THE CANADIAN BAR ASSOCIATION
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July 6, 2018

Via email: Minister@cic.gc.ca

The Honourable Ahmed Hussen, P.C., M.P.
Minister of Immigration, Refugees and Citizenship
Immigration, Refugees and Citizenship Canada
365 Laurier Avenue West
Ottawa, ON K1A 1L1

Dear Minister Hussen:

Re: Reversal of measures under C-43 regarding IRB procedures and impact of C-46

I am writing on behalf of the National Immigration Law Section of the Canadian Bar Association (CBA Section) to urge the government to restore elements of due process and procedural fairness to the *Immigration and Refugee Protection Act* (IRPA),[1] undermined since 2013 with the passage of the *Faster Removal of Foreign Criminals Act* (FRFCA).[2]

The CBA is a national association of over 36,000 members, including lawyers, notaries, academics and students across Canada, with a mandate to seek improvements in the law and the administration of justice. The CBA Section is comprised of over 1,000 lawyers, practicing in all aspects of immigration law and delivering professional advice and representation in the Canadian immigration system to clients in Canada and abroad.

Introduced as Bill C-43, the FRFCA amended IRPA procedures, concentrating discretionary powers in the hands of the Minister, with limited opportunity for judicial oversight and few procedural safeguards. The Bill was passed essentially as introduced, despite opposition by your party then in opposition,[3] and many individuals and groups including the CBA Section.[4]

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1 *Immigration and Refugee Protection Act*, S.C. 2001, c. 27

2 *Faster Removal of Foreign Criminals Act*, S.C. 2013, c. 16

3 Liberal speeches on Bill C-43: http://www.ourcommons.ca/DocumentViewer/en/41-1/house/sitting-151/hansard#7684077 ; https://sencanada.ca/en/Content/Sen/chamber/411/debates/153db_2013-04-18-e#48

4 CBA submission, *Bill C-43, Faster Removal of Foreign Criminals Act* (November 2012)

Reversing the harsh measures brought into effect by FRFCA is long overdue. The situation is now critical due to the recent passage of Bill C-46,[5] increasing *Criminal Code* penalties for impaired driving offences with the apparently unintended consequence of reclassifying these offences as constituting "serious criminality"[6] under IRPA. The implications for permanent residents and foreign nationals are severe, as explained in the CBA's recent submissions on Bill C-46 to the Senate Legal and Constitutional Affairs Committee,[7] and discussed further below. This situation is exacerbated by the loss of appeal rights under IRPA through FRFCA. We address here that loss of appeal rights, and other IRPA provisions affected by FRFCA that are most urgently in need of amendment.[8]

1) Loss of appeal rights

The most significant change in FRFCA was expanding the group denied Immigration Appeal Division (IAD) appeal rights under IRPA s. 64(2) on the grounds of inadmissibility for "serious criminality" (IRPA s. 36 (1)). Before FRFCA, individuals who had been convicted and sentenced in Canada to a two-year sentence of imprisonment were denied access to appeal rights under this provision. FRFCA reduced the threshold from a two-year sentence to a six-month sentence (IRPA s. 36(1)(a)).[9]

FRFCA also extended the denial of appeal rights under IRPA section 64(2) to permanent residents or foreign nationals convicted of foreign offences, regardless of the sentence imposed,[10] or who are believed to have committed a foreign offence, even without conviction or charges laid.[11] As a result of FRFCA, these section 36(1)(b) and section 36(1)(c) categories of "serious criminality" were added to section 64(2) as circumstances where there is no IAD right of appeal from a removal order. In its 2012 submission on Bill C-43, the CBA Section argued that these categories of "serious criminality" were too broad to justify loss of appeal rights.[12]

In these cases, a Canada Border Services Agency (CBSA) officer may make a determination to send the matter to an unappealable Immigration Division hearing to confirm the inadmissibility. A CBSA determination is no substitute for the right to a full IAD appeal hearing before an impartial decision-maker, particularly given the potential for dire consequences. Discretionary relief is inconsistent with

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5 Bill C-46 *An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts,* now S.C. 2018, c. 21.

6 IRPA, s. 36(1), *supra* fn 1

7 CBA letter to Senate Legal and Constitutional Affairs Committee re: Bill C-46 (February 27, 2018); also highlighted in a CBA letter to the Canada Border Services Agency (December 21, 2017)

8 Some FRFCA measures were reversed as part of Minister McCallum's mandate.

9 IRPA s. 36(1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for (a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed…

10 IRPA s. 36(1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for … (b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years…;

11 IRPA s. 36(1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for … (c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

12 CBA submission (February 27, 2018), *supra*, fn 7

CBSA's enforcement mandate and the process lacks impartiality, fairness and consistency. The CBSA is not overseen by an independent body and, in the experience of CBA Section members, CBSA officers err on the side of enforcement. CBSA officers also lack tools possessed by the IAD, most notably the ability to issue a stay of deportation on terms and conditions.

The lack of a meaningful review is particularly harsh for long-term permanent residents who, in many cases, have been in Canada since childhood. Also, the loss of a right to IAD appeal significantly limits the opportunity to advance relevant considerations, such as the best interests of any child affected, hardship of removal on family members, the actual circumstances of the offence, lack of any prior criminal history, and likelihood of rehabilitation - factors that would reasonably be considered in IAD proceedings.

2) Limiting Humanitarian and Compassionate Relief

FRFCA eliminated consideration of humanitarian and compassionate relief under IRPA section 25, where parties have been found inadmissible due to offences listed in IRPA sections 34, 35 and 37.

These sections include a broad range in the seriousness of the offences. For example, under section 37 "organized crime" can involve a low level of participation (such as street level trafficking), or more serious behavior (such as a leadership role in a violent gang). The activity leading to inadmissibility may have occurred decades in the past when the individual was in very different social circumstances. FRFCA tied the hands of officers, preventing them from balancing the seriousness of the offence that led to inadmissibility with compelling humanitarian and compassionate considerations.

Ministerial discretion to relieve applicants from unwarranted harsh consequences of IRPA has long been part of Canada's immigration policy and practice. All persons should be eligible to submit a humanitarian and compassionate application. The application need not delay enforcement proceedings or stay a removal order. It is in keeping with Canadian values to consider the totality of the case and allow for compassionate relief in appropriate circumstances.

The 2015 Supreme Court of Canada decision in *Kanthasamy* expanded the definition of humanitarian and compassionate relief by incorporating the *Chirwa* test, which states that relief should be granted when "those facts, established by the evidence, which would excite in a reasonable man [sic] in a civilized community a desire to relieve the misfortunes of another...".[13] The IRPA amendments under FRFCA came into effect well before *Kanthasamy* and should be adjusted to expand access to humanitarian and compassionate relief accordingly.

3) Misrepresentation

For parties found to have misrepresented facts in an IRPA process, FRFCA extended the duration of inadmissibility under IRPA section 40 from two to five years. Parties found to have misrepresented are not allowed to enter Canada or apply for permanent resident status during this period. No distinction is made between those who intentionally misrepresented and those who made an unintentional error, or between persons who misrepresented for the purpose of gaining a benefit under IRPA and those whose misrepresentation would not have affected the outcome of the application.

The five-year bar is a blunt instrument that responds to all misrepresentations with the same punishment, notwithstanding the seriousness of the violation. Further, calculation of the five-year bar for parties inside Canada does not commence until enforcement of the removal order, considerably

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13 *Kanthasamy v. Canada*, 2015 SCC 61

lengthening the period of uncertainty regarding status as it may take years for a party to be removed and to exercise their appeal rights.

Compounding Effect of C-46 – Impaired Driving as Serious Criminality

Bill C-46 section 320.19 amends the *Criminal Code* to increase the maximum penalty for impaired driving from five to 10 years' imprisonment, effectively escalating an impaired driving conviction from ordinary criminality under IRPA (s. 36(2)) to serious criminality (s. 36 (1)), with the severe consequences for permanent residents and foreign nationals discussed above.

The consequences impact four main groups as follows:

1. Permanent residents with impaired driving convictions inside Canada will now be considered serious criminals for IRPA purposes, inadmissible to Canada and subject to loss of permanent resident status; those sentenced to at least six months' imprisonment will lose IAD appeal rights. (IRPA ss. 36(1)(a) and 64(2))

2. Permanent residents with impaired driving convictions outside of Canada, or who are believed to have committed impaired driving offences outside of Canada, will now be inadmissible to Canada with no right of appeal to the IAD. Even a foreign charge that is subsequently withdrawn could trigger the same harsh outcome. (IRPA ss. 36(1)(b) and (c) and 64(2))

3. Foreign nationals will be inadmissible and ineligible for permanent resident status until they obtain a record of suspension for impaired driving convictions inside Canada, or where five years have passed since an "outside Canada" conviction or commission of an offence and a determination of rehabilitation has been made. This harsh outcome will extend to sponsored spouses of Canadian citizens or permanent residents, and their children. (IRPA s. 36(3)(b) and (c))

4. Foreign nationals previously deemed rehabilitated pursuant to Immigration and Refugee Protection Regulations will be inadmissible to Canada following an impaired driving conviction. This will affect thousands of foreign students, foreign workers and visitors to Canada. (IRP Regulations section 18(2))[14]

IRPA section 36(3)(a) deems hybrid offences to be indictable, making the immigration consequences more serious than the fact situation might support – effectively the immigration consequences of a crime are related to the maximum possible sentence, not the facts of the case. The illogical outcome is that a permanent resident first offender under the new impaired driving law, who would likely be prosecuted summarily, will face inadmissibility because the ten-year maximum sentence amounts to "serious criminality" under IRPA. Permanent residents committing a driving while impaired offence outside Canada will lose their status and the right to appeal based on the mere fact of an offence, even without conviction and without regard to the circumstances of the case.

Clearly the intention of Bill C-46 is to send a strong message that impaired driving is unacceptable. Yet, the immigration consequences for non-citizens are disproportionate and severe. For a Canadian citizen a first offence might mean a minimum sentence of a $1,000 fine (Bill C-46, section 320.19(1)). For a permanent resident, it could mean deportation and separation from family, possibly without recourse to appeal. These consequences must be remedied prior to the coming into force of Bill C-46.

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14 *Immigration and Refugee Protection Regulations*, SOR/2002-227

Recommendations

1. Reverse the FRFCA amendment to IRPA section 64(2) by reverting the threshold for loss of appeal rights from a six-month sentence to a two-year sentence.

2. Reverse the FRFCA amendment to IRPA section 64(2) that included in the group denied appeal rights persons inadmissible for foreign convictions or foreign offences under s. 36(1)(b) or (c). Alternatively, amend IRPA section 64(2) to state that an impaired driving offence is not "serious criminality" for the purposes of section 36(1)(b) or 36(1)(c) inadmissibility.

3. Amend IRPA section 25(1) by removing the bar to humanitarian and compassionate relief to persons with sections 34, 35 and 37 inadmissibility.

4. Restore the period of inadmissibility for misrepresentation to two years. Consider instituting a graduated scale from zero to two years, taking into consideration the seriousness of the misrepresentation.

5. Amend IRPA section 40(2) to provide that, as long as the person is not evading the CBSA, the period of inadmissibility commences from the date of the removal order.

6. Amend IRP Regulations sections 18(2)(a)(i) and 18(2)(c)(i) to include an exception to the ten-year penalty threshold for impaired driving offences that do not involve serious bodily injury or death, allowing continued eligibility for deemed rehabilitation. Alternatively, use regulation authority under IRPA section 43 to exempt a single impaired driving offence from ineligibility for deemed rehabilitation.

7. Add a grandfather clause to preserve the "deemed rehabilitated" status of all persons deemed rehabilitated prior to Bill C-46 coming into force. Also, clarify that the immigration consequences of Bill C-46 apply only to offences that occur after it comes into force.

8. Develop policies and procedures to ensure foreign nationals and permanent residents are not disproportionately affected by increased penalties for impaired driving offences, as a supplement to, not a substitute for, legislative change. Operational guidance cannot effectively remediate legislative inadequacy. For example:

    i. Delegated authority for issuing a temporary resident permit or determination of rehabilitation for an impaired driving offence should be at the officer level, rather than the supervisor or manager level.

    ii. Develop guidelines on the circumstances favouring issuance of a temporary resident permit or determination of rehabilitation (i.e. where there was no incarceration, where the individual would have been deemed rehabilitated under prior legislation, where there was no bodily harm, where there are valid business, humanitarian and compassionate reasons for coming to Canada).

Thank you for considering our recommendations. We would be pleased to work with your officials to find workable solutions to these difficult issues, before Bill C-46 comes into force.

Yours truly,

(original letter signed by Sarah MacKenzie for Barbara Jo Caruso)

Barbara Jo Caruso
Chair, CBA Immigration Law Section