the course of litigation. We understand that it is intended that communication during managerial review should be in writing and that it should be copied to the appropriate local office of the Department of Justice. The Section also recommends that there be a mechanism for Program Managers to avail themselves of the assistance of Justice counsel during the managerial review process.

3. The Section recommends that the pilot project include situations where, on the evidence which was before the visa officer, he or she has apparently exercised discretion in an unreasonable way in the assessment of whether an applicant qualifies for immigration under an independent category. We also understand that the International Region does not wish

the pilot project to include failure by the responsible officer to exercise positive discretion under subsection 11(3) of the *Immigration Regulations* or on humanitarian and compassionate grounds. Hopefully, this aspect of a decision by the visa officer can be addressed when a more comprehensive ADR model is developed.

4. As we believe your legal counsel will have advised you, it is likely that a Program Manager's review decision could be challenged in Federal Court and there is nothing to stop applicants from doing so. However, for the pilot project to work, the Section recognizes that it is not in the interest of the parties to challenge such decisions in Federal Court. Rather, the original decision of the visa officer should be the subject of judicial review, should reconsideration fail to resolve the dispute. Accordingly, we will encourage our members to file timely applications for judicial review of Visa Officers' decisions.

5. The Section has concerns about the narrow parameters adopted by International Region for this pilot project. The managerial review model should ultimately allow new evidence submitted by applicants or their counsel to be taken into account by the Program Manager in any request for reconsideration. This is particularly so where the visa officer should have sought that evidence in order to properly consider the application (for example, where there is uncertainty regarding educational or employment qualifications).

6. Where there is a breach of natural justice or procedural fairness, reconsideration should take place regardless of the total points achieved by the applicant. This is especially so where the applicant did not have an opportunity to respond to information used by the visa officer to make the original decision.

The draft guidelines narrowly restrict the scope of circumstances for managerial review. The Section would hope that an ADR process could accommodate review of a visa officer's decision on language or work skill/experience where the officer's assessment was contrary to clear evidence in support (for example, low language points awarded despite college or university graduation in an English language environment, or not awarding occupation points – and related points – despite clear experience in a "degree usually required"situation). We recommend that these situations be within the pilot.

If the pilot is limited essentially to "clear error" situations, there still remain cases that could be resolved without requiring full hearing on judicial review. It may be that these cases could reach resolution before hearing in the judicial review process, through consent. While consents now occur in significant numbers, not enough use is made of this effective tool.

Consent requires agreement between CIC (as client), the Justice counsel and the applicant's counsel. Consents can be reasonably determined at the leave stage, upon review of the parties' affidavits and

record of decision. The consent process could be encouraged through an institutionalized process that sought to identify cases where consent would be appropriate, and to promote consent resolution. This process might be the responsibility of a dedicated case management team at CIC headquarters, and liaison with Justice counsel and applicant's counsel.

The Section recommends the pursuit of such process, much as IRB has done through the EHP process in the Refugee Division, and in appeals before the Appeal Division, through consents and pilot for ADR. The process would run concurrently with the Program Manager review. Justice counsel should be encouraged to consider and initiate consent in appropriate cases. They should also be required to respond to offers to settle from the applicant's counsel.

The Section offers its assistance to the International Region in the development of any comprehensive ADR model for use by all parties, of which the present pilot project is just the first part. We look forward to discussing these issues with you further in the near future.

Yours very truly,

Michael A. Greene
Chair
National Citizenship and Immigration Law Section