THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

May 18, 2011

Via email: judy.jewers@cic.gc.ca

Judy Jewers
Deputy Director
Social Policy and Programs
Immigration Branch
Citizenship and Immigration Canada
365 Laurier Avenue West
Ottawa, ON K1A 1L1

Dear Ms. Jewers,

Re: Immigration and Refugee Protection Regulations amendments, Canada Gazette, Part 1, April 2, 2011

I write on behalf of the Citizenship and Immigration Law Section (CBA Section) regarding the proposed amendments to s. 130 of the *Immigration and Refugee Protection Regulations* (the Proposed Regulation). The Proposed Regulation, pre-published in the Canada Gazette, Part I, on April 2, 2011, would bar a sponsor who became a permanent resident after being sponsored as a spouse, common-law or conjugal partner from sponsoring a new spouse, common-law or conjugal partner for a five year period. The stated purpose, like the recent proposal to impose conditional permanent residence status on sponsored spouses, common law partners and conjugal partners,[1] is to deter individuals entering non *bona fide* relationships for the purposes of immigration to Canada.

While we appreciate that the government seeks to discourage marriages of convenience and protect family class sponsors from abandonment by their spouses, we believe that the Proposed Regulation will fall short of this objective. Further, any positive effects of imposing a five year sponsorship bar cannot be justified in light of the real potential for harm to innocent newcomers in Canada who suffer genuine marriage breakdown within five years of their landing in Canada.

Like the conditional permanent residence proposal,[2] the Proposed Regulation fails to distinguish between immigrant spouses who have suffered genuine breakdown from those who have

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1 Notice (Department of Citizenship and Immigration), (2011) C Gaz I, 1077, online: http://www.gazette.gc.ca/rp-pr/p1/2011/2011-03-26/html/notice-avis-eng.html#d114>. The conditional permanent residence proposal would require that the sponsored spouse or partner remain in a bona fide relationship with their sponsor for a period of two years or more following receipt of their permanent residence status in Canada.

2 A copy of our submission regarding the conditional permanent residence proposal is attached for your reference.

committed so-called 'marriage fraud'. Given the broad legislative language, and the lack of any prescribed exceptions to the general rule, the amendment will compromise family reunification.

The Proposed Regulation also fails to distinguish between relationships that began soon before the initial sponsorship application from those that were in place for an extended period before the intended sponsor became a permanent resident. For example, the five year sponsorship bar would prohibit a permanent resident who was married for 40 years prior to landing in Canada from sponsoring a subsequent spouse for a five year period, even if she is widowed soon after her arrival in Canada. In situations like this, the sponsorship bar will impose serious hardship, but will not do anything to deter marriage fraud.

Statistics from the Institute of Marriage and Family Canada indicate that 38% of Canadian marriages end in divorce.[3] Statistics Canada has also reported that the highest rate of divorce occurs after the third and fourth wedding anniversaries.[4] Given the prevalence of legitimate family breakdown in Canada, fairness demands that the Department demonstrate bad faith before prohibiting otherwise eligible sponsors from reuniting with their spouses.

The CBA Section supports the government's objective of deterring marriages of convenience. However, the Proposed Regulation has the potential to impose unintended barriers to family reunification for *bona fide* immigrants and their sponsors. If the government is to proceed with this amendment, we recommend that the duration of the sponsorship bar be limited to three years. We also recommend that the prohibition be limited to sponsored spouses, common-law partners and conjugal partners who have been in a relationship of less than two years duration at the time of the initial sponsorship application. This would minimize the impact on *bona fide* relationships and correspond with the duration of the sponsorship undertaking.

Thank you for taking the time to consider our position. We would be pleased to discuss our submission in greater detail at your convenience.

Yours truly,

(original signed by Chantal Arsenault)

Chantal Arsenault
Chair, National Citizenship and Immigration Law Section

Encl.

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3 Institute of Marriage and Family Canada, "Canada Divorce Statistics" (November 15, 2010), online: <http://imfcanada.org/default.aspx?go=article&aid=1182&tid=8> (accessed April 12, 2011).

4 Statistics Canada, *The Daily* (May 4, 2004), online:<www.statcan.gc.ca/daily-quotidien/040504/dq040504a-eng.htm>.

THE CANADIAN BAR ASSOCIATION
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May 18, 2011

Via email: justine.akman@cic.gc.ca

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Director, Social Policy and Programs
Citizenship and Immigration Canada
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Dear Ms. Akman:

Re: Notice requesting Comments on Proposal - Conditional Permanent Residence

I write on behalf of the Citizenship and Immigration Law Section of the Canadian Bar Association (CBA Section) to provide our comments regarding the Notice of Intent published in the Canada Gazette on March 26, 2011. The Notice of Intent proposes that sponsored spouses, common-law and conjugal partners who have been in a relationship with their sponsor for two years or less be subject to a period of conditional permanent residence spanning two years or more.[1]

The stated purpose of the proposal is to deter fraudulent or "non *bona fide*" spouses from obtaining permanent residence in Canada. While we agree that this is a laudable goal, we believe that the proposed amendment will fall short of its objective. The proposed amendments may also create unacceptable risks for victims of domestic violence and for *bona fide* spouses who experience genuine marriage breakdown within two years of their landing in Canada.

Before the government implements any measures to address marriage fraud, we recommend that steps be taken first to identify clearly the objective, to examine the efficacy of similar provisions in foreign law, and to consider whether the ameliorative intent of the intended regulation justifies the serious consequences for these vulnerable newcomers.

Defining the Problem

The Notice of Intent states that only cases targeted for fraud will be reviewed during the conditional period. It also states that status may be revoked if the condition of remaining in a *bona fide* relationship is not met. This implies that permanent residence may be revoked even in cases where the applicant and sponsor were in a genuine relationship at the time of application, and that *all* sponsored spouses and partners must maintain their relationship for two years after landing to ensure that their status in Canada is not impugned. The proposed amendment in its present form is

[1] (2011) C Gaz I, 1077, online: <http://canadagazette.gc.ca/rp-pr/p1/2011/2011-03-26/html/notice-avis-eng.html>.

too broadly framed. It fails to provide any basis for distinguishing a fraudulent marriage from a failed marriage.

We oppose any scheme that allows for revocation of permanent resident status in the case of *bona fide* spouses who have suffered genuine marriage breakdown. It goes beyond the proper purview of immigration law to prescribe sanctions against genuine couples who have separated or divorced following their landing.[2] Measures introduced to combat immigration fraud must be carefully circumscribed so that only those with fraudulent intent are penalized.

The Notice of Intent concedes that there is no statistical information to establish the extent of marriage fraud in Canada. The statistic that 16% of spousal sponsorship applications are refused "for various reasons" does not support the conclusion that marriage fraud is a persistent problem in Canada. In fact, this rate of refusal may imply that visa offices are doing an effective job at screening out non *bona fide* marriages.

The Notice of Intent also lacks information about the type of fraud that the proposed measure seeks to address, whether it is lack of genuineness by the foreign spouse, the Canadian spouse, or both. Without clarity about the type and extent of the problem, it is difficult to assess the potential efficacy of the proposed measure. For example, if the intent is to deter Canadian sponsors from defrauding or abusing innocent foreign nationals, it is difficult to ascertain how conditional permanent residence will accomplish this goal. The proposal is likely to create more opportunity for the abuse of sponsored individuals.

It would be premature for the government to move ahead with amendments before the issue has been clearly defined. This is a necessary condition to remedy these issues, while being sufficiently precise to avoid unintended effects on innocent applicants.

Assessing the Potential for Harm

When the *Immigration and Refugee Protection Act* (IRPA) came into force on June 28, 2002, it reduced the duration of sponsorship undertakings from 10 years to three years for spouses, common law partners and conjugal partners. In introducing this change, the government provided the following rationale in its Regulatory Impact Analysis Statement:

> The IRP Regulations take into account the protection of dependent children and spouses or common-law partners from violence. The duration of sponsorship was decreased from 10 to 3 years given concerns that domestic violence is aggravated by the implied dependency imposed on the sponsor by the undertaking of support.[3]

The current proposal will undermine previous efforts to reduce the dependency of women and children on abusive sponsors by prolonging the period of insecure immigration status. Conditional permanent residence will give abusers the power to instigate removal proceedings against their spouse, providing additional means to perpetuate abuse.

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[2] See also the proposed regulations that would bar sponsored spouses from sponsoring a new spouse, common-law, or conjugal partner within five years of acquiring permanent residence (*Regulations Amending the Immigration and Refugee Protection Regulations [Spousal Sponsorship].*(2011) C Gaz I, 1251, online: <http://www.gazette.gc.ca/rp-pr/p1/2011/2011-04-02/html/reg3-eng.html>) and our submission responding thereto (copy enclosed).

[3] *Immigration and Refugee Protection* Regulations, (2001) C Gaz I, 4477, online: www.gazette.gc.ca/archives/p1/2001/2001-12-15/html/reg-eng.html>.

The Notice of Intent states a process would be developed to allow victims of domestic violence to come forward without facing enforcement action. However, it will be impossible to fully redress the impact of vexatious reports by abusive sponsors on their spouses and dependent children. Even without the potential for loss of permanent resident status, statistics show that incidents of domestic violence are largely unreported by new immigrants.[4] Abused women will face distinct disadvantages in proving the genuineness of their relationship, since many standard indicia of a *bona fide* relationship (e.g. joint assets, jointly held bank accounts) will not exist in a relationship characterized by unequal power and financial abuse. Further, the fraud investigation will cause additional hardship to those seeking to extricate themselves from abusive relationships, even where fraud is eventually disproven. The proposed condition on sponsored permanent residents may create new barriers for abused women, further jeopardizing their safety.

International Example: Does Conditional Permanent Residency Actually Curtail Fraud?

As indicated in the Notice of Intent, other countries, including the United States, Australia and the United Kingdom, have adopted some form of conditional permanent residence for sponsored spouses. Before Canada attempts to bring its spousal policy into line with these jurisdictions, it would be prudent to establish whether these policies have proven effective in deterring marriage fraud, and whether other jurisdictions have been successful in addressing risks created by conditional status for vulnerable persons, including victims of domestic violence.

The short deadline to respond to the Notice of Intent has not permitted a detailed analysis of parallel provisions in the identified jurisdictions. Our preliminary research indicates that conditional residence for sponsored spouses does not effectively deter fraud. Evidence also suggests that in all three countries conditional permanent residence has increased vulnerability of abused spouses, *bona fide* spouses who experience marriage breakdown, and spouses of sponsors who die within the probationary period.

In the US, legislative attempts to deter marriage fraud began more than 20 years ago, when the *Immigration Marriage Fraud Amendments of 1986* introduced a two year period of conditional permanent residence for sponsored spouses whose marriage is less than two years old when status is acquired. Additional criminal and civil sanctions against immigration fraud have been included in the *Immigration and Nationality Act* and Title 18 of the *United States Code*. Yet the US Government Accountability Office (GAO) has repeatedly questioned the effectiveness of fraud control measures.[5] In March 2006, the GAO called on the US Citizenship and Immigration Service to enhance its ability to detect immigration fraud, and criticized the Department of Homeland Security for failing to actively use available administrative sanctions.

In Australia, sponsored spouses are not eligible to apply for permanent residence unless their relationship is still genuine and ongoing for two years after they have been admitted to Australia on a temporary "Spouse Visa to Australia." Australian law provides a limited number of exceptions to the two-year wait rule, including relationships ongoing for five years or more at the time of application, or relationships of two years or more with dependent children of the relationship.

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4 Statistics Canada, *Family Violence in Canada -- A Statistical Profile* (Ottawa: Minister of Industry, 2011), online: < www.statcan.gc.ca/pub/85-224-x/2010000/aftertoc-aprestdm2-eng.htm>.

5 United States Government Accountability Office, Report to Congressional Requesters (January 2002), online: <www.gao.gov/new.items/d0266.pdf>, and United States Government Accountability Office, Report to Congressional Requesters (March 2006), online: <www.gao.gov/new.items/d06259.pdf>.

The spousal sponsorship scheme in the UK is similar to the Australian system. Spousal applicants may obtain temporary permission to live and work in the UK for up to 27 months. If the relationship is still ongoing at the end of two years, the applicant may apply to settle permanently in the UK. The UK also allows certain applicants to apply for permanent residence before the two year period has transpired where the applicant and sponsor have been in a relationship for least four years prior to the date of application.

In spite of the probationary period imposed by UK immigration law, a 2009 report from the Home Office indicates that immigration "sham marriages" continue to be a problem.[6] In February 2005, the government took the further step of introducing the "Certificate of Approval" scheme, which requires that many spouses obtain a 'Certificate of Approval to Marry' from the UK Border Agency. The Certificate of Approval system was declared unlawful by UK and European courts and was abolished on May 9, 2011. The government is currently contemplating new measures to replace the Certificate of Approval system.[7]

In each country, special measures address the negative impact of temporary or conditional permanent residence on victims of domestic violence. However, studies conclude that the vulnerabilities created by insecure immigration status for women who face abuse at the hands of their sponsor have not been adequately mitigated. In particular, the threat of deportation often induces women to remain in abusive relationships without assistance. Concerns have been identified in Australia about the hardship for victims of violence in proving to immigration authorities that their marriage is "genuine."[8] In the US, legal scholars have criticized the inaccessible procedures that require abused immigrant women to 'self-petition' to avoid deportation enforcement.[9]

Existing Enforcement Mechanisms

Canada's immigration scheme already contains numerous mechanisms to prevent marriage fraud. The most important is the screening of sponsorship cases when an application is assessed by a Canadian visa office or case processing centre. As well, IRPA prohibits obtaining permanent residence by misrepresentation[10] or inducing another person to commit misrepresentation.[11] We believe the government should attempt greater enforcement within the current framework, before imposing changes that have the potential for serious negative impact.

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6 See the letter from Damian Green, Minister of Immigration, Home Office, dated December 21, 2010, appended to the House of Lords and House of Commons Joint Committee report, *Draft Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010- Second Report* (London: The Stationary Office, 2010), online: <http://www.publications.parliament.uk/pa/jt201011/jtselect/jtrights/111/111.pdf at 14>. The statistics quoted by Minister Green were updated in a March 24, 2011 news release by the Home Office entitled, "Immigration minister reiterates commitment to cracking down on marriages for visas as reports by registrars rise," online: <http://www.homeoffice.gov.uk/media-centre/news/sham-marriage-crackdown >.

7 Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010, Second Report, Human Rights Joint Committee, online: <www.publications.parliament.uk/pa/jt201011/jtselect/jtrights/111/11110.htm>.

8 *Equality Before The Law: Justice For Women*, Australian Law Reform Commission, ALRC Report 69, Part 1, **<**www.austlii.edu.au/au/other/alrc/publications/reports/69part1/ALRC69part1.pdf>

9 Deborah M. Weissman, "Addressing Domestic Violence in Immigrant Communities" *Popular Government* (Spring 2000) 13-18; Kavitha Sreeharsha, "Reforming America's Immigration Laws: A Woman's Struggle" *Immigration Policy Centre* (June 10, 2010), online: <http://www.immigrationpolicy.org/sites/default/files/docs/A_Womans_Struggle_062810.pdf>

10 *Immigration and Refugee Protection Act,* S.C. 2001, c.27, s.40

11 *Immigration and Refugee Protection Act*, S.C. 2001, c.27, ss.124-128

In addition to the other concerns we have raised, the government should also consider impact of introducing these new "back end" enforcement mechanisms on the immigration system as a whole. This includes the following complex questions:

- Does the Immigration Division of the Immigration and Refugee Board (IRB) have the capacity to handle an influx of permanent residence revocation applications?
- Does the extent of marriage fraud justify the cost of increased enforcement measures?
- How will Canada ensure that fraud reporting mechanisms are not utilized as a tool for vengeance in cases of genuine marriage breakdown?
- Will fraud investigation activities consume existing resources and cause further delays in immigration processing for *bona fide* applicants?

Role of the Immigration and Refugee Board – Appeal Division

If IRPA is amended to allow for removal of sponsored spouses for breach of condition, it is essential that corresponding amendments be made to IRPA s. 64, to confirm the jurisdiction of the Immigration Appeal Division to hear a full appeal on the merits. This will ensure that sponsored permanent residents who become subject to enforcement proceedings due to breach of condition will benefit from the same protections extended to other permanent residents in Canada facing enforcement, including the right to be heard and present evidence, the right to counsel at their appeal, and the opportunity to present the humanitarian and compassionate grounds that warrant a positive exercise of ministerial discretion. Given the very serious interests at stake, and the potential for loss of permanent residence by vulnerable and *bona fide* spouses, procedural fairness demands that unrestricted access to the appeal division be provided.

Limiting the Scope of the Condition

For the reasons above, the CBA Section opposes regulatory amendments that would impose conditional permanent residence on sponsored spouses in Canada. If the government intends to proceed, steps should be taken to limit those to whom conditional residence would be applied. For example, the condition should be waived for all couples that have children at the time of application, even if their relationship is less than two years old, to minimize the impact on children of immigration marriages.

In the interest of fairness, we also recommend that a mechanism be created to give sponsored spouses an opportunity to explain the reason for marriage breakdown before removal procedures are initiated. For example, the government might mandate that a fairness letter be sent to the sponsored spouse before an investigation is initiated, and that the spouse have an opportunity to address the allegation before a s.44 report is written.

Conclusion

We appreciate the opportunity to provide these preliminary remarks regarding the proposed amendments. We would be pleased to engage in further dialogue on this topic.

Yours truly,

(original signed by Chantal Arsenault)

Chantal Arsenault
Chair, National Citizenship and Immigration Law Section

Encl.

THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

April 28, 2011

Via email: Debra.Presse@cic.gc.ca

Debra Pressé
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Dear Ms. Pressé,

Re: Immigration and Refugee Protection Regulations amendments , Canada Gazette, Part 1, March 19, 2011

On behalf of the Citizenship and Immigration Law Section of the Canadian Bar Association (CBA Section), I am writing in response to the notice of regulations proposing to eliminate the "source country class" from the Canadian refugee protection system. The source country class allows residents of designated countries to apply directly to Canada for protection without leaving their country of nationality. To be eligible, applicants must live in one of six designated countries,[1] be seriously and personally affected by civil war or armed conflict, been detained without charges or punished for an act that in Canada would be considered a legitimate exercise of civil rights pertaining to political dissent or trade union activity, or fear of persecution for reasons of race, religion, nationality, political opinion, or membership in a particular social group. We believe that the source country class plays an important role in Canada's efforts to resettle refugees and should be maintained. We suggest a number of improvements that would allow the class to meet the stated objective of being a "flexible tool for humanitarian intervention."

Historically the source country class and its previous incarnations have empowered Canadian officials to save the lives of thousands of human rights activists. Canadian lawyers have worked with NGOs in places like Guatemala and Haiti, where they witnessed the source country class being used to protect human rights defenders. Canadian consular officials on the ground in designated countries are best placed to develop the intelligence and close links with human rights and other NGO groups. It is more efficient, timely and effective to empower Canadian officials on the ground to conduct these life and death decisions, rather than compelling refugees to flee their country.

[1] Currently, Colombia, Guatemala, El Salvador, Sudan, Sierra Leone and the Democratic Republic of Congo are designated.

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The additional benefit of the source country class is that it enables victims of persecution to avoid hiring smugglers and taking dangerous security risks to leave their country. The government's proposal would close one of the few options people who face persecution have to avoid smugglers when fleeing to Canada.

In justifying removal of the source country class, the Regulatory Impact Analysis Statement lists four key issues that prevent the source country class from meeting its objective.

- Many persons of concern are not eligible for resettlement under the source country class because they do not live in a designated source country. Changing the schedule of designated source countries requires a regulatory amendment, which is impractical for timely responses to humanitarian crises. The schedule has changed only four times since 1997, with the same six countries listed for over 10 years. This suggests that the class lacks the flexibility originally intended.

- The provision is used by non-nationals residing in the source countries who would normally be required to have a referral or a private sponsor, since Canada did not restrict the application of direct access based on nationality.

- Without referral organizations to work with applicants, vulnerable persons of concern are unable to access the application or the mission in some source countries.

- While the Canadian embassy in Colombia received over 4,500 source country class applications annually, few applied in other designated countries. Even in Colombia, the acceptance rate is only 13%.

The CBA Section agrees that most of these concerns are legitimate. However, lives are at stake, and the answer is not to "throw the baby out with the bath water". We therefore propose the following improvements to allow the source country class to be effective and administratively efficient:

- We agree that the program should be responsive to individuals, rather than a program for whole groups. The need for Source Country resettlement may occur in many countries, and Canada should be in a position to respond. Therefore, the program should be universal, rather than limited to named countries. There are also practical reasons for preferring universal application, since naming countries creates political and diplomatic issues. Regulatory criteria for the source country class (discussed below) would assist in ensuring that the class fulfils its original objective of assisting human rights advocates and political dissidents in their country of nationality or habitual residence.
  The Source country class should allow for urgent and timely protection, through temporary resident permits.

- We suggest that criteria be developed for considering source country applications in accordance with the following:

    - There should be a narrower, more targeted definition of eligibility (rather than meeting the refugee definition minus being outside your country). The definition should describe those whom the class is meant to protect (e.g. threatened human rights activists).

    - Applicants should be referred from international organizations or organizations with international partners who are able to appropriately identify those at risk (e.g. Amnesty International, the Red Cross, and the United Nations High Commissioner for Refugees in countries where they work with internally displaced peoples.)

- Applicants for permanent residence must apply to the Canadian embassies responsible for their country of nationality or habitual residence unless they arrived with a lawful status of 12 months or more. The source country class should also establish similar provisions.
- The source country class should not be available to nationals from visa exempt countries.

There are many examples when effective intervention under the source country class saved lives. These successes depended on commitment from the Canadian officials and strong partnerships with local NGOs. Canada has long been a leader in international protection of human rights defenders. Now is not the time to abandon an important element of our humanitarian traditions.

Yours truly,

(original signed by Chantal Arsenault)

Chantal Arsenault
Chair, National Citizenship and Immigration Law Section