Immigration and Refugee Protection Regulations

ISSUE PAPERS

NATIONAL CITIZENSHIP AND IMMIGRATION LAW SECTION
CANADIAN BAR ASSOCIATION

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I. INTRODUCTION

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 (the CBA 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.

The CBA Section is pleased to have the opportunity to present its views on 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.* Earlier this year, we set out a preliminary overview of our concerns

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

in our *Submission on Immigration and Refugee Protection Regulations*, Parts 1 to 17. The CBA Section continues to have serious concerns with many of the proposed regulations. In this submission, we elaborate further on those concerns previously outlined in more general terms through discussion in a series of Issue Papers.

CONDUCT OF EXAMINATIONS

Overview

Section 15 of the *Immigration and Refugee Protection Act (IRPA)* gives officers the power to commence examinations of any persons making any application to the officer "in accordance with this Act". This broad examination power is new, and powerful. Under the current Act, this examination power only existed at the port for entry for the purpose of determining whether persons were allowed to enter Canada. Under the *IRPA,* it applies against citizens, permanent residents or foreign nationals making any manner of application. It applies to persons seeking entry into Canada, or applying abroad for temporary or permanent visas and applications for employment, student or visitor visas. It will be applied to permanent residents or citizens applying for sponsorship, or residents applying to renew permanent resident cards. It will apply to persons applying inland for refugee protection or for humanitarian consideration.

The examination authority is powerful because the person concerned is compelled to answer all questions put to them under penalty of fine or imprisonment (section 127) and may be arrested to compel attendance at an examination (section 55). Failure to answer questions honestly or to provide documents is both a misrepresentation offence and grounds for loss of status. Compelled examinations have significant impact on civil liberty and are capable of abuse.

Section 17 of the *IRPA* authorizes the making of regulations for the conduct of section 15 examinations.

The Regulations

The regulations cover the conduct of medical examinations, clarifying what constitutes a medical examination (R.27), what classes of persons must undertake medical examinations (R.28), and considerations and criteria for medical inadmissibility (R.29-32).

The regulations cover port of entry examinations of persons seeking entry to Canada. These provisions include alternate means of examination (R.37), authority to direct persons to leave Canada for later examination or to direct back to the United States (R. 39,40), withdrawal of applications for entry (R.41), deferred examinations (R.42), the requirement for deposits or guarantees (R.44-47) and documents and disclosure requirements of persons seeking permanent or temporary entry (R.48-50).

There are no regulations covering the conduct of overseas examinations of applicants abroad or examination of persons in Canada who make applications under the Act, other than applications to enter Canada. In our view, this is a serious omission.

Our Comments

1. General Provisions controlling the Examination Authority

It is a fundamental necessity that there be regulations controlling the use and purpose of the section 15 examination authorities. These regulations do not provide such provisions.

The CBA Section recommends that the regulations provide that:

i. **Examinations at port of entry are for the purpose of determining whether:**

   a) **a foreign national shall be allowed to enter Canada as a temporary resident pursuant to section 22 of the Act;**
   b) **a foreign national shall be allowed to become a permanent resident pursuant to section 21 of the Act;**
   c) **a Canadian citizen, Indian or permanent resident as described in section 19 of the Act shall be allowed to enter and remain in Canada pursuant to that section.**

ii. **Examinations of a person making an application other than at port of entry are for the purpose of determining that application.**

2. Examinations on Applications other than at Port of Entry

The broad authority of officers to conduct compelled examinations upon threat of arrest or prosecution for non-compliance and risk of loss of status for misrepresentation has been a matter of serious concern from the first introduction of the legislation. The CBA has recently participated in the debate regarding the appropriate balance between civil liberties and compelled detention and examination of persons in the context of new anti-terrorist legislation. This legislation raises the same issues, but lacks the compelling security concerns or a statutory framework of safeguards for appropriate conduct of the examinations.

We are surprised and concerned to note that there are no regulations governing the actual conduct of examinations, even as to basic matters of notice to the individual, access to counsel or limits on the purpose of the examination content, and no regulations whatsoever on the conduct of examinations on applications for visas, sponsorship or permanent resident cards. These are serious omissions that allow the section 15 authority to be misused. Basic protections are required.

In its first and second reading, Bill C-11 authorized officers to conduct compelled examinations on suspected inadmissibility of persons in Canada, including permanent residents. The CBA Section criticized this "police state" authority and that power was subsequently deleted from Bill C-11 in third reading. The failure of these regulations to properly constrain the still considerable authority of officers to conduct compelled examinations of applicants will allow the authority to be misused by permitting officers to do through the back door what was forbidden through the front.

The CBA Section recommends that the regulations for conduct of examinations on applications under the *IRPA*, other than Port of Entry examinations, include:

i. **a definition specifying that an examination may consist of an interview with an officer, or a request for provision of information or documents;**

ii. **the requirement that an examination be commenced with a notice of the time and place of examination, including a description of the authority of the officer conducting the examination to ask questions and demand documents reasonably required, the person's obligations to comply, and the consequences of non-compliance;**

iii. **that the person being examined is entitled at their own expense to counsel, if they wish; and**

iv. **that an officer may conduct further examinations as are reasonably necessary to determine the application**.

These are basic safeguards necessary to ensure that the conduct of compelled examinations is proper and non-abusive.

3. Port of Entry Examinations (R.33 - 50)

These regulations offer options for officers in dealing with persons whose entry is not allowed or cannot be determined at the Port of Entry. These provisions for "direct back", "withdrawal" and further examination are similar to existing provisions, but with modifications.

i) Withdrawal (R.41)

The current Act and the *IRPA* both allow the option of a person withdrawing their application for entry, rather than facing enforcement proceedings. The standard practice of officers at Port of Entry is to offer the option to persons at that point. Section 41 of the *IRPA* suggests that the option only arises if the applicant raises the desire to withdraw. This section should be amended to clarify that officers shall put the option to applicants, in appropriate cases.

Section 41 lists a number of circumstances where officers shall not allow withdrawal of entry, and these are new. The underlying rationale for the change is unclear. For example, section 41(a)(iii) does not allow withdrawal for someone who has had a previous removal order. If someone has obeyed in all respects a previous removal order, and is now seeking to enter in accordance with the law, there is no reason why the withdrawal option should be denied.

ii) Direct Back to the United States (R.40)

The new regulations continue the option of directing an individual to return to the United States when examination or enforcement cannot be competed because a senior officer is unavailable to consider an inadmissibility report. The *IRPA* adds a new provision; a person can be directed back when "(c) an admissibility hearing cannot be held by the Immigration Division". Again, the value or meaning of this provision is unclear. The Immigration Division exists, operates and has jurisdiction to determine referred cases. There is no reason for the Division to be unable to hold a hearing.

The CBA Section recommends that R.40(c) be deleted.

4. When a Port of Entry Examination Ends (R.35)

The question of when an examination begins and ends is important because of the obligations and consequences to the persons concerned. The regulations acceptably state that examinations at port of entry end when an officer decides to either allow or withdraw entry, and the person leaves the port of entry to enter Canada or to depart Canada (R.35(a,b,c)).

Regulation 35(d) causes concern for its lack of clarity. The fault lies with the reference to "any person" and the reference to section 44 determinations. A plain reading of the Regulation would allow the entry of a permanent resident to trigger an examination on any ground, regardless of the individual's absolute right to enter Canada. When a permanent resident seeks to enter Canada, the only legitimate examination is one to determine whether they are a permanent resident. Once that is established, the purpose of examination is over. It is inappropriate for the "application" for entry to allow officers to conduct compelled examinations of the permanent resident on any issue that might affect the status of the permanent resident in later enforcement proceedings.

The CBA Section recommends that Regulation 35(d) be rethought and redrafted. It may be appropriate for the section to have application to foreign nationals only.

The CBA Section recommends that there be an additional provision of R.35 specifically referring to permanent residents, reading:

35. The examination .....ends only when;

(e) a permanent resident seeking entry satisfies an officer that they have that status, pursuant to section 19 and section 46 if the Act.

5. Medical Examinations (R.28-32)

The regulations defining medical examinations and defining the class of persons who should undergo examination are acceptable (R.27,28).

However, the CBA Section has significant concerns with the new definition of medical inadmissibility, which is based on anticipated costs of care or services and comparison to national averages. These concerns are discussed in the portion of our response concerning "Inadmissibilities".

6. Deposits and Guarantees (R.44-47)

These regulations concern the power of officers to require cash deposits or performance bonds to ensure compliance with conditions for entry. Performance bonds can only be posted by citizens or residents residing in Canada. The performance bond is enforceable or the deposit forfeited when persons entering Canada fail to comply with any conditions imposed.

Under the current Act, officers may require deposits from visitors at port of entry. The new regulations authorize the use of performance bonds at port of entry, and are not limited to foreign nationals entering Canada.

The CBA Section recommends that:

i. the minimum requirement for a $4000 deposit or bond be removed or reduced as too high a figure for minimum requirements.

ii. the requirement that the resident or citizen posting the performance bond or deposit "be able to ensure" compliance with conditions by the persons seeking entry be

deleted (R.45(1)(a)). This is a test that is difficult to measure and unnecessary.

iii. **the right of officers to require cash deposits or bonds be limited to entry of foreign nationals. It is an error to authorize imposition of a deposit or bonds against permanent residents, whose right of entry is unconditional.**

7. Documents Required

The CBA Section questions whether R.49, regarding the examination of persons seeking to become a permanent resident at the port of entry, is written in error. The provision under the current law is R.12. The new Regulation is written slightly differently with the result that <u>all</u> permanent visa holders at port of entry have the obligation to establish that they and all dependents are not inadmissible. This obligation should only be necessary when there has been a change in marital or other material circumstances, as under the current Act.

MEDICAL EXAMINATION AND INADMISSIBILITY ON HEALTH GROUNDS

Overview

In the area of medical inadmissibility, one significant change from the current law is the recognition that certain immigrant groups with compelling humanitarian and compassionate reasons to enter Canada should be exempted from the medical inadmissibility provisions. Section 38(2) of the *Immigration and Refugee Protection Act (IRPA)* limits these groups to spouses, common-law partners and children of Canadian sponsors and Convention refugees and protected persons. The exemption does not apply to other immigrant groups who have also been determined to have compelling humanitarian and compassionate reasons to enter Canada.

The second significant change from the current law is the definition of "excessive demand". When determining whether an individual is likely to create excessive demand, the new law requires an officer to determine whether the costs of anticipated health or social services for that individual would likely exceed "average Canadian *per capita* health service and social services costs over a period of five consecutive years…" or whether a demand on health or social services "would add to existing waiting lists and would increase the rate of mortality and morbidity in Canada as a result of the denial of or delay in the provision of those services" to Canadians.

Comments

The definition of "excessive demand" is problematic for the following reasons:

- The Federal Court has held that in determining excessive demands, the officer must assess the circumstance of each individual in their uniqueness and not rely on demand in general. The requirement to conduct a subjective assessment is generally not applied by medical officers and forms the basis for numerous Federal Court applications. The new regulations fail to clearly state that the officer must look at the circumstances specific to the individual;
- There is no reference in the regulations as to how the average Canadian *per capita* costs will be calculated;
- There is no reference in the regulations as to how the existence of waiting lists will be determined. Will they take into account regional disparities?
- Health and social services are defined by services for which the majority of the funds are contributed by governments. How will this be calculated? Will it take into account regional differences? If the average Canadian *per capita* cost calculation used by the department lumps all health and social services together, without taking into account the fact that in some regions these services may be privately funded or the applicant has made arrangements for private funding, how will the cost comparison apply?

In summary, the new regulations fail to clearly address the main problem that has been the focus of numerous and ongoing Federal Court applications, which is whether the determination of excessive demands is to be conducted according to a subjective analysis taking into account each individual's unique circumstances. Without further explicit clarification, the regulations will continue to be a source of litigation.

The CBA Section recommends that the regulations be amended to state that in determining excessive demands, officers must assess the particular circumstances of the individual's condition.

PERMANENT RESIDENT CARDS

Overview

The issuance of Permanent Residents Cards (PRC) that are evidence of a permanent resident's status is a new concept under the *Immigration and Refugee Protection Act (IRPA)*. Currently, permanent residents have relied upon their Record of Landing, or upon a Returning Resident Permit as proof of status.

As under the current law, permanent resident status does not expire. It is status that is good for life, so long as it is not lost after removal proceedings.

Under the new law, the PRC issued to new and existing permanent residents is an expiring document. The card may be valid for periods of one or five years. When the card expires the permanent resident is still a permanent resident, they are simply without a valid proof of their status and must apply for renewal of the card.

While there is no legal obligation for permanent residents to be in possession of a valid card, transportation companies will not carry them to Canada without a valid card. For this and other reasons of desiring proof of status, all permanent residents will be compelled to apply for issuance of cards and renewals upon expiry.

What the Regulations Cover

i. The issuance of cards to new permanent residents (R.56),
ii. The issuance of cards to existing residents, and renewals of cards (R.54(2)),
iii. The application requirements (R.54),
iv. The obligation of an officer to renew a card (R.57), and
v. Revocation of a card (R.58).

Our Comments

The process for issuing or renewing status cards, the fact that the PRC expire and require application for renewal, the conditions that the Department may impose for renewal, the authority of officers to conduct examinations of residents seeking renewal, and the inability of permanent residents without valid cards to access transportation carriers for return to Canada are all contentious issues affecting the quality of permanent resident status.

Contrary to the statement in the RIAS, we have expressed great concern with the regulations respecting PRC. We have consistently expressed concern about the expiring nature of the cards, the requirements for renewal, and the impact upon residents seeking to exercise their right of travel and entry to Canada as permanent residents. It must be emphasized and remembered that permanent residents in legal status have no obligation to apply for cards or to hold a valid card at any time. They continue as perfectly lawful permanent residents with or without the cards. They do not lose their status when the cards expire or when they do not apply for a card. The only obligation is on the government to provide permanent residents with proof of their status.

Permanent residents will be forced to apply for cards and for renewal because the new regulations make the cards expiring and make return travel to Canada a difficult process if valid cards are not held. Our concern is that the issuance and renewal processes be both lawful and fair. The application process for renewal of cards should not be used as a trigger for abusive and inappropriate compelled examinations on issues that are unrelated to the resident's right to a proof of status document.

We raised many other concerns with the regulations proposed in the discussion paper released by the Department in August 2001. We appreciate that some of our concerns with the draft regulations have been addressed, but the regulations still have provisions requiring reconsideration and amendment.

5. Issuance of Cards to New Immigrants (R.56)

Persons becoming new immigrants under the *IRPA* are required to provide their address in Canada within 180 days of entry to Canada to allow the Department to provide them with their PRC. The card is to be delivered to the CIC office "nearest the applicant's address in Canada".

These are straightforward conditions that raise only practical questions as to why the card is sent to the CIC office, how delivery is made to the resident and in what time frame.

6. Issuance of Cards to existing Permanent Residents (R.54(2), 57)

While new permanent residents must be issued a card, existing permanent residents must make an application for a card. The application is the same as for when a new permanent resident makes an application for renewal of the card.

There is no regulation saying when an officer "shall" issue a first card to an existing permanent resident. R. 57 says when the officer "shall, on application, renew" a card, but this does not cover existing permanent residents who are asking for their first card. This is a critical omission.

The CBA Section recommends that R. 57 be amended by adding to read as follows:

> **Section 57(1) An officer shall, on application, renew a permanent resident card or issue a card to an applicant referred to in paragraph 51(1)b if....**

7. Renewal of Cards and the Application Process (R.54,57(1))

i) When may Application for Renewal be made?

Our concern is that the application process for residency cards is more an exercise in examining compliance with residency requirements than an efficient process for residents in good status to renew their cards. An application process that bogs down in examination of residency will result in slow processing and is an unfair impairment of the resident's entitlement to a card confirming current status.

The CBA Section recommends that residents be allowed to apply for renewal of cards any time in the last year of a card's validity. This will provide an overlap period that prevents processing gaps leaving the resident without evidence of status.

ii) The Applicant Guarantor requirement (R.54)

The application process is unduly onerous, requiring a full application disclosing all of the applicant's employment, schooling and residences in Canada, and all absences from Canada, over the previous five years, with supporting documentation. The regulations further require the Department to assess the resident's compliance with the residency requirement to determine whether a short term or long term card will issue. In addition to the details of residence in Canada, the applicant is required to provide a guarantor of a prescribed occupation who declares the truthfulness of the application details, "to the best of their knowledge and belief". This requirement is unnecessary and excessive. The residency requirement is for two years presence or deemed presence in Canada in a five year period. The residence may be entirely on the basis of overseas residence for Canadian business purposes or accompanying a spouse. It is unrealistic to expect all residents to have a doctor, lawyer, principal or similar guarantor in Canada who is capable of or willing to provide the declaration.

The CBA Section recommends that the requirement for a guarantor be deleted.

iii) Period of Validity (R.52)

Permanent residents will usually be issued for five years, but can also be issued for a one year period if there are enforcement proceedings commenced on the permanent resident, including for belief of residency breach.

This requires that CIC consider and commence enforcement proceedings before being able to issue a short term card. This can lead to unnecessary enforcement proceedings, or delay card issuance pending consideration of enforcement proceedings.

The CBA Section recommends that the issuance of a short term card be separated from the requirement to commence enforcement proceedings by, for example, providing that officers may issue a short term card if the application does not disclose two years of residence as required by the Act. The CIC is then free to pursue further inquiries and enforcement proceedings as necessary.

The CBA Section recommends that the regulations provide that upon a favourable final determination of enforcement proceedings, the applicant shall receive a full term, five year card.

iv) Conditions for Refusing Renewal (R.57)

R. 57 says that renewal shall be refused if the applicant was previously convicted of the offence of misuse of the prior card (sections 123,126) and has not received a pardon.

The CBA Section recommends that this provision be deleted. The appropriate punishment is in courts upon conviction, and by loss of status if the punishment is serious enough. If a permanent resident has been punished by the courts and it is not an appropriate case for loss of status, then it is inappropriate and unduly punitive to deny proof of the resident's continuing status.

SKILLED WORKERS

The Issue

The regulations set out a new scheme for the selection of skilled workers and procedures to be followed in the processing of skilled worker applications. Many of the proposed changes are welcome. However, we believe that there are remaining serious deficiencies in the drafting of the regulations. In their present form, the regulations will create significant impediments to the selection of the type of skilled worker that government officials have indicated that they wish to select. Other provisions give rise to concerns of fairness and equality.

The Proposal

The skilled worker selection criteria contained in the proposed regulations purport to select a different type of immigrant. The intention is to emphasize education and language skills and to give preference to those who have worked or studied in Canada. The criteria were designed to remove subjectivity from the selection process.

Section 64(1)(b) imposes a new mandatory requirement that the skilled worker have substantial transferable funds equal to the Low Income Cutoff to support all accompanying family members for a period of one year after entry to Canada. There is no procedure for waiver or reduction of this requirement. Although current law allows an immigration officer to refuse an application if they believe that the applicant does not have the ability to support himself/herself and accompanying dependants, there is no mandatory requirement of funds.

- Section 67 introduces a scheme for awarding education points based upon the number of years of post-secondary education leading to an educational credential combined with the total number of years of full time studies. The latter requirement is a new addition to earlier government proposals and one that has not been previously been the subject of consultation discussions.

- Section 68 introduces a language assessment whose highest standard of points is "high proficiency", intended to be less than the current highest standard of "fluency". There is a substantially greater point value to achieving this high standard. There is also a substantially greater gap between this high level and the next level down, "moderate proficiency".

- Section 69 awards experience points in five point gradations of experience per year up to a maximum of twenty-five points for four years of qualified experience. The maximum value for experience is considerably higher than under the previous

system. More notably, the difference in points awarded for successive years is very substantial. Under the current system, the difference between one year and four years is six points. Under the proposed system, the difference would be fifteen points.

- Section 70 awards ten points for "arranged employment" as under the current system, but changes the test to facilitate the issuance of such points to persons who are working in Canada and have validated employment for twelve months before the date of application.

- Section 71 awards points for adaptability based on a number of objective factors including:

  a. Educational credentials of the applicant's spouse;
  b. The previous study in Canada or previous work in Canada;
  c. An offer of employment in Canada; and
  d. The presence of a close relative in Canada.

Our Concerns

1. Minimum Requirement of Funds

We are strongly opposed to a minimum requirement of funds. The current approach of determining admissibility based upon an officer's determination of whether the applicant will be able to support themselves and their family members works well. Moreover, the nature of our proposed selection criteria will accomplish the same ends because it emphasizes successful economic establishment in the short term. Applicants will simply be unable to qualify unless they have strong language skills, a high degree of employability and, in most cases, a job offer or current employment in Canada. We are unaware of any problem with skilled workers having to rely upon public social assistance after arrival in Canada.

A mandatory requirement of funds will make it extremely difficult for persons from many countries of the world to qualify. In most of the world, it is almost impossible for people to acquire the level of funds proposed by the regulations. In many countries of, for example, Eastern Europe, Africa, South America and much of Asia, the only people who would be able to meet the qualification would be the very elite, whose wealth is generally related more to birth or access to power than to ability to establish economically in an economy such as Canada's. The proposal is also troubling in that it does not provide for any flexibility or exemption. For instance, persons who have current employment, an offer of employment or family members in Canada are much less likely to need substantial funds upon their arrival.

The CBA Section recommends that section 64(1)(b) be eliminated. In the alternative, we recommend that the minimum requirement be substantially

reduced and that officers be given the ability to waive the requirement in circumstances where the skilled worker can demonstrate that they will be able to support themselves without recourse to social assistance.

2. Education

We believe the proposed educational criteria will also make it extremely difficult for people from many countries to qualify and will work a particular hardship upon skilled trades persons. Introducing a total number of years of study was not something raised in previous proposals for discussion and is problematic in that it is based upon a Canadian type of educational system with twelve years of primary and secondary education. This type of system does not exist in most parts of the world. For instance, in England, a person finishes secondary education at age sixteen after ten years. Similar systems exist in the Soviet Union, the Philippines, Pakistan and many other of Canada's primary source countries. In several countries in Europe, students are streamed into technical education after nine years of primary and secondary studies. However, at the completion of their education, many such students are highly qualified and would be very desirable in the Canadian economy. While the apparent intention of not rewarding inferior education is understandable, the proposed mechanism excludes far too many desirable skilled workers.

Section 67(2)(f) rewards only Master's or doctoral education credentials. We believe it should reward any post-secondary degree. For instance, in many countries, a physician or a lawyer must obtain a second degree, but that degree is not referred to as a Master's or doctoral degree, in spite of the fact that a Bachelor's degree may be a prerequisite to entering the program.

We also suggest that the section allow for a cumulative post-secondary education. For instance, many highly skilled workers are educated through a sequence of one or two-year certificates. However, the combination of these certificates is not recognized in the proposed selection criteria. We believe that this should be rectified.

The CBA Section recommends that:

1. **section 67(2) should be amended to eliminate the total year requirement.**

2. **section 67(2)(f) be amended to read: "..a Master's, doctoral or other post-graduate educational credential".**

3. **section 67(3)(a) should be eliminated**.

4. **section 67 allow for a cumulative post-secondary education**.

3. Experience

While the experience points weighting is intended to place greater emphasis on relevant work experience and perhaps allow skilled trades persons who lack extensive formal education to offset this with experience points, it has the unfortunate affect of excluding some of the most highly desirable skilled applicants. Those are persons who are recent graduates, particularly of Canadian institutions. The severe five point gradation for successive years of experience handicaps the person who only has one or two years of experience. Current or post-graduate work visas for foreign students only allow them one year of employment in Canada. If the pass mark is close to what has been proposed, these people will not be able to qualify. Potential solutions are to either reduce the total number of points for experience, reduce the points gradations for successive years of experience or increase the adaptability or other points awarded to Canadian graduates. Our view is that a combination of the second and third options would be preferable. As well, the government could facilitate the entry of foreign students who graduate from Canadian programs by extending the work visa eligibility for such graduates.

Skilled workers should receive credits for more than one occupation. In this rapidly changing world, skilled workers may be required to move to different jobs often requiring the use of the same skill set. For instance, an engineer might be transferred to a position involving the marketing of technical products or into a managerial position. These transfers are often due to the individual's exceptional abilities and are an indicator of success and career progress. There is no reason that a person with four years of combined experience in such a situation should not receive full credit.

> **The CBA Section recommends that the point gradations be reduced to three points per year starting from a base of fifteen points for the first year of employment. We also recommend that the regulations include a provision that the EO8 visa be extended from one to two years.**
>
> **The CBA Section recommends that section 69 be clarified to allow skilled workers to rely on cumulative work experience.**

4. Arranged Employment

It is commendable that the regulations propose two different ways of obtaining credit for arranged employment. The new proposal properly accords value to long term employment approval. However, we believe that the section contains an unjustifiable requirement that the employment approval must come from Human Resources Development Canada (HRDC). The rationale for this is apparently that HRDC applies a neutral or positive economic effect test. In fact, a substantial number of foreign workers come to work in Canada under exemptions that are based upon significant economic benefit to Canada. In our view, these people are as entitled to the arranged employment points as HRDC approved workers.

The CBA Section recommends that section 70 be amended to include foreign workers whose work permits are based on exemptions to HRDC validation.

5. Adaptability

The replacement of the subjective "personal suitability" test with objective adaptability factors is commendable. Nevertheless, there are problems with some of the proposed criteria. It seems that "spouse's or common-law partner's education" is included to take into consideration the family unit, as opposed to only the principal applicant. However the addition of that one discretionary element without any further consideration becomes discriminatory to single applicants who are unable to earn the bonus points for an educated spouse. We note that the imposition of differential pass marks has been used with success in Québec. The problem should either be addressed by allowing the possibility of getting points for having visited Canada or removing the factor altogether. Another alternative would be to offset this impact by a bonus for single applicants. This should be three points, less than the five point maximum in order to avoid having the opposite impact.

We are curious as to the justification for awarding only four points to the knowledge of a second language. Since all other values are divisible by five, it is of no use to have knowledge of a second language if it will only bring your total score to seventy nine, and not eighty. To respond to the objective of sections 3(b.1) of the Act," to support and assist the development of minority official languages communities in Canada", the addition of points must be meaningful and the minimum value for a second language should be five points.

Section 71(5) is problematic in that the "genuine offer of employment in Canada" is likely to invite fraudulent offers that will be difficult to detect. There will be a considerable financial incentive for individuals or companies to produce "genuine offers of employment" where there is no real likelihood of the person being employed. Moreover, legitimate employers will be reluctant to commit themselves to guaranteeing employment to someone who might not arrive for many months, if not years. This provision can only be effective if there is a concurrent commitment of resources and will to engagement to enforcement. Otherwise, there could be a serious compromise of program integrity.

The ten point maximum for arranged employment will result in disregard for relevant and beneficial qualifications. All of the factors of arranged employment deserve recognition where they exist and we recommend that the ten point maximum be increased to fifteen. The most significant barrier to this is the government's desire to limit the total possible points to one hundred, believing that it makes the system easier for applicants to understand. We believe that this is not a meritorious concern. In our experience, applicants are not confused by the present total of one hundred and ten; their only concern is the pass mark, and whether or not they achieve it.

Section 71(5) also provides that a person will not get the five bonus points for a job offer if they have "arranged employment" (pursuant to section 70). We believe that this exclusion is not justified. Arranged employment requires that the applicant's offer of employment be

scrutinized and approved by Canadian officials in HRDC. As such, it is substantially more valuable and more trustworthy then the so called "Genuine offer of employment" provided by section 71(5). Since the application for HRDC approval is employer driven, there is a greater likelihood that the skilled worker will have long term employment and will thus be able to economically establish in Canada. Having only a five point difference between the "genuine offer of employment" and "arranged employment" is insufficient.

The CBA Section recommends that:

1. **section 71(5) be amended to delete the words "is not an arranged employment and";**
2. **single applicants receive a bonus of three points or the possiblity of getting points for having visited Canada, or alternatively, there should be no bonus for spouses' education;**
3. **five points be awarded for the knowledge of a second language;**
4. **section 71(5) be implemented only if there is a commitment and mechanism for ensuring program integrity;**
5. **section 71(5) be amended to delete the words "that is not an arranged employment"; and**
6. **section 71(1) be amended to change "10" to "15".**

6. Requirements

Section 72(b) places an unnecessary restriction by only allowing family members to be included in an application if they are included at the time the original application was filed. We can see no rationale for such a requirement. Moreover, it imposes tremendous hardships on persons who marry or have a child following the submission of their application.

The CBA Section recommends that section 72(b) be amended by deleting the words "at the time it is made" and replacing those words with the words "at the time the visa is issued."

ECONOMIC CLASSES AND BUSINESS IMMIGRANTS

Overview of the Current Law

Currently, the law defines an Entrepreneur as an immigrant:

a. who intends and has the ability to establish, purchase or make a substantial investment in a business or commercial venture in Canada that will make a significant contribution to the economy and whereby employment opportunities will be created or continued in Canada for one or more Canadian citizens or permanent residents, other than the entrepreneur and his dependants, and
b. who intends and has the ability to provide active and on going participation in the management of the business or commercial venture.

Currently, an Investor is defined as an immigrant who:

a. has successfully operated, controlled or directed a business,
b. indicates to the Minister, in writing, that they intend to make an investment or have made an investment or have made an investment, and
c. has a net worth, accumulated by their own endeavors, of at least $800,000.

Investors have no conditions on their immigrant visa, whereas entrepreneurs must meet terms and conditions. An entrepreneur has two years in which to satisfy an immigration officer that:

a. his or her business will make a significant contribution to the economy;
b. demonstrate the creation of an employment opportunity for one or more Canadian citizens or permanent residents other than the entrepreneur or his or her dependents; and,
c. he or she has provided active and ongoing participation in day-to-day management of the business.

The Proposed Changes

The proposed regulations concerning investors and entrepreneurs are much harsher and more exclusionary than the present legislation.

1. Entrepreneurs

The proposed entrepreneur definition requires an *entrepreneur* to:

- have a minimum of two years business experience within the period beginning five years before the date of the application and continuing to the completion of the application;
- have a net worth of at least $300,000;
- have the intention and ability to control a percentage of the equity of a qualifying Canadian business;
- provide active and ongoing management; and,
- create at least one incremental full-time job equivalent in that business.

In order for entrepreneurs to satisfy the factors above, the "qualifying business" in their home countries must meet extremely high standards including two of the following:

- employ two full-time job equivalents per year;
- total annual sales equivalent to $500,000;
- net income of $50,000 or net assets at the end of the year equivalent to $125,000.

This is an unrealistic burden to be placed on a potential entrepreneur. In our opinion, this discriminates against individuals from many countries who may not be able to meet such onerous requirements. Historically, many individuals have emigrated from economically disadvantaged countries to become extremely successful in Canada. These individuals would not have succeeded in their applications if these new regulations were applied to them.

Further, if entrepreneurs are able to meet the above criteria, they must still demonstrate that within three years, they owned and operated a qualifying Canadian business with demonstrated sales of at least $250,000 per year, net income of at least $25,000 per year, and assets of $125,000 for one full year.

The CBA Section believes that these standards are unrealistic. Many small businesses do not show a net income within three years and small businesses specifically will have great difficulty with these requirements. If, for instance, a small business wishes to expand its workforce thereby temporarily affecting net income, it would be punished under these new regulations. Individuals that come to Canada and succeed in establishing successful businesses may have their landing revoked if unable to meet these onerous conditions.

Further, if individuals do not have business ownership experience, they must be involved in the management of at least fifty full-time job equivalents per year for at least three years.

In our view, an individual can be a successful entrepreneur in Canada without having managed fifty individuals. This is an impracticable and overly restrictive requirement with little bearing on a person's ability as an entrepreneur.

In addition to meeting the requirements of the definition, the entrepreneur must obtain the requisite number of points. Points are achieved for age, education and knowledge of an official language and redefines the points for experience and adaptability. Points for experience are allocated for the number of years of business experience within the previous five years, up to a maximum of thirty-five points. Entrepreneurs will only be able to obtain points for adaptability to a maximum of ten points, if they have made a business trip to Canada within the five years previous to the date of the application. An additional five points for adaptability can be obtained by participating in a joint Federal/Provincial business immigration initiative (not defined). Once again, this will discriminate against business people from countries that require visas to enter Canada.

2. Investors

Investors are now subject to a more comprehensive definition, therefore narrowing the definition of investor. An investor must have "business experience", similar to the business experience required in the entrepreneurial category, and a net worth of $800,000 to make an investment. Further, the investor is subject to the point allocation and selection criteria as noted above.

3. Self Employed Category

The Self Employed Category is extremely restrictive as it only applies to world-class level artists, athletes and farmers.

Once again Canada is unnecessarily restricting itself. We will lose extremely attractive immigrants to countries that will be more welcoming to them, such as Australia and the United States.

Comments

The rationale behind these significant changes is unclear. Over the past years, the number of entrepreneur and investor applications has been minimal and is continually decreasing. In our view:

- the changes will effectively eliminate the entrepreneur programs and the federal investor program.
- it is unrealistic to include previous experience in managing at least fifty full-time job equivalents per year in the definition of "business experience".

- the net worth requirement of $300,000 is too high. At a maximum, it should be the same as the Manitoba Provincial Nominee Program for Entrepreneurs ($250,000).
- the terms and conditions requiring sales, employment, profits and investments at specific levels are extremely arduous for any business, especially new immigrants' businesses.
- points for adaptability under section 91(a) are allocated for a trip to Canada within the previous five years and for an investment into a Federal/Provincial business immigration initiative. Therefore, entrepreneurs who are refused visitors visas to Canada cannot score any points for adaptability. It is common for entrepreneurs from many areas of the world to be refused visitors visas to Canada if they advise the Consulate or Embassy that they are visiting for the purpose of doing research for an Application for Permanent Residence. Additionally, there is no clear explanation of the Federal/Provincial business immigration initiative.
- there is no convincing rationale behind requiring an investor immigrant to have recent business experience.
- the figures quoted in the regulations are such that Canada will limit itself and detract from its ability to attract individuals who can contribute to our economy and create employment opportunities. We may also discriminate against individuals from developing countries who are successful in those countries and would continue to be successful in Canada, but do not have the requisite net worth.

With respect to entrepreneurs, the CBA Section recommends that past management experience should be reduced to the supervision of full-time job equivalents to five to ten, as a maximum, and the net worth requirement should be reduced to $250,000.

The CBA Section recommends that the definition of "qualifying business" be amended, as it is too stringent and is unrealistic for people coming from most parts of the world.

The CBA Section recommends that the definition of "qualifying Canadian business" should be amended, as it is unrealistic to expect applicants to commit themselves to operating a business within three years that creates sales and profits according to the proposed definition.

The CBA Section recommends that terms and conditions should be eliminated. Given the extensive screening of those that would be qualified as entrepreneurs, terms and conditions should not be attached to their visas.

The CBA Section recommends that adaptability criteria for investors and entrepreneurs should be the same as for self-employed applicants and skilled workers. The notion that an applicant can only obtain adaptability points having also previously obtained a Canadian visitors visa is arbitrary and beyond the applicant's control.

The CBA Section recommends that stringent "business experience criteria" for the investor should be eliminated. Subjecting an investor to a point allocation and restrictive selection criteria is also unwarranted. An investor is contributing

financial directly to the economy of Canada in a passive manner. Requiring that the investor show the same skills as an entrepreneur, who is actively supposed to manage a business, is illogical.

The CBA Section recommends that definitions of "qualifying business" and "qualifying Canadian business" should take into consideration the cumulative figures of multiple businesses owned by same applicant.

FAMILY CLASS ISSUES

Sponsorships

1. Definition of Marriage: section 3

i) The Proposal

A spouse, common law partner, or adopted child would be removed from the class of persons within section 3 if the primary purpose of entering into the relationship was for the purpose of gaining permanent residence in Canada.

ii) Existing Legislation

The current regulations in section 4(3), applicable to spouses only, have a two-part test to determine whether the spouse should be removed from the family class:

(i) if the primary purpose of entering into that relationship was for the purpose of gaining admission to Canada, and
(ii) if the overseas spouse did not have the intention of residing permanently with the other spouse.

iii) Our Concerns

There is a well-defined body of case law, centered around *Horbas v. Canada (MEI),* [1985] 2 F.C. 359 (T.D.) which clearly defines how the two-part test is to be applied. The proposal alters this test to a one-part test only, which will result in a significant impediment for arranged marriages. Many such marriages are entered into for immigration purposes and we are greatly concerned that officers will assess that that intention is the primary one, resulting in the refusal of many family class applications that currently meet, and should continue to meet the provisions of the Act.

The CBA Section recommends that the two-part test for removal from the family class set out in section 4(3) of the current regulations be maintained with the addition of common law partner and adopted child.

2. Income Requirements

i) Proposal

Section 130(1)(k) prevents a sponsor who does not meet certain income requirements from being able to sponsor family members, unless those members are spouses or common law partners and dependent children.

ii) Existing Legislation

The current regulations have a similar provision to these proposals in section 5(2)(f).

iii) Our Concerns

There is no consideration that sponsors may have assets equal to or greater that the Low Income Cut Off (LICO) requirements but that these assets are not in the form of current income. Assuming the rationale behind the LICO requirements is to ensure that the sponsor is able to support the family members being sponsored, then it should also be possible for sponsors to obtain letters of credit or put up some other form of security to provide for the financial being sought by the Department.

Similarly, there are often other close family members who are willing to co-sponsor and provide the funds necessary to support the sponsorship. The use of these funds to top up minimum income should be available to sponsors.

> **The CBA Section recommends adding a provision to section 130(1)(k) to include both an income "or other form of security" that is equal to the minimum necessary income.**

3. Person in Receipt of Social Assistance

i) Proposal

In section 130(1)(k), a person in receipt of social assistance for reasons other than disability is prevented from sponsoring a member of the family class.

ii) Existing Legislation

The current legislation is silent on this point.

iii) Our Concerns

This provision appears very harsh and will target single parents with dependent children who are unable to work because they must care for their children. It may well be that once a sponsored spouse or parent arrives in Canada, the single parent will be able to work and be both self-supporting and able to support sponsored family members.

The CBA Section recommends that section 130(1)(k) either be deleted or amended to add after "disability", the words "or other reason justifiable in the opinion of an officer".

4. Requirement for "Habitual Presence" in Canada

i) Proposal

In section 130(1)(b), the sponsor must be habitually present in Canada on the day that the application is made.

ii) Existing Legislation

The definition of sponsor in section 2 of the regulations allows for the situation where Canadian citizens, resident outside Canada, could sponsor their family class members conditional upon them residing in Canada once the family class member is granted landing.

iii) Our Concerns

The new regulations fail to provide for the common situation recognized in the current legislation where a Canadian is either working or living outside Canada, meets and marries a foreign national and wants to remain with the spouse abroad until the sponsorship issue is addressed.

The CBA Section recommends that section 130(1)(b) be amended to include the situation referred to above by adding after the word "is", the words "or will be".

5. Length of Sponsorship Undertaking

i) Proposal

In section 129, the proposed regulations oblige a sponsor to undertake to support a sponsored spouse in R.129(a) for a maximum of three years and a sponsored child in R.129(b)(c) for a minimum of ten years and up to twenty-two years of age.

ii) Existing Legislation

The length of the sponsorship undertaking in the current regulations is a period of ten years as noted in section 5(2)(h).

iii) Our Concerns

The reduction or increase, as the case may be, in the undertaking will be meaningless without a concerted joint effort by federal and provincial governments to enforce these undertakings. In the past, there has been not been the necessary political will. The change in the regulations for sponsorship of children under twelve years of age at the time of landing results in a sponsor's undertaking being effective for up to twenty-two years in the case of children landing as infants. There is a discriminatory impact of this regulation depending on the age of the child.

The CBA Section recommends that the undertaking for all dependent children, regardless of age be the same, with a recommendation that ten years would be appropriate. In cases where a sponsorship expires prior to the child reaching the age of majority, provincial family law statutes are available to fill in the gap.

Adoption

1. Definition

i) Proposal

The definition covering an adopted child has reduced the age prior to which adoption must have taken effect to eighteen from nineteen, while at the same time the regulations have increased the age of sponsorship from nineteen to twenty-two.

ii) Existing Legislation

The current definitions of "dependent daughter", "dependent son" and "daughter" and "son" are consistent as to the age of adoption and the age up to which the dependent may be sponsored.

iii) Our Concerns

As only biological children can benefit from the increase in age to twenty-two, this section discriminates against adopted children who were not adopted before the age of eighteen years.

The CBA Section recommends that the definition of dependent child be amended to include all children less than twenty-two years of age.

2. Types of Adoptions

i) Proposal

Section 114(2) and (3) set out two types of adoption, full and simple, and the requirements for each. The section also discusses a person who the sponsor "intends to adopt in Canada" and sets out certain requirements for this type of adoption.

ii) Our Concerns

The "intends to adopt in Canada" class of adoptees is not placed in either of the other two categories and does not have similar requirements for the "best interests of the child" assessment and other tests as set out for full and simple adoptions. It is not clear whether this is intended to be a third category with different prerequisites for sponsorship.

The CBA Section recommends that this section be reviewed to determine whether the child who a sponsor is intending to adopt in Canada is to be a category distinct from the "full" and "simple" adoption categories.

3. Requirement for Medical History of Adopted Child

i) Proposal

In section 115, the regulations require the parents of an adopted child to obtain, from a reliable source, complete information of the child's medical condition.

ii) Existing Legislation

There is no equivalent section in the current regulations.

iii) Our Concerns

The section puts the onus on adopting parents to obtain a complete medical history of their adopted children. In many cases of adoption this is not possible as to the lack of knowledge of the father, or the disappearance of the parents.

If the section is only to require the child to undergo a medical examination, this requirement already exists in section 28 of the regulations. If it is placing this more onerous requirement on adopted parents, it is not only unfair; it will be in many cases impossible to meet.

The CBA Section recommends that this section should be deleted as section 28 already covers this matter.

Dependent Children

1. Lock-in Date for Age

i) Proposal

The regulations are silent as to the lock-in date for age, and intimate that the requirements of the class must be met both at time of application and at time of entry to Canada (sections 13(4),(5) and section 49).

ii) Existing Legislation

The current practice has been to lock-in the age for dependent children as of the time of filing the overseas application.

iii) Our Concerns

An applicant could be a dependent child at the time of filing the application and due to factors beyond his or her control and in the sole control of the Department and its overseas offices, reach an age beyond that set out in the definition. This would be most unfair to applicants and would never provide a certainty to the law.

The CBA Section recommends that the age of dependent children be locked in at the date of filing their applications.

2. Definition of Dependent Child

i) Proposal

The definition of dependent child in section 2 includes children over the age of twenty-two who are dependent because of physical or mental conditions or because of being students.

ii) Existing Legislation

The concepts of dependency in the existing regulations are similar, although the age limit is nineteen.

iii) Our Concerns

The definition fails to consider children who are over the age of twenty-two and are subject to compulsory military service, but who are still financially and emotionally dependent on their parents. It also fails to capture the last remaining child, over the age of twenty-two, who is still financially and emotionally dependent on their parents.

The CBA Section recommends that the definition of dependent child include two more categories in (b) to cover the above situations as follows:

iv. "is 22 years of age or older and has depended substantially on the financial support of a parent since at least the age of 22 and is the last remaining child of that parent".

v. "is 22 years of age or older and has depended substantially on the financial support of a parent since at least the age of 22 and is enrolled in compulsory military service in his or her country of residence".

Family Class Members

1. Fiancé(e)s and Intended Common Law Partners

i) Proposal

Fiancé(e)s and intended common law partners have been excluded from the definition of member of the family class in section 114(1).

ii) Existing Legislation

In the current legislation, fiancé(e)s are members of the family class.

iii) Our Concerns

Being excluded from the membership in the family class denies to fiancé(e)s and intending common law partners certain benefits that are granted to the members of that class such as:

(i) the right to appeal the denial of an application to the IAD under section 63(1) of the Act,

(ii) exemption from the minimum income requirements under sections 130(1)(k) and 130(4) of the regulations,

(iii) exemption from medical inadmissibility provisions under section 38(2) of the Act.

Fiancé(e)s can cure the denial of these rights by marrying. However, common law partners have no legal recourse to do so. As a result, although there was an attempt to modernize the Act to

treat common law partners the same as married partners, the regulations fail to do this for these two classes.

The CBA Section recommends that fiancé(e)s and common law partners be listed as members of the family class.

2. Non-Accompanying Family Members

i) Proposal

The regulations in section 28(1)(a) require all dependents, whether they are accompanying or not, to undergo and pass medical examinations. Yet, section 114(5) in conjunction with section 228 takes certain dependents out of the definition of family member. It seems an anomaly to require a dependent who does not qualify to be sponsored as a family class member to have to undertake a medical examination.

ii) Our Concerns

If the dependent is inadmissible for reasons other than medical reasons, for example, because he or she is co-habiting with another person, then there appears to be no reason to require that person to undergo a medical examination.

The CBA Section recommends that section 28(1)(a) be amended to refer to "accompanying dependents" only.

Live-In Caregivers

1. Proposal

Section 103 of the regulations requires the requirements in section 100 to 102 to be applicable at three different points in time: time of application for the work permit, time of issuance of the work permit and time of landing.

2. Existing Legislation

There is no similar provision in the existing legislation.

3. Our Concerns

There are certain provisions in each of the sections 100 to 102 that cannot possibly apply at all three points in time: for example, a Live-in Caregiver cannot have provided live-in caregiver

duties for two out of three years under section 101(1)(d) at the time of application for the work permit. Similarly, that person cannot hold a work permit under section 101(1)(c) at time of applying for a work permit.

The CBA Section recommends that, to avoid misrepresentation, only the specific requirements under section 100(a)(b)(c), and any others deemed critical to avoid misrepresentation, be required to be met at all of these three points in time.

The requirement of two years of service within three years is especially difficult to attain for Québec-based Live-in Caregivers due to additional delays when a change of employer is required. Because of the necessity to obtain a dual validation and a Certificate of Acceptation of Québec (CAQ) it can often take more than four months for an individual to obtain a new work permit. Such delays will often render Live-in Caregivers ineligible to the program and they would then have to apply under the Humanitarian & Compassionate grounds class.

The CBA Section recommends that section 101 be amended to indicate:

> **"(...) cumulative period of at least two years within the four years immediately following their entry (...)**

HUMANITARIAN AND COMPASSIONATE APPLICATIONS

Overview

In our view, the regulations concerning humanitarian and compassionate (H and C) discretion to overcome inadmissibility are incomplete. The regulations do not preserve the current broad authority to exercise discretion, and do not ensure that H and C considerations may allow an inadmissible person to remain in Canada in appropriate circumstances. For the exercise of H and C grounds, discretion is an important and essential mechanism, particularly where the law is harsh.

H and C discretion is the ability to allow someone to enter or remain in Canada because there are good common sense considerations that they should be allowed to do so, in spite of the fact that the person does not meet all the strict requirements of the law, or may be inadmissible. H and C discretion is a safety valve; it allows the Department to override harsh laws in appropriate cases. Without discretion, there is only the harsh law and it can operate unfairly.

Anyone can apply for discretion, but no one has a right to the favourable exercise of discretion. The discretion is solely in the hands of the Minister and the Minister's delegates, to be used reasonably and fairly. In some cases persons should not be saved from their inadmissibility or failure to meet requirements of the law; in others it is appropriate that they should.

In appropriate cases, H and C discretion has been used to permit spouses, children or parents to remain in Canada rather than face unnecessary separation or removal. Occasionally, it is used to relieve persons from removal orders because of compelling circumstances. Under the *Immigration and Refugee Protection Act (IRPA)*, the Minister's discretion is particularly important. It may be the only formal process allowing Permanent Residents without appeal against deportation to apply for review of their circumstances.

The Regulations

Section 25 of the Act says that there is a H and C grounds authority. It says that the Minister (and the Minister's delegates) shall consider applications by person who are inadmissible or not meeting the requirements of the Act, and may grant permanent

resident status or an exemption from any requirement, if justified by humanitarian and compassionate considerations. This is an acceptably broad authority. However, in our view, this authority is contradicted by regulations 107, 108 and 110.

Those proposed regulations say that inadmissible persons asking for section 25 humanitarian discretion must apply to remain in Canada as a permanent resident (or to obtain a visa if abroad), and that the application for status or visa must be denied if the person is inadmissible.

The proposed regulations contradict the Act by requiring that applications for H and C consideration by inadmissible persons be refused because they are inadmissible.

Our Comments

1. Humanitarian and Compassionate Applications

The regulations governing the section 25 H and C authority are incomplete and inconsistent with the Act itself. If the Minister's only option is to refuse persons who have been determined inadmissible, then how is H and C discretion to be exercised?

The regulations should reflect the broad authority granted by the Act, and should confirm the current practices for exercising discretion in appropriate cases. When H and C circumstances warrant, persons should be allowed to enter or remain in Canada, and to become permanent residents. If they cannot be processed immediately to permanent resident status because of an inadmissibility, then temporary permits under section 24 of the Act may be used to allow them to remain in Canada until processing is possible. This is the current practice that should be reflected in the regulations.

It would be appropriate too for the regulations to confirm the mechanism of a Ministerial H and C review of permanent residents who lose their status and particularly those who are denied access to Appeal Division review by section 64 of the Act. In its statements to the Parliamentary Committee on Bill C-11, the Department stated that permanent residents who lost their right of Appeal Division review of deportation orders could use the H and C application mechanism for review of their circumstances. Unfortunately, this does not appear reflected in the draft regulations.

When section 64 permanent residents seek to submit a section 25 application for H and C consideration, there should be a stay of removal pending submission and consideration by the Minister.

The CBA Section recommends the following amendments:

107. Where the Minister considers the humanitarian and compassionate circumstances of a foreign national making a request under section 25 of the Act to enter or to remain in Canada as a permanent resident and exempts the foreign national from any applicable criteria or obligations of the Act, the Minister shall:

a) issue a permanent resident visa to a foreign national outside of Canada, or shall allow a foreign national in Canada to become a permanent resident, if they are not inadmissible; or
b) shall authorize an officer to issue a temporary permit facilitating the entering or remaining in Canada as applicable, in every other case.

108. A foreign national issued a temporary permit under paragraph 107 is a permit holder under section 24 of the Act for the purpose of membership in the section 106 permit holder class.

109. Notwithstanding paragraph 108, a foreign national issued a temporary permit under paragraph 107 and continuing residence in Canada as a permit holder may apply in Canada for a determination that they are no longer inadmissible, and shall become a permanent resident if it is determined that they are no longer inadmissible.

(These amendments would replace paragraphs 107,108, 110.)

2. Stay of Removal Order

The CBA Section recommends the following amendment of paragraph 239:

239. (1) A removal order made against a foreign national and any member of the foreign national's family is stayed on a decision of the Minister under section 25(1) of the Act that there exist humanitarian and compassionate considerations, or public policy considerations, and the stay is effective until a decision is made to grant permanent resident status, or to refuse or terminate a temporary permit.

(2) A removal order is made against a permanent resident described in section 64 of the Act is stayed for 30 days pending submission of an application for humanitarian and compassionate consideration

pursuant to section 25 of the Act, or for such further time authorized by an officer pending submission of the application, and once submitted the removal order is stayed pending the Minister's determination that there exists humanitarian and compassionate considerations.

REFUGEE PROTECTION

Ideally, protection determination results should be the same no matter where you are. The same definition should be interpreted the same way whether the interpretation is done in Canada or abroad.

In reality, there are wide differences in result. A person making a refugee claim in Canada is far more likely to recognized as a refugee than a person making a refugee claim abroad. The inland process is a much fairer process than the overseas process. It is easy to have confidence in the results.

For visa office protection determinations, instead of oral hearings as of right, there are discretionary interviews. Policy is not to permit counsel to attend interviews, in those cases when interviews are granted, although exceptions are sometimes made to this policy. The application of any criteria, no matter how broad, can be corrupted when the process is unfair. The process of risk determination abroad must reflect Canadian standards of fairness.

The regulations propose that every refugee application must be either sponsored or referred by a referral organization.[1] There are some limited exceptions to this rule where advice from a referral organization is not available.[2] Yet, the visa office can still refuse an applicant on the basis that the applicant is not at risk, despite the sponsorship or referral. There should be a right of interview in the case of every sponsored or referred application.

> **The CBA Section recommends that there should be a visa officer interview for every Convention refugee and humanitarian protected applicant who is referred or sponsored unless it is apparent from the documentary material that the application can be approved.**

It is unconscionable that persons seeking the protection of Canada should be denied the assistance of counsel at the interview. A risk claim involves sometimes complex questions of international law, as well as detailed presentations of fact about country conditions and the person's own story. There is almost always a cultural gap between the interviewing officer and the applicant.

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1 Regulation 147(1)(a).

2 Regulation 147(3)

The CBA Section recommends that the regulations should entitle every Convention refugee and humanitarian protected applicant who is interviewed to be assisted by counsel at the interview, at the very least, when that counsel is a member of the bar of any Canadian province or territory.

Members of the Convention refugees abroad and humanitarian protected persons abroad class must be able to become economically established in Canada.[3] Paradoxically, these same people do not have to meet the financial reasons inadmissibility requirement in the statute.[4] A foreign national is inadmissible for financial reasons if the person is or will be unable or unwilling to support himself or herself or any other person who is dependent on him or her, and has not satisfied an officer that adequate arrangements for care and support, other than those that involve social assistance, have been made.[5]

So a refugee or humanitarian protected person abroad need not satisfy an immigration officer either that he or she is able or willing to support himself or herself or that adequate arrangements for care and support have been made. Yet this same applicant must satisfy an immigration officer that he or she will be able to become economically established in Canada, with the exception of those who are vulnerable or in urgent need of protection.[6]

The regulatory impact analysis statement says that "focus is now on social rather than economic factors"[7]. However, the regulation uses the words "economically established" and not "socially established". The present regulation, with its criterion of ability to establish successfully[8], is more ambiguous and less obviously economic than the new criterion of ability to establish economically. If the Department's intent is to move away from an economic criterion, it seems strange to introduce the word "economically" where it did not exist before.

There are those who suggest that Canada takes only the most economically viable of the world's refugee population. Rather than resettling those in need, Canada resettles those who will help Canada economically the most, turning what was characterized as a humanitarian program into an economic immigration program. The present successful establishment criterion also has an adverse discriminatory impact, as it is much harder for women to come to Canada as refugees than men.

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[3] Regulations 136(1)(g).

[4] Regulation 136(3).

[5] *IRPA* section 39.

[6] Regulation 136(2).

[7] *Canada Gazette* Part I, December 15, 2001, page 4547.

[8] Regulation 7(1)(c).

The proposed imposition of the economic establishment requirement applies only to refugees and humanitarian protected persons at visa posts abroad and not to protected persons in Canada. The system creates an artificial incentive for those at risk to come to Canada to make protection claims here, rather than make them at visa posts abroad.

The solution is not to apply extraneous economic or social considerations to refugees in Canada to allow them to remain, something that would violate our international obligation. The solution is rather not to apply these considerations to those applying at visa posts abroad.

The CBA Section recommends that the criterion of ability to establish economically should be deleted from the regulations for refugees and humanitarian protected persons abroad. At the very least, the criterion should be changed to the ability to establish socially.

Medical admissibility is also different inland and overseas, though this difference appears unintentional. Protected persons are inadmissible if they are likely to be dangers to public health or safety, but not because they might reasonably be expected to cause excessive demand on the health or social services.[9] A protected person is defined to include a person who has been determined to be a Convention refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa for protection reasons.

So, for this group, a person is not a protected person just because the person has been determined to be a Convention refugee or a person in similar circumstances under a visa application. In addition, the person must become a permanent resident under the visa for protection reasons. In advance of permanent residence, the person does not fit within the protected person definition. The result is that the protected person exemption from the excessive demand criterion does not apply to persons at risk overseas.

Overseas, refugees and humanitarian protected persons are inadmissible for all three medical reasons, including that they might reasonably be expected to cause excessive demand on the health or social services.[10] Our discussions with CIC officials suggest that the regulations do not accord with the policy intent, which is to exempt refugees and humanitarian protected persons overseas from the excessive demand requirement. The regulations need to be changed to reflect this intent.

The CBA Section recommends that the regulations should be changed to reflect the policy intent that refugees and humanitarian protected persons abroad should not be inadmissible for the reason that they might reasonably be expected to cause excessive demand on health or social services.

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[9] *IRPA* section 38.

[10] Regulation 136(1)(i) .

An artificial hurdle imposed on Convention refugee and humanitarian protected applicants overseas that has no counterpart inland is the requirement that there is no reasonable prospect within a reasonable period of a durable solution.[11] Durable solution is defined to mean either voluntary repatriation, resettlement in the country of nationality or habitual residence, or resettlement or an offer of resettlement by a country other than Canada. This definition, with a minor variation, is to be found in the present regulations.

In Canada, a person can be denied access to the refugee protection determination procedure if the person has been determined to be a refugee by a country to which the person can be returned.[12] As well, a person in Canada who is allowed to claim will still be denied refugee recognition if recognized by the competent authorities of the country in which the person has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.[13]

There are a number of problems with the overseas provisions. First of all, what is resettlement in the country of nationality or habitual residence that is not voluntary repatriation? Obviously, it must be forced repatriation. Yet, forced repatriation is a violation of international standards. It is unacceptable for Canadian regulations to refuse resettlement on the basis of the possibility of forced repatriation. The definition of durable solutions should not include non-voluntary resettlement in the country of citizenship or habitual residence.

The CBA Section recommends that the definition of durable solution should not include resettlement in the country of citizenship or habitual residence.

A person who applies to enter Canada proceeds to examination.[14] One way the examination can end is that the Minister makes a removal order.[15]

Under the present law, the Supreme Court of Canada has ruled a person in secondary examination at the port of entry is not entitled to counsel.[16] That decision was based on the present system where no removal order can be made during secondary examination. For removal proceedings, under the present system, even when the removal order is to be issued

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[11] Regulation 136(1).

[12] *IRPA* section 101(1)(d).

[13] *Immigration Act* Schedule enacting Article 1E of the *Refugee Convention*.

[14] Act section 15(1) and regulation 26(b).

[15] Regulation 35(d) and Act section 44(2).

[16] *Dehghani v. M.E.I.,* [1993] 1 S.C.R. 1053.

by a senior immigration officer, the Manual provides for access to counsel for the interview.[17]

The new Act blends together into one step - the examination - what are two steps under the present system - the secondary examination and the senior immigration officer interview, the first with no access to counsel and the second with access to counsel. The question becomes what happens to access to counsel?

The new Act makes a distinction between a claim for refugee protection and an application for refugee protection. A claim for refugee protection is made to the Refugee Protection Division of the Immigration and Refugee Board. An application for refugee protection is made to the Minister under the pre-removal risk assessment procedure. A person under a removal order cannot make a claim for refugee protection [section 99(3)]. Nor can such a person make an application for refugee protection where "the prescribed period has not expired" [section 112(2)(c)].

So a removal order can cut off access to the Refugee Protection Division of the Immigration and Refugee Board and may cut off any protection application whatsoever, a drastic result. There are two solutions. One is that every person who is seeking entry and is subject to a removal order before the examination ends should be advised before the examination begins of the right to make a refugee claim. The second is that every person who is seeking entry and is subject to a removal order before the examination ends should have the right of access to counsel and be advised of that right before the examination begins.

The CBA Section recommends that the regulations should provide that every person who is seeking entry and is subject to a removal order before the examination ends should be advised prior to the examination of the right to make a refugee claim and the right to counsel.

A protected person may be granted permanent residence even without a listed type of identity document otherwise required, and solely on the basis of any identity document or a statutory declaration. However, the document or declaration, in addition to other requirements, must constitute credible evidence of the applicant's identity.[18]

In practice, for many immigration officers, the only credible evidence of a person's identity is a passport. The Immigration Manual provides that in order to provide satisfactory evidence of the person's identity, it should normally predate the claim to refugee status.[19] This sort of

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[17] Immigration Manual Port of Entry (PE) Chapter 10 section 2.2.

[18] Regulation 171(2).

[19] Immigration Manual Inland Processing (IP) Chapter 3 "Processing Refugee Applications for Landing" section 8.2 page 14.

rule of thumb means affidavits sworn by community members about the person's identity are systematically rejected.

There are thousands of refugees in Canada who have been recognized as refugees, whose identity has been established to the satisfaction of the Refugee Division of the Immigration and Refugee Board, but who cannot be landed because they do not have passports. The Government attempts to deal with this problem by a proposed regulation stating that persons from designated countries can be permanent resident under an undocumented protected persons in Canada class three years after a positive protection determination, even without credible identity documents. Somalia and Afghanistan have been designated under the regulations. This proposal carries forward present regulations.

The undocumented protected persons in Canada class is not much of a solution to those within the class. It is no solution at all to those from countries not within the class.

Not being granted permanent residence has all sorts of consequences. It means that the person can work only with work permits, which are time-limited and require a fee. Many jobs in Canada and many educational programmes are accessible only to permanent residents and citizens. Even for those educational programmes that are accessible, there may be substantial differences in fees depending on whether the student is a permanent resident or not. Most important of all, family reunification is impossible. If the person cannot be granted permanent residence, the application for permanent residence of the family abroad will not be processed, even for families abroad at risk.

The identity document provision in the present *Immigration Act* is relatively new. It was introduced into Parliament as an amendment to the *Immigration Act* with Bill C-86[20] and took effect with the rest of Bill C-86 on February 1, 1993.

The requirement that a person must establish identity on an application for permanent residence after having already succeeded in a protection claim is perverse. Every protection determination is a determination of identity. No person can be recognized as a protected person without a finding on identity by the Refugee Protection Division of the Immigration and Refugee Board.

The *Immigration and Refugee Protection Act (IRPA)* provides:

> The Refugee Protection Division must take into account, with respect to the credibility of a claimant, whether the claimant possesses acceptable documentation establishing identity, and if not, whether they have provided a reasonable explanation for the lack of documentation or have taken reasonable steps to obtain the documentation.[21]

[20] Bill C-86, section 38(6).

[21] Section 106.

If the Department of Immigration has any concerns about the identity of a claimant, the Department has a right to present evidence on the matter at the hearing of the protection claim.[22] As well, a representative of the Minister of Immigration may at the hearing, question the claimant and any other witnesses and make representations on the claim.[23]

In this context, questioning the identity of a protected person after the claim has been made means questioning the determination of an independent tribunal after a hearing in which a representative of the Minister may have participated, and certainly could have participated. If the Department of Immigration declines to participate in the protection hearing, then arguably any concern the Department has over the identity of the claimant has been waived.

Denying identity documents to recognized refugees is a violation of the *Refugee Convention*. The Convention provides that each contracting state shall issue identity papers to any refugee in their territory who does not possess a valid travel document.[24] Canadian authorities have turned the *Refugee Convention* on its head. Instead of issuing identity documents to those without valid travel documents, Canadian authorities insist that refugees have valid travel documents before the authorities will issue the refugees identity papers.

This failure to recognize the identity of refugees even after refugee recognition is more than just a violation of the *Refugee Convention*. It is a violation of the *Universal Declaration of Human Rights*, and the *International Covenant on Civil and Political Rights*, both of which say that everyone has the right to recognition everywhere as a person before the law.[25]

For child refugees, the failure to recognize identity is a violation of the *Convention on the Rights of the Child*, which says that state parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. That Convention says further that where a child is illegally deprived of some or all of the elements of his or her identity, state parties shall provide appropriate assistance and protection with a view to re-establishing speedily his or her identity.[26]

The CBA Section recommends that there should be no requirement that those recognized as in need of protection must provide credible identity documents for permanent residence. The Department should accept protection recognition as a satisfactory determination of identity for the purposes of an application for permanent residence.

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[22] *Immigration Act* section 170(e).

[23] *Immigration Act* section 69.1 (5)(b).

[24] Article 27.

[25] *Universal Declaration of Human Rights*, Article 6, *International Covenant on Civil and Political Rights*, Article 16.

[26] Article 8.

The pre-removal risk assessment regulations provide that an application must be received within fifteen days after notification is given.[27] It appears that this fifteen days is for the entire application, and not just the notice of intent to apply. However, this intent is not completely clear, because the Minister can not decide until fifteen days from the end of the notice period.[28] It appears, from discussion with officials, that this second fifteen days requirement is
an indirect way of allowing a further fifteen for submissions.

This fifteen day period has to be contrasted with the current post determination refugee claimants in Canada class time span of fifteen days for the application and a further thirty days for submissions. The Federal Court leave procedure also follows this fifteen and thirty day pattern, fifteen days for the leave application and thirty days for the Record.

Fifteen days for submission after filing of the application is, in many cases, too short a time. Thirty days has been already accepted as a reasonable length of time for submissions both by the Department and the Federal Court. That same time span should apply here.

The CBA Section recommends that the time allowed for receipt of pre-removal risk assessment submissions should be thirty days from the end of the notification period.

The *IRPA*, in Division 4 on Inadmissibility, states that the regulations may define any of the terms used in the Division.[29] One of the terms used in the Division is terrorism. Yet, the regulations do not define terrorism.

The new *Anti-terrorist Act* (formerly Bill C-36) includes a definition of terrorist activity. There is no reason why that definition could not be included in the regulations. It would dissipate uncertainty in the application of the Act.

The CBA Section recommends that the definition of terrorist activity used in Bill C-36 should be included in the *Immigration and Refugee Protection Act* regulations.

[27] Regulation 157 .

[28] Regulation 158(2).

[29] Section 43.

Currently, people who are denied Convention refugee status who apply for judicial review beyond the fifteen days, but who apply for an extension of time benefit from a statutory stay of removal. They do not have to apply for a court ordered stay. The proposed regulations intend to remove this stay[30]. Such persons will have to apply for a judicial stay, as well as persons in a number of other categories.

The need to apply for a judicial stay must be considered in conjunction with the Department's practice of lightning removals. Under this practice, removable persons are picked up on the street and whisked away without notice. They are not given an opportunity to pack their bags or see family or friends before removal. Some have been deliberately enticed into the local office, detained and removed, without prior notice. Victims of lightning removals include people who have previously voluntarily complied with all immigration requirements and of whom there is no reason to believe would not report voluntarily for removal when requested to do so. Many of the people removed are returned to countries with well known records of gross and flagrant human rights violations.

The practice prevents access to the court for stay applications, or requires a last minute scramble to have matters heard in court. An anticipatory stay, asking the court to order the stay of execution of the deportation order before the client had been told when the deportation order would be executed is not an effective remedy. The Federal Court has refused to consider an application to stay the execution of a decision when no decision had yet been communicated to the client.

The CBA Section recommends that the regulations should provide for a stay of removal in every case once a stay application is filed in court, until the stay application is heard.

There are some people who should not be removed, and yet who are removable under the *IRPA*, those fleeing generalized violence. The *IRPA* excludes those people from its definition of persons in need of protection.[31] The regulations instead allow for a stay of a removal order of such people.[32]

It makes little sense to say to people in Canada who are seriously and personally affected by civil or armed conflict or, in the case of the country of asylum class, a massive violation of human rights that they cannot be given permanent residence status if they stay in Canada, but they can if they leave and apply at a visa post abroad. People in Canada should be treated no worse than those abroad.

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[30] Regulation 237(3).

[31] Section 97(1)(b)(ii).

[32] Regulation 236(1).

Canada used to have a regulation to deal with this problem, the deferred removal orders class (DROC). The basic premise was that those not removable after three years were eligible for landing. Something like DROC should be reinstated.

The abolition of DROC did not change the fact that the people concerned remain in Canada. To actually remove these people would be impractical, inhumane and in violation of international law. What changed by abolishing the DROC was that these people were stuck in an indefinite limbo instead of a three year limbo. An indefinite limbo for the non-removable is desirable neither for the individuals concerned nor for Canada. Forced marginalization means that the contribution that these people can make to Canadian society is unnecessarily limited. At some point, it surely becomes cruel treatment, whether it be three years, five years, or twenty years, to continually hold over people's heads the threat of removal and deny them the possibility of integration in Canadian society. Three years is an appropriate cut-off point.

When DROC was repealed, a Government of Canada Regulatory Impact Analysis Statement argued that abolishing DROC would encourage people the Department had not yet removed to leave on their own, knowing that they would have nothing to gain by waiting.[33] This argument ignores the plight of those who cannot leave because the only country that will accept them is a country where generalized risk makes return impossible.

The Regulatory Impact Analysis Statement published at the time that DROC was introduced said[34]:

> The goal of this regulatory amendment is to regularize the status of certain failed refugee claimants who have been in limbo for several years awaiting removal due to the Department's unwillingness or inability to remove them and whose situation shows no immediate prospect of resolution. In many cases, these individuals have formed an attachment to Canada; consequently, removal, at this point, would be both unfair to the individual and would have no deterrent value....The status quo was rejected because in some cases the situation which led the Department to depart from the normal removals policy show little sign of improvement and hence those persons who are currently under order would likely continue in limbo for some time. In other cases, the human rights situation has improved to the point that removals are now possible, but many of those under removal order have been in Canada for such a long time that removing them would be unfair.

Obviously, the Department's reasons for initially instituting DROC apply equally as reasons for reintroducing something like DROC. To date, nothing indicates that the reasoning in the earliest Regulatory Impact Analysis Statement was wrong.

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[33] *Canada Gazette* Part I, January 4, 1997, page 46.

[34] *Canada Gazette* Part II, Volume 128, 1994, pages 3637 to 3640.

The Immigration Manual allows now for landing of such people on humanitarian grounds. The Manual says:

> When the period of inability to leave due to circumstances beyond the applicant's control is of **significant duration** and where there is evidence of **a significant degree of establishment in Canada,** these factors may combine to warrant a favourable H&C decision. There is no hard and fast rule relating to the period of time in Canada but it is expected that a significant degree of establishment would take several years to achieve.[35]

Given that, there can be no policy objection to such a regulation. Allowing for a grant of permanent residence in the regulations is a more visible and clear cut way of resolving the problem of limbo these long stayers face.

The Manual does not bind the Department, but regulations do. Use of the Manual is appropriate for setting out criteria for the exercise of discretion. Where a policy exists that is more than just criteria for exercise of discretion, it is preferable to have the policy in the regulations, where it is stable, visible and the source of rights, than in the Manual.

The CBA Section recommends that persons who benefit for three years from a stay under regulation 236 should be eligible to apply for permanent residence.

[35] Inland Processing (IP) Chapter 5 section 8.7.

INADMISSIBILITIES

Overview

Division 4 of the *Immigration and Refugee Protection Act (IRPA)* sets out the eight grounds of inadmissibility that either prevent someone from entering Canada, or justify loss of status and removal. The eight grounds are security(A34), human or international rights violations(A35), criminality(A36), organized criminality(A37), medical inadmissibility(A38), financial reasons(A39), misrepresentation(A40), failure to comply with the Act(A41), and an inadmissible family member(A42).

Some of these grounds of inadmissibility are new (misrepresentation, transborder offences, inadmissible family members); the others are variations of current grounds.

The Regulations

The regulations, in paragraphs 219 - 228 provide further definition, explanation or guidance for each of the grounds of inadmissibility.

Our Comments

We have offered comments only on the regulations with which we have significant concerns; several of the regulations are fine, or give rise to concerns that are modest. Comments on the medical inadmissibility provisions have been addressed separately.

1. Prescribed Senior Officials

Section 221 lists a range of government occupations. If the government commits acts of terrorism or other human rights violations, then persons in these positions are deemed to be inadmissible, simply by their relationship to the offending government. The list includes senior members of the public service and judiciary. These people are deemed to have been able "to exert a significant influence" on the offending government, or "<u>were able to benefit from their position</u>", and so are inadmissible without proof of influence or benefit.

"...were able to benefit from their position" is a new phrase and, in our view, it is not helpful to identify inadmissible persons. Given its vagueness, we believe it should not be adopted. All persons in government employment can be said to have benefitted from their position, simply by salary. It does not mean they are culpable for crimes committed by their government.

The list of prescribed senior officials is the same as under the current Act, but is too broad. It is not logical, for example, for all senior members of the public service to be deemed to have significant influence or to have benefitted from their position so that they are inadmissible for rights violations committed by the government. These regulations too broadly stipulate inadmissibility through association.

2. Transborder Offences

Section 36(2)(d) describes a new ground of inadmissibility - for committing a prescribed offence while entering Canada. It is unnecessary that a person be convicted of the prescribed offence, it is only necessary that that person is believed to have committed the prescribed offence.

Para. 224 sets out the prescribed offences - they are <u>any</u> offence under the *Criminal Code*, the *Customs Act*, the *IRPA*, the *Firearms Act*, the *Customs Act*, and the *Controlled Drugs and Substances Act*.

The CBA Section has many concerns with this new ground of inadmissibility and the regulations. Too many offences are prescribed, and there can be inadmissibility without any conviction, but only belief of an offence.

What happens when a person is ordered deported on belief, but there is no trial to establish guilt? The person has no way of erasing their inadmissibility; there is no rehabilitation provision under the *IRPA*, and no conviction from which to seek pardon.

The sweeping inclusion of all offences under the prescribe Acts means that an adjudicator could have no choice but to order the deportation of a person who commits a very minor offence, such as the failure to declare a belt purchased on a shopping trip to the US, without any conviction, and even when the offence itself would not support criminal inadmissibility.

In our view, the inadmissibility provision is itself flawed (A36(2)d) for not requiring conviction, and the Regulation (para.224) is flawed for prescribing far too many offences.

3. Inadmissible Family Member

Under A42, a foreign national is inadmissible if a prescribed non-accompanying family member is inadmissible. For example, an individual may be inadmissible to Canada because their separated spouse or child is inadmissible, even if the spouse or child is not coming to Canada. Regulation 228 defines "prescribed non-accompanying" family members.

The Regulation is confusing; the prescribed circumstance is if the "foreign national has cohabited with the non-accompanying family member for at least the last year". Does this mean anytime in the last year, for all of the last year, or has not cohabited for at least one year, and from when? In our view, it should be clarified.

WORK PERMITS AND STUDENT PERMITS

Many of the changes to the work permits and student permits will be better understood with the help of the manuals and policy statements. At this point, it is difficult to fully comprehend the extent to which the changes will affect the manner in which the applications will be addressed. However, the CBA Section has concerns with the wording of a number of the provisions and their impact on applicants.

The CBA Section therefore wishes to suggest the following modifications, sometimes for the sake of fairness, sometimes for the sake of clarity and consistency.

Restoration: Extension of the Period and Use of Discretion

Section 21, leads to a discussion on section 19, which should, in our view, be amended to state:

> 19(1) An application made within 90 days after the temporary status (…)
>
> 19(2) Notwithstanding (1), an officer may restore that status if, following an examination, the officer is satisfied that the failure to apply in accordance with (1) was unintentional or excusable for any other reason.
>
> 19(2) Par dérogation à (1), un agent peut rétablir ce statut si, suite à un contrôle, l'agent est convaincu que l'omission de présenter une demande conformément au paragraphe (1) était involontaire ou excusable pour tout autre motif.

Removal of Provision on Restriction on Movement

Section 178(d) prescribes the area within which they are permitted to travel or prohibited from travelling in Canada. This provision should be removed, as it would be unenforceable.

Correction of Wording

In section 179(m), the French version should read:

> «(…) une compétition internationale de sport amateur»
>
> «athlétisme» would be only track & field

Definition of Business Visitors

Section 180(2) should be removed and subsequent reference in section 180(1) should be deleted. Alternatively, it should read:

> The following foreign nationals, without limiting the definition, are business visitors:
>
> > (c) foreign nationals representing a foreign business or government for the purpose of selling goods for that business or government or offer training or familiarization in respect of such goods or services, if the foreign national is not engaged in making sales to the general public in Canada.

Since it was indicated that section 193(e) will be part of section 195 (now section 195(a) and (b)), section 22 will also need to be amended accordingly.

Issuance of Work Permit through Validation

Section 194(1) should read:

> On application under Division 2 for a work permit, an officer shall issue to a foreign national a work permit to engage in specific work for an employer who has made an offer of employment to the foreign national if the officer determines, on the basis of an opinion provided by Human Resources Development Canada (HRDC) in accordance with Division 4, that performance of the work by the foreign national is likely to result in a neutral or positive economic effect in Canada.
>
> L'agent, sur demande présentée conformément à la section 2 de la présente partie, délivre à l'étranger un permis l'autorisant à se livrer à un type particulier de travail pour l'employeur qui a fait une offre d'emploi à l'étranger si l'agent conclut, en se fondant sur l'opinion fournie par le ministère du Développement des ressources humaines Canada conformément à la section 4 de la présente partie, que l'exécution du travail par l'étranger est susceptible d'entraîner des effets économiques positifs ou neutres pour le Canada.

And section 194(2) should read:

> If the foreign national intends to work in the Province of Québec, the determination referred to in subsection (1) shall be based on an opinion developed in concert by the competent authority of that Province and HRDC and provided by that Department in accordance with Division 4.
>
> Si l'étranger entend travailler dans la province de Québec, la détermination visée au paragraphe (1) se fonde sur l'opinion rendue de concert par l'autorité compétente de la province et le ministère du Développement des ressources humaines Canada et fournis par ce ministère conformément à la section 4 de la présente partie.

Technical Modifications

In section 195, modifications already envisaged:

(a)

(b) [add section 193(e)]

Section 198(c) is designated by the Minister as being work that can be performed by a foreign national on the basis of one of the following criteria, namely:

il est désigné par le ministre comme étant un travail pouvant être exercé par des étrangers sur la base de l'un des critères suivants (. . .) .

Religious and Charitable Organization

Section 198 (d) should be amended to read:

is requested by a registered religious or charitable organization or purports to achieve a religious or charitable goal.

est requis par un organisme religieux ou charitable dûment enregistré ou a pour but de réaliser un objectif religieux ou charitable.

Consequence of Breach of Conditions

Section 202 should be amended to include:

c)if the officer is satisfied that the failure of the worker or student to respect conditions was unintentional or excusable for any other reason.

c)si l'agent est convaincu que l'omission du travailleur ou de l'étudiant de respecter ces conditions était involontaire ou excusable pour tout autre motif.

Validation Process

The CBA Section proposes the following modifications to the provisions relating to the validation process.

Section 204(1):

> In determining the economic effect under section 194 of specific work, an officer shall use the opinion provided by Human Resources Development Canada concerning the economic effect in respect of (…) .
>
> Pour déterminer les effets économiques entraînés par un type particulier de travail aux termes de l'article 194, l'agent utilise l'opinion fournie par le ministère du Développement des ressources humaines Canada concernant les effets économiques reliés à : (…) .

Section 204(3):

> In order to permit the agent to determine the likely economic effect of the work, the (deleted) opinion provided by Human Resources Development Canada shall evaluate whether the likely positive labour market outcomes, such as economic growth and infrastructure creation, job creation and job retention, skills and knowledge transfer and amelioration of labour shortages, are equal or superior to likely negative labour market outcomes, such as loss of attractive employment opportunities for Canadian citizens and permanent residents or downward pressure on Canadian wages or working conditions.
>
> Pour permettre à l'agent de déterminer les effets économiques probables de l'exécution du travail de l'étranger (retirer) l'opinion fournie par le ministère du Développement des ressources humaines Canada doit évaluer si les résultats positifs probables pour le marché du travail, tels que la croissance économique et la création d'une infrastructure, la création ou le maintien d'emplois, le transfert de compétences ou de connaissances ou la résorption de la pénurie de main-d'oeuvre, contrebalanceront ou dépasseront les résultats négatifs probables pour le marché du travail, tels que la perte de débouchés intéressants pour les citoyens canadiens et les résidents permanents ou le recul des conditions de travail ou des salaires canadiens.

Section 205(1):

> An employer may request an opinion to Human Resources Development Canada concerning the economic effect determination in respect of work specified in one or more job offers.
>
> (2) A neutral economic effect determination is made when the Minister does not receive the opinion (deleted) referred to in subsection (1) within six months after the application is submitted.

Section 205(1):

> Tout employeur peut demander une opinion au Développement des ressources humaines Canada concernant les (retiré) effets économiques en rapport avec le travail précisé dans une ou plusieurs offres d'emploi.

(2) Est assimilée à une détermination d'effets économiques neutres l'absence d'opinion par le Développement des ressources humaines (retiré) dans les six mois suivant la date de la demande.

General Comments

It appears that inland processing centers are still unable to issue entry visas. This means that an application must be dealt with twice, which only maintains the current inefficiency.

1. In Canada Landing Class

A.17(2) Alternatively the E-08 exemption should permit the issuance and renewal of a work permit for up to 3 years.

2. Dual Intent

Section 23(b), should include the words "or any extension thereof".

3. Statutory Extension and Possibility to Travel

Section 181(2), 6 months study permit example.

In Section 182(2), the words "courses or" should be deleted.

RETROACTIVITY

> *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.*
> - Senator Michael Kirby during Senate Committee on Social Affairs hearings on the *Immigration and Refugee Protection Act*.

What Applicants Knew and When They Knew It

In the period after the proposed *Immigration and Refugee Protection Regulations* (IRPR) were pre-published in December of 2001, no issue in the IRPR has attracted more attention than the retroactive application of selection criteria to skilled worker applicants for permanent residence. Indeed, news of the Government's plan to retroactively fail the vast majority of such applications currently in the system has traveled around the world.

The former Minister's explanation for the retroactive application of selection criteria appeared in the *Toronto Star* shortly after pre-publication. She said, "[b]ecause we've given such advance notice on this, I don't consider it retroactive at all." Similar statements appeared in other media.

People who filed their applications prior to pre-publication had no way of knowing that their cases would be adversely affected by any changes in the selection criteria. To support this position, we refer to the following statements made by the Minister and the Department regarding the effect of retroactivity:

> Finally, independent and assisted relative applications that are received after 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...
> - RIAS, 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.
> - CIC's web site and CIC's Overseas Processing Manual, Chapter 5, Section 4.1. (Note that this statement reflects how Canada has treated such applications in the past.)

> [M]any of the provisions in this bill are more favorable toward family class applications, skilled worker immigrants, refugee claimants, and refugees seeking resettlement. Those people would be denied the opportunity to benefit from those provisions that are more beneficial to them.
> - The Assistant Deputy Minister, Policy, before the House Committee in May of 2001.
>
> I should point out, as well, that with the proposed new regulations for skilled workers and family members, many applicants who will not have been interviewed under Bill C-11 when it takes effect will likely benefit from a more open and generous rule.
> - The Minister before the Senate committee in October of 2002.

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

If Canada pursues its announced course of action on retroactivity, we will be changing the rules on people mid-stream. In our view, such conduct would harm Canada's reputation and integrity in the immigration field and would, therefore, be counter to Canada's economic interest.

Retroactivity - Past and Future

Virtually all of the public discussion around retroactivity in this area has been about the effect on applications filed prior to pre-publication. Even more worrisome is the fact that the proposed regulations would permit the use of retroactivity on an on-going basis. The issue of retroactivity on future skilled worker applications is dealt with in two sections of the regulations as follows:

> 65. For the purposes of Part 3, the requirements and criteria set out in sections 63 and 64 must be met at the time an application is made as well as at the time the permanent resident visa is issued.
>
> 49. A foreign national ... seeking at a port of entry to become a permanent resident must ... establish, at the time of examination (at the port of entry), that they and their dependants, whether accompanying or not, meet the requirements of the Act and Regulations.

Thus, applicants will have to meet the requirements of the Act and IRPR at the time of application, when their visas are issued, and when they land. Changes to the requirements at any time until landing could have an adverse impact on someone's ability to become landed.

The End of Predictability

Changing requirements retroactively will make it very difficult for Canadian companies to recruit skilled workers to Canada. People who are asked to come to Canada to work are often unwilling to uproot their families and relocate to Canada unless they receive some assurance from the company that they will qualify for permanent residence. Companies will no longer be able to

provide any assurances since the rules could change at any time. Indeed, we are already aware of companies losing recruits as a result of the expressed intention to utilize retroactivity. Similarly, skilled workers who are not connected to a Canadian company but who have some interest in immigrating to Canada may choose not to do so, rather than pay significant fees to participate in an immigration system in which the selection criteria can be changed at any time.

Retroactivity is the Wrong Tool

By failing to adjust the levels control factor in the present selection criteria, Canada has let its backlog grow to nearly unmanageable proportions. However, the answer is not to disqualify applications because we have failed to process them in a timely manner. While we understand the present predicament, we do not agree that retroactivity will solve the backlog problem. If retroactivity is to be used, fairness demands that each existing applicant be notified of the change in selection criteria and be given an opportunity to provide evidence as to the person's qualifications under the new criteria. Each application will have to be assessed based on the new criteria. We can expect that CIC will be inundated with applications for the favorable use of discretion in cases where the applicants cannot meet the new selection criteria. Furthermore, there are likely to be many court challenges regarding the use of retroactivity, further draining CIC's limited resources. The CBA Section believes that resources would be best spent by approving applications under the existing criteria, rather than refusing applications under the new criteria. In our view, it would be less resource intensive to follow this path.

> **The CBA Section recommends that retroactivity should not be used as a means of culling the present backlog of applications, nor should it be used as a means of controlling inventory levels on an ongoing basis. Canada should continue its present practices of locking in points at the time of application and controlling ongoing inventory through the pass mark until such time as new methods of application intake can be implemented.**