THE CANADIAN BAR ASSOCIATION

L'ASSOCIATION DU BARREAU CANADIEN

Bill C-43, *Faster Removal of Foreign Criminals Act*

NATIONAL IMMIGRATION LAW SECTION
CANADIAN BAR ASSOCIATION

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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**

PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Immigration Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Immigration Law Section of the Canadian Bar Association.

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I. EXECUTIVE SUMMARY

The Canadian Bar Association's National Immigration Law Section (CBA Section) appreciates the opportunity to comment on Bill C-43, the *Faster Removal of Foreign Criminals Act*. The CBA Section comprises lawyers from across Canada with expertise in all aspects of immigration and refugee practice, and has contributed regularly over the years to the development and implementation of related laws in Canada. While the proposed amendment limiting inadmissibility for temporary entrants is welcome, the majority of the proposed amendments are excessive, harmful and unnecessary. We recommend that the Bill be withdrawn or substantially amended.

The law goes farther than needed, extending to areas that are not justified by the purported harm it is seeking to address. Due process is eliminated and discretionary powers concentrated in the hands of the Minister, with limited opportunity for judicial oversight and few procedural safeguards. The safety valve of "humanitarian and compassionate" consideration is diminished as a matter of policy and by legislated elimination or reduction of access to appeal mechanisms.

There is little evidence of abuse justifying Bill C-43's amendments. The targeted "foreign criminals" include permanent residents of Canada, persons with legitimate status who have been living in Canada often since childhood. Access to legitimate and efficient procedures designed to assist rational and fair decision making is fair and appropriate.

1. Loss of Appeal Rights

The loss of appeal rights for many permanent residents is perhaps the most significant change proposed in Bill C-43. The Bill would dramatically eliminate access to Immigration Appeal Division (IAD) review of deportation orders made against permanent residents of Canada on the grounds of criminality. We believe these denials of access to review are unnecessary and unreasonable. Bill C-43 would deny access to the IAD to those sentenced more than six

months' imprisonment, reduced from the current two-year threshold. This would result in the deportation without appeal of permanent residents with a six month jail sentence, regardless of any other circumstances, including whether deportation is sought for a singular conviction, whether the individual has lived in Canada since childhood, whether they are rehabilitated and possess no risk of reoffending or whether the sentence is more severe than average given variations in sentencing patterns across jurisdictions. We recommend that the existing threshold for denial of access to the IAD in IRPA s. 64(2) be maintained.

The Bill makes no distinction between conditional sentences, which are served in the community, and those served in jail. Conditional sentence orders are commonly set for much longer than an equivalent sentence served in a jail, and are intended to reflect situations of less serious criminality and punishment. They should not be considered so grave as to justify loss of appeal rights. If the amendments restricting appeal rights are implemented, the amendment to IRPA s.64(2) should exempt any conditional sentence.

Bill C-43 extends the denial of access to IAD review to permanent residents who have been convicted of foreign offences (regardless of the sentence imposed) or who are believed to have committed a foreign offence, even with no conviction. We question why the Bill removes IAD jurisdiction for permanent residents who have no inadmissibility for crimes committed in Canada or whose foreign convictions involve sentences that do not convey any indication that the offence was serious. The nature of foreign police and legal systems in certain countries make it essential to maintain IAD jurisdiction for assessment of the alleged foreign conduct in the full context of the offender's situation, before deportation orders become effective.

With conviction for foreign offences, the only requirement is that the offense, if committed in Canada, would be punishable by potential imprisonment of 10 years or more. This would include conduct that on its face may not be particularly serious, such as a young permanent resident convicted of using fake identification to get into a bar while visiting the US. Under Bill C-43, an appeal of the deportation order would no longer be available regardless of the circumstances of the offence or of the offender. . Our system of admissibility determinations, based on concepts of proportionality and fairness, can only make sense if the IAD review is maintained.

The need to maintain IAD review is perhaps most important for removal orders based merely on an officer's belief of commission of a foreign offence, even without conviction. An IAD review permits an assessment of the true seriousness of the offense and the circumstances of the permanent resident but also ensures that evidence of commission of a foreign offence, in the absence of any record of court conviction, has been properly evaluated. Denying access to the IAD should not apply to inadmissibility categories based on foreign convictions or commissions of foreign offence.

The retroactive application of Bill C-43 has the potential to create significant unfairness. Bill C-43's transitional provisions would deny appeal rights even if the offence or conviction in question was before the amendments, unless the case has been referred to the Immigration Division before the provisions come into force. The timing of the referral is not an equitable basis on which to decide who ought to be stripped of appeal rights. In the course of sentencing, criminal courts take a holistic view of an offender's circumstances and the consequences of the sentence imposed. The loss of a right to appeal a deportation order is an important and valid consideration for a sentencing court. The retroactive nature of the provisions is particularly harsh for individuals who have received a longer sentence on the basis that they would be allowed to serve their sentences in the community under conditional sentence orders. The CBA Section recommends that transitional provisions in Bill C-43 relating to loss of appeal rights be revised so that the legislation is applicable only to individuals convicted or charged after the legislation comes into force.

2. Obligation to Attend CSIS Interview

Bill C-43 creates a mandatory obligation for foreign nationals making an application to attend a CSIS interview and answer all questions "for the purpose of an investigation," if requested by an immigration officer. An unfettered obligation to answer queries from CSIS could in many cases be deeply problematic, as an individual could be placed in the unenviable position of having a legal obligation to provide information about others with no relevance to their own immigration application. Although many Canadian citizens freely cooperate in Canada's intelligence gathering activities, the *Canadian Charter of Rights and Freedoms* protects the right of the individual to choose the extent of that cooperation. This fundamental protection is not and should not be limited to citizens. We recommend that the section be drafted to make it

clear that the obligation to attend and answer questions is limited to the information reasonably required for the individual's application.

3. New Authority for the Minister to Deny Entry

The proposed s.22.1 of Bill C-43 would create an unprecedented new authority for the Minister to deny entry to Canada on "public policy grounds". The proposed section grants the Minister virtually unlimited discretion to prevent entry to individuals not otherwise inadmissible to Canada for up to three years at a time. IRPA already has sufficient mechanisms to address a wide array of legitimate concerns for the protection of the Canadian public. The lack of accountability and the vague criteria would invite Ministers to deny entry to persons whose views are unpopular or simply objectionable to the Minister of the day. "Public policy" grounds are particularly vague and undefined. They would invite and permit the use of this power to prevent entry on purely political or ideological grounds. We recommend that proposed s.22.1 be withdrawn.

4. Limiting Humanitarian and Compassionate Relief

Bill C-43 eliminates the possibility of considering humanitarian and compassionate factors in balancing whether to deport individuals from Canada for certain categories of apparently serious inadmissibility. However, there is a broad spectrum of seriousness within these categories. For instance, "organized criminality" under s.37 can involve a relatively low level of participation in a pattern of less serious offences, such as shoplifting. In many cases, the inadmissibility may be based on involvement in events decades in the past in very different social circumstances or when the person was a youth. Ministerial discretion to consider humanitarian factors plays an important role in balancing the breadth of the inadmissibility sections in question with positive personal considerations. Accordingly, this amendment is inconsistent with basic Canadian values of fairness and due process. It is difficult to understand the mischief the amendment is seeking to address, as the Minister has the ability to deny relief in cases that are not compelling. Therefore, the proposed amendments to IRPA s.25(1) and s. 25.1(1) removing the ability of the Minister to consider humanitarian and compassionate factors in certain cases of inadmissibility should be deleted.

5. Misrepresentation

Bill C-43 proposes to extend the duration of inadmissibility for those found inadmissible for misrepresentation from two to five years, and to prohibit those found inadmissible for misrepresentation from applying for permanent residence during that period. No distinction is made between those who intentionally defrauded the immigration system, and those who made minor or honest and unintentional errors. It would be overly punitive to render inadmissible for five years those who made inadvertent errors due to lack of sophistication or limited language proficiency, or who relied on advice from an inexperienced or unscrupulous third party. The five year bar is a blunt instrument that would treat all misrepresentations as if they were the most serious and would impose the maximum punishment on all violators, regardless of the seriousness of their offence. In addition, it would remove any means to mitigate these harsh consequences on humanitarian and compassionate grounds. The CBA Section recommends that these proposed amendments to IPRA section 40 be removed.

II. INTRODUCTION

The Canadian Bar Association's National Immigration Law Section (CBA Section) appreciates the opportunity comment on Bill C-43, the *Faster Removal of Foreign Criminals Act*, introduced in June 2012. Bill C-43 proposes to eliminate access to the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB) for permanent residents or family class members who receive certain criminal sentences in Canada or are believed to have committed offences outside Canada. In addition, Bill C-43 also:

- adds new Ministerial discretion to deny entry to individuals on unspecified "public policy grounds";
- increases the penalty for misrepresentation (from two to five years);
- provides the Canadian Security Intelligence Service (CSIS) with broad entitlement to conduct unrestricted, compelled examinations of anyone making any application under the Act;
- reduces the already limited remedies for persons subject to other findings of inadmissibility; and
- limits inadmissibility for temporary entrants with inadmissible family members.

While the proposed amendment limiting inadmissibility for temporary entrants is welcome, the majority of the proposed amendments are excessive, harmful and unnecessary.

The opportunity for meaningful discussion and debate on these matters has been hindered by the promotion of the Bill as necessary to stop "dangerous foreign criminals" who "terrorize innocent Canadians"[1] with illustrations of "abuse" by foreigners exploiting "loopholes" in the law by delaying their removal through cycles of appeals, while continuing their criminal behaviour, including even such serious crimes as murder.[2]

The law goes farther than needed, extending to areas that are not justified by the purported harm it is seeking to address. Due process is eliminated and discretionary powers concentrated in the hands of the Minister with very limited opportunity for judicial oversight and few procedural safeguards. The safety valve of "humanitarian and compassionate" consideration is diminished as a matter of policy and by legislated elimination or reduction of access to appeal mechanisms.

Bill C-43 is an attack on safeguards and procedures that are well established and well-functioning. What remains are enforcement and refugee schemes with many elements that undermine principles and legacies of fairness and due process. This legislation does not reflect a proud Canadian tradition of respect for individual rights, procedural safeguards and the rule of law. There is little evidence of abuse justifying the scope of Bill C-43's amendments.[3] The "foreign criminals" referred to in the title of the bill include permanent residents of Canada, persons with legitimate status who have been living in Canada often since childhood. Access to

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1 Citizenship and Immigration Canada, "Minister Kenney Supports the Faster Removal of Foreign Criminals Act" (September 24, 2012), online: http://www.cic.gc.ca/english/department/media/releases/2012/2012-09-24.asp?utm_source=media-centre-email&utm_medium=email-eng&utm_campaign=generic.

2 See for instance, Citizenship and Immigration Canada, "Speaking notes for The Honourable Jason Kenney, P.C., M.P. Minister of Citizenship, Immigration and Multiculturalism" (June 2012), online: http://www.cic.gc.ca/english/department/media/speeches/2012/2012-06-20.asp.

3 One illustration cited by the Minister concerns Clinton Gayle, who, while under a deportation order, shot a Toronto police officer in 1994. This tragedy occurred after CIC lost and then mismanaged his removal file. The IAD played no role. See: Timothy Appleby, "Immigration Department settles multimillion-dollar lawsuit 17 years after Toronto police officers shot." *Globe and Mail* (June 4, 2011), online: http://www.theglobeandmail.com/news/toronto/immigration-department-settles-multimillion-dollar-lawsuit-17-years-after-toronto-police-officers-shot/article582129/. Another illustration concerns a pair of street-racers, Khosa and Bhalru, deported after causing the death of Irene Thorpe in 2000. The IAD heard and denied their appeals. There is no evidence that either committed further significant crimes before their deportation from Canada.

legitimate and efficient procedures designed to assist rational and fair decision making is fair and appropriate.

III. LOSS OF APPEAL RIGHTS

The loss of appeal rights for many permanent residents is perhaps the most significant change proposed in Bill C-43. The Bill would dramatically eliminate access to Immigration Appeal Division (IAD) review of deportation orders made against permanent residents of Canada on the grounds of criminality. The Bill would deny IAD review to permanent residents convicted of reportable offences outside of Canada, or who are believed to have committed foreign offences, even without conviction. The Bill would deny IAD review to permanent residents convicted in Canada and sentenced to six months or more imprisonment.

These denials of access to review are unnecessary and unreasonable.

A. Background

Access to an independent tribunal, the IAD, by permanent residents with removal orders issued because of criminal convictions is a longstanding fixture of immigration law. The tribunal has an open hearing attended by Minister's counsel and the person concerned. The tribunal listens to evidence on the criminality and the circumstances of the person. The tribunal either upholds the deportation by denying the appeal altogether, or issues a stay order – a form of probation – that requires the permanent resident to obey conditions. Counsel for the Minister often jointly recommends the stay order conditions, or takes no objection to the stay order, because it is an appropriate resolution of the review.

The IAD process is efficient and fair. There is only one hearing, usually concluded in a single sitting. The decisions are rarely successfully challenged in Federal Court. They are based on well-established criteria approved by the Supreme Court of Canada and the Federal Courts. The IAD considers the seriousness of criminality, likelihood of rehabilitation, establishment in Canada, level of community and family support, and hardship on family in Canada. It balances the need to protect Canadian society from further criminal behavior, and consideration of the circumstances of the permanent resident. It is a rational, transparent and necessary process. In some cases a stay order is the sensible resolution: the permanent resident is given the opportunity to demonstrate that they should be allowed to remain in Canada. In other cases, deportation is appropriate.

The IAD is the only place where this consideration and balance is mandated for permanent residents facing deportation. The IAD jurisdiction to consider all the circumstances of the case when deciding whether a deportation order should be enforced is especially significant for permanent residents who have been in Canada for many years (if not since early childhood). These permanent residents have well established social networks, employment, children and extended families in Canada. If their criminality is not sufficiently grave, and rehabilitation is demonstrated, then immediate deportation may be an overly harsh consequence. These are appropriate cases for a stay order.

In past years the government has excluded the most serious cases of criminality from access to the IAD. These are cases where the government believes that the IAD should not have an option to consider a stay order. For the past ten years, the test for "serious criminality" has been a sentence in Canada of imprisonment for two years or more. A permanent resident convicted of a criminal offence in Canada and given a two year sentence of prison could be ordered deported without any IAD review of his circumstances.

B. Changes to Appeal Division Access

1. Convictions in Canada - Six month imprisonment rule

Bill C-43 will deny access to the IAD to permanent residents sentenced in Canada to more than six months imprisonment under IRPA s. 64(2). The two-year threshold is reduced, capturing many more permanent residents and subjecting them to "automatic" removal with no review of the circumstances of the case.

We do not maintain that immigrants with sentences of six months in jail should never be deported from Canada. Some should. However, we do not believe that everyone with a six month jail sentence should be deported regardless of any other circumstances. For example, the proposed change would not permit consideration of:

- whether this was a single conviction or one of a string of convictions indicating an entrenched criminal lifestyle;
- whether the individual has been in Canada for one year or 35, or since they were a child;
- whether the individual is rehabilitated and poses no risk of reoffending;
- whether family and children are dependent on them for care and support; and

- the fact that sentences for equivalent offences are not consistent across Canada, and therefore the individual received a harsher sentence than if they had been sentenced in another jurisdiction.

The CBA Section believes this change in the threshold for loss of appeal rights is unnecessary and excessively punitive. It will lead to bad decisions, unnecessary deportations and great hardship to affected families in Canada. It is unsupported by empirical evidence of abuse.

RECOMMENDATION:

1. There should be no amendment to IRPA s. 64(2) regarding denial of access to the IAD.

2. Conditional Sentences of Imprisonment

A "term of imprisonment" has been interpreted by the courts to include a conditional sentence of imprisonment, under s.742 of the *Criminal Code*. These are sentences served in the community, instead of in jail. Criminal court judges can use a conditional sentence only if they are satisfied that the sentenced person will not be a danger to the community and does not have a history of disobeying court orders. A conditional sentence cannot be imposed if the sentence is longer than two years, if the law sets a minimum jail term, or if the *Criminal Code* lists the crime as a violent offence. A conditional sentence usually has strict conditions, including a curfew. If the conditions are disobeyed, a criminal court judge can send the person to jail for the duration of the sentence.

Conditional sentence orders are commonly set for much longer time than an equivalent sentence served in a jail. A judge imposing a conditional sentence as an alternative to a three month jail sentence might impose a six or nine month conditional sentence instead.

Bill C-43 treats a six month conditional sentence as exactly the same as an order for imprisonment in jail. A permanent resident receiving a six month conditional sentence would be subject to a removal order enforceable without IAD review. Conditional sentences are intended to reflect situations of less serious criminality and punishment, and should not be considered so grave as to justify loss of appeal rights, especially given the serious implications and consequences to the permanent resident.

The CBA Section recommends that any amendment clarify that the six month (or any) threshold does not apply to conditional sentence orders.

RECOMMENDATION:

2. If the amendments restricting appeal rights are implemented, the amendment to IRPA s. 64(2) should exempt conditional sentence orders.

3. Foreign offences and convictions

Bill C-43 extends the denial of access to IAD review to permanent residents convicted of foreign offences (regardless of the sentence imposed) or believed to have committed a foreign offence, even with no conviction. These are categories of criminal inadmissibility under IRPA s. 36(1)(b) and s. 36(1)(c).[4]

Permanent residents inadmissible on either of these grounds currently have unrestricted access to the IAD for review of the removal order. Bill C-43 removes all access to the IAD for review on either of these grounds. There are no exceptions.

The "mischief" to which Bill C-43 purports to be aimed is "foreign" criminals committing serious crimes in Canada. We question why the Bill removes IAD jurisdiction for permanent residents who have no inadmissibility for crimes committed in Canada or whose foreign convictions involve sentences that do not convey any indication that the offence was serious.

A formal review process is essential for inadmissibility categories relating to foreign convictions and foreign offenses believed to have occurred (with no conviction). The nature of foreign police and legal systems in certain countries make it essential to maintain IAD jurisdiction for assessment of the alleged foreign conduct in the full context of the offender's

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[4] IRPA ss. 36(1)(b) and 36(1)(c) read:

> 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; or
> (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.

situation, before deportation orders become effective. Our detailed concerns regarding foreign convictions, and foreign offences without conviction, respectively, are outlined below.

4. Foreign convictions (IRPA s. 36(1)(b))

Inadmissibility based on a foreign conviction is very broad. It does not matter what sentence was given to the permanent resident abroad: a fine, probation or jail sentence. The only requirement is a conviction for an offense that, if it was committed in Canada, would be punishable by potential imprisonment of ten years or more. This would include many *Criminal Code* offences, including obviously serious offences (murder or armed robbery) and other offences not so obviously serious or not even serious at all.

For example:

- Using a false or fraudulent document under *Criminal Code* s. 368 carries a maximum potential in penalty of ten years. A 20 year old permanent resident convicted of using fake identification to get into a bar while visiting the US is inadmissible for foreign conviction. It doesn't matter that the US court issued only a $200 fine. IRPA s. 36(1)(b) does not require a threshold sentence, only a foreign conviction.
- The offence of assault causing bodily harm under *Criminal Code* s. 267(b) carries a potential penalty of ten years imprisonment. If the 20 year old permanent resident attending US college is drunk in a bar and injures someone in a fight, the US conviction triggers inadmissibility under IRPA for a foreign conviction. It doesn't matter that the US court punishment was probation.
- The offence of dangerous operation of a motor vehicle causing bodily harm under *Criminal Code* s. 249(3) has potential penalty of ten years' incarceration. A foreign conviction for an equivalent offence creates inadmissibility under IRPA, regardless of the sentence imposed under foreign law.

While other types of offences might be more serious, the issue is that an appeal of the deportation order would no longer be available regardless of whether the offence was truly serious, regardless of the circumstances of the permanent resident, regardless of the sentence imposed by the foreign court and regardless of whether the process in the foreign jurisdiction was fair. Paragraph 36(1)(b) depends only on whether there was a foreign conviction and an equivalent offence under Canadian law. There is no discretion.

The only available discretion is through review by the IAD, which conducts a proper and necessary review of all the circumstances and a determination as to whether deportation is appropriate. Our system of admissibility determinations, based on concepts of proportionality and fairness, can only make sense if the IAD review is maintained.

5. Foreign Offenses without Conviction (IRPA s. 36(1)(c))

The need to maintain IAD review is perhaps most important for removal orders based merely upon an officer's belief of commission of a foreign offence, without conviction. An IAD review permits an assessment of the true seriousness of the offense and the circumstances of the permanent resident but also ensures that evidence of commission of a foreign offence, in the absence of any record of court conviction, has been properly evaluated.

The CBA Section opposes removing appeal rights for inadmissibility under s.36(1)(b) and (c).

RECOMMENDATION:

3. Any provision to deny access to the IAD should not apply to inadmissibility categories based on foreign convictions or commissions of foreign offence. Therefore, "or that is described in paragraph 36(1)(b) or (c)" should be removed from the amendment to IRPA s. 64(2).

C. Retroactivity

Bill C-43's transitional provisions would deny appeal rights in cases of convictions for offences committed before C-43 comes into force, unless Canadian Border Service Agency officers have already reported under IRPA s. 44 and referred the cases for Immigration Division hearing before the provisions come into force. Although the preservation of appeal rights in such cases is appropriate, the timing of referral is not an equitable basis to decide which permanent residents ought to be stripped of their appeal rights. These transitional provisions will create significant unfairness if they are not revised to take into account the circumstances of all those convicted or sentenced before the provisions come into force. Permanent residents who have been convicted of "serious criminality" offences and had their sentences imposed by the courts under the current regime may now face significant consequences that were unforeseen at the time of sentencing. The retroactive nature is particularly harsh for individuals who received a longer sentence on the basis that they would be allowed to serve their sentences in the community under conditional sentence orders. Given a choice between serving a sentence in the community and the devastating prospect of deportation without appeal, many permanent residents might choose to serve a period of incarceration. In the course of sentencing, criminal courts take a holistic view of an offender's circumstances and the consequences of the sentence imposed. The loss of a right to appeal a deportation order is an important and valid consideration for a sentencing court. The retroactive application of the provision would strip

permanent residents previously sentenced of a right to appeal that may be preserved for an offender who is sentenced after the proposed amendment is passed.

RECOMMENDATION:

4. The transitional provisions in Bill C-43 relating to loss of appeal rights should be revised so that the legislation is applicable only to individuals convicted or charged after the legislation comes into force.

IV. OBLIGATION TO ATTEND CSIS INTERVIEW

Bill C-43 creates a mandatory obligation for foreign nationals making an application to attend a CSIS interview and answer all questions "for the purpose of an investigation," if requested by an immigration officer. CSIS has an important role to play in addressing national security concerns in the immigration context. In making an immigration application, individuals can reasonably expect that it would be involved in security screening and it is reasonable that applicants be required to answer questions put to them by CSIS. However, the language proposed in Bill C-43 does not place appropriate limitations on this obligation.

IRPA s. 16 currently creates an obligation for an applicant to answer questions put to them by an immigration officer during an examination. However, the section limits the obligation to that "reasonably required" by the officer in the context of the examination. This limitation strikes an appropriate balance between legitimate state interests in security and the rights of the individual under examination. An immigration officer is empowered to examine the applicant on relevant issues such as identity or admissibility. However, the applicant does not have an obligation to answer questions unrelated to their own admissibility or application.

There should be a similar limitation on CSIS interviews. An unfettered obligation to answer queries from CSIS could be problematic, as individuals would be placed in the unenviable position of having a legal obligation to provide information about others with no relevance to their own immigration application. Although many Canadian citizens freely cooperate in Canada's intelligence gathering activities, the *Canadian Charter of Rights and Freedoms* protects their right to choose the extent of that cooperation. This protection is a core element of a free and democratic society in striking an appropriate balance between security and individual liberties. This fundamental protection is not and should not be limited to citizens.

Although the courts may well interpret the proposed amendment as implicitly having the limitations discussed above, Parliament ought to draft legislation that clearly protects *Charter* rights rather than leaving interpretation or amendment to the courts. We propose that the section be drafted to make clear that the obligation to attend and answer questions is limited to the information reasonably required for that application.

RECOMMENDATION:

5. The following amendment should be made to proposed IRPA s. 16(2.1):
(2.1) A foreign national who makes an application must, on request of an officer, appear for an interview for the purpose of an investigation conducted by the Canadian Security Intelligence Service under section 15 of the Canadian Security Intelligence Service Act for the purpose of providing advice or information to the Minister under section 14 of that Act and must answer truthfully all questions relevant to the application put to them during the interview.

V. NEW AUTHORITY FOR MINISTER TO DENY ENTRY

Proposed s. 22.1 of Bill C-43 would create an unprecedented new authority for the Minister to deny entry to Canada on "public policy grounds". The proposed section grants the Minister virtually unlimited discretion to prevent entry to individuals not otherwise inadmissible to Canada for up to three years at a time. IRPA already has sufficient mechanisms to address a wide array of legitimate concerns for the protection of the Canadian public. For example, s. 34(1)(c) contains a broad mechanism for addressing the admissibility of individuals who pose a "danger to the security of Canada" while s. 36(2) allows an officer to deny entry to someone who is believed to have committed certain criminal offences. Other sections deal with other concerns that may arise upon allowing entry to Canada.

This unprecedented Ministerial power invites arbitrary application and abuse. It is repugnant to the fundamental principles of Canadian democracy and the freedoms protected in the *Canadian Charter of Rights and Freedoms*. The lack of accountability and the vague criteria would allow Ministers who may so choose, to deny entry to persons whose views are

unpopular or simply objectionable to the government of the day.[5] "Public policy" grounds are particularly vague and undefined. Any valid public policy grounds for denying entry to Canada ought to be explicitly outlined in the law and subject to public debate and Parliamentary oversight and approval.

RECOMMENDATION:

6. The CBA Section recommends that proposed s.22.1 be withdrawn.

VI. LIMITING HUMANITARIAN AND COMPASSIONATE RELIEF

Bill C-43 eliminates the possibility of considering humanitarian and compassionate factors in balancing whether to deport individuals from Canada for certain categories of apparently serious inadmissibility. At first blush, it may seem appropriate to prevent humanitarian consideration from overcoming inadmissibility based on security grounds for espionage and terrorism or for organized criminality. However, the reality is that there is a broad spectrum of seriousness within these categories. For example, most Canadians would likely share the view that a long time permanent resident's brief and minimal involvement in a local gang as a youth ought to be balanced against their rehabilitation, strong ties to Canada and proof of a successful and positive contribution to Canadian society. The proposed provision would not allow for consideration of these factors and would treat all individuals as if they were full-fledged members of groups like Al Qaeda. "Organized criminality" under s.37 can involve a relatively low level of participation in a pattern of less serious offences such as shoplifting. In many cases, inadmissibility may be based on involvement in events decades in the past in very different social circumstances or when the person was a youth. The person may have compelling circumstances and their removal could have a devastating impact on Canadian-born children, spouses, family members or the community at large. Ministerial discretion to

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[5] Bill C-43 follows the attempt to use existing inadmissibility provisions to prevent controversial British politician George Galloway from entering Canada. In reviewing the circumstances of the case, Mosley J. of the Federal Court found no formal decision had been made on admissibility, but said the following about the government's argument that declaring Galloway inadmissible would be reasonable:

> It is clear that the efforts to keep Mr. Galloway out of the country had more to do with antipathy to his political views than with any real concern that he had engaged in terrorism or was a member of a terrorist organization. No consideration appears to have been given to the interests of those Canadians who wished to hear Mr. Galloway speak or the values of freedom of expression and association enshrined in the *Canadian Charter of Rights and Freedoms*. [*Toronto Coalition to Stop the War v. Canada (Public Safety and Emergency Preparedness)* 2010 FC 957 at para 8]

consider humanitarian factors plays an important role in balancing the breadth of the inadmissibility sections with positive personal considerations. This amendment is inconsistent with basic Canadian values of fairness and due process. It is difficult to understand the mischief the amendment seeks to address, as the Minister can deny relief in cases that are not compelling.

RECOMMENDATION:

7. The proposed amendments to IRPA s. 25(1) and s. 25.1(1) removing the ability of the Minister to consider humanitarian and compassionate factors in certain cases of inadmissibility should be deleted.

VII. MISREPRESENTATION

IRPA s. 40 currently imposes a two year inadmissibility on any person found inadmissible for misrepresentation. Bill C-43 proposes to extend this inadmissibility to five years, and to prohibit those found inadmissible for misrepresentation from applying for permanent residence during that period.

The CBA Section appreciates that Citizenship and Immigration Canada requires an effective mechanism to deter applicants from supplying fraudulent information, or from willfully concealing information that might cause an error in the administration of the Act. However, the provision makes no distinction between those who intentionally defraud the immigration system, and those who make minor or honest and unintentional errors. It would be overly punitive to render inadmissible for five years those who made inadvertent errors due to lack of sophistication or limited language proficiency, or who relied on advice from an inexperienced or unscrupulous third party. While some cases of misrepresentation involve persons who would commit serious fraud to deceive Canadian officials, other cases involve much less serious misrepresentations, like individuals who succumb to the temptation to embellish an otherwise bona fide application to enhance their chances of success. The five year bar is a blunt instrument that would treat all misrepresentations as if they were of the most serious category and would impose the maximum punishment on all violators, regardless of the seriousness of their offence. It would deprive immigration officers of any means to mitigate harsh consequences on humanitarian and compassionate grounds. Recently proposed or enacted provisions, such as those designed to address fraudulent spousal applications, are sufficient to protect program integrity. The proposed provision is not warranted and would

likely result in substantial hardship to both applicants and their Canadian family members, including Canadian children. The proposed amendment should not be adopted.

RECOMMENDATION:

8. **Remove the proposed amendments to IRPA s. 40.**

VIII. CONCLUSION

The CBA has serious concerns with many of the proposed provisions of Bill C-43. While the proposed amendment limiting inadmissibility for temporary entrants is welcome, many of the proposed amendments are both unnecessary and unjustified. The new provisions obliging an applicant to submit to a CSIS interview require some revision. The proposed restrictions of appeal rights, the prohibition on balancing humanitarian and compassionate considerations against findings of inadmissibility and the granting of ministerial powers to deny entry for undefined "public policy" considerations are deeply flawed and not in keeping with fundamental principles of our Canadian justice system. Given the numerous flaws and shortcomings in the proposed legislation, we urge the Committee to recommend that the Bill be withdrawn or substantially amended.