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March 14, 2006

Michel Dupuis
Director
Citizenship and Immigration Canada
Social Policy and Programs
300 Slater Street
Ottawa, ON K1A 1L1

Dear Mr. Dupuis,

Re: IRPR s. 117(9)(d) and Its Adverse Impact on Canadian Families

I write to you on behalf of the Citizenship and Immigration Section of the Canadian Bar Association (the CBA Section) to request again that Citizenship and Immigration Canada revisit the issue of IRPR s. 117(9)(d) (the Regulation). As a result of the operation of the Regulation, there is the potential for lifetime separation of spouses and dependent children. This adverse effect upon Canadian families is in direct conflict with a cornerstone of Canada's immigration policy and a stated objective of the *Immigration and Refugee Protection Act*: family reunification.[1]

The CBA Section has previously made a number of submissions with respect to the Regulation (attached for ease of reference):

- Letter to Citizenship and Immigration Canada dated November 26, 2003 (pages 5 to 12, "Comments on Regulations Amending the Immigration and Refugee Protection Regulations"); and

- Submission to the Standing Committee on Citizenship and Immigration entitled, "IRPA Family Reunification Issues" dated April 2005 (pages 1 and 2).

[1] See IRPA s. 3(d).

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The Regulation generally excludes family class membership simply on the basis of non-examination, without considering the reasons for non-examination. The Regulation does not allow any discretion in the assessment of an application, with some minor exceptions[2], and purports to bar completely remedial review by the Appeal Division. Future entry of the unexamined dependent is wholly within the humanitarian discretion of CIC, subject only to Federal Court review by leave.

The Federal Court has rendered decisions regarding IRPR s.117(9)(d), and Certified Questions are pending. Many of the Federal Court cases suggest that it remains open to the sponsor to make an application for permanent residence, other than as a member of the family class, via an application on humanitarian and compassionate grounds (H & C). The Federal Court appears to be anticipating that H & C will be considered in these cases, and that this would serve to reduce the inflexibility of IRPR s. 117(9)(d) and therefore the potential violation of the sponsor's s.7 *Charter* rights. However, the current approval rate for overseas H & C cases is quite low: approximately 13%. As well, no specific guidelines exist to assist visa officers with H & C applications arising out of the Regulation.

I. Harshness of the Regulation

Situations continue to exist that that the Regulation did not anticipate, or where the Regulation's effect has been extremely harsh. In the most sympathetic situations:

- Illegitimate children may be unknown to immediate family members (as in the *Jean-Jacques* case discussed below), or they may be in one parent's custody with no intent to immigrate. Years later, the other parent in Canada may wish to take custody of the children but would not be permitted to sponsor them;

- Children may be in a former spouse's custody and even disclosed to the visa officer, but examinations were waived – perhaps because the former spouse refused to allow the children to be examined. If circumstances change (eg. death or ill health of the former spouse) and the parent in Canada takes custody, there is no way to sponsor their own children even though they are now the sole custodial parent;

- Live-in caregivers serve Canadian families, and may subsequently obtain resident status and citizenship. Many of these caregivers, particularly from the Philippines, do not disclose children when they apply for a work permit or residency status. They erroneously believe that their children disqualify them from the program. They left their children with relatives and supported them with earnings from Canada. These children cannot now be sponsored as family class members, even in situations where they had been wholly financially supported by their mothers here and where the sponsoring parent gained no immigration advantage;

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[2] These minor exceptions include IRPR ss. 117(10) and (11), which came into effect in 2004 and remedy situations of non-examination that occurred as a result of examinations not being required under the Act, or former Act.

- An independent applicant with no family receives a visa, and then marries before obtaining permanent resident status with the intent of sponsoring once settled in Canada. The spouse is then disqualified from being sponsored; and

- An accompanying dependent child is forced to leave a child behind by the parent, and the parent does not disclose this grandchild. The accompanying dependent child cannot sponsor their own child upon arrival in Canada, notwithstanding that this child would not have been prohibited from coming to Canada as part of the original application.

II. Inconsistencies in Processing

In response to our previous submissions calling for the deletion of the Regulation, your Department asked us to provide specific examples of how visa officers' application of H & C in IRPR s. 117(9)(d) cases has been problematic. We received many reports from our members, which may be summarized as follows:

- In some cases, the visa officer refused to consider H & C, and the Immigration & Refugee Board, Appeal Division refused to take jurisdiction, even though the sponsor in question did not even know that he had dependants at the time of his application (*Jean-Jacques v. Canada (Minister of Citizenship & Immigration)* 2005 F.C. 104, Docket No. IMM-3639-04);

- In some instances, an officer refused the case without considering H & C under IRPA s.25, even though it was specifically requested.;

- If no specific request for H & C consideration was in the original submission package, the officer did not give H & C consideration, and generally no letter was issued in the interest of procedural fairness to the sponsor advising them of the opportunity to make such submissions;

- In a number of instances, officers' reviews of H & C considerations were seemingly perfunctory, and no reasons were given for negative decisions despite the existence of factors such as a change in custody situation, or that parents of the undisclosed or unexamined child had been financially responsible for the child for many years. It is impossible to tell how much weight was given to these seemingly compelling factors as detailed refusal letters were not issued;

- In those cases where H & C submissions were made and applicants were scheduled for interviews, the officers refused requests for counsel to attend at the interview or for the sponsor to be interviewed as well. From the CAIPS notes of one file, it does not appear that the request for counsel to attend at the interview was even forwarded to Ottawa for review, as per the process outlined by David Manicom at the CICIP meeting in Toronto on November 4, 2005;

- There does not seem to be consistency in the issuance of refusal letters from different visa offices. Some visa offices are issuing two separate letters - one that refuses the family class application, (sometimes) with instructions to appeal to the Appeal Division, and the other refusing the H & C component of the application, (sometimes) with

instructions to proceed to the Federal Court. Other visa offices are including both refusals in one letter with no direction; and

- In one recent case, the visa office would not consider H & C until all avenues of appeal on the issue of membership in the family class were resolved, forcing a likely delay for the sponsor of at least one year.

The above examples call into question whether IRPA s. 25 provides relief from the harshness of the Regulation in the current circumstances. Therefore, the CBA Section recommends once again that IRPR s. 117(9)(d) be deleted. Alternatively, the CBA Section recommends that the government make a regulatory change to allow an appeal to the Appeal Division for disqualification for prior non-examination. In addition, or in the further alternative, we recommend that Citizenship and Immigration Canada draft special guidelines for the Manual, tailored to these specific situations, which would assist officers in their application of H & C under IRPA s. 25. We discuss these recommendations in detail below.

III. Recommendations

1. Delete IRPR s. 117(9)(d)

We stand by our previous submissions that prior non-disclosure of dependents is a misrepresentation and should be dealt with accordingly. In appropriate cases, the misrepresentation allegation can be made against the sponsor or against the applicant.

There is no reason to treat non-disclosure differently from any other misrepresentation. The effect is to punish family members more harshly than other applicants, despite the importance of family in immigration policy. It results in a lifetime separation of family members, whereas a finding of misrepresentation leads to only a two-year period of separation. There is also no reason why decisions to refuse applications by spouses or children should not be reviewed by the Appeal Division to determine whether the failure to disclose was deliberate and whether the circumstances justify loss of status or refusal of the application.

Deleting the Regulation would not give applicants license to conceal non-accompanying dependents. Misrepresentation inadmissibility continues to apply, both at the initial application and during subsequent sponsorship. Officers would conduct an independent assessment of the misrepresentation, and consider whether the misrepresentation should result in loss of status of the subsequent sponsor.

If CIC still believes that a complete deletion of the Regulation is not an option, we recommend:

2. Disqualification for Prior Non-Examination Should be Appealable to the Appeal Division

The Appeal Division is a specialized tribunal that can assess the deliberateness of the non-examination, and determine if there are sufficient H & C factors to overcome the refusal. The sponsor and the applicant would bear the onus of making a case to overcome that refusal. A case involving unexamined spouses and children under the Regulation would be like any case of a reviewable refusal of a family class member. The Appeal Division would provide a balance

between the enforcement interest and the inherent interest in reuniting immediate family members.

The Appeal Division has developed considerable expertise in addressing and balancing H & C factors in the context of non-disclosure. Factors such as deliberate deception (and the purpose of it), the child's situation in their home country, the parent's situation here, the existence of benefits accruing from the non-disclosure, among others, would be reviewed and balanced.

This change could be accomplished easily by changing IRPR s.117(9)(d) from a jurisdictional ground to an admissibility ground in the regulations.

In addition to this recommendation, or in the further alternative, we recommend the following:

3. Changes to Policy Guidelines

IRPR s.117 (9)(d) is a hard and fast rule, with no apparent appeal. There is no meaningful review of H & C by the Appeal Division; the only consideration of these factors occurs at the discretion of CIC officers under IRPA s.25. The guidelines provide the officers with little guidance as to how this discretion ought to be exercised.

It has been our position since the inception of this legislation that not all failures to disclose are malicious or unforgivable, and situations exist where even deliberate failures to disclose ultimately merit relief. Given the historical significance of family reunification to Canada's immigration policies and process, guidelines should address all of these situations. The guidelines for the application of H & C should be expanded so that "disproportionate hardship…caused to the person seeking consideration" looks to the well being of the unexamined child or spouse. The guidelines should specifically address all of the examples of sympathetic situations outlined above as unforeseen by the legislation, and direct officers to grant relief in those cases.

In addition, we would recommend the following directions be referenced in the Manual for these types of cases:

a) There is a right to counsel at all H & C interviews (in person or via teleconference), which interviews should include the sponsor (in person or via teleconference) and the applicant;

b) H & C consideration should be given in all of these cases even if <u>not</u> requested (as the sponsor may not be aware of this option);

c) If there are no submissions by the sponsor on the H & C factors, a fairness letter should be sent to the sponsor (as in medical refusal cases) requesting submissions on this point;

d) If an application is ultimately refused notwithstanding the procedural safeguards which are noted in a) to c) above, a detailed refusal letter should be issued on the refusal of H & C grounds, with a clear statement of the sponsor's recourse if they wish to appeal, seek leave, etc.;

e) A separate refusal letter should be issued with respect to the refusal of the family class application, with a clear statement of the sponsor's recourse if they wish to appeal, seek leave, etc.; and

f) H & C consideration should be given immediately once determination is made by the visa office that IRPR s.117(9)(d) applies, and not after all avenues of appeal have been exhausted.

IV. Conclusion

The prospect of a family being forever separated due to a sponsor remaining in Canada while their spouse or dependent child are barred from entry as a result of the Regulation supports deleting the Regulation all together. This would leave the issue of misrepresentation to be dealt with through the appropriate sections of the Act. This is the most pragmatic solution to stop the heartbreak when families cannot be reunited under a family class sponsorship. Alternatively, at the very least, an appeal should lie to the Appeal Division to permit it to weigh all factors contributing to the non-examination. In addition, or in the further alternative, comprehensive guidelines should exist in the interest of procedural fairness to allow for consistent processing of H & C cases arising out of this Regulation.

Our Section Officers will be in Ottawa at the end of March for the H & C and CICIP meetings, and we would welcome the opportunity to meet with you and Rell DeShaw on this issue separately at that time.

Yours truly,

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

Robin Seligman
Chair, Citizenship and Immigration Section

cc. Rell DeShaw

Enclosure