THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

April 30, 2010

Brenna MacNeil, Director
Social Policy and Programs, Immigration Branch
Citizenship and Immigration Canada
365 Laurier Avenue West
Jean Edmonds Tower South, 8th Floor
Ottawa, ON K1A 1L1

Dear Ms. MacNeil:

Re: Regulations Amending the Immigration and Refugee Protection Regulations (Bad faith), Canada Gazette, Part I, April 3, 2010

I write on behalf of the Citizenship and Immigration Law Section (CBA Section) in response to the proposed *Regulations Amending the Immigration and Refugee Protection Regulations (Bad faith),* pre-published in the Canada Gazette, Part I, on April 3, 2010 (the proposed Regulations). The Proposed Regulations would change the two-part test in s.4 of the *Immigration and Refugee Protection Regulations* (IRPR Reg. 4), which deems certain spousal and adoptive parental relationships to be in "bad faith" and results in the foreign national being ineligible for sponsorship on the basis of that relationship. Under the two-part test, a bad faith relationship "is not genuine" and "was entered into primarily for the purpose of acquiring any status or privilege under the Act."

We commend the government for excluding from the Proposed Regulations an amendment to change the wording of IRPR Reg. 4 from "is not genuine" to "was not genuine." As we noted in our submission dated July 17, 2008 (copy enclosed), such a change would have limited the assessment of the relationship to a fixed period of time (its commencement) and would have precluded a holistic assessment of the relationship.

However, we reiterate the other concern raised in our previous submission that changing the test from a conjunctive test ("and") to a disjunctive test ("or") will lead to illogical and discriminatory outcomes. Two recent cases before the Immigration and Refugee Board demonstrate the potential for inappropriate outcomes that would result from this change to the test:

- In ***Harinder Singh Gill v. MCI*** (TA5-12998), the Immigration Appeal Division (IAD) allowed the appeal of a refused marriage sponsorship. In this case, the IAD found that although it appeared the applicant entered into marriage with the appellant primarily for immigration reasons, it was nonetheless a genuine relationship of permanence.

  The applicant and the appellant married in June 2001 and resided together in Canada from June 2001 until November 2003 when the applicant voluntarily returned to India in order

500-865 Carling Avenue, Ottawa, ON, Canada K1S 5S8
tel/tél : 613.237.2925 | **toll free/sans frais** : 1.800.267.8860 | **fax/téléc :** 613.237.0185 | **info@cba.org** | **www.cba.org**

to comply with her deportation order and be sponsored back to Canada. From 2001 to 2003, the applicant lived with her husband, her parents, her son, and her husband's twin teenage daughters. She lovingly took care of her husband's daughters, he lovingly provided for her, her parents and her son, and they all lived in a joint family household. This couple is still married today.

In paragraph 18 of the case, the IAD notes the rationale for maintaining the conjunctive ("and") test, and allowing genuine marriage cases to survive notwithstanding the intention at the beginning of the relationship:

> The object of section 4 of the *Regulations* is to exclude applicants whose primary intention is to acquire permanent resident status in Canada and who have no plans to live with their sponsor any longer than necessary…In the Panel's opinion, the objectives of the requirements for immigration to Canada under the family class category would not be served by denying the appellant's appeal. Given its strength, the evidence of a genuine relationship must prevail and for this reason, despite its concerns with respect to the initial intention behind the marriage, the Panel allows the appeal.

- In ***Sukhwant Singh Grewal v. MCI*** (MA9-09002), the IAD again allowed a sponsorship appeal which met the genuineness prong of the test but failed the intention test.

  The applicant and the Appellant married in February 2004, and they had a child together in November 2004. The appellant visited her in India every year from 2004 to 2009 (with the exception of 2006), they communicated regularly, he supported her financially, they opened a joint bank account and she is the beneficiary of his life insurance policy.

If IRPR Reg. 4 is amended, couples like these two cases would be rejected even though they are in genuine, loving relationships of permanence. This is unfair and contrary to the principles of family reunification as per IRPA s.3(3).

The CBA Section supports the government's objective of refusing applications involving "sham" relationships where the parties have no intention of residing together. However, the currently proposed amendments would not be effective at accomplishing this goal. On the contrary, they may lead to a significant increase in sponsorship appeals to the IAD, as well as claims of discrimination against persons adhering to cultural practices of arranged marriages. Altering the longstanding conjunctive test from *Horbas v. MEI* could aggravate the existing backlog of cases before the IAD.

Thank you for taking the time to review our submissions. We would be pleased to discuss them with you at your convenience.

Yours truly,

(Original signed by Kerri Froc for Stephen Green)

Stephen Green
Chair, National Citizenship and Immigration Law Section

Encl.

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July 17, 2008

Brenna MacNeil, Director
Citizenship and Immigration Canada
Social Policy and Programs
Immigration Branch
365 Laurier Avenue W.
Ottawa, ON K1A 1L1

Dear Ms. MacNeil:

Re: Regulation 4 (Bad Faith relationships)

I write on behalf of the Citizenship and Immigration Section of the Canadian Bar Association (CBA Section) in response to your June 2008 letters to Baerbel Langner and myself. Thank you for consulting with the CBA Section regarding the proposed changes to Regulation 4 of the *Immigration and Refugee Protection Regulations* (IRPA Reg 4).

Introduction – Proposed Amendments

The proposed changes to IRPA Reg 4 are twofold. First, the test for "bad faith" would be amended to make its two prongs ("genuineness" of relationship and relations entered into for immigration status or privilege) disjunctive rather than conjunctive. "And" would change to "or," so that an officer could refuse a relationship based on either element, rather than having to find both elements together. Your letters state that this policy change is consistent with the intent of the legislation, as either of the two elements from IRPA Reg 4 would be sufficient, in and of itself, to demonstrate a "bad faith" relationship.

The second proposal would change the verb tense so that a finding of bad faith would require evidence that the relationship "*was* not genuine", rather than "*is* not genuine." Your letter states that this change is necessary to ensure that the genuineness of the relationship is assessed at the time the relationship was entered into (i.e. date of marriage). This would permit "an appropriate assessment of the relationship…consistent with the original intent" of the regulation.

Separate provisions regarding adoption would assess whether an adoption is undertaken in bad faith prior to legal completion of the adoption. The amendments to IRPA Reg 4 respecting the disjunctive test and fixing the assessment of good faith relationship to the commencement of relationship would also apply to the adoption relationship.

500–865 Carling, Ottawa, Ontario, Canada K1S 5S8
tel/tél. : 613.237.2925 toll free/sans frais : 1.800.267.8860 fax/téléc. : 613.237.0185 info@cba.org www.cba.org

The CBA Section supports the government's wish to screen out relationships that are not *bona fide* and to protect program integrity. However, in our view, the proposed changes do not reflect the original intent of the regulation. The current wording serves legitimate immigration objectives and the proposed changes would cast the net wider than intended, catching legitimate relationships within its scope.

Disjunctive Test – "Or" vs "And"

IRPA did not intend a Disjunctive Test

The disjunctive, two-prong test to refuse recognition of a relationship has been part of Canada's immigration law for more than 20 years, dating back at least to the 1984 amendments of the 1976 *Immigration Act* regulations. At that time, IRPA Reg 4 excluded from the family class a spouse who:

> ...entered the marriage primarily for the purpose of gaining admission to Canada as a member of the family class and not with the intention of residing permanently with the other spouse.

The seminal interpretation of the regulation was the 1985 Federal Court decision in *Horbas v. MEI*.[1] There, the Court stated:

> ...the test is a double test: that is, the spouse is disqualified under subsection 4(3) only if the marriage is entered into primarily for the purpose of gaining admission to Canada and not with the intention of residing permanently with the other spouse.[2]

The regulation stayed intact until 2002. When IRPA was enacted, IRPA Reg 4 was reworded, but expressly without any intention of altering the two-step *Horbas* test. The prong of the test requiring an "intention of residing permanently with the other spouse" was modified to require instead that the relationship be "genuine". This was not a significant change. "Genuine" is interpreted to include an intention to reside together, as well as other elements, such as a legal marriage ceremony (in the case of married spouses).

Through the course of legislative review, CIC officials confirmed that there was no intention to depart from the *Horbas* test. When regulations were first introduced in 2001, the French version of IRPA Reg 4 said "et" ("and"), while the English version said "or." CIC's position was reaffirmed in November 2002 when the then Director of Policy and Planning, Johanne DesLauriers, stated that:

> ...there was no intent to amend the Horbas test and that we plan to amend the English version of section 4 of the Regulations...IRPA is new and we are doing all that is possible to ensure consistency in its application.[3]

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1 (1985) 2 F.C. 359.

2 *Ibid,* at 365.

3 E-mail from Ms. Johanne DesLauriers to Gordon Maynard, then Vice Chair of the CBA Section (November 26, 2002).

When IRPA Reg 4 was included in the first regulatory amendment package (published in Canada Gazette in September 2003), the English "or" was indeed changed to the current "and," consistent with the CIC position that the conjunctive test would continue to apply. Thus, the proposed disjunctive test cannot be supported as a clarification or reflection of legislative intent. It was always intended that the *Horbas* test would be preserved in the IRPA Regulations.

Disjunctive Test is Illogical

Intention to acquire status is a common characteristic of fraudulent marriages. However, this is also true of many genuine marriages where the parties intend to reside permanently together. We question why genuine marriages would be refused as being in "bad faith", regardless of any intention to acquire status in Canada. This is not a theoretical inconsistency. It will impose harm on real life *bona fide* relationships and marriages.

For example, consider a genuine romance between a Canadian resident and a foreign visitor. They decide to marry, but no date is set. The visitor applies to extend their status, so marriage can be pursued. The visitor extension is denied. The couple must separate, and pursue their application while apart for months and perhaps for more than a year, or accelerate their marriage date so they can pursue their application within Canada. Is the marriage genuine? Yes. Was there a significant intention that the marriage would facilitate acquiring status? Absolutely. However, despite the fact that these circumstances would not ordinarily constitute "bad faith," this couple would be vulnerable to refusal of the relationship using the proposed disjunctive test.

Disjunctive Test is Prejudicial

For centuries, arranged marriages have been common in cultures around the globe. Only in relatively recent times have western cultures moved away from arranged marriages. They remain, however, very common around the world and within parts of Canadian society. In fact, these marriages have a high rate of success compared to western "love marriages". Legitimate arranged marriages are made for a variety of reasons, both to ensure that the marriage and resulting family are strong and viable, and to advance the interests and future prospects of individual parties and their families. As migration and mobility have become more common and attainable, immigration prospects have come to be an important factor in many marriage arrangements. This does not mean that those marriages are not *bona fide,* only that acquiring immigration status is a major factor in choosing a prospective partner – the same as education, wealth, religion and family background. The proposed disjunctive test may be perceived as targeting those cultures that practice arranged marriage.

The proposed test will have significant negative impact, particularly on the Indian Sikh community where arranged marriage between a Canadian citizen or permanent resident and a foreign national is invariably followed by the sponsored application for permanent resident status. While eliminating fraudulent marriages in this and other cultures is a desirable goal, many legitimate relationships will be barred from being reunited in Canada by application of the amended test.

In the *Horbas* decision, it was argued that the two-part test was prejudicial to cultures practicing arranged marriages because it looked at intention to obtain status. The Court rejected this argument specifically on the ground that the test was conjunctive – it required an officer to find

both arms were met (intention to acquire status and no intention to reside permanently together)[4]. It is likely that this argument of prejudicial or discriminatory effect would be revived if the test were changed to a disjunctive one.

In sum, a "bad faith" test that renders it possible to ignore the genuineness of the relationship and consider only the intention to acquire status is illogical and prejudicial. Accordingly, the CBA Section cannot support the proposed change.

Refusing a Relationship that "was not genuine" rather than "is not genuine"

The stated reason for the proposed change of tense is to limit assessment of "genuineness" to the time when the relationship commenced – the date of marriage for married couples or the date the relationship was entered into for common law couples. We do not see the basis for restricting that assessment to a fixed point in time, particularly to the commencement of the relationship.

Consider love at first sight. A couple meets on Friday and marries on Sunday. There is no history of dating or the usual development of a relationship. Only time will tell whether the relationship is durable and was entered into in good faith. As the couple cohabits, joins their economic fortunes and woes together, develops mutual joint friends, engages family into their orbit, conceives children and develops the family unit, it becomes apparent that the marriage is in good faith – there is an intention to reside together permanently in a partner relationship.

More commonly, in arranged marriages, much of the evidence of the genuineness of the relationship will arise after the date of marriage. It is customary in arranged marriages that there is no courtship and little or no contact between the bride and groom prior to marriage. The marriage is not the product of a direct relationship between the couple, but of arrangements negotiated between the families. At the date of marriage, the couple will have no history of relationship and little history of communications with each other. Currently, the decision maker will consider not only the family arrangements and formalities undertaken prior to marriage, but also the conduct of the couple since marriage. Living arrangements, communications, children, financial arrangements and the like are examined for consistency with a good faith relationship.

When the applicant is assessed or interviewed, the officer is currently able to make a holistic assessment of the relationship. The totality of evidence is considered, including evidence of conduct before, during and since the marriage (or relationship) up to the date of assessment, in order to properly evaluate the *bona fides* of the relationship. Not only is this reasonable, it is consistent with the role of the Immigration Appeal Division of the Immigration and Refugee Board in appeals from refusals of sponsored applications. The Board is directed to allow an appeal if it is "…satisfied that, <u>at the time that the appeal is disposed of</u>, the decision appealed is wrong in law or fact or mixed law and fact;…"[5]

It is artificial and unnecessary to restrict the assessment of genuineness to a particular point of time – especially the point of time when the relationship commenced. Fixing the point of time

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4 The Court stated, "It should first be observed that the test is a double test: that is, the spouse is disqualified under subsection 4(3) only if the marriage is entered into primarily for the purpose of gaining admission to Canada and not with the intention of residing permanently with the other spouse. There was no significant evidence that the effect of this section has been predominantly to discriminate against persons of any particular religion or national or ethnic origin" (*supra,* note 1, at 365).

5 IRPA s.67(1)(a), emphasis added.

prevents considering valid evidence arising since the marriage or since the relationship began. It is not apparent from practice or the legislation that this was the intention of IRPA Reg 4.

The CBA Section also has concerns that the proposed amendment may potentially foreclose avenues of appeal from a refused application, even if subsequent applications are made with respect to a sponsored relationship. If the assessment of genuineness is tied to the moment of entering into marriage, then a prior Appeal Division refusal could not be cured by subsequent application and appeal. The issue of validity of relationship at the time of commencement would be *res judicata,* having already determined, regardless of subsequent evidence to demonstrate that the relationship is currently genuine. Legitimate couples previously denied but truly intent on remaining together would be permanently thwarted from being together in Canada. Any limitation of an applicant's access to appeal would be unfair, for the reasons we describe above.

When people are seen to get away with marriage fraud, it undermines public confidence and encourages further fraudulent activity. We agree that the practice should be condemned, officers should be vigilant and offenders should be punished. However, we cannot support the proposed changes as we do not think that they will stop those intent on committing fraud, but will rather punish many legitimate couples who intend to remain together permanently.

Impact on Adoption

We are not convinced that amendments to IRPA Reg 4 are necessary to satisfy the requirement of the *Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption* (the Convention) that an international adoption take place "only if the competent authorities of the receiving State have determined that the child is or will be authorized to enter and reside permanently in the State." Further, we are concerned that assessing the *bona fides* of a parent-child relationship prior to an international adoption would be practically very difficult and would add an unnecessary layer of bureaucracy on an already a complicated process.

Currently IRPA Reg 117 allows for sponsorship of foreign born children who have been adopted by Canadian parents (whether citizens or permanent residents of Canada), in the same manner as any other dependant child. The only difference between a natural child and an adopted child of a sponsor is that an adopted child will not be considered part of the Family Class unless the adoption was in the best interests of the child within the meaning of the Convention (IRPA Reg 117(2) and (3)). Foreign-born children whom the sponsor *intends* to adopt may also be sponsored for permanent residence if certain conditions are met, including that the adoption is not primarily for the purpose of acquiring any privilege or status under the Act (IRPA Reg 117(1)(g)).

The current practice of visa officers ensures compliance with the Convention. Section 7.1 of Overseas Processing (OP) 3 Adoptions manual outlines the procedures for a Convention adoption case and states that a visa officer will advise the central authority of the sending country that an adoption can be finalized only after they have assessed that the child meets all the requirements for obtaining permanent resident status in Canada. This includes an assessment that the province of destination approves the adoptive parents. The central authority must also make its own assessment that the adoption is in the child's best interests. The current practices, including the requirement of assessing *bona fides*, provide adequate safeguards to ensure that only legitimate adoptions are approved for immigration to Canada.

Accordingly, under current law the visa officer would have already considered whether the adoption was primarily for the purpose of acquiring any privilege or status under the Act prior to the adoption being finalized. The only *additional* power that the proposed change would provide is the ability to consider the genuineness of the parent-child relationship prior to the adoption. In other words, the visa officer would be required to assess the genuineness of the relationship *before* it is created. This is a practical impossibility. Rather, the visa officer would be assessing the intention of the potential adoptive parent with respect to the future adoption. This is a subjective assessment, which the visa officer may be poorly equipped to undertake. In most cases, trained Canadian provincial or local authorities would have already provided an assessment that the adoption was in the best interests of the child. An additional pre-adoption assessment of genuineness would likely be very similar to these previous assessments.

The requirement of a pre-adoption assessment of *bona fides* may well inflict great harm upon the children involved as it may result in extensive delays before adopted children could commence a relationship with their adoptive parents. Immigration resources at visa offices are already greatly stretched. While CIC has been very facilitative in expediting adoption cases where adoptions have occurred, we fear that requiring sponsors to apply for an assessment prior to adoption will result in greater delays while children languish in untenable situations that are detrimental to their well being. The denial of parental affection can be permanently damaging, particularly for young children.

With the amendment to the *Citizenship Act* this year, the government recognized the need to streamline the granting of status to adopted children for the benefit of Canadian parents and their children. Adding another layer of pre-adoption assessment for genuineness would detract from those advancements. Potential adoptive parents may be wary of starting the process if a visa officer has an overriding discretion at the end of the day to refuse the application if their intention to adopt is not believed to be sufficiently genuine.

Therefore, we respectfully suggest that the proposed change is not necessary, as procedures already in place ensure that a proposed adoption is assessed and supported by both the province of destination and the sending country prior to completion of an adoption. Furthermore, any attempt to assess the genuineness of an adoption before it has been completed unnecessarily widens the gap between natural and adopted children.

Appeal Rights

If the regulations are amended, any decision to reject a proposed adoption due to *bona fides* should be appealable pursuant to IRPA s. 63(1). IRPA provides Canadian citizens and permanent residents an appeal to the IAD following a refused "application to sponsor a foreign national as a member of the family class". "Member of the family class" presently includes a child adopted abroad or a child to be adopted in Canada. It does not include a child "to be adopted" abroad.

Any changes to permit a pre-adoption assessment of *bona fides* must be accompanied by concurrent amendments to ensure that the decision is appealable to the Appeal Division of the IRB in the same manner as refusals of applications by already adopted children.

Summary

The CBA Section does not support the creation of a disjunctive test, through amendment of "and" to "or" in IPRA Reg 4. A disjunctive test that allows an officer to refuse the relationship if it is either not genuine or with the primary intention of acquiring status would amend the *Horbas* test, contrary to the government's intention when the regulation was enacted. A relationship should not be refused for "bad faith" without regard to its genuineness.

The CBA Section does not support the amendment of tense, so that the issue of bad faith is whether the relationship "*was* not genuine" rather than "*is* not genuine". The better question is whether the relationship, as it currently stands before an officer or the Appeal Division, is a good faith, genuine relationship. Limiting the assessment to a particular point in time does not accord with the intention of the legislation.

Last, changes that would empower a visa officer to assess the genuineness of a parent-child adoptive relationship before the relationship exists in fact are not necessary to comply with the *Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, could potentially harm the children involved, and add an administrative layer that may frustrate potential adoptive parents seeking an international adoption.

We trust you will find these comments useful, and remain available to discuss these issues in greater detail.

Yours truly,

(Original signed by Kerri A. Froc for Alex Stojicevic)

Alex Stojicevic
Chair, National Citizenship and Immigration Section