Immigration and Refugee Protection Regulations
Comments on Tranche 2

1. Seizure Provisions R. 270-275

The proposed regulations for seizure, return and forfeiture of property deny basic property rights and remove accountability by restricting Superior Court jurisdiction. Decisions of whether a use was improper or whether owners are innocent are left solely to Departmental officials, in an examination procedure that is not subject to sufficient review or appeal. Officers are allowed to seize private property and impose substantial penalties with virtually no review of their actions and little recourse available to property owners. We believe that these provisions must be redrafted to impose reasonable limits on Ministerial authority, to ensure due respect for property rights and to provide for proper Court review and appeal.

Under the current Act, the seizure of things (including documents) is set out separately from the seizure of vehicles. There are separate rules for when seizure is appropriate and separate rules for return or forfeiture of the goods. The current Act and Regulations are detailed, logical and complete. The proposed single set of IRPA rules for seizure of all "things", including automobiles, is unnecessary and problematic.

The seizure regulations are often confusing and illogical, and are in need of rewriting for both clarity and substance. There are overlapping provisions for applications for return of goods, and inappropriate criteria for return of goods seized.

"Improper or fraudulent obtaining or use" of vehicles

Under the current Act, a vehicle may be seized only when it is used in the commission of certain specific offences involving smuggling of improperly documented persons (namely IRPA sections 94.2 or 94.4, per s.102.01).

Under the IRPA s.140, seizure powers are expanded to include any "improper or fraudulent use" of the thing/vehicle. While this is the language of the IRPA, it becomes vague when coupled with enormous powers granted by the regulations that do not distinguish between minor or serious breaches or between innocent or guilty participation in the use of the thing.

These provisions would appear to authorize irrevocable seizure in cases where most Canadians would find the penalty unduly harsh. For instance, if a driver/owner crosses into Canada with a passenger who, unknown to the driver/owner:

- is improperly documented; or

- is criminally inadmissible and does not disclose it; or
- is carrying drugs or other contraband, or has secreted them in the vehicle;

it would appear that an officer may seize and forfeit the owner's vehicle for "improper use". It is irrelevant whether the driver or owner was knowingly committing a person-smuggling offence. The seizure is justified simply if the Minister believes that the vehicle was "fraudulently or improperly used". An innocent driver who was not in possession of the vehicle, may be required to pay a $5000 penalty (disingenuously called a "fee" in the regulations) for return of the vehicle. An innocent owner in possession of the vehicle has no remedy against forfeiture whatsoever.

The broad grounds for seizure of vehicles will create problems, as the provisions for return or forfeiture are badly drafted and insufficient, particularly in the case of an owner in possession who did not participate in the misuse.

It is recommended that seizure of vehicles be dealt with separately, and limited to use of the vehicle in the commission of serious smuggling offences, as in the current Act (sections102.1 and 102.2).

Other interest holders

Section 271 is deficient in not protecting the rights of interest holders. Unlike the current Act, the proposed regulations provide no protection for lien and charge holders from loss of security arising from seizure and disposition of seized goods. Section 102.01 of the current Act provides for notice of seizure to owners, mortgagees, lien holders, and all holders of interest, while the proposed IRPR section 271(1) limits notice to owners only. The government should not be licensed to profit from disposition at the expense of prior charge holders.

It is recommended that provisions be added to protect the interests of charge holders against loss of security, similar to the current Act.

Application for return of seized goods

There are three provisions for application for return of goods: s.272 (lawful owner or person from whom goods are seized); s.273 (lawful owner not in possession at time of seizure); and s.274 (person from whom seized).

Section 272 is unduly harsh in requiring the posting of a cash security in the full amount of the fair market value of the thing seized. This will impose undue hardship, in many cases far in excess of what is warranted by the alleged infraction. For instance, a trucker whose vehicle, rig and load are seized because an undocumented person is found inside would not be able to obtain

release of these things without coming up with cash in the full amount of the value of the truck and rig. For many this would be virtually impossible and would impose additional economic penalties as a result of the loss of ability to earn a livelihood.

In any event, s. 272 is not really an application for return of goods. Rather, it allows for exchange of the thing seized for cash security pending determination of forfeiture.

It is recommended that the wording in s. 102.07 of the current Act (for vehicles) be retained and that proposed s. 272 be deleted. If this section is retained**, it is recommended** that there be provision for posting of alternatives to cash security and in lesser amounts than fair market value.

Return of seized goods to owner not in possession at seizure — Section 273

The proposed regulations are an ineffective attempt to combine the existing separate tests for return of documents and vehicles.

It is recommended that the regulations for seizure and return of vehicles be separate from the regulations respecting "things".

It is appropriate for the innocent owner of things to demonstrate ownership and no participation in the misuse, as in s. 273(2)(a) and (b). The s. 273(2)(c) test is badly written and unduly onerous. The lawful owner should not have to prove a negative by demonstrating "no reasonable grounds to believe" that the things would be improperly misused by the person in possession. This reverse onus test is vague and would be too difficult to prove. A due diligence test would be preferable.

It is recommended that s. 273(2)(c) be limited to application for return of vehicles only, as in the current Act.

It is recommended that s. 273(2)(c) be rewritten consistent with the test in s. 102.2(5) of the current Act, which requires that the owner demonstrate "all reasonable care ...to satisfy the applicant that the vehicle was not likely to be used in connection with the commission of an unlawful act." The test is simply more appropriate.

Return of vehicle upon $5000 payment — Section 273(3)

Section 273(3) is objectionable, in that it penalizes all vehicle owners, regardless of non-complicity in vehicle misuse, by an arbitrary $5000 fine. Officers could impose substantial penalties that bear no relationship to the nature of the "improper use" and in excess of most fines imposed by Canadian courts for violations of immigration legislation. Although the regulations

call this payment a fee, no reasonable person could interpret this as anything other than a penalty.

Departmental officials advised the Parliamentary Committee that no fine was intended to be levied against innocent owners. The proposed regulations clearly miss this target. Even if it was limited in application to non-innocent owners, it is objectionable for being arbitrary and extreme, requiring a person to prove a negative and not subject to adequate accountability.

It is recommended that s. 273(3)(c) be deleted. Current legislative mechanisms should continue.

Accountability and Judicial Oversight

Section 102.2 of the current Act permits innocent owners and other interest holders to apply to a Superior Court judge for an order protecting their interests in a seized vehicle. The judge determines whether the owner has been complicit or was not exercising due care respecting the vehicle and offence. The decision may be appealed by either party to the Court of Appeal.

Under the proposed IRPR, these decisions would rest solely with the Minister, without any appeal, and subject only to Federal Court judicial review upon leave. It is not appropriate for the Minister to both enforce and review its own decisions respecting vehicle seizures, particularly against owners not in possession. Judicial review with leave is not an appropriate oversight.

It is recommended that determinations of vehicle owner complicity and due diligence be made by independent courts in hearing. As in the current Act, this could be the Superior Court in a province, on application by the owner. Alternatively, the Minister's decision could be reviewed by right in a Federal Court action.

Under the current Act (ss. 102.12 and.102.17), a decision by the Minister for forfeiture of vehicles may be appealed by right to Federal Court. The proposed regulations provide no similar appeal. The failure to provide for an appeal means that the only recourse available would be an application for leave for judicial review, which would not look at the merits of the Minister's decision. The seizure of significant private property without Court participation, review or appeal is unacceptable, particularly when the seizure is not based on any conviction or judicial determination. There is no justification for lumping vehicles and other things together.

It is recommended that, <u>for vehicles</u>, owners and persons from whom they are seized should continue to have a full right of appeal to the Federal Court, as in s. 102.17 of the current Act.

It is recommended that <u>for things and documents</u>, there continue to be a right of judicial review of the Minister's decision, without a requirement for obtaining leave.

Innocent owner in possession, when vehicle misused

The IRPR have no appropriate provision for return of a vehicle when the owner is in possession at time of seizure, but has unwittingly participated in "improper use".

R.274 would not apply, because the vehicle was misused, albeit without the owner's knowledge. R.272 might apply, but only if the owner paid a security deposit. However, since s. 274 allows relief from forfeiture only where there was no improper use, the deposit would be lost, effectively requiring the unwitting owner to pay a fine amounting to the full value of the vehicle. R. 273 would not apply because the owner was in possession at the time of seizure.

The situation of an innocent owner/driver is not farfetched, and does not appear to be solvable by the proposed regulations. **It is recommended** that "knowingly" be inserted prior to "fraudulently" in s. 274.

Limitation on Seizure

Section 276 is poorly drafted and incomprehensible. It seems to state that no seizure can be made in the case of a use that occurred more than six years after the use.

The six-year period in the current Act (s.102.04) applies only to seizure of vehicles or evidence respecting commission of a human smuggling offence. Proposed section 276 has no limitation, it can support seizure of any thing, document, vehicle "misused" in any immigration circumstance.

It is recommended that s.276 be amended to apply in limited circumstances involving human smuggling offences.

2. Transportation (sections 277 - 306)

No comments.

3. Loans (sections 307 - 312)

No comments.

4. Fees (sections 313 - 335)

We support the Parliamentary Committee's recommendation to retain the Family Business Job Offer, and therefore we believe this fee should not be canceled.

5. Transitional Provisions (sections 336 - 337)

We have considerable concern with the provisions respecting Court proceedings, and others.

Court Proceedings (sections 367 - 369)

We have great concern with R.369, and the following.

Returns by Federal Court of decisions made under current law (R. 369)

R. 369(1) says that decisions made by officers or the Minister under the current law, which have been successfully judicially reviewed, shall be redetermined under the new law.

It is neither fair nor sensible for redeterminations ordered by the Federal Court to be made under the new law where the new law diminishes or takes away the individuals rights and remedies. Persons whose matters were applied for and were determined under the current law are entitled to a fair and lawful determination. If the determination has been made unfairly or unlawfully, then the person is entitled to redetermination as it should have been done, without prejudice by change in law. They should not be penalized due to an error by the Minister.

There is obvious unfairness in cases of errors in applying overseas immigrant selection criteria under current law. There is no compelling reason not to make such re-determinations under the "lock-in" law.

As a general rule, persons who, but for a reviewable error should have benefitted from consideration under the previous law, should continue to obtain that benefit.

It is recommended that there be a general regulation that any Federal Court-ordered redeterminations of decisions for visas, student or employment authorizations, RRPs, humanitarian and compassionate applications, extensions of status, referral of claim, and the like be determined according to the relevant law applicable at the time of impugned decision.

Consistent with legislative practice, those who would benefit under the new law following a redetermination should be allowed that benefit. Where PR danger opinions made under current law are set aside, there should be no redetermination under s. 70(5). A person who was accordingly entitled to appeal under the current Act should be entitled to continue that appeal.

Adjudication Division redeterminations (section 369(3))

For the same reasons, Adjudication Division and Appeal Division redeterminations should be made under the current Act. For example, Federal Court-ordered redetermination of foreign national or PR inadmissibility, including misrepresentation, abandonment, overstay, or working/studying without authorization should be disposed of under the current Act in all regards.

It is recommended that the word "former" be inserted prior to the word "Act" in subsections 369(1) and (3).

Enforcement (sections 336 - 351)
s. 339(5)(b) - s. 27(1)(d) inadmissibility by offence punishable by 5 - 10 years imprisonment

This section says that Permanent Residents inadmissible under s. 27(1)(d) by conviction for a 5+ year offence shall be inadmissible for "criminality" under the IRPA. This does not equate to any ground of PR inadmissibility under the IRPA. Section 27(1) only applies to PRs, and under the IRPA PRs can only be inadmissible for "serious criminality" involving a 10+ year offence or six month sentence.

s. 345(2) - Danger opinions against PRs and refugees, s.64 right of appeal to Appeal Division

R. 345(2) says that a Permanent Resident determined to be a danger to the public under s. 70(5) of the current Act is caught by s.64 of the IRPA, and will not have any right of appeal. For danger opinion holders who would otherwise meet the s. 64 "serious criminality" test, there is no prejudice. However, there is serious prejudice to individuals who received less than a two year sentence. This appears to be another example of individuals carrying the burdens of the new legislation without enjoying the benefits.

It is recommended that danger opinions against PRs without two year sentences should be set aside upon the IRPA coming into force. Persons whose removals have not been effected should be entitled to pursue appeals. R.345 should be rewritten accordingly.

S. 350 - Seizure of things under the current Act

It is recommended that, for seizures made under the current Act, the remedial provisions including rights of Court determination be continued.

Refugee and Humanitarian Resettlement Program (sections 352 - 356)

No comment.

Refugee Protection (sections 357 - 366)

No comment.

Court Proceedings (sections 367 - 369)

s.369 (1) - The regulation respecting Federal Court-ordered redeterminations must be redrafted to preserve the applicability of "lock-in" law for determinations by officers or Minister.
s.369(3) - It is recommended that redeterminations by the Immigration Division be disposed of in accordance with the current Act.

Undertakings (section 370)

Where the IRPA or regulations reduce the term of undertakings, persons currently holding undertakings issued under s.118 of the current Act should have the benefit of the reduced term. There is no justifiable public policy reason for continuing to enforce the more onerous provisions of the current Act.

Non-accompanying Dependents (sections 371 - 374)

No comment.

Fees (sections .375 - 378)

No comment.