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November 30, 2005

Julie Stock
Acting Director
Citizenship and Immigration Canada
Legislative and Regulatory Policy
300 Slater Street
Ottawa, ON K1A 1L1

Dear Madam:

Re: YCJA and Proposed Amendments to IRPA

I am writing in response to Neil Cochrane's letter sent to Wendy Danson, the past Chair of the Citizenship and Immigration Law Section of the Canadian Bar Association (CBA Section). Your letter advises of a proposed recommendation to amend the *Immigration and Refugee Protection (IRPA) Regulations* to reflect replacement of the *Young Offenders Act (YOA)* with the *Youth Criminal Justice Act (YCJA)*. Under IRPA paragraph 36(3)(e), a foreign national or permanent resident convicted of an offence under the YOA is exempt from being criminally inadmissible. As you note, this did not apply where the individual's case was transferred to adult court, as they were then not convicted under the YOA. The proposed regulations would exempt from criminal inadmissibility foreign nationals and permanent residents convicted under the YCJA, unless they were issued adult sentences.

While we agree changes must be made, the CBA Section has concerns regarding the proposal. In our view, it ignores fundamental differences between transfers to adult court under the YOA and imposition of adult sentences under the YCJA. Availability of adult sentencing under the current YCJA is much greater than was availability of transfers to adult court under the YOA. Unless Citizenship and Immigration Canada takes into consideration the significant differences between the Acts, the proposed regulatory change will have perhaps unforeseen consequences for young immigrants and their families.

Under the *Juvenile Delinquents Act* and the YOA, a young person could be given an adult sentence only if the proceedings were transferred to adult court prior to judgment. There were two forms of transfer under the YOA: the general transfer and the presumptive transfer. The general transfer mechanism was available where the young person was at least fourteen years old and charged with an indictable offence. The party applying for the transfer, usually the Crown, had the burden of proof. In practice, it was very rare for the Crown to seek a transfer in anything but murder cases.

Because of this, Parliament amended the YOA in 1995 to include the presumptive transfer of certain cases to the adult system. A young person who was at least 16 years old at the time of the offence and charged with murder, attempted murder, manslaughter, or aggravated sexual assault would have their matter transferred. In such cases, the party applying to prevent the transfer, usually the defence, had the burden of proof.

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Under the YOA, all parties considered the transfer process cumbersome and thus rarely used it. This is in marked contrast to the current YCJA transfer provisions. The YCJA also expands the circumstances in which a court may impose an adult sentence to include patterns of serious violent offences. The current YCJA will likely result in many more adult sentences annually, probably in the thousands, versus less than a hundred under the YOA (see the attached graph from the *Canadian Centre for Justice Statistics' Youth Court Survey, 2002*).

Even under the YOA, there were very apparent discrepancies in the rate of transfers amongst provinces. The *Survey* shows that British Columbia averaged just over 7 transfers annually between 1997 and 2001, compared with Manitoba, for example, which averaged about 26 transfers a year over the same period. With the introduction of the YCJA and its expanded access to adult sentences, we expect that these types of variances to increase substantially.

Further, under the YCJA, each province has the ability to set a minimum age for youth to receive an adult sentence. For example, British Columbia set the age of fourteen as a minimum, while Quebec's minimum age is sixteen. These types of discrepancies could result in youth being deported from one province and not from another for similar crimes if the proposed regulations take effect. Fourteen-year-olds who are convicted and receive an adult sentence in British Columbia, for example, could be deported. If they were sentenced to more than two years, they would be subject to the "serious criminality" provision in IRPA section 64 and therefore be unable to appeal to the Immigration Appeal Division. Meanwhile, fourteen-year-olds in Quebec would not be deportable for the same offence because of the higher minimum age.

Accordingly, the CBA Section would make the following recommendations:

- IRPA section 64 should be amended to give all young offenders the absolute right to an appeal to the Immigration Appeal Division, regardless of the length of sentence; and
- The regulations should provide an exemption from criminal inadmissibility for persons who have been convicted under the YCJA, unless they were issued an adult sentence *and* are over sixteen years of age.

These two recommendations would alleviate our concerns regarding the effect of the expansion of adult sentencing under the YCJA, the differences between the YOA and YCJA, and the hardship upon teenagers facing deportation.

Thank you for this opportunity to consult regarding such an important issue.

Sincerely,

(Original signed by Kerri Froc on behalf of Robin Seligman)

Robin Seligman
Chair, National Immigration & Citizenship Law Section

Encl.

ACCESS TO ADULT SENTENCE: TRANSFERS BY PROVINCE

	97-98	98-99	99-00	00-01
CANADA	79	91	52	86
MARITIMES	3	1	5	4
QUE.	23	23	8	18
ONT.	9	6	15	17
MAN.	23	29	11	26
SASK.	1	1	0	3
ALTA.	14	20	6	12
B.C.	5	11	7	6
YUK.	0	0	0	0
N.W.T.	1	0	0	0
NUN.	N/A	N/A	0	0

Source of data: Youth Court Survey (YCS), Canadian Centre for Justice Statistics.
Modified from chart prepared by: Nathalie Quann, Research and Statistics Division, Department of Justice Canada.

British Columbia averaged just over 7 transfers a year between 1997 and 2001. This is a significant variance from Manitoba, which averaged about 26 transfers a year over the same time period. The transfer provisions were applied quite differently across Canada.

The transfer process was also directed at different offences. Transfers in British Columbia were almost always for violent offences. But in Canada as a whole, about 40% of transfers in 2000-01 were for non-violent offences.

	TOTAL CASES 1998-99	TRANSFERRED 1998-99
VIOLENCE	22,284	54
PROPERTY	45,336	27
OTHER CC/YOA	34,290	9
DRUGS	4,755	1
TOTAL CASES	106,665	91

Provincial Variations in Transfers to Adult Court

	96/97	97/98	98/99	99/00	00/01
Canada	92	79	91	52	86
Newfoundland	0	1	1	4	4
Prince Edward Island	0	0	0	0	0
Nova Scotia	0	2	0	0	0
New Brunswick	0	0	0	1	0
Quebec	26	23	23	8	18
Ontario	12	9	6	15	17
Manitoba	32	23	29	11	26
Saskatchewan	0	1	1	0	3
Alberta	10	14	20	6	12
British Columbia	11	5	11	7	6
Yukon	0	0	0	0	0
North West Territories	1	1	0	0	0
Nunavut	n/a	n/a	n/a	0	0

