THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

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Via email: FINA@parl.gc.ca

James Rajotte, M.P.
Chair
Standing Committee on Finance
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, ON K1A 0A6

Via email: nffn@sen.parl.gc.ca

The Honourable Joseph A. Day, Senator
Chair
Senate Committee on National Finance
The Senate of Canada
Ottawa, ON K1A 0A4

Dear Senator Day and Mr. Rajotte,

Re: Bill C-38, Part 4, Division 54 – *Immigration & Refugee Protection Act*

I am writing on behalf of the National Immigration Law Section of the Canadian Bar Association (the CBA Section) to comment on Part 4, Division 54, amending the *Immigration and Refugee Protection Act* (IRPA). The CBA is a national association of over 37,000 lawyers, notaries, students and law teachers, with a mandate to promote improvements in the law and the administration of justice. The CBA Section comprises lawyers whose practices embrace all aspects of immigration and refugee law.

Part 4, Division 54 of Bill C-38. would give the government authority to summarily dismiss approximately 300,000 pending applications for permanent residence in the Federal Skilled Worker (FSW) class backlogged in CIC's processing queue since February 2008[1]. The CBA Section reiterates its objection to the omnibus style of legislation employed in Bill C-38. The significant impact and sweeping nature of the changes, and the quick timeframe for its passage, militate against meaningful comment or debate. The result is that these comments are limited to certain portions of the Bill, although we have significant concerns about others.[2]

If the bill is enacted, FSW applications filed before 27 February 2008 will be returned to applicants along with an estimated $130 million in processing fees – without interest on those fees[3], timely notice of the change in policy, legal right of remedy or indemnity[4], or any consideration of the merits of those applications. The bill would also empower the Minister to create immigration

[1] Section 707 of Bill C-38.

[2] See also letters from the CBA Competition Law Section on Part 4, Division 28 and from CBA Criminal Justice Section on Part 4, Division 37.

[3] Section 87.4(4) of Bill C-38.

[4] Section 87.4(4) of Bill C-38

classes that would be exempt from regulatory oversight. It introduces intrusive investigatory powers, and allows for unprecedented, unfettered control by Ministerial instruction over permanent and temporary resident processing. It would give the Minister power to establish conditions by category that must be met before or *during* the processing of an application or request[5] and allows the Minister to retroactively change those conditions and requirements. It also enumerates additional and far-ranging powers to inspect under the *Customs Act*[6] and confers powers and duties on the Minister of Human Resources and Skills Development.[7]

We recognize the importance of ensuring that Canada's immigration system responds to our changing labour market needs. But the backlog reduction in Bill C-38 far overreaches its stated objective and fails to meet principles of accountability and transparency. In our view, Part 4, Division 54 should be withdrawn, or at least separated and referred to the Standing Committee on Citizenship and Immigration for proper study and debate.

A. Omnibus Style of Legislation

The immigration measures in Bill C-38 constitute significant program changes by way of Ministerial instruction, seriously devolving the Parliamentary process by eliminating meaningful public engagement. The significant changes and controversial effects of this bill should not be implemented without thorough public debate. Packaging diverse material into a budget bill (though its impact is in many areas outside the realm of budgetary considerations) effectively immunizes it from proper study by Parliamentary committees best informed on the substantive issues.

B. Integrity of the Canadian Immigration System

Closing pre-2008 FSW files means changing the rules mid-stream. This will harm Canada's reputation and integrity in the immigration field, undermining public confidence, and operating counter to Canada's economic interests.

The expectation of the FSW applicants affected by C-38 was that their applications would be processed if filed in accordance with sections 10 and 11 of the *Immigration and Refugee Protection Regulations*, paid for in accordance with section 294, and not returned pursuant to section 12. There is no legal authority or precedent in Canadian law for the government to refuse to process completed applications. There was no notice at the time of filing that the applications might be returned unprocessed. While those who applied prior to 27 February 2008 had no guarantee that their application would result in a positive decision, they had a reasonable expectation that it would be considered on its merits and would likely be successful if they achieved 67 points. The proposed changes constitute an "unusual or unexpected use of the authority conferred on the Minister", contrary to s.3 (2)(b) of the *Statutory Instruments Act*.

While the government intends to reimburse application fees, the bill absolves the government from liability for other costs and damages − be it language training and other studies, legal fees, other costs associated with preparing to immigrate to another country, or the difficult-to-quantify cost of lost opportunities for those who could have applied through other programs or to other countries. If Bill C-38 becomes law, complaints may arise under the *Federal Accountability Act*[8] and to the Office of the Public Sector Integrity Commissioner of Canada for potential gross mismanagement in the public sector[9].

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[5] Sections 703-706 of Bill C-38

[6] Section 482 of Bill C-38

[7] Section 701 of Bill C-38

[8] http://www.tpsgc-pwgsc.gc.ca/apropos-about/rspnsblt-ccntblt-eng.html

[9] http://www.psic-ispc.gc.ca/faq/menu-eng.aspx#gross

C. Rule of Law

A fundamental cornerstone of Canadian law is the Rule of Law. This principle was articulated by the Supreme Court of Canada in *Re Manitoba Language Rights*, as follows:

> The rule of law, a fundamental principle of our Constitution, must mean at least two things. First, that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power.
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> …
>
> Second, the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order".[10]

This principle is enunciated in the study guide for citizenship applicants produced by CIC itself: "One of Canada's founding principles is the rule of law. Individuals and governments are regulated by laws and not by arbitrary actions. No person or group is above the law."[11]

Bill C-38 enables the government to renege on its promise of prompt processing, accountability and transparency, all objectives of *the Immigration and Refugee Protection Act (*IRPA*)*.[12] The bill would authorize the government to arbitrarily extinguish 300,000 applications (to their significant prejudice), by way of Ministerial instruction. This approach to backlog reduction is anti-democratic, and contrary to the Rule of Law.

D. Mandamus

Mandamus is a legal remedy whereby an applicant to compel a public body to perform an obligation imposed on it by statute, whether that body has refused or neglected to perform the duty when requested to do so.

The landmark case involving mandamus in the immigration context is *Dragan v. Canada* (*Minister of Citizenship and Immigration*)[13]. In *Dragan*, a class of 124 applicants who had applied for permanent residence prior to the enactment of the IRPA sought a writ of mandamus to compel the Minister to assess their applications under the criteria in the previous legislation. The Court granted mandamus for 102 applicants, ordering the Minister to assess those applications by 31 March 2003 in accordance with the former legislation. The Court found the government neglected to make best efforts to assess the applications before 31 March 2003 and had violated the legislative intent of IRPA – specifically the "prompt processing" objective in s. 3(1)(f) – because no special effort had been made to process the backlog at visa posts with significant inventory. The same might be said of the pre-2008 FSW backlog. Although reduced from estimated highs in 2008 of 800,000 applicants, the Minister has opted to process post-2008 applications at a much higher rate than the pre-2008 cases.

Mandamus is currently being pursued by some of the 300,000 applicants who will be impacted by Bill C-38. Aside from the and the cost to taxpayers to fight this litigation and serious drain that class action litigation will have on the already-overtaxed Federal Court, a positive decision by the court

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[10] *Re Manitoba Language Rights*, [1985] 1 SCR 721, para 59-60

[11] Study Guide – Discover Canada the Rights and Responsibilities of Citizenship, online at www.cic.gc.ca/english/resources/publications/discover/section-04.asp

[12] Sections 3(1)(f) and 3(3)(b)

[13] *Dragan v. Canada (Minister of Citizenship and Immigration)* [2003] 4 F.C. 189; 2003 FCT 211; [2003] F.C.J. No. 260 at par. 39 (T.D.)

could plunge the immigration system into a worse position with respect to its backlog, similar to what occurred after *Dragan* in 2003.

E. User Fees Act

The *User Fees Act* is aimed at strengthening accountability, oversight, and transparency in the government's management of user fee activities. It mandates the government to take reasonable steps to notify clients, and provide the clients a reasonable opportunity to respond before services for which fees are charged may be changed[14]. We believe the measures in Part 4, Division 54 of Bill C-38 violate the *User Fees Act*. In fact, the bill would exempt the government's conduct from the *User Fees Act* [15]. The laudable objective of the *User Fees Act* – to hold the government accountable to its service commitments – should not be undermined. Nor should IRPA's promise of prompt processing, accountability and transparency[16].

F. Minister`s Instructions

Bill C-38 is a significant change from previous immigration legislation, giving the Minister the power to create new sub-classes of economic immigrants and to set or change the rules governing those sub-classes. Now, economic classes and sub-classes can be created only by regulations after pre-publication in *Canada Gazette* and an opportunity for review by a Parliamentary Committee and for submissions by stakeholders and concerned parties.

This is part of a trend that has emerged in recent years, incrementally increasing Ministerial powers at the expense of Parliamentary and public oversight.

The Government`s intent is to create a flexible tool that would allow for the timely introduction of "start-up" classes as pilot projects. The up-to-two years to implement regulatory changes militates against attempts to introduce untested and creative new mechanisms. We agree that these provisions may permit testing of creative selection mechanisms. But sufficient controls to ensure Parliamentary scrutiny and public input must be maintained. We welcome the limits of 2750 applicants per year per class and the five year non-renewable maximum duration on Ministerial classes. However, we object to a Ministerial power to retroactively change the selection criteria to affect applications already been filed. This is contrary to basic principles of transparency and fairness.

G. New Zealand Experience

Canada can learn from the experience of New Zealand, where the government attempted to retroactively change immigration eligibility criteria in the "General Skills" and "Long Term Business Visa" categories. These changes were challenged at the Auckland High Court in *New Zealand Association for Migration and Investments (NZAMI) v. Attorney General*[17]. NZAMI argued that the retrospective application of stricter rules contravened the affected applicants' legitimate expectations. The court accepted this argument, and struck down the impugned law.

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14 www.tbs-sct.gc.ca/fm-gf/ktopics-dossiersc/fms-sgf/uf-fu/menu-eng.asp and www.tbs-sct.gc.ca/fm-gf/ktopics-dossiersc/fms-sgf/uf-fu/menu-eng.asp

15 Section 703 of Bill C-38

16 IRPA, sections 3(1)(f) and 3(3)(b)

17 [2006] NZAR, 45

H. Conclusion and Recommendations

The backlog of pre-February 2008 FSW application is a significant problem for Canada's immigration system. It impedes the government's ability to process what may well be more desirable immigrants in a timely manner. However, this backlog is entirely the result of policies and rules introduced by successive governments and compounded by unwillingness to implement restrictions or change selection criteria when too many people were qualifying under the existing rules. The current government justifies its course of action by claiming the pre February 2008 applicants are not well suited to Canada's economic needs and that they have found a way to select better qualified immigrants. We remember virtually the same arguments and rationale when the government of the day attempted to retroactively refuse a backlog of Skilled Worker applicants as a result of the introduction of IRPA.

Even though the backlog presents a significant challenge, we believe that the ends do not justify the means proposed in Bill C-38. Canada must strive to fashion its law in a manner that preserves its international reputation as a country of openness while promoting economic, social and cultural nation-building. Parliament has legislated under section 3(1) of the *IRPA* that the objectives of Canada's immigration program are "to permit Canada to pursue the maximum social, cultural and economic benefit of immigration." This means that the potential economic benefits of our immigration program must be carefully balanced against the social and cultural objectives critical to our core values as a society. It is in everyone's interest to achieve faster processing. However, the potential consequences of the changes proposed by Bill C-38 must be carefully considered to ensure that the right balance is struck.

The changes contemplated by Bill C-38 will have a profound impact on existing and potential immigration applicants and also stand to alter the structure and foundation of Canadian law-making. A plethora of serious legal issues could arise if Bill C-38 becomes law. At a minimum, these challenges must be debated meaningfully and comprehensively, with particular emphasis on the potential consequences to the integrity and functionality of Canada's immigration system, and our values and principles as a parliamentary democracy.

The CBA Section recommends that:

1. measures impacting immigration law, including proposed changes to the Customs Act, the new Integrated Cross-Border Law Enforcement Operations Act and the proposed expansion of powers for the Minister of Human Resources and Skills Development Canada, be sent to the House and Senate committees mandated to study immigration matters, for an examination of impact and potential legal issues.
2. any proposed amendments protect the Parliamentary process and prohibit or restrict the use of Ministerial Instructions and retroactive amendments that undermine the regulatory process expressed at section 5(2) of the IRPA.
3. the Government consult with stakeholders and continue to implement effective backlog reduction, as it has over the past few years.

Yours truly,

(original signed by Tamra L. Thomson for Joshua B. Sohn)

Joshua B. Sohn
Chair, National Immigration Law Section