COALITION FOR A JUST IMMIGRATION & REFUGEE POLICY
SUBMISSION TO THE STANDING COMMITTEE ON CITIZENSHIP & IMMIGRATION
with respect to the Regulations under the Immigration and Refugee Protection Act

INTRODUCTION

The Coalition for a Just Immigration & Refugee Policy (the "Coalition") is made up of over 50 national, provincial and local community based organizations who share a common goal of promoting a fair and equitable immigration and refugee policy in Canada.

The Coalition had previously submitted its position on Bill C-11 to the Standing Committee on Citizenship & Immigration (the "Standing Committee"). We are disappointed to see that many of the concerns as highlighted in our previous submission and as expressed by other community organizations were not addressed before the final passage of the Bill. As long as these fundamental issues affecting the rights of immigrants and refugees remain unsolved, the Coalition's strong objection to the Bill and its Regulations will continue to stand.

In our earlier submission, we expressed our concerns that much of what was being proposed by the Minister of Citizenship & Immigration was not contained in the Bill itself, but rather would be brought in through regulations. We were particularly concerned about the difficulty individuals and groups might face in providing feedback given that regulations are usually not subject to public debate. The Coalition appreciates the opportunity now given by the Standing Committee to comment on the proposed Regulations under the Immigration & Refugee Protection Act (the "Act" or AIRPA@). The Coalition strongly recommends that similar consultation process be adopted with respect to any future amendment to either the Act or the Regulations thereunder.
The Coalition notes with regret that, although regulations made concerning most aspects of the Act must be brought to the House and referred to the appropriate Committee [i.e. the Standing Committee] pursuant to section 5(2) of the Act, regulations made under section 43 which deals with Division 4 on Ainadmissibility@ need not be brought to the House and the Standing Committee.

When the Regulations under C-11 were introduced, the then Minister of Citizenship and Immigration promised that the new Regulations would be transparent and much easier to understand than those under the current Immigration Act. A careful review of the proposed Regulations however would seem to suggest otherwise. Not only are the Regulations difficult to follow because of the way the various divisions and parts are organized and structured, specific provisions are impossible to understand, thanks to the draftsmanship or lack thereof. The most outrageous example of the poor draftsmanship can be found in the definition of family relationships where, rather than using terms like brother/sister, grandparent, uncle/aunt, niece/nephew, the Regulations describe these relationships as "a child of the sponsor's mother or father", "mother or father of that mother or father", "child of the mother or father of that mother or father", "child of a child of the mother or father of that mother or father"(Reg. s.114).

Further, there is no apparent rationale underlying the various divisions and parts in the Regulations. They do not correspond to the sections, parts or divisions of the Act, nor are they structured by way of any specific topic, status, or legal issue. To understand how a particular group of immigrants might be affected by the Regulations, one has to read through all divisions and the parts therein. For example, to find regulations that deal with students and student authorizations or Astudy permits,@ one must look in Part 1, Division 2, s. 7; Part 3, Division 4, s. 23; Part 8, Division 3, ss. 181 - 182; and Part 11, Divisions 1 to 5, ss. 206 - 218. If a trained legal profession has difficulty getting through the web of these convoluted sections, parts and divisions, imagine what it might take a lay person to find his/her way through this regulatory maze.

Transparency also implies a certain level of public knowledge and opportunity for public debate. Yet the Regulations under C-11 were introduced right before the Christmas holiday and soon after community organizations are asked to respond to hundreds of pages of proposed regulations which they have little time to read, let alone analyze. To ensure that there is real public input, we ask that the Standing Committee extend the time for hearing so that as many community groups and immigrants and refugees who are directly affected by the Regulations as possible can present their views.

Recommendation 1: The Regulations need to be re-organized and re-structured to make them understandable by lay persons. Specific provisions in the Regulations which are particularly confusing and difficult to decipher should be rewritten in clear and simple language.

Recommendation 2: The hearing by the Standing Committee into the Regulations should be extended to allow more input from the public in general and from immigrant and refugee organizations in particular.

FAMILY CLASS

It has always been the position of the Coalition that "family class" should be defined as broadly as possible under Canada's immigration law. Just as ordinary Canadians often consider family in a practical way to include all kinds of relationships in addition to spouses and children, immigrants and refugees also embrace an extended family concept. While we are glad to see an expansion of the family class to include common-law (as well as same sex) partner, we are disturbed by the restrictive definition that continues to be imposed on other family relations - or even on the common-law partners themselves.

We are also alarmed by specific changes in the proposed Regulations which signal a retreat from Canada's commitment to family reunification and may lead to more family class immigrants being denied admission to Canada. The following sets out some of our concerns in this respect.

Reg. s. 1. Definition of "common-law partner"

As stated above, we are pleased to see the inclusion of "common-law partner" in the definition of family member under the proposed Regulations. There are, however, some unreasonable limitations to this definition. The Regulations define common-law partner as an individual who is "cohabiting with the person in a conjugal relationship, having so cohabited for a period of at least one year", unless the individuals are "unable to cohabit due to persecution or any form of penal control". The exception seems to protect individuals who are in a same sex relationship and are unable to cohabit due to the law or state policy of their country.

We would like to point out that in many countries around the globe, there may not be any specific penal control or state sanctioned "persecution" against gays and lesbians, but these individuals nonetheless face discrimination at a societal level which makes it impossible for them to cohabit. Under this proposed definition, these individuals will not be considered as common law partners if they are unable to cohabit not because of any written law, but because of actual discrimination in the community they live. If the intent of the Act is to recognize same sex relationship, then there is no reason why it should only be restricted to those who face legal - but not social or cultural - discrimination.

Recommendation 3: The exemption from the one year co-habitation should also be applied to those who are unable to cohabit due to discrimination of any form, and not just due to penal control or persecution.

Reg. S. 2 - Adependent child@

ADependent child@ is defined restrictively to include "the biological child of the parent, if the child has not been adopted by way of a full adoption..." or the Aadopted child of the parent...@ In order to determine whether a child is the biological child of a parent, even if you have a birth certificate, it would be necessary to carry out DNA testing, an extremely expensive and potentially humiliating experience for families to have to go through. In Canada, to register the birth of a child, one does not require proof of biological relationship, only a declaration by the parent or parents of the relationship. Moreover, there is a presumption of parentage when the child is born within the marriage and there is no one seeking to deny parentage, or where there is someone else claiming parentage. In fact, throughout history many children have been brought up as children of particular parents when no biological connection exists, or when the biological connection exists with only one of the legal parents. Family law in Canada also recognizes obligations of care and support to a child by persons who have stood *in loco parentis* to the child, even when they have no biological connection to the child.

Furthermore, if DNA testing should reveal that a child who has been brought up as a child of his or her presumed or legal parents, is not the biological child of one of them, adoption may not be an option to ensure that the child remains in the family. For example, Sharia or Muslim law does not recognize adoption and, if the child is the legal or Alegitimate@ child of the parents, it would not be possible to carry out any kind of adoption or guardianship procedure to include the child as a member of the family class because that would be tantamount to bastardizing the child, or alleging adultery or impotence of the parents.

Our concern is that a child who is not a biological child may still be recognized as the legal issue of the parents without going through any adoption process. Examples may include a child who was the result of the rape or adultery by the mother, and is not the biological child of the father, but has been recognized and brought up as the child of the marriage; or the child of an unwed sibling, placed with a married sibling or parent at birth and brought up within a marriage as the child of the aunt or grandmother; or an orphaned or abandoned child, who has been accepted into a family and raised by relatives who treat the child as their own. No adoption may ever have taken place in these cases because the child is already considered part of the family. The advent of reproductive technologies is also a factor that could affect whether a child born to a particular couple is the biological child of both of parents. Under the current Immigration Act, dependent child is defined as the Aissue@ of the parent, but Aissue@ is not restricted to Abiological@ issue. There is no evidence of widespread false claims in this respect as people do not usually claim the responsibilities of parenthood, unless they are indeed the parents.

We believe it is not appropriate to restrictively define child as Abiological child.@ We are also fearful that the restrictive definition may in fact open the door to unreasonable requests by visa officers for DNA testing in all cases of sponsorship of dependent children. We do not think that our fear is exaggerated given the growing reliance by visa officers on DNA testing in recent years. DNA tests are expensive, intrusive, and are perceived by some communities as contemptuous and contrary to religious beliefs. In some cases the cost involved may effectively bar the families from being reunited.

Recommendation 4: The definition of dependent child should be changed to include the biological or legal issue of the parents, and to also include a Ade facto@ child who may never have been legally adopted but who has been raised as the child of the parents.

The other concern regarding the definition of dependent child is for children over the age of 22. The proposed regulations define them as dependent if they are students "enrolled in a post secondary institution that is accredited by the relevant government authority." Compared to the requirement under the current regulations, which state simply that they are enrolled in a post secondary institution, the new proviso is unnecessarily restrictive. In fact, in many situations the child may be enrolled in an institution which is not Aaccredited.@ Examples would include certain religious learning institutions. Again, this is a new addition which serves little purpose other than to restrict the reunification of Canadians with their children abroad.

Recommendation 5: The requirement that the educational institution that the child is enrolled in be "accredited by the relevant government authority" should be deleted.

Finally, the regulations do not specify that the age of the sponsored dependent child is fixed or Alocked in@ to the age at the time of the application. Given the notoriously long delays at some visa offices in processing applications, it would be unfair to penalize the prospective immigrants by denying the entry of their children because of delay caused by Canadian officials.

Recommendation 6: The Regulations should specify that the age of the sponsored dependent child is fixed or Alocked in@at the time of the application.

Reg. s.3 ABad faith@ relationships:

The proposed Regulations introduce a new concept of "bad faith" in relation to family class sponsorships. It seems to have derived from what is known as "marriage of convenience" and "adoption of convenience" under the current legislation.

Under the current legislation, an applicant spouse who is being sponsored will not be admitted as a member of the family class if the marriage has been entered into for the purpose of immigration **and** the applicant has no intention of residing with the sponsor as a spouse. The Federal Court has recognized and consistently applied this two-pronged test when assessing the genuineness of a spousal relationships. The proposed "bad faith" test in the new

Regulations omits the second prong of the test. The objective, as the Coalition suggests, is to get around the jurisprudence well established by the court in this respect.

What is most objectionable about the proposal, however, is that it is excessive and unnecessary. We believe that the court recognizes the two-pronged test for very a pragmatic reason. There is no rational reason why the sponsorship of those who are going to reside with their sponsor should be refused. If the concern of Canada Immigration is to capture the "marriage of convenience" - as if no true marriages are not, in one way or another, for convenience - then there is no "convenience" to be gained by a sponsor and his spouse who will be residing together as husband and wife. People have many motives, in addition to Atrue love@ when they marry: companionship, wealth and status, for example. [Even Jane Austen=s romantic heroine, Elizabeth Bennet, admitted to her sister that she realized she was in love with Mr. Darcy after seeing his beautiful estate at Pemberly!] The possibility of immigration to Canada may be a factor in a decision to marry, or in a decision to give up a child for adoption. But as long as the parties intend to reside together as spouses, or to raise the adopted child within the family, why should the state concern itself with the motives? What policy rationale is there to deny their admission to Canada? Furthermore, how can a visa officer possibly divine whether immigration to Canada was the primary motive or only a secondary or tertiary motive for the marriage or adoption?

Recommendation 7: Wherever Abad faith@ is defined in the case of family class sponsorship, the Regulations should be amended to add the requirement that the applicant also does not have the intention of residing with the sponsor.

Reg. ss.113-114 - "Family Class"

The Coalition has a number of concerns with respect to the proposed definition of "family class" members. To begin with, we do not see why the Regulations should distinguish between "family members" as defined in s.1 on the one hand, and "family class" members in s.114, on the other. The former definition is a much narrower one than the latter. If an individual is recognized as a "family class" member under s.114, there is no reason why he/she cannot also be recognized as a "family member" under s.1.

Recommendation 8: The term "family member" as defined in s.1 be deleted or, in the alternative, be amended to include all family class members as the term is defined in s.114

We are very concerned to see that "fiancé(e)" is no longer considered part of the family class. Individuals who are coming to Canada as fiancé(e)s will now have to apply under the discretionary provisions of the "humanitarian & compassionate@ application, according to ss.107 to 111. A sponsor of a fiancé will lose the right to appeal to the Immigration Appeal Division if the sponsorship is denied because only sponsors of members of the Afamily class@ have access to the IAD sponsorship appeal provision. Moreover, fiancé(e)s will still be subject to a 90 day marriage condition. Studies have shown that the majority of individuals who come as fiancées are women who, because of the marriage condition, are vulnerable to abuse and exploitation by their sponsor. The continuing imposition of the marriage condition on these women amounts to discrimination as no other family class members have any condition attached to their status. Simply taking fiancée out of the family class does not make the impact of this condition any less discriminatory. Rather, it reflects an attempt on the part of the immigration department to shield such sexist law from legal challenge.
In addition, the current concept of fiancée is restricted to heterosexual relationships, given the condition that they be married after their arrival in Canada. According to s. 111 of the Regulations, an intended common-law partner can be sponsored in a manner similar to that of a Afiancée@ but must Ademonstrate@ to an officer within 15 months of landing, that a common-law relationship [as defined in the Act] has resulted from the sponsorship. This is excessively intrusive as a simple certificate of marriage cannot be produced to satisfy the condition. This is another reason why no condition of marriage or common-law partnership should be imposed on fiancées or intended common-law partners.

Recommendation 9: Fiancé(e) and intended common-law partners should be included as part of the family class and they should not be subject to any condition after landing.

s.126 - s.134 Sponsorship Issues

Just as family class should be given a broad and generous definition, the eligibility requirement for sponsorship should be made as minimal as possible, in order to allow ordinary Canadians the opportunity to be reunited with their family from abroad.

Unfortunately, the proposed Regulations would make it even harder than before for a sponsor to bring his/her loved one to Canada. One of the key problems as identified previously by the Coalition is the absolute bar to sponsorship by people who are in receipt of "social assistance". As a matter of principle, the Coalition finds it repulsive that our Government proposes that the poor in this country do not deserve to be with their family. We believe very strongly that one's income and wealth should never be used as a determinant of one's ability to care for his/her family. We therefore object to the inclusion of s.130(1)(l).

To make the matter worse, the term "social assistance" is so broadly defined under s.126 that it would disqualify a sponsor simply because he/she is living in public housing, has received support from a food bank, or is a recipient of some provincially subsidized drug plan (such as the Trillium program in Ontario). With this wide net, not only the poorest would be caught, but also the working poor who are capable of supporting their family, but may from time to time receive government support in one form or another. In short, the restriction undermines the whole notion of family reunification by allowing only the rich to sponsor their families.

Recommendation 10: Section s.130(1)(l) should be deleted as receiving social assistance should never be a bar to sponsorship of any family class members. The definition of Asocial assistance@ set out in s. 126 should be restricted to receipt of welfare payments if one is able, but unwilling, to work, and work is available.

While the whole concept of sponsorship as a function of one's income and wealth is repulsive, the fact that one could only be reunited with one=s family by signing an undertaking to support them with the government is indeed a form of duress. A Acontract@ signed under duress is an unconscionable contract. Furthermore, there is no need for the sponsorship undertaking as obligations for care and support among family members have long been established in the family law of each province. If individual members of the family class become estranged from their sponsors, they can resort to provincial family law to seek support, whether or not their sponsors have signed any sponsorship agreement with the government.

However, if the government insists on a sponsorship undertaking, then the policy should be uniformly applied to all members of the family class. The proposed regulation s. 129 reduces spousal sponsorship undertakings to 3 years, but increases the sponsorship of children to the age of 22, while keeping other sponsorship undertaking to10 years. This is inconsistent to say the least. It may also place sponsored individuals at risk: for example, it might make it impossible for a sponsored dependent child to leave an abusive home, because of the inability to access social assistance due to the existence of a sponsorship agreement.

Recommendation 11: There should be no sponsorship undertaking required for members of the family class. In the alternative, all sponsorship undertakings should end after three years.

The penalization [through inability to sponsor family members] of persons who have Adefaulted@ on a previous sponsorship undertaking [an unconscionable contract signed under duress] is also grossly inequitable. Inability to continue to support a family member may be the result of unavoidable unemployment or illness or disability. The requirement that a sponsor who is in Adefault@ repay welfare payments made to the sponsored relatives before being permitted to sponsor other relatives, punishes the sponsor for his or her misfortune in becoming unemployed, and penalizes the family members who cannot join their sponsor in Canada.

Recommendation 12: If the sponsorship undertaking Abreaks down@ through no fault of the sponsor [i.e. the sponsor has become unemployed and is unable to find employment, or the sponsor has become unable to work due to illness or disability] and the sponsored individuals have to resort to welfare, the sponsor should not be found in Adefault@ and should be not have to repay any amounts of social assistance paid to the persons sponsored.

ECONOMIC CLASSES: SKILLED WORKERS (ss. 61 - 75)

The Coalition submits that Canada's selection criteria for skilled workers should be based on a thorough analysis of the long-term social and economic needs of our society and not aimed at admitting only the best and the brightest people around the world.

We also believe that the Government should take an active role to support and integrate skilled workers with appropriate settlement services so that their skills can be fully utilized to benefit Canada. To that end, barriers that prevent foreign professionals practicing in Canada in their fields of expertise must be eliminated. Otherwise their education and skills will be wasted.

The proposed policy of Aretroactivity@ is unjust and contrary to the principle of procedural fairness. Applicants should be evaluated in accordance with laws that are in place at the time of their application submission.

The eligibility criteria of the proposed Point Grid System and its exceedingly high pass mark of 80 points are unreasonable because they will exclude many highly qualified applicants that Canada needs.

Further, the increased weight on education and language proficiency will have an adverse impact on applicants from non-English and non-French speaking countries and also those from countries where post secondary education is not common.

Under the criterion of adaptability, the indicator regarding education of accompanying spouse or common-law partner of the principal applicant discriminates against those applicants who are single.

Recommendation 13: The proposed changes to the selection criteria for independent immigrants are too restrictive and should be replaced with regulations similar to the current legislation. Whatever the new regulations might be, they should not be applied retroactively to applicants who submitted their applications under the current system.

BUSINESS IMMIGRANTS:

The term Aself-employed@ is too restrictively defined in section 76: There is no logical reason why Aself-employed@ should be limited to artists, world-class athletes and farmers.

Recommendation 14: The term Aself-employed@ should have its normal meaning of anyone who has the intention and ability to create their own employment and support themselves and their dependents from that employment.

REFUGEES IN LIMBO (Sections 168-175)

We are disappointed that the Regulations do nothing to address the problem of legal limbo. During the Spring 2001 hearings on Bill C-11, the House of Commons Standing Committee on Citizenship and Immigration heard numerous submissions on the problems facing undocumented refugees seeking to obtain landed status under subsection 46.04(8) of the current Immigration Act. Without permanent resident status, protected persons are unable to travel outside of Canada, they are barred from sponsoring family members to come to Canada, they are denied access to loans for post-secondary education, and they often face difficulties getting good jobs (employers are often reluctant to hire and train someone with only temporary status). Refugees in legal limbo are also unable to engage in meaningful civic participation. (We note that this situation is also faced by refugees who have been arbitrarily labeled Aterrorists@ by the Minister.)
Unfortunately, while Bill C-11 itself is silent on the ID requirement, sections 48 and 171 of the Regulations reintroduce the problematic requirement.

As a State Party to the 1951 United Nations Convention relating to the Status of Refugees, Canada is obliged to provide undocumented refugees with an identity document and a travel document (Art. 27, 28). International refugee law expert Guy Goodwin-Gill found that the current Immigration Act and associated practices fail to comply with this legal obligation (ARefugees in Limbo and Canada=s International Obligations,@ (Ottawa: Caledon Institute of Social Policy, 2000)). Bill C-11 and the proposed Regulations continue this illegality, not just refusing to provide documents but denying access to basic rights to those who do not have identity or travel documents from their country of origin.

Not only is the document requirement illegal, it is also quite unnecessary. The Immigration and Refugee Board conducts a thorough investigation into identity as part of the refugee determination process. The IRB has developed detailed and rigorous procedures for doing so, with a very strong track record of accuracy. There is thus no good reason to redetermine identity if the IRB has already done so. Moreover, any lingering doubts are more than met by the newly implemented front-end security screening process for refugee claimants. By the time a refugee claimant has been granted protection by the IRB, there will be little doubt as to their identity.

Standing Committee members from several parties, including Liberal Chair Joe Fontana, appeared to recognize the injustice of the additional landing requirements last Spring. During public consultation on Bill C-11, several members tentatively proposed that the bill be amended to allow automatic landing for refugees upon determination by the Refugee Protection Division of the Immigration and Refugee Board. Despite widespread support for such an amendment among refugee support agencies, social justice organizations and grassroots coalitions, including the Coalition for a Just Immigration and Refugee Policy, this proposal did not make its way into the amended bill.

It is, however, not too late. We call on the Committee to correct this injustice by amending the Regulations to confer landing immediately upon determination as a protected person by the Immigration and Refugee Board. We note that should new information arise later on that a particular individual deliberately and seriously misrepresented the truth about her or his identity, Bill C-11 allows the Minister to strip the person of landed status and vacate their protected status.

Recommendation 15: Eliminate the identity document requirement for landing for protected persons by amending subsection 48(2) of the Regulations to read: ASubsection (1) does not apply to a person who is a protected person within the meaning of subsection 95(2) of the Act.@ This amendment would render section 171 unnecessary. (If the committee is unable to agree to remove the identity document requirement entirely, it should at a very minimum amend subsection 171(2) by adding a new subsection as follows: A(c) A statutory declaration shall be presumed credible where there is no compelling evidence to the contrary.@)

Recommendation 16: Amend the Regulations to automatically confer permanent resident status on protected persons upon recognition by the Immigration and Refugee Board (by analogy with refugees resettled by Canada from overseas who are landed immediately upon arrival). [NOT SURE HOW/WHERE TO DO THIS IN THE REGS]
Recommendation 17: Bring Canada into compliance with Article 28 of the Convention relating to the Status of Refugees by amending the Regulations to include the provision of a travel document to undocumented protected persons upon recognition by the Immigration and Refugee Board. This could be done by adding a section after section 148 to read AA protected person who does not hold a travel document from his or her country of origin shall be provided with a Canadian travel document allowing entry into Canada.@

Recommendation 18: Bring Canada into compliance with Article 27 of the Convention relating to the Status of Refugees by amending the Regulations to include the provision of an identity document to undocumented protected persons upon recognition by the Immigration and Refugee Board. This could be done by adding a section to the Regulations after either section 170 or section 148 to read AA protected person who does not hold an identity document from his or her country of origin shall be provided with a Canadian identity document.@

UNDOCUMENTED PROTECTED PERSONS IN CANADA CLASS (sections 172-175)

As laid out in sections 172-175, this class is in all respects the same as the current Undocumented Convention Refugee in Canada Class. The Coalition believes that this class is unfair and discriminatory. The problems associated with the three-year waiting period are the same ones discussed above for all refugees in legal limbo. Much has been written about this discriminatory class; we would refer the Committee to AWhat=s In A Name?@ (Ottawa: Caledon Institute of Social Policy, 1999) as well as to prior submissions on this matter by The Maytree Foundation and the Canadian Council for Refugees. The Department of Citizenship and Immigration was advised by its own consultants last year that the class is ineffective and unnecessary. Furthermore, the class is rendered unnecessary by the amendments proposed above with respect to identity document requirements for landing. Therefore our primary recommendation is as follows:

Recommendation 19: Eliminate the Undocumented Protected Persons in Canada Class by deleting sections 172-175 of the Regulations.

Should the committee find itself unable to agree to this preferred option, amendments should at least be made to the Regulations to minimize the injustice perpetrated by the class. Specifically, the three year waiting period for landing under the class should be eliminated; overseas dependents should be processed concurrently rather than having to wait until the in-Canada applicant has received landed status before being allowed to apply; there should be no restriction on eligible countries of origin (lack of documentation is a problem inherent to the nature of refugee flight and may be an issue for refugees from any country).

Recommendation 20: Eliminate the waiting period under the Undocumented Protected Person in Canada Class by deleting section 173(f) of the Regulations.

Recommendation 21: Allow concurrent processing of overseas dependents by amending section 174(b) to read: AWhether or not the family member is in Canada when the applicant referred to in section 173(k) is made, the family member shall be processed for landing concurrently with the applicant.@

Recommendation 22: Eliminate the restriction to listed countries for the Undocumented Protected Person in Canada Class by amending section 173(h) to read: Aeach of their countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, is a country that is in turmoil or that does not have a central authority that can issue identity documents.@

HUMANITARIAN AND COMPASSIONATE CASES (Reg. s. 107 - s. 112)

Section 25 of the Act provides for the consideration of applications for landing on Ahumanitarian and compassionate@ grounds of a Aforeign national@ who is Ainadmissible@ or Awho does not meet the requirements of this Act.@ Section 25 specifically states that the Minister may exempt such a person from Aany applicable criteria or obligation@ and may Agrant the foreign national permanent resident status.@ Section 25 also specifies the importance of taking into account the Abest interests of a child directly affected@ and Apublic policy considerations.@ **There is no reference in section 25 of the Act to any waiting period before granting permanent resident status.** Section 108 of the Regulations, which deals with applicants under section 25 who are outside of Canada, purports to modify the clear provisions of section 25 of the Act by stating that if the Minister grants an exemption from s. 13 of the regulations [dealing with applying for an immigrant visa from outside of Canada] and IF there are Aadequate arrangements for the care and support of the foreign national@ that do not Ainvolve social assistance@ , and Athe foreign national is not inadmissible@ the visa officer shall issue a permanent resident visa to that person. Section 109 provides for granting Aconditional@ landing to a foreign national who is a fiancé(e) or Aintended common-law partner.@

Section 110 of the Regulations deals with applicants for H & C consideration who are in Canada and specifies that if the Minister grants and exemption from section 17(1) (a), (c) and (d) [provisions which refer to being members of the live-in caregiver class, the spouse or common-law partner in Canada class, and the undocumented protected person in Canada class], and if they meet the requirements of 17(1)(b) [intention to become permanent residents] and (e) [they and their dependents are not inadmissible, and they and their dependents hold medical certificates issued in the last 12 months that they are not inadmissible on health grounds - except for Amembers of the undocumented

protected persons in Canada class@], then such a person shall be granted permanent residence IF there are Aadequate arrangements for the care and support of the foreign national@ that do not Ainvolve social assistance@ , and Athe foreign national is not inadmissible.@

THESE REGULATIONS SEVERELY LIMIT AND DIRECTLY CONTRADICT THE CLEAR AND SPECIFIC INTENTION OF SECTION 25 OF THE ACT! Section 25 specifically provides for the granting of permanent resident status to inadmissible persons who cannot meet the requirements of the Act or regulations. These Regulations say that such persons can only be landed if they are not inadmissible, and identify inadmissibility for financial and health reasons. This is an attempt to take away through regulations what the Act clearly provides for - the grant of permanent residence to inadmissible persons who don=t meet the requirements of the Act, if H & C grounds warrant the granting of permanent residence. We learn from the Regulatory Impact Analysis Statement (RIAS) that such persons would be granted ATemporary Resident Permits@ - replacing the current AMinister=s permit@ and would be eligible to apply for landing after three years on such a ATemporary Resident permit@ [page 4531 - 4532 of Gazette]. One wonders what the possible rationale could be for deciding to land an inadmissible person on H & C grounds but then delaying that landed status for three years. One wonders if, indeed, after three years they would be landed.

Under the current H & C provisions, although section 114(2) of the Immigration Act allows for the facilitation of admission or exemption from the regulations on Ahumanitarian and compassionate@ grounds, the practice of CIC has been to grant the person Aapproval-in-principle@ but then to deny landing if the person is Ainadmissible.@ Such a person is placed on a Minister=s permit and **maybe** landed after five years by Governor in Council. We know of cases, usually persons who are Amedically inadmissible,@ who have been on such Permits for many more than five years and are still not landed. This has caused unimaginable hardship to families in Canada because persons on Minister=s Permits do not qualify for Auniversal@ health insurance coverage in many cases, despite the fact that they are long-term residents of the province, legally residing in the province. In the recently decided case of *Irshad et al v. Ontario (Ministry of Health) 55 O.R. (3d) 43*, Mr.Justice Doherty of the Ontario Court of Appeal noted the cruel irony of the situation:

> It seems inherently contradictory, if not cruel, to permit a young boy like Raja to enter Canada on compassionate grounds so that he might live with the rest of his family who have been allowed to settle in Canada, while at the same time not taking cognizance of Raja's need to access expensive medical services that can, to some degree, at least alleviate his severe physical disability. While I have found no constitutional violation, I would think that the federal and provincial authorities could work together to find some way to extend our country's compassion beyond permission to enter Canada to include access to the medical services available through OHIP to persons like Raja.

Although under the new Act, medical inadmissibility will not prevent the landing of some family members (spouses and dependent children), placing persons on Temporary Resident Permits for three years, after making a decision to allow them to stay on 'humanitarian and compassionate" grounds, is unnecessary and cruel.

It is the clear intention of the Act to grant landing to inadmissible persons when H & C grounds exist. The Department cannot so radically alter the clear intention of the Act by regulations that effectively contradict the Act!

Recommendation 22: The sections of the Regulations that deal with applicants for landing on H & C grounds should be re-drafted to remove any restrictions on landing due to inadmissibility or financial settlement criteria, or that attempt to restrict the application of section 25 of the Act in any way. The Regulations should not limit in any way the discretion to grant landing or an immigrant visa immediately to persons who have been accepted on H & C grounds.

Recommendation 23: There should be a transitional regulation, providing for the immediate grant of landing to all persons currently on Minister=s Permits due to Ainadmissibility.@

MISREPRESENTATION AS A GROUND FOR INADMISSIBILITY: (Reg. S.

Under section 40(1) of the Act, Amisrepresentation@ is made a new ground of inadmissibility. This section is extremely broad, in that it renders inadmissible not only persons who have lied about some material fact, but also persons who Awithhold material facts.@ This, as has been recognized by the Coalition, means that refugees or prospective immigrants would effectively have to read the mind of the immigration officer and guess what that person might want to know about them.

A second serious concern about section 40 (1) is that persons *sponsored* by a person who is found to be inadmissible for reasons of misrepresentation are also considered inadmissible. This means for example that children who are sponsored by a parent who has misrepresented his or her situation (or who has neglected to inform the officer of something, about which he or she has not been asked) could lose their status through no fault of their own. This is essentially a Aguilty by association@ approach, making innocent parties culpable for actions which are not their own.
Section 227 of the proposed Regulations *appears* to soften the impact of this new ground of inadmissibility. Under this section, those who have claimed refugee protection, Aif the disposition of the claim is pending,@ as well as Aprotected persons within the meaning of section 95(2) of the Act@ are exempted from this ground of inadmissibility. Effectively, this should mean that refugee claimants and Convention Refugees would not be considered inadmissible for misrepresentation. **HOWEVER,** section 95(2) of the Act specifies that a Aprotected person@ is a person on whom refugee protection has been conferred AND whose claim has not been subsequently deemed to be rejected under subsections 108(3), 109(3), or 114(4). Subsection 109 deals specifically with vacation of refugee claims, and specifies that a decision to allow a claim for refugee protection may, on application by the Minister, be vacated if it is found that the decision was obtained through misrepresentation.

This appears to mean that the exemption under section 227 is meaningless B in effect it says that refugee claimants and those found to be refugees are exempt from the misrepresentation ground for inadmissibility if they haven=t been found to have misrepresented themselves. It is possible that what is intended is that someone found inadmissible because they had misrepresented themselves could make another application for protection, for example under the new PRRA.

The implications of this new ground of inadmissibility, and the failure of the Regulations to meaningfully exempt refugee claimants and convention refugees from its application may have serious impacts on many persons in need of protection. For example, in one case of which we are aware, a woman=s identity, nationality and the existence of two of her dependent children was misrepresented by her abusive and controlling husband at the time of her entry into Canada and they were then granted Convention refugee status. At the time of entry, this woman spoke no English, and did not even understand that a misrepresentation of her identity had been made. Subsequently she has separated from her abusive husband and has sought to correct the information about her identity. And reunite with the children not listed originally as her dependants. Furthermore, after she was landed, she had successfully sponsored two children to come to Canada and these two children are now extremely vulnerable by virtue of section 40(1)(b) of the Act, whereby they too would be considered inadmissible.

Recommendation 24: That section 227 simply exempt refugee claimants and protected persons within the meaning of section 95(2) of the Act, and their dependants, from the application of section 40(1)(a) of the Act, and that they also are explicitly exempted from the operation of section 109(3) of the Act which seems to take back with one hand what was given with the other.

RIGHT TO EDUCATION OF ALL CHILDREN

Under section 10 of the current *Immigration Act*, student authorizations are required for non-permanent residents and non-citizens to attend any university or college or take any academic, professional or vocational courses in Canada. Policy directives have been sent from CIC to provincial school authorities indicating that student authorizations issued by Canada Immigration are required for all children who are not Canadian citizens or permanent residents, **even to attend primary and secondary schools**. This is an attempt by the federal Immigration authorities to act in an area specifically assigned to the provinces: the education of persons in the province. It is our position that legislation regarding education is a provincial matter and that attempts by the federal government to require federal student authorizations from Immigration to attend schools in the province, particularly when dealing with children, is outside the jurisdiction of the federal government and that such legislation is therefore *ultra vires.*

The RIAS [p. 4492 of Gazette] notes that in dealing with the issue of student authorizations, an alternative would have been to simply treat all students as visitors: ABecause education falls under provincial jurisdiction, the requirement for a student permit could be completely eliminated and foreign students treated as visitors. This alternative was not adopted because it would result in inconsistent application across Canada and would not allow us to ensure that the proposed studies were not potentially injurious to Canadian security. The information captured from study permits is important; it tells us about the type of courses these students are taking, where they are enrolling, where they are from, their numbers and their gender. If necessary, the information can be used in analyses and to maintain the integrity of the program. Finally, it helps us assess the economic impact on Canada and helps our partners in educational institutions target potential markets.@

Section 30(2) of Bill C-11 states: AEvery minor child in Canada, **other than a child of a temporary resident not authorized to work or study**, is authorized to study at the pre-school, primary or secondary level.@ According to the RIAS, [pp. 4490 - 4493 of the Gazette] : ABecause access to education is a fundamental principle, the *Immigration and Refugee Protection Act* provides that minor children in Canada may study at the pre-school, primary or secondary level, with the exception of the minor children of temporary residents who are not authorized to work or study. These Regulations apply in particular to refugee claimants....The purpose of allowing minor children to study without a student permit is to facilitate access to education for all minor children in Canada by reducing the administrative procedures. After presenting documentation indicating the purpose of the stay, other than tourism, the provincial authorities and educational institutions may be contacted in order to register the child.@

This appears to be an attempt by the Minister of Immigration to reduce the involvement of the federal immigration authorities in the matter of education of minor children and to leave this matter to the provinces where it belongs. However, as we noted to the Standing Committee in our brief and presentation on this issue, the exclusion of children of a temporary resident not authorized to work or study is very problematic. As long as that limitation is there, school authorities in the provinces will feel that they are obliged to ask for proof of the immigration status of children applying for entry into primary or secondary schools. Some children who may have valid visitor status but who are actually being processed for permanent resident status, will be refused admission for this reason. The parents of children who are without status may be afraid to proceed with an attempt to enroll their children in school if asked to produce immigration documents. Thus even though we have legislation in some provinces, such as Ontario, that specifically states that lack of legal immigration status is not a reason to deny registration to any child, these children will be refused admission or the parents will simply keep them out of school due to fear of immigration action against them.

In the United States, back in 1982 the U.S. Supreme Court confirmed that denial of free access to primary and secondary school to children who did not have legal status in the U.S. **was illegal and unjustified discrimination against these children**. Furthermore, this case confirmed the child=s right to privacy as it unequivocally forbids any school system from asking for identification from the U.S. immigration department (INS), communicating with the INS about a child=s immigration status, or even from asking any questions of the parent or child about status. Currently, in the State of California, the Legislature is considering the passage of amendments to the education act that will extend equal access to postsecondary education to undocumented young people living in the state, and this was approved by the Governor of California in October of 2001. We believe that Canada=s *Charter of Rights and Freedoms* is as strong as the U.S. Constitution and that denial of free access to education to school age children because of their status in Canada is unjustified and illegal discrimination. We further submit, based on our experience, that any attempt to verify the child=s immigration status by school authorities, results in parents removing the child from school or not attempting to enroll the child due to fear of immigration consequences. The only victims here are the innocent children, many of whom will remain in Canada and suffer from the damage caused by denial of their right to education.

Canada is one of the leading proponents of universal access to education for all children and Canada was an active participant in negotiations for the *United Nations Convention on the Rights of the Child*. The Government of Canada and all of the provinces and territories have signed this *Convention*. The *Convention* commits us to the principle of non-discrimination, **including non-discrimination on grounds of status**, for all of the primary rights

contained in the *Convention.* The *Convention* also commits us to ensuring that primary education is compulsory and free to all and that secondary education is made available and accessible to every child.

We had requested that section 30(2) of the Act be amended to read: *Every minor child in Canada is authorized to study at the pre-school, primary or secondary level.* We heard the debate in the House when section 30 of Bill C-11 was passed without the amendment we had requested and we recognize that Parliamentarians believed that the changes to the Act would have the result that only the children of tourists in Canada would be refused access to our schools. However, we continue to be concerned that this basic human right of all children, regardless of their own or their parents= immigration status, to attend school will not be respected if school authorities feel that they are obliged to request information about the student=s immigration status. It is simply more important, from a human rights perspective and a long-term social justice perspective, that all children in Canada have access to school without any delay. The former Minister stated clearly in the House and in public gatherings that she would not use the situation of access to school for school-age children as an enforcement tool under the Immigration Act. But school boards are using the immigration legislation to keep immigrant and refugee children out of school and they will continue to do so under section 30 of the Act unless the Regulations assist in clarifying the intention of Parliament that all school age children in Canada have access to school, unimpeded by any requirement of school authorities to verify their own or their parents= status in Canada.

The proposed Regulations do not provide any assistance as they only deal with foreign students who require study permits.

Recommendation 25: That the Regulations be amended to ensure that the intention of Parliament that all minor children in Canada be admitted to school without delay, including Aundocumented@ or Aillegal@ immigrant and refugee children, that school authorities have no obligation under the Act to inquire as to the immigration status of the children and have no right to request access to the child=s or the parent=s immigration identification number. We further request a regulation that specifically directs immigration officers not to contact schools or school boards to make inquiries about the status of any child attending schools in any province of Canada, or to use any information received about children in attendance at any school in order to enforce the Act.

PERMANENT RESIDENT CARD: (Reg. Ss. 51 - 58)

The Coalition does not object to the issuance of the Apermanent resident card.@ However the Regulations should provide that there is no requirement for permanent residents in Canada to carry this card on their persons. It should be at the discretion of the permanent resident when and where they choose to carry their Apermanent resident card@ for identification or other purposes. The Coalition is strongly opposed to the use of any biometric data on the Apermanent resident card.@ The use of such data would only be acceptable in the case of a person with a criminal record who has not been pardoned. The suggestion that such data could be included on Apermanent resident cards@ implies that permanent residents are less trustworthy than citizens and that is discriminatory and ridiculous.

The Coalition supports the position of the Canadian council for Refugees on the need for some special provision for transition to permanent resident cards for those permanent residents who are outside of Canada when the Act and Regulations come into force at the end of June of 2002.

The Coaltion opposes the requirement for renewal of the >permanent resident card@ every five years. It is our position that the Permanent resident card remains in effect until revoked or until the person to whom it applies gives up their permanent residence in Canada. Given that the Apermanent resident card@ will be a primary source of Canadian identification for a newcomer to Canada, it is in many ways the equivalent of a birth certificate or citizenship card and should not be subject to any renewal provisions. Unlike a passport, which is a travel document, and which a permanent resident would also have to have in order to travel, it should be an historic document and there is no need to renew it. Renewal of permanent resident cards will require an extraordinary additional administrative service, not to mention the likely processing fees and the aggravation involved. Unlike passports that are only renewed if the person intends to travel out of Canada, the permanent resident card would presumably have to be renewed before it expired. People will inevitably forget to do this on time. The Minister stated that the intention would be that permanent residents become citizens as soon as they qualify. Many permanent residents of

Canada, who live her, have families here and make important contributions to our country, do not become citizens for very legitimate reasons: for example, many countries will not recognize dual citizenship so citizens from those countries do not take out Canadian citizenship so that they may continue to enjoy the citizenship of their native country. Some countries that prohibit dual citizenship are Chile, Denmark, Ecuador, Germany, Kenya, Korea, Japan, India, Peru, Poland, Sweden, Thailand. Nationals of these countries who have become permanent residents of Canada should not be prejudiced and inconvenienced as a result of this reasonable decision to maintain their connection to their native country. This is especially true in the case of refugees who may hope to return some day to visit or reside in the country they fled, when there is no longer a fear of persecution. Others are thinking of maintaining the option of citizenship in their native country for the sake of their children who may have advantages for study, employment and travel as a result of their parents= citizenship.

The provisions in the Regulations for renewal of the permanent resident card are offensive and would be laughable, if this was not such a serious matter. Section 54(2) sets out the requirements for obtaining and renewing a permanent resident card, including details of the employment, study and travel of the permanent resident over the past five years. We do not require such information in a passport application for a citizen. Nor do we require such information to apply for citizenship! Why are permanent residents to be subjected to such intense scrutiny? Many people will not even remember exactly where they have been and what they have been doing over a period of five years and if they make a mistake, is that a Amisrepresentation@ for which they might then be found inadmissible and deported from Canada?

Recommendation 26: That the permanent resident card not contain biometric data, unless the person has a criminal record. That there be no requirement that permanent residents carry the card on their persons (they should be able to identify themselves with their SIN card or drivers licence, just as citizens do). That the Apermanent resident card@ be valid in perpetuity, until revoked or abandoned by the permanent resident, and that it only require renewal if it is lost. That, if the card is to be renewed periodically, the renewal be every 10 years and that there be no obligation to provide detailed information about a permanent resident=s address, employment, travel abroad, etc, other than what is needed to satisfy the residency requirements of the Act. That a guarantor, equivalent to that of a guarantor for a passport, should be all that is required to establish the identity of a permanent resident.

OTHER ISSUES

The Regulations also deal with the issues affecting convention refugees and protected persons. They set out the procedures for conducting pre-removal assessment, the inadmissibility of certain individuals on security and other grounds, and the removal of such individuals. On this whole host of issues, the Coalition wishes to endorse the analysis provided by the Canadian Council for Refugees (CCR), which is also a member of the Coalition. CCR has well recognized experience and expertise in issues affecting refugees and other protected persons. The Coalition would want to echo their concerns in this respect.

NOTE: We have done the best we could in a short period of time to analyze and comment on the Regulations. We will be adding to this brief over the next few weeks as we have more time to digest and consider this very complex set of Regulations.