Submission on

Immigration and Refugee Protection Regulations

Parts 1 to 17

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NATIONAL CITIZENSHIP AND IMMIGRATION LAW SECTION
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PREFACE

The Canadian Bar Association is a national association representing over 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Citizenship and Immigration Law Section of the Canadian Bar Association, 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 by the Executive Officers as a public statement by the National Citizenship and Immigration Law Section of the Canadian Bar Association.

Submission on *Immigration and Refugee Protection Regulations* Parts 1 to 17

I. INTRODUCTION

The National Citizenship and Immigration Law Section of the Canadian Bar Association (the CBA Section) is pleased to have the opportunity to present its views on the Parts 1-17 of the proposed *Immigration and Refugee Protection Regulations*[1] (the proposed Regulations). The members of the CBA Section bring a unique perspective to the development of immigration law and policy. Firstly, we put a legal context to the issues. Secondly, we are well placed to assess proposed policy changes against operational realities. The CBA has a mandate to work to improve the law and the administration of justice, and we offer our comments in the optic of public interest.

The *Immigration and Refugee Protection Act* (IRPA) is framework legislation designed to entrench core principles, rights and obligations, leaving procedural and administrative matters to the regulations. The draft regulatory package contains almost five times as many regulations than the current *Immigration Regulations.* The CBA Section has serious concerns with many of the proposed regulations. Some of these concerns are legal in nature — the proposed regulations do, in fact, affect substantive rights and obligations. Others are technical and operational.

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1 *Canada Gazette*, Part I, December 15, 2001, pp. 4477 - 4698.

This submission for the House of Commons Standing Committee on Citizenship and Immigration addresses only key issues of critical importance to the integrity and effectiveness of Canada's immigration system. Areas not commented upon are not necessarily without concern. We will provide a more detailed technical analysis to Citizenship and Immigration Canada (CIC) in the context of its pre-publication consultations.

II. RETROACTIVITY

A. Introduction

Retroactivity is not a tool normally used in Canadian law. In the Senate Committee hearings on Bill C-11, Senator Kirby remarked:

> In some 30-odd years around government, I have never known policies to be applied retroactively. I understand your point of view. Traditionally, we grandfather everything if you are in the queue. If they change the labels on cigarette packages, all the packages that are out there in the marketplace can still be sold. All of Canadian history and public policy precedent is on your side on the retroactivity point.

Those who filed applications before the pre-publication date had no way of knowing how their cases would be affected by changes in the selection criteria. Numerous government statements support this interpretation:

> Finally, independent and assisted relative applications that are received before the publication of these regulations in Part I of the *Canada Gazette* ... were submitted and application processing fees were paid on the basis of an understanding that they would be assessed against the former selection system. . . .[2]

[2] Regulatory Impact Analysis Statement, *supra,* p. 4517.

> The values awarded for each of the selection criteria will be 'locked in' or protected. The applicant will receive the value current on the day the application was submitted and the fees paid. This will occur regardless of the day on which paper screening or interview takes place. Should a subsequent change in the values occur which would be to the applicant's advantage, the applicant may receive the benefit of the additional units of assessment. The applicant will not suffer from any decrease in the value of any of the selection criteria.[3]

Finally, the pass mark was unknown until pre-publication, making it impossible for applicants to know how the new rules would affect their applications.

Retroactivity simply means changing the rules in mid-stream. This can only harm Canada's reputation in the eyes of potential worthwhile immigrants, and would therefore be counter to Canada's economic interest.

B. Retroactivity — Past and Future

The public discussion on retroactivity has focused on the adverse impact on applications filed prior to pre-publication. Even more worrisome, the proposed regulations would set a precedent for use of retroactivity in the future. The potential harm of applying retroactivity to skilled worker applications is found in sections 65 and 49 of the proposed regulations. Applicants must meet the requirements at the time of application, and when their visas are issued, and when they land. Any change in the requirements prior to landing could have an adverse impact on the ability to land, even if the immigrant had a validly issued immigrant visa.

C. End of Predictability

If requirements can be changed retroactively, Canadian companies will have difficulty recruiting skilled workers to Canada. People recruited to Canada on

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3 CIC web site and CIC's Overseas Processing Manual, Chapter 5, Section 4.1. (This statement reflects how Canada has treated such applications in the past.)

temporary work permits are usually unwilling to uproot their families without some assurance that they will qualify for permanent residence. Companies will no longer be able to provide assurances, since the rules could change at any time. We are already aware of companies losing recruits as a result of the threat to impose retroactivity.

D. Retroactivity is the Wrong Tool to Reduce the Backlog

With a backlog of applications in unmanageable proportions, the Government plans to disqualify retroactively the majority of applications it was unable to process in a timely manner. While we have some sympathy for the predicament, we do not agree that retroactivity will solve the backlog problem. If retroactivity is applied, fairness demands that applicants be notified of the change in criteria and be given an opportunity to show their qualifications under the new criteria. Each application will have to be assessed under the new criteria. CIC will be inundated with applications for discretion where the applicants cannot meet the new selection criteria. Court challenges on the use of retroactivity will further drain limited CIC resources. The CBA Section believes that resources would be best spent by processing applications under existing criteria rather than refusing applications under the new criteria.

Retroactivity should not be used as a means of culling the present backlog of applications, nor as a means of controlling inventory levels on an ongoing basis. To avoid creating a system with no predictability, Canada should continue its traditional practice of locking in eligibility criteria at the time of application.

Any proposal to apply new selection criteria to applications filed after pre-publication, but before the IRPA comes into force, would also contravene Canada's tradition of not using retroactivity. Since the proposed criteria will likely be changed before they come into force, pre-publication would not give adequate notice of the ultimate criteria.

III. SELECTION CRITERIA FOR SKILLED WORKER APPLICANTS FOR PERMANENT RESIDENCE

A. Introduction

The CBA Section applauds the thought and effort that CIC has put into the development of new criteria.

Minister Caplan frequently said the selection system was to deliver "the best and the brightest". In our view, this standard ignores the historic contribution by immigrants of varying skills determined to make lives for themselves in Canada and contribute to Canadian society. We ask you to apply the proposed criteria to yourselves and to people you know. It will quickly become apparent that Canada has developed through the effors of a wide range of people who would not qualify under the proposed standards.

In short, we believe that strict adherence to a "best and brightest" policy is contrary to Canada's economic interests.

B. Effect of Proposed Changes

The intent is to pass applicants who attain 80 or more points in the new selection grid. Thus, applicants highly functional in English, the right age (between 21 and 44 according to CIC), with the maximum required skilled work experience (four years), and a bachelor's degree would fail, unless they scored maximum points for adaptability or validated employment with a Canadian employer. Adaptability points are to be awarded to applicants with close family ties in Canada, an educated spouse, one year of work or two years of study in Canada, or an informal job offer from a Canadian employer. Thus, the system will favour applicants with a connection to Canada over those who do not. This represents a dramatic change to Canadian immigration policy.

Compare two cases. First, a 33 year old, unmarried computer programmer with a master's degree from MIT, more than four years of skilled work experience, and fluent in English, but with no points for adaptability or arranged employment, could not immigrate to Canada. Second, a primary school teacher who also scores full points for age, language, education and experience, who also has a spouse with a university degree and an uncle in Canada would be able to immigrate. With a pass mark of 80, this system will not meet Canada's economic interests.

Another aspect is the treatment of skilled tradespeople. The Government asserts that the proposed criteria will allow skilled tradespeople to become Canadian immigrants. We take issue with this assertion given that, to be successful, the majority of skilled tradespeople would have to have fifteen years of formal education, a level virtually unheard of in the trades.

In ten years, one hundred percent of the growth in the Canadian labour market will come through immigration. The Canadian economy requires immigrants with a broad range of skills, not just university graduates with educated spouses and/or connections to Canada. Thus, the new selection system may well seriously impede Canada's workforce development.

C. Low Income Cut Off (LICO) Requirement

The CBA Section opposes the imposition of a transferable funds requirement equal to the one year LICO amount. The Government rationale is that people who arrive without this level of funds will be forced to take jobs beneath their skill level, thereby jeopardizing their ability to obtain better jobs in future. CIC proposes to impose this requirement even on applicants already working in Canada or who have arranged employment. This requirement will have a discriminatory impact on applicants from developing nations who are successful in their own economies but cannot accumulate sufficient funds in Canadian

dollars. CIC has previously proposed a six month LICO standard. We would support this, but only for applicants not already in Canada.

IV. LOSS OF DISCRETION IN DECISION MAKING

A. Introduction

Discretion gives decision makers options, to prevent unintended results that might occur if the law were applied strictly. Discretion exists because no complex set of laws, no matter how well thought out, can possibly take into account the myriad circumstances that may exist in individual cases.

In the immigration context, discretion may be beneficially employed in making relatively simple decisions, such as whether or not to issue an employment or student authorization, or whether to reinstate status after an overstay. It may also be employed in more serious decisions, such as an application to remain in Canada on humanitarian and compassionate grounds, or whether loss of status and removal should flow from a breach of the Act.

In many instances, the proposed regulations preclude discretionary decision making. Instead hard and fast rules dictate how an officer must deal with situations, regardless of surrounding circumstances. The loss of discretion will lead to increased enforcement action, whether or not that is the appropriate resolution in a particular case.

B. Study and Work Permits, Temporary Status

Under the current law, officers have discretion to reinstate the status of persons who let their status expire before applying for extension of visitor status, and thus mend oversights or inadvertent expiries. Section 19 of the proposed regulations only allows for restoration of status within 30 days following expiry.

Under the current law, officers have discretion to impose a one year refusal of a new employment authorization to someone who has breached the conditions of a prior authorization or who has worked without authorization. Officers can decide whether the breach is excusable. Sections 202 and 217 remove discretion for excusable breaches.

Worker, student and visitor breaches are commonplace and often technical in nature. The circumstances of many such breaches could be considered excusable. Removing the discretion to distinguish between serious breaches and non-serious or unintended breaches is not good policy. Enforcement resources should focus on serious breaches of the law.

It is recommended that the 30 day window for reinstatement be removed, and that officers have discretion to issue new permits where breaches are excusable.

C. Immigration Officer Issuance of Removal Orders

The proposed regulations give immigration officers too much authority to issue removal orders for too broad a range of breaches of the law, and without the requirement for a hearing.

Under the current law, officers in Canada have limited authority to administratively issue removal orders against foreign nationals (persons who are not permanent residents). An Adjudicator, not an immigration officer, issues deportation orders or determines contentious cases of inadmissibility.

Under the proposed regulations, immigration officers have greater authority to issue removal orders against foreign nationals in more circumstances. In most cases, immigration officers must issue an exclusion order, with a one or two year ban against re-entry.

There is no requirement for a determination, no opportunity for the person to respond to the case against them, and no right to be represented by counsel. Immigration officers will have unchecked authority to determine inadmissibility and issue exclusion orders against foreign nationals for overstays, breach of study or work permits, failure to appear at examinations (that the officers control), failure to meet requirements of entry (even for temporary visa holders), or failure to comply with any conditions.

The proposed regulations fail to address how or why an officer may decide to allow the foreign national to leave Canada voluntarily, i.e. without a removal order being issued. For cases that go to an Adjudicator, the Adjudicator has no discretion to choose the type of removal order. The proposed regulations dictate that the removal order must take place following a finding.

The regulations should limit immigration officers' authority to administrative inland issuance of departure orders only, apart from exceptional cases as in the current law. Adjudicators should retain discretion to issue the type of removal order appropriate in the circumstances of the case.

Persons who may be subject to an administratively issued order should be entitled to notice, an opportunity to respond to the case against them, and counsel, before determination of breach and issuance of removal order.

D. Section 64 Permanent Residents Facing Deportation Without Appeal

No regulations require consideration of all the circumstances of permanent residents who face loss of status and deportation without Appeal Division review, under section 64 of the IRPA.

CIC officials acknowledge that the absence of a legal requirement for consideration of circumstances is deliberate, to prevent a removal decision being judicially reviewed by the Court. This is an unacceptable excuse for abandoning the principle that deportation is appropriate only if a decision maker or tribunal has considered all of the circumstances.

The regulations should require that an officer consider all the circumstances of the case before issuing an enforcement report under section 44(1). This would include a notice requirement, an opportunity to make representations and a decision by the appropriate Department official.

Alternatively, after issuance of the removal order, the regulations should provide for stay of a removal order pending determination of an application by the person concerned to remain in Canada on humanitarian and compassionate grounds, under sections 24 and 25 of the IRPA.

E. Humanitarian and Compassionate Discretion

Sections 107, 108, and 110 of the proposed regulations contradict section 25 of the IRPA, the authority of the Minister to exercise humanitarian and compassionate consideration to allow persons to become permanent residents. Section 25 states that the Minister must consider an application made by an inadmissible person, while sections 108 and 110 say that the application must be refused if the person is inadmissible.

The authority of the Minister to allow persons to enter or remain in Canada on humanitarian and compassionate grounds, regardless of inadmissibility or failure to meet the requirements of law, is a long-established corrective tool. In most cases, exercise of this kind of discretion is not particularly dramatic. Humanitarian and compassionate discretion is not avoidance of the law. It is an essential safety valve that ensures the law does not work an injustice.

V. EXAMINATIONS

Section 15 of the IRPA authorizes officers to conduct compelled examinations of any person making applications under the Act. This powerful authority exists only for port of entry examinations under the current law.

The examination authority compels applicants to answer all questions and produce all documents required by an officer. Applicants can be arrested to compel attendance. Failure to attend, to answer honestly, to answer questions, or provide documents are grounds for a removal order, and an offence punishable by up to $100,000 fine or five years' imprisonment.

The proposed regulations cover only medical examinations and port of entry examinations. The rules for examination at port of entry do not provide for right to counsel, even though the consequences may include the issuance of a removal order.

It is recommended that the regulations limit s.15 examinations to the purpose of making a determination of the merits of the application.

It is recommended that the regulations require notice to the applicant, advising of the relevant obligations and penalties for non-compliance, and the right to counsel at the examination.

VI. PERMANENT RESIDENT CARDS

Permanent Resident Cards are a new document under the IRPA. Unlike current records of landing, permanent resident cards cease to be valid, generally after five years. Permanent resident cards are issued to new permanent residents following entry to Canada, but must be applied for by existing permanent residents after passage of the law and with each future expiry. Proposed regulations 52, 54, and

57 describe the application form and requirements for permanent residents seeking their first card and subsequent renewals.

Regulation 57 should confirm the obligation to issue a Permanent Resident Card to a permanent resident applying for their first card when the conditions of application are met.

Section 51(3) makes a Permanent Resident Card a required document if a permanent resident wishes to board transportation for return to Canada from abroad. This penalty for not having a valid card is an unnecessary infringement on a permanent resident's right of entry to Canada.

Section 51(3) should be deleted.

VII. REFUGEE MATTERS

A. Overseas and Inland Protection Hearings

Refugee determinations are made in Canada by a specialized tribunal, and overseas by officers at missions. Both systems should be consistent in result and fairness. They are not. The inland process always involves a hearing with records of evidence and with counsel permitted. The overseas process involves discretionary interviews where counsel participation is only exceptionally permitted.

It is recommended that the regulations provide for a visa officer interview for every refugee and humanitarian protected applicant who is referred by a referral organization or is sponsored, unless the application may be approved on documentary material without an interview.

It is recommended that every applicant for Convention refugee protection or humanitarian protection be entitled to assistance by counsel at interview.

B. "Economic Establishment" Test for Selection of Protected Persons and Refugees Abroad

Canada is often accused of taking the most economically viable of the world's refugee population, rather than resettling those in need. While the regulatory impact analysis statement says that focus is now on social rather than economic factors, the proposed regulations place more emphasis on ability to settle economically, with the exception of those an officer finds vulnerable or in urgent need of protection. This requirement only applies to selection overseas, creating an incentive to seek protection inland rather than abroad.

It is recommended that the criteria for ability to establish economically be removed for refugees and humanitarian protected persons abroad. Alternatively, the criteria should be changed to ability to establish socially.

C. No Durable Solution Requirement

Refugees and protected persons overseas must meet the test of there being "no reasonable prospect within a reasonable period of a durable solution", before issuance of visa. Durable solution means either voluntary repatriation, resettlement in the country of nationality or habitual residence, or resettlement or offer of resettlement in another country, other than Canada.

It is recommended that the definition of durable solution not include non-voluntary resettlement in the country of nationality or habitual residence.

D. Examination of Refugee Claimants at Port of Entry, and Right to Counsel

It is recommended that every person seeking entry and subject to the issuance of a removal order at examination be advised before the examination of the right to make a claim for protection, and should be advised of the right to counsel before examination.

E. Undocumented Protected Persons in Canada Class

Thousands of refugees in Canada who have been recognized as such and whose identity has been established to the satisfaction of the Refugee Division of the IRB, cannot be landed because they do not have passports and cannot get passports. The current regulations attempt to deal with this problem with the Undocumented Protected Persons in Canada Class. A person from designated countries can become a permanent resident three years after a positive protection determination even without credible identity documents. This proposal continues the current regulations.

Not being granted permanent resident status has many serious consequences for such matters as employability, education, and family reunification, for applicants and their families.

Questioning the identity of a person after a claim before an independent tribunal in which identity was satisfactorily established, and in which the Minister can participate, is perverse. Failure to recognize the identity of refugees even after refugee determination is arguably a violation of the Refugee Convention, the Universal Declaration of Human Rights, the International Convention on Civil and Political Rights, and the Convention on the Rights of the Child.

It is recommended that the regulations provide that identity established in protection proceedings is satisfactory for the purposes of an application for permanent residence.

F. Pre-removal Risk Assessment Submissions

The proposed regulations provide that risk assessment submissions must be received within 15 days after notice is given to the person. This is too short a time. Thirty days has been accepted as a reasonable time for submissions in existing immigration and Federal Court proceedings.

It is recommended that the regulations allow for receipt of pre-removal risk assessment submissions thirty days from the end of the notification period.

G. Definitions of Terrorism

The regulations do not define "terrorism", yet it is a ground of inadmissibility under the Act. The new *Anti-terrorism Act* defines terrorist activities.

It is recommended that the regulations incorporate the definition of terrorist activities from the Anti-terrorism Act.

H. Stays of Removal Pending Applications for Judicial Stays

Under the current law, persons who seek Federal Court judicial review of a refused claim and an extension of time for late filing are granted a statutory stay of removal pending the Court determination. The proposed regulations remove this stay, requiring the individual to seek a judicial stay of removal.

The current practice of lightning removals — sudden arrest and deportation of persons, including those who have complied voluntarily with all immigration requirements and for whom there is no reason to believe would not report voluntarily for removal when requested to do so, prevents reasonable access to the Courts for stay applications.

It is recommended that the regulations provide for a stay of removal in every case where a stay application has been filed in Court, pending hearing and determination by the Court.

I. Stays of Removal to Countries Posing a Generalized Risk to the Entire Population

Section 236 of the proposed regulations provides for a stay of removal to countries where there is a generalized risk to the entire population as a result of armed conflict, environmental disaster, or other conditions preventing safe return.

There is no provision for granting permanent status to persons whose removal is stayed on these grounds for years, while the person develops a significant degree of establishment and the overseas conditions persist. At one time, the deferred removal orders class (DROC) allowed eligibility for landing after three years of deferred removal.

It is recommended that persons who benefit from three years' stay of removal under section 236 be eligible for application for permanent residence.