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SUBMISSION TO STANDING COMMITTEE ON CITIZENSHIP AND IMMIGRATION

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Bill C-11: Discriminatory, Unnecessary and Dangerous Restrictions On Humanitarian and Compassionate Applications

Parkdale Community Legal Services (PCLS) has worked for nearly forty years in the low-income community of Parkdale in Toronto, providing legal services and carrying out community driven law reform, education and outreach. Historically, many residents of Parkdale are new immigrants and refugees, making immigration and refugee law a major area of work for the law students, community legal workers and lawyers at PCLS over the years. We have also worked with members of Parliament to ensure that the voices of new immigrants and refugees are heard and that the issues affecting this vulnerable sector of Canada's community are understood. PCLS actively participated in the process leading to the new *Immigration and Refugee Protection Act* (*IRPA*) which became law in June of 2002 and we have had the opportunity in our work with our clients and community to recognize problem areas of the *Act*.

PCLS has carefully examined the provisions of Minister Kenney's Bill C-11, proposing major changes to the refugee determination process in Canada and also the drastic modification of the discretionary provisions of section 25(1) of the *IRPA* which allow for "humanitarian and compassionate" (H&C) applications for permanent residence. The H&C provisions of the *IRPA* have long been one of the major areas of work of PCLS, and of the many other community legal clinics in Ontario, as we provide legal services to the most vulnerable members of the community who often cannot afford legal

counsel. Over the years we have been able to regularize the status of many persons living without legal immigration papers in Canada through the H&C provisions, and many of these persons have been refused refugees. We have worked particularly with women who have been victims of family violence, children, victims of torture, persons with mental health disabilities and serious life-threatening health concerns. We are in a particularly strong position to be able to advise the Standing Committee on Citizenship and Immigration as to problems with Bill C-11 that will be seriously harmful to the community we have served for so many years.

We are extremely concerned about the restrictions on making "humanitarian and compassionate" applications under section 25 (1) of the IRPA as set out in sections 25(1.1), (1.2) and (1.3). We believe these changes are completely unnecessary, discriminatory and dangerous because lives will be at risk as a result of these changes. We recommend that these sections be deleted from Bill C-11.

Section 25 (1.2) (a) (b) and (c) of Bill C-11 proposes that a person will have to choose between making a refugee claim or filing a humanitarian application. In other words, if you make a refugee claim you are not eligible to file a humanitarian application while your refugee claim is pending, and if refused, for one year after the refusal. Moreover, Section 25(1.3) of Bill C-11 provides that if you do make a refugee claim and it is refused, and you manage to make a humanitarian application after one year, you can't base your humanitarian application on any of the dangers or risks you raised in your refugee claim.

Furthermore, section 25(1.3) affects many other persons who are not refugee claimants but who would experience "unusual, undeserved or disproportionate hardship" if returned to their country of origin. Even if the person in Canada does not believe that

they are a refugee and wants to make an application based on “humanitarian and compassionate” grounds, it is possible that the changes proposed in section 25(1.3) would prevent the Minister’s delegate from considering the hardship the person would face as a factor in the H&C application if that hardship might also be “factors that are taken into account in the determination of whether a person is a Convention refugee under section 96, or a person in need of protection under subsection 97(1)”. This might force a person to make a refugee claim who might otherwise just submit the H&C application and argue that they would face severe hardship on return.

Unnecessary restrictions on grounds of efficiency:

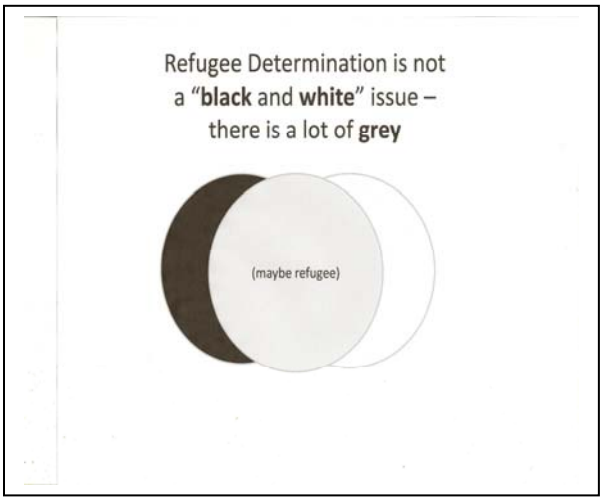
There is absolutely **no efficiency benefit** from these changes. If refugee claimants are unable to file a humanitarian and compassionate application under section 25(1) of *IRPA* while their refugee claim is proceeding, this will not save any time or resources for the refugee process because in the current process, the humanitarian application is dealt with separately by experienced immigration officers (not the Refugee Board), it is a paper application unless the officer wants to interview the applicant, and most significantly, the filing of the humanitarian application does not delay removal if the refugee claim is refused. The only way to obtain a deferral of removal due to the existence of a pending humanitarian application is if the immigration officer agrees to defer removal, or if the applicant can obtain a stay of removal from the Federal Court. The Federal Court only grants such a stay of removal if there are serious issues in the humanitarian application and the applicant would suffer “irreparable harm” if removed before the decision on the humanitarian application. The Federal Court is very reluctant to grant such stay orders and only does so if convinced of the irreparable harm issue.

The proposed restrictions on access to the humanitarian and compassionate application would present an impossible choice for many persons seeking protection in Canada. As

legal counsel in a community legal clinic, it will be impossibly difficult for us in the community legal clinics to advise people who have sought refuge in Canada how to choose between a humanitarian application or a refugee claim. This is because there is a **large grey area** of what constitutes a well-founded fear of persecution (the test for a Convention refugee), and what does not meet that stringent test, but does constitute **very serious hardship** (which has been the test for a successful humanitarian application).

But getting accepted as a refugee results in much stronger protection – ***"non-refoulement"***: **you can't be returned to the country where you fear persecution.** And furthermore, accepted refugees and their family members are also granted **some exemptions from inadmissibility** (such as financial and medical inadmissibility).

Deciding whether someone is or is not a refugee in many cases is **not a black and white issue**. The case often falls into a **large grey area**: On the same facts, some Board members will accept the person as a refugee and others will refuse the person as a refugee but recognize that that person has a **strong humanitarian case**. For example, we have seen cases where the Board member is very sympathetic, and says that the claimant is completely credible and, although she is not a refugee, she has a strong humanitarian case to remain in Canada. One of our cases from 2008 involved a Roma woman from Hungary who had experienced a long history of attacks by skinheads. She had reported these attacks to the police and the police took the information but no prosecution resulted. The Board found that she was credible



and had clear evidence of the suffering she had experienced, but nevertheless decided that there was effective state protection in Hungary so she did not come within the Convention refugee definition. The Board member stated that she had experienced **discrimination,** not persecution, and that discrimination was not enough to grant refugee protection. However, with the decision by the Board that this claimant was truthful and that she had a strong humanitarian case, we filed a humanitarian application, quoting from the Board's decision and this woman was accepted for permanent residence on humanitarian and compassionate grounds.

But under the changes in Bill C-11, if this woman had been able to remain in Canada for a full year after her refusal of refugee protection, and been eligible to make a humanitarian application, **she would not have been able to base her humanitarian application on the very facts of severe discrimination that the Board described as a very strong humanitarian reasons** for being permitted to remain in Canada - the treatment she had experienced from the skinheads.

Furthermore, if this same client was advised after her arrival in Canada that, based on other decisions by the Refugee Board, her case was unlikely to be accepted on refugee grounds (ss. 96 and 97 of IRPA), she might file a humanitarian application only to find out that the factors of severe discrimination she had faced and would continue to face in her home country **would not be considered in her humanitarian application** because the officer would exclude any factors which could have been the basis of a refugee claim!

Under Bill C-11, a claimant whose case falls within the **large grey area** of claims that could be accepted as refugees, or which could be refused as refugees but would likely be accepted on humanitarian grounds, the person would have to make an impossible choice. She would have to take a chance on the refugee claim (which would result in

better protection if she wins) or base everything on the humanitarian application. If she takes a chance on the humanitarian application, she has no right to a personal interview with the immigration officer who makes that decision and the hardship she has experienced, which is similar to the experiences of refugees, would not be considered by the officer dealing with her humanitarian application.

Furthermore, in law, the humanitarian application is a completely discretionary decision, so if it is refused, there is no appeal. The chance of getting that decision overturned by the Federal Court on grounds that it is unreasonable, would be very unlikely because the Court grants more deference to the decision maker in a situation of a discretionary decision, as opposed to a legal determination of refugee protection.

That is why we are saying that it would be an impossible decision to make – and impossible for legal counsel to advise the applicant which process to follow. One would always have to seek the stronger protection of refugee status, even if the decisions in similar cases were only 50 % successful. This might have the result of forcing many people into the refugee process who could be dealt with more efficiently in the H&C process.

New Humanitarian Issue after refusal of claim:

In some cases the proposed one year delay before a failed refugee would be eligible to make a humanitarian application could result in a **serious risk to life**. Life is unpredictable and many things could happen during that one year after the refusal of the refugee claim. For example, what if the failed refugee suddenly becomes seriously ill and has a life-threatening condition for which she would not receive treatment if returned to her home country? In such circumstances a humanitarian application is the most appropriate way to deal with the case because the Federal Court has found that

lack of adequate medical treatment cannot be a reason for granting protected person status in Canada, and that the person should use the humanitarian procedure under section 25(1). [See *Covarrubias v. Minister of Citizenship and Immigration,* 2006 FCA 365]. But this would not be possible if the health condition arose during the one year after the refusal of the refugee claim.

In a real case we dealt with in our office (and there have been several), our client was diagnosed with Type I diabetes **after** the refusal of her refugee claim and was facing removal to Angola where, according to her doctors in Canada, **she would die within three weeks** as she would not be able to receive daily insulin injections to combat her condition. We filed a humanitarian application for her and her two teenage daughters. We obtained a stay of removal from the Federal Court because the Court recognized that removal to Angola would result in her death within weeks and her two young daughters would be orphaned. Eventually, her humanitarian application was granted and she and her daughters are now being landed in Canada. If she had not been able to make the humanitarian application, based on health circumstances that arose after the refusal of her refugee claim, she would have been removed to Angola where she would have died.

The $550 fee per adult for filing the humanitarian application:

Section 25(1.1) of Bill C-11 provides that a humanitarian application can only be considered if the $550 processing fee is paid. In our work in the community legal clinics we have seen many strong humanitarian applications that cannot be filed because of the lack of $550 fee and we have even had to do fund-raising to help a client pay this fee. In March of this year law students at Parkdale Community Legal Services organized a fundraising bowl-a-thon to raise money for a charitable organization (also set up by former law students at PCLS) to be able to make loans for clients who cannot pay the $550 fee to apply for permanent residence. (This fee is also required of

accepted refugees who have to pay the fee to become permanent residents after they have been granted protected person status in Canada.) We raised just under $4000 in this bowl-a-thon: this amount will fund loans for about **7 people** to apply for permanent residence.

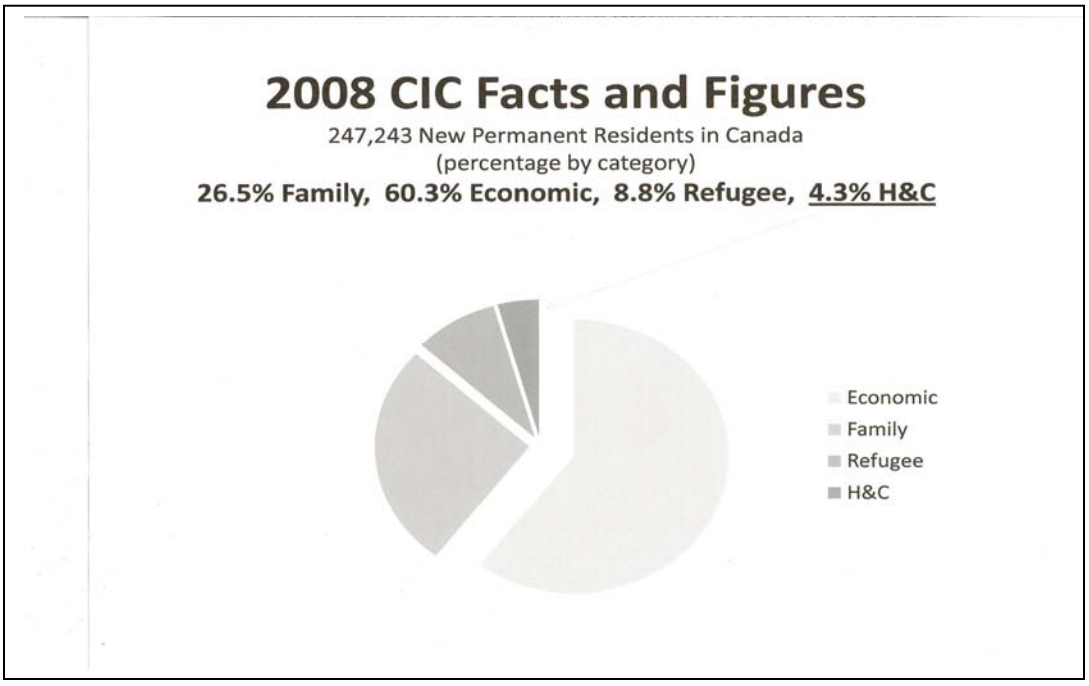
We have seen desperate clients use their food and shelter money to pay the $550 fee. Usually they have to borrow the money. So we believe a possibility of a waiver of the fee is necessary for humanitarian cases. In fact, the Federal Court of Appeal is now about to consider whether the refusal to grant a waiver of the $550 fee for persons who are living in poverty violates the common law principle of access to the courts and/or Canada's *Charter of Rights and Freedoms* [*Toussaint v. Canada (MCI) 2009 FC 873*]. It should be noted that after the community legal clinics in Ontario mounted a successful challenge to Small Claims Court filing fees in the case of *Polewsky v. Home Hardware* [66 O.R. (3d) 600] the Ontario government passed an omnibus bill allowing for **waiver of fees** in circumstances of economic hardship for all tribunal and court matters in Ontario. We therefore recommend that Section 25(1.1) should be amended to allow for a waiver of the $550 fee if the applicant cannot afford to pay the fee.

Restrictions on section 25(1) humanitarian applications punish refugees

Taken together, these changes proposed for Section 25(1) **punish** the claimant for having made a claim which has been refused and this seems to reflect Minister Kenney's statements indicating that a refused refugee is a "bogus" one – that the person made a false claim knowing that they were not a real refugee. In fact, in so many cases, a negative refugee decision does not mean the claim was knowingly false or lacking in merit but just that it didn't reach the severity of what one Refugee Board member believes to be necessary to be a refugee. Negative decisions are often rendered for reasons having nothing to do with the claimants' credibility. But even where

credibility is found to be a problem, this may be because the refugee claimant was unable to present their case fully due to effects of trauma, mental illness, or even poor representation. Our office has also seen many examples of this situation which have been rectified through the humanitarian procedure.

The idea that some refugee claimants are genuine while others are bogus harms all immigrants and refugees by poisoning the public perception of refugees and immigrants as fraudsters and cheaters, and even turning immigrants and refugees against each other because they don't want to be associated with the "bad" or "bogus" refugees. Many Canadians also worry that refugees and humanitarian applications are interfering with other groups of immigrants – the economic or skilled immigrants and the family class immigrants. This is not the case as both refugee and accepted humanitarian applicants comprise a very small percentage of our new immigrants each year.



CONCLUSION AND RECOMMENDATIONS

The changes to the humanitarian provisions in Bill C-11 are very drastic and potentially harmful to people genuinely in need of humanitarian protection and fleeing very serious hardships. The language being used to support such drastic changes is negative language that encourages racism and anti-immigrant xenophobia, by suggesting that Canada is being exploited and overrun by phony refugees. The truth is that **40% of the refugee claims that are heard in Canada are accepted by the Board**, and a high percentage of those that are refused (with no appeal), are then granted permanent resident status on humanitarian and compassionate grounds. **In our office at PCLS about 90% of the cases we have taken of refused refugees have been accepted as immigrants on humanitarian grounds**. We strongly urge that there are **no restrictions on section 25(1)** as Bill C-11 proposes. All those changes should be scrapped. The humanitarian option needs to remain as a safeguard for those who do not qualify as refugees but who would nonetheless suffer disproportionate hardship if returned to their country of origin. Leaving the humanitarian provisions as they are will not interfere with a more efficient refugee process. Section 25(1) if unchanged will continue to provide a necessary safety net for truly humanitarian cases that do not qualify for refugee status.

Recommendations to Standing Committee:

1. Delete proposed sections 25 (1.2) and (1.3).

2. (a) Amend proposed section 25 (1.1) as follows:

"The Minister is seized of a request referred to in subsection (1) only if the applicable fees in respect of that request have been paid *unless a waiver of that fee is granted on humanitarian and compassionate grounds*."

Or

(b) Delete proposed section 25(1.1).

2008 CIC Facts and Figures:

New permanent residents by category
247, 243 new permanent residents:
26.5% Family, 60.3% Economic, 8.8% Refugee, 4.3% H&C