



April 10, 2012

Via email: Caroline.RiverinBeaulieu@cic.gc.ca

Caroline Riverin Beaulieu
Deputy Director
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Citizenship and Immigration Canada
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Dear Ms. Beaulieu:

Re: Immigration and Refugee Protection Regulations: Conditional Permanent Residence, Canada Gazette Part 1, March 10, 2012

I am writing on behalf of the National Immigration Law Section of the Canadian Bar Association (CBA Section) to comment on the proposed regulations pre-published in the Canada Gazette on March 10, 2012.

These draft regulations cement the government's proposal that spouses, common-law partners and conjugal partners who have been married or living in a common law relationship with their sponsor for two years or less be subject to a period of conditional permanent residence for two years after landing, during which time they are expected to remain in that relationship.

In May 2011, the CBA Section wrote to CIC raising several concerns in response to the government's notice of intent about conditional permanent residence. (A copy is attached for your ease of reference.) We are heartened by some of the changes in the most recent draft regulations. However, we believe that the proposed regulations still fall short of their objectives of determining marriage fraud, while at the same time creating unnecessary hardship for *bona fide* spouses who experience genuine marriage breakdown within two years of landing in Canada.

The government has addressed a number of our main concerns, including the creation of an exception for victims of domestic violence and other forms of spousal abuse. There also now seems to be an exception in the regime for couples who had children prior to filing the application to sponsor the permanent resident. We applaud both changes as being within the spirit of fairness.

None of the changes seem to have an impact on the rights of conditional permanent residents to access the Appeal Division of the Immigration and Refugee Board, which provides a means by

which an independent tribunal can provide equitable review of all the circumstances affecting the permanent resident. This is fair, in our view.

Nevertheless, some issues are unclear, many of our concerns remain unaddressed, and we recommend further changes to make the system fair. These can be summarized as follows:

1. The regulations are not clear on whether conditional permanent residence automatically ends in two years.
2. The regulations offer no exception for marriage breakdown in situations where a child is born after filing the sponsorship application but prior to landing, or subsequent to landing but prior to the expiration of the two year period. These children would face a parent being removed from Canada, while children born prior to filing the sponsorship application would not. This seems to be an arbitrary distinction, that may well be against the best interests of those children.
3. Any children who accompanied a spouse from a prior relationship will also face removal proceedings in the event of a genuine marriage breakdown, which will not always be in their best interests.
4. The regulations offer no exception for termination of the conjugal relationship in good faith.
5. No guidance is given on the evidence of abuse or neglect needed to end the condition.
6. Section 72.4 places no limitation on when the conditions can be reviewed for compliance.
7. The argument for why conditional permanent residence is necessary to curtail fraud has not been effectively made.
8. Canada's immigration scheme already has numerous mechanisms to prevent marriage fraud.

We will elaborate further on each of these points.

1. End of the Conditional Period

The proposed regulations do not clearly state whether spouses and common-law partners subject to the condition must apply to have the condition removed at the end of the two-year period, or if the condition will end automatically if the department has not initiated an investigation into breach of conditions during the two year period following landing.

If the intent is to have affected persons apply for removal of the condition at the end of the period, it would increase the workload of immigration officers, and potentially add to existing processing delays.

2. Impact on Children Born After Landing

The Regulatory Impact Analysis Statement notes (emphasis added):

Description:

*The proposed amendments to the Regulations would specify that, under the family class or the spouse and common-law partner in Canada class, a spouse, common-law or conjugal partner **who is in a relationship of two years or less with their sponsor and has no children in common with their sponsor at the time of sponsorship application** would be subject to a*

two-year period of conditional permanent residence. The condition would require that the sponsored spouse or partner cohabit in a conjugal relationship with their sponsor for a period of two years following receipt of their permanent resident status in Canada.

The proposed amendments to the Regulations read (emphasis added):

72.1 (1) Subject to subsections (4) and (5), a permanent resident described in subsection (2) is subject to the condition that they must cohabit in a conjugal relationship with their sponsor for a continuous period of two years after the day on which they became a permanent resident.

Permanent resident subject to the condition

(2) For the purpose of subsection (1), the permanent resident is a person who was a foreign national who...

(c) had no child in respect of whom both they and the sponsor were the parents at the time the sponsor filed a sponsorship application with respect to the person under paragraph 130(1)(c).

While we commend the government for taking into consideration children of the marriage in s.72.1(2)(c), we question why the condition of cohabitation for two years following receipt of permanent resident status is waived only where children were born *at the time of filing the sponsorship application*.

If the existence of children is relevant in determining the *bona fides* of a relationship, then a birth at any time up to receipt of permanent resident status by the sponsored spouse, or birth in the two years after landing, (if the relationship breaks up in this two year period), should also result in the condition of two years' cohabitation following receipt of permanent resident status being waived.

Otherwise, a Canadian-born child could face the removal of a parent. Canada's immigration regulatory scheme is informed by an obligation to look at the best interests of any children affected.

3. Disproportionate Impact on Children of Conditional Permanent Residents

Section 72.4 of the proposed regulations will have a disproportionate impact on children of conditional permanent residents as defined in s. 72.2. Section 72.4 allows for the enforcement process against a conditional permanent resident to start many years after landing. The result could be to impose a penalty on the children of the conditional permanent resident who may have spent most of their life in Canada. Through no fault of their own they will face removal of their parent (the conditional permanent resident) from Canada, and their own removal and uprooting from Canada. We suggest that the regulation take into account the best interests of the child, with a process to determine the best interests.

The conditional permanent resident's subsequent sponsored spouse or family members as defined in s.72.3 face the same disproportionate punitive effect of s. 72.4 as described above. It will put at risk of removal from Canada, for example, spouses or adopted children sponsored many years after the conditional permanent resident first landed. The subsequent spouse or adopted children may have nothing to do with the initial sponsorship that triggered the conditional PR. Yet, they will be at risk of being removed from Canada, without fault.

4. Termination of Conjugal Relationship in Good Faith

The initial Notice of Intent published in Canada Gazette in March 2011¹, indicated that “only cases targeted for fraud would be reviewed during the two year period”. By contrast, s. 72.1(3)(b) of the proposed regulation says a permanent resident must provide evidence of compliance with the condition if an officer has reasonable grounds to suspect bad faith **OR** “requests such evidence as part of a random assessment of the overall level of compliance.”

The proposed regulations offer no exception for conjugal relationships that end in good faith through no fault of the conditional permanent resident. This places the sponsored spouse or partner at risk, in that the sponsoring spouse could use the threat of divorce proceedings to exert undue influence over a vulnerable spouse.

The CBA Section believes that this goes beyond the stated objective of deterring marriage fraud. We recommend that exception be added for conjugal relationships shown to be *bona fide*, similar to the exception in the US law.²

5. Evidence of Abuse or Neglect

The CBA Section welcomes the exception for victims of domestic violence and other forms of spousal abuse. However, the proposed regulations give no guidance on what evidence of abuse or neglect will be required to end the condition. Many abused spouses or partners do not report the conduct to authorities, which can make it difficult to establish abuse or neglect. Further, any uncertainty about whether there will be a finding of abuse or neglect may deter the sponsored spouse or common-law partner from ending the conjugal relationship, putting already vulnerable persons at greater risk.

6. No Limit on Compliance Requirement Unfair; Potential Hardship Disproportionate to Harm it was Intended to Address

Section 72.4 of the proposed regulations would enable CIC and CBSA to find a permanent resident non-compliant with the conditions of their landing, even if that determination is made well after the initial two-year condition has ended. This would render affected spouses vulnerable to investigation and loss of status on a virtually indefinite basis, even in the absence of any evidence of misrepresentation or fraud on their part. The hardship imposed is disproportionate, and does not address the program integrity issue it was designed to address.

Where there is reason to believe that the condition is not or has not been met, CIC and CBSA should complete their investigation within a reasonable time. Currently, CIC and CBSA often take more than two years from an allegation of misrepresentation to even look at the file and then many more months to make a decision. In the meantime, the sponsored person’s life is on hold. They cannot apply for citizenship or a five year PR Card renewal, resulting in uncertainty about their status and future in Canada.

In fact, as many investigations turn out negative, unwarranted stress is put on the person concerned. With a limitation on the number of years after landing that an investigation can occur, as well as a limitation on the length of the investigation, CIC can balance the need to prevent fraud in sponsorship, while not putting undue stress on, and instability into, the sponsored person’s life.

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

² See U.S. *Immigration and Nationality Act* s.216(c)(4) and 8 CFR 216.5(a)(1)(ii).

The CBA Section proposes a specific time limitation for these investigations. Investigations for an allegation that the sponsored person did not meet the requirements of the conditional permanent residence should not be permitted if the sponsored person has been landed for five years or more. This would be consistent with the recently introduced five year bar from sponsoring a second spouse or partner where the prospective sponsor was previously sponsored to come to Canada.

7. Not Proven Effective in Addressing Marriage Fraud in Other Jurisdictions

As outlined in our May 2011 letter, there is no evidence from the three cited jurisdictions (US, UK and Australia) that making permanent residence subject to a condition is a viable means to deter marriage fraud. Indeed, the research is inconclusive in this regard, and other jurisdictions that attempted conditional permanent residence in the past appear to be looking for more effective alternatives.

8. Existing Enforcement Mechanisms

Canada's immigration scheme already contains numerous mechanisms to prevent marriage fraud, including:

- the most important measure, screening sponsorship cases when an application is assessed by a Canadian visa office or case processing centre.
- the *Immigration and Refugee Protection Act* (IRPA) prohibits obtaining permanent residence by misrepresentation or inducing another person to commit misrepresentation.
- the recent introduction of a five year bar from the date of landing to sponsor a second spouse or partner where the prospective sponsor was previously sponsored to come to Canada. As well, a sponsor may not sponsor a subsequent spouse or partner for the three year undertaking of support after landing.

The CBA Section believes the government should attempt more enforcement in the current framework, before imposing changes that have the potential for serious negative impact.

SUMMARY OF RECOMMENDATIONS

Children born after landing

The regulations should offer an exception for marriage breakdown in situations where a child is born after filing the sponsorship application prior to landing, or subsequent to landing prior to the expiration of the two year period.

Humanitarian and compassionate grounds exception

The proposed regulations should permit humanitarian and compassionate considerations to justify retention of permanent resident status, notwithstanding a determination of failure to meet the conditions in s. 72.1 of the proposed regulations. This would mirror the ability of an officer to rely on humanitarian and compassionate grounds to allow retention of permanent residency notwithstanding the person's failure to meet the residency obligation (IRPA s. 28(2)(c)).

Bona fide relationships

The CBA Section recommends adding an exception for conjugal relationships shown to be bona fide.

Limitation exception

The proposed regulations should create a specific time limitation of five years after landing for investigations of allegations that the sponsored person did not meet the requirements of the conditional permanent residence. Further, CIC and CBSA should complete their investigation

within a reasonable time. Adequate resources should be allocated to CIC and CBSA, so they can conduct their investigations in a timely manner.

We trust these comments will be constructive in finalizing the regulations.

Yours truly,

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

Joshua B. Sohn
Chair
National Immigration Law Section



May 18, 2011

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

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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.³

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

³ (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.⁴ 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.⁵

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.

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

⁴ 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).

⁵ *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>.

domestic violence are largely unreported by new immigrants.⁶ 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.⁷ 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.

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.

⁶ 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>.

⁷ 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>.

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.⁸ 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.⁹

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.”¹⁰ In the US, legal scholars have criticized the inaccessible procedures that require abused immigrant women to ‘self-petition’ to avoid deportation enforcement.¹¹

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 misrepresentation¹² or inducing another person to commit misrepresentation.¹³ We believe the government should attempt greater enforcement within the current framework, before imposing changes that have the potential for serious negative impact.

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?

⁸ 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> >.

⁹ *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>.

¹⁰ *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>

¹¹ 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>

¹² *Immigration and Refugee Protection Act*, S.C. 2001, c.27, s.40

¹³ *Immigration and Refugee Protection Act*, S.C. 2001, c.27, ss.124-128

- 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