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Via email: CIMM@parl.gc.ca

Borys Wrzesnewskyj
Chair, Citizenship and Immigration Committee
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, ON K1A 0A6

Dear Mr. Wrzesnewskyj:

Re: Family Reunification – Determining the *Bona Fides* of a Relationship

Thank you for the opportunity to contribute to the Citizenship and Immigration Committee's study on family reunification on October 27, 2016. I am writing on behalf of the Immigration Law Section of the Canadian Bar Association (the CBA Section) further to our undertaking to provide language to replace the bad faith marriage section of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations).

The CBA Section recommends three amendments. All will strengthen the government's ability to fulfill its commitment to reunite families in Canada:

1. Replace the existing test to determine the validity of a relationship with an expanded and more relevant test.
2. Prevent the use of *res judicata* from denying the right to a full appeal when Immigration, Refugees and Citizenship Canada (IRCC) refuses a family sponsorship application for families that have reapplied to immigrate after a previous application and appeal was unsuccessful.
3. Remove the prohibition on marriages done by proxy, telephone or other remote means from being eligible for family sponsorship.

1. An Expanded and More Relevant Test to Determine the *Bona Fides* of a Relationship

The CBA Section's first recommendation is to replace the current disjunctive test (using "or") for excluding couples from the Family Class and the Spouse or Common-Law Partners in Canada Class – where only one of the elements must be present to meet the test – with a conjunctive test (using "and") – where all of the elements must be present to meet the test. This would equip officers with a relevant focus when considering the *bona fides* of a relationship.

Regulation 4(1) currently reads (emphasis added):

> *4 (1) For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the marriage, common-law partnership or conjugal partnership:*
>
> *(a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or*
>
> *(b) is not genuine.*

We recommend that Regulation 4(1) be amended to read:

> *4 (1) For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the marriage, common-law partnership or conjugal partnership:*
>
> *(a) is not genuine; and*
>
> *(b) the primary purpose of the marriage, common-law partnership or conjugal partnership is to acquire status or privilege under the Act.*

The proposed revision makes two significant changes. First, the two current parts of the test for a bad faith relationship (the "genuineness" of a relationship and its "primary purpose") would need to be present.

Second, the "primary purpose" analysis should shift from an examination of what the primary purpose of a relationship ***was*** when it was entered into to what it ***is*** at present. An officer's determination of the primary purpose of relationship is a difficult and subjective assessment of the intent of the applicant, and cannot by itself lead to the estrangement of children from their parents, and partners from each other, which has occurred too frequently since the current test was introduced.

The CBA Section supports the government's objective of excluding applicants coming to Canada fraudulently with no intent of continuing their relationship after they immigrate. However, in the same way that the government has recognized that imposing conditional permanent residency on all individuals who have recently entered into the relationship prior to immigrating unduly restricts family reunification, the same is true of the current test introduced in 2010.

Since the Regulations were changed, visa officers, the Immigration and Refugee Board and the Federal Court have grappled with difficult situations where couples in genuine relationships, who may even have children together, have a previous determination that their relationship was entered into with the primary intent of acquiring an immigration benefit.

The CBA Section also believes that the primary purpose assessment should be more expansive and relevant. It should focus on the present purpose of a relationship rather than an individual's past intent. For example, an individual may have intended to marry primarily to derive an immigration benefit. After several years of cohabiting and having children together, however, the primary purpose of the relationship may change. While the person's original primary purpose may have been contrary to the principles of the family class, it should not permanently preclude a determination that the relationship is genuine. A primary purpose test that focuses on the present circumstances of a family is more in accord with the government's objective of facilitating family reunification.

The CBA Section further recommends that the Regulations for determining the *bona fides* of an adoption be similarly amended.

2. Prevent *Res Judicata* from Denying Right to Full Appeal

The CBA Section's second recommendation is to prevent the use of *res judicata* from denying the right to a full appeal when IRCC refuses a family sponsorship application for families that have reapplied to immigrate after a previous application and appeal was unsuccessful.

Res judicata is a legal doctrine that bars re-litigation of any legal issue determined in a prior proceeding, as well as any material fact necessary for the redetermination of that issue. Unless particular circumstances warrant hearing a matter on its merits, an administrative tribunal will typically apply the doctrine of *res judicata* to end further litigation on matters were previously decided.

While the application of *res judicata* is logical in the commercial litigation context, it has had devastating impacts for many families seeking reunification. The CBA Section does not believe that Parliament intended that *res judicata* – a creation of common-law not mentioned in any immigration legislation – be applied in the way currently done in the family reunification context.

In applying *res judicata,* the Immigration Appeal Division has declined to hear sponsorship appeals on numerous occasions – even in situations where, since the first IAD refusal, a couple have cohabited for several more years, or have since had a child. No Canadian should be denied a meaningful hearing as to whether their relationship is *bona fide* simply because they were unsuccessful in a previous attempt.

We believe that that *Immigration and Refugee Protection Act* should be amended so that *res judicata* does not restrict the ability of a sponsor to appeal a Family Class refusal under s. 63(1) of the Act. We propose a new section 63(1.1):

> *63(1.1) Res judicata shall not apply to an appeal under paragraph 63(1).*

3. Remote Marriages and Marriage by Proxy

The CBA Section also recommends that regulations 5(c), 117(9)(c.1) and 125(1)(c.1), which exclude marriages from sponsorship eligibility where either spouse was not physically present at the marriage ceremony, should be repealed. While proxy, telephone, fax, internet and other similar forms of marriage are uncommon in Canada, the government should be sensitive to cultural practices abroad. Outside the immigration sphere, these marriages are typically recognized as valid under the laws of the jurisdiction where it took place and under Canadian law.

We trust that these recommendations will be of use in the Committee's deliberations.

Yours truly,

(original letter signed by Kate Terroux for Vance P. E. Langford)

Vance P. E. Langford
Chair, CBA Immigration Law Section