



THE CANADIAN
BAR ASSOCIATION

L'ASSOCIATION DU
BARREAU CANADIEN

**Excessive Demand on Health
and Social Services under *Immigration
and Refugee Protection Act***

**CANADIAN BAR ASSOCIATION
IMMIGRATION LAW SECTION**

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PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

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

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Excessive Demand on Health and Social Services under the *Immigration and Refugee Protection Act*

I. INTRODUCTION

The Immigration Law Section of the Canadian Bar Association (CBA Section) appreciates the opportunity to comment on Immigration, Refugees and Citizenship Canada's (IRCC) review of the current assessment process for cases involving excessive demand on health and social services, in section 38(1)(c) of the *Immigration and Refugee Protection Act* (IRPA).¹ This review is based on IRCC's November 2015 report, *Evaluation of the Health Screening and Notification Program* (the IRCC Report).²

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

A medical inadmissibility finding has a serious consequence, barring entry to Canada for foreign nationals, ranging from family class applicants to temporary workers and economic migrants. It can hinder family reunification and have significant consequences for Canadian businesses. However, a decision made in error could also lead to the admission of individuals whose medical conditions result in excessive demands on Canadian health and social services.

Our comments on the Health Screening and Notification Program (the HSN Program) begin with our understanding of IRCC's current priorities and processes, and then focus on the three main issues outlined in the IRCC Report:

1. resolving limitations on operationalizing excessive demand policy;
2. reducing the number of overturned excessive demand cases; and
3. enforcing mitigation plans.

¹ See *Immigration and Refugee Protection Act*, SC 2001, c 27, available [online](http://ow.ly/EfyV309RLHT) (<http://ow.ly/EfyV309RLHT>)

² See Immigration, Refugees and Citizenship Canada, *Evaluation of the Health Screening and Notification Program* (November, 2015), available [online](http://ow.ly/jkEE309RLK3) (<http://ow.ly/jkEE309RLK3>)

We do not comment on improving the Global Case Management System (GCMS) or the e-Medical System, which are sufficiently canvassed in the IRCC Report.

The CBA Section's view is that the HSN Program could be improved without significant overhaul of the program, or legislative and regulatory amendments at this time.

II. PRIORITIES AND PROCESSES

The objectives in IRPA section 3(1) include reducing and preventing excessive demand on Canada's publically funded health and social services systems.³ While it is difficult to assess the significance of the number of applications refused because of excessive demand – the IRCC Report indicates that 5090 applicants (0.19%) required to undergo a medical assessment were refused between 2008 and 2012 – the intricacies and cost of healthcare continue to rise, and accounts for increasing portions of federal and provincial budgets.

This objective is achieved through IRPA section 16(2)(b), requiring that (most) foreign nationals (and their dependants) who apply for temporary or permanent migration to undergo a medical examination before gaining entry to Canada. Results for a permanent resident visa are not interchangeable with results for a temporary resident visa. Failure to undergo an examination can form the basis of a refusal on a separate ground of inadmissibility – such as non-compliance with IRPA or the *Immigration and Refugee Protection Regulations* (IRPR). It may also result in an application being considered abandoned (IRPA section 41(a)). It is also achieved by controlling the admission of prospective immigrants whose medical conditions would create an excessive demand through IRPA section 38(1)(c).

Medical examinations must be carried out by a Panel Physician (a medical practitioner designated by IRCC).⁴ IRCC delegated staff receive the results of an examination from the Panel Physician.

A Medical Officer then assesses an applicant's medical examination results for information indicating whether they are likely to cause an excessive demand, and creates a Medical Profile. This profile ultimately begins the medical admissibility determination. It is the code which denotes that an applicant underwent a medical examination and was or will be found either

³ See *Immigration and Refugee Protection Regulations*, SOR/2002-227, at s. 1(1), available [online](http://ow.ly/3QEH309RLOt) (http://ow.ly/3QEH309RLOt) for definition of **health services** and **social services**.

⁴ *Ibid* at s. 29 – Medical examinations include any or all of the following: a physical examination; a mental examination; a review of past medical history; laboratory tests; diagnostic tests; and a medical assessment of records respecting the applicant.

admissible or inadmissible. An M5 profile is assigned when it is believed that an applicant will cause an excessive demand, with a sub-code of T9 for excessive demand on social services, or H9 for excessive demand on health services.⁵

The Medical Officer then prepares an opinion on the applicant's inadmissibility that includes a narrative – which forms the basis of the Procedural Fairness Letter (the Fairness Letter) – as well as a list of required services and costs. The Medical Officer must also assess the applicant's response to the Fairness Letter, including both medical and non-medical factors. An Immigration Officer must then determine if the opinion is reasonable in making the final decision on admissibility. A number of operational challenges have been identified by IRCC in this bifurcated assessment.

Exemptions to findings of inadmissibility due to excessive demand in IRPA section 38(2) include members of the family class (spouses, common law partners and children) and protected persons. They are not being reviewed at this time, and will remain in place.

III. RESOLVING LIMITATIONS ON APPLICATION OF EXCESSIVE DEMAND POLICY

A. Threshold for medical inadmissibility

Demand is found to be excessive if it exceeds the average annual health care costs for Canadians during a specified period of time.⁶ This average is set annually by IRCC's Health Management Branch, and is currently \$6,655 per year.⁷ The cost threshold for medical inadmissibility is determined by multiplying the per capita cost by the number of years used in the medical assessment for the applicant. A five year period is generally used (a \$33,275 threshold), unless the applicant's anticipated length of stay is shorter, or there is evidence that significant costs are likely to be incurred beyond that period, in which case the period is no more than 10 consecutive years.

⁵ *Ibid* at s. 1(1)

⁶ *Supra* note 3 for definition of **excessive demand**

⁷ See Justice Canada, *Divorce and Separation* (May 10, 2016), available [online](http://ow.ly/FIks309RLRT) (<http://ow.ly/FIks309RLRT>). For other examples see Canada Business Network, *Legal challenges? Maybe a business lawyer can help* (May, 2011), available [online](http://ow.ly/olZL309RLUL) (<http://ow.ly/olZL309RLUL>).

Special education and prescription drugs

The cost of special education presents a particular challenge in assessing this threshold. Many provinces and territories have mainstreamed special needs students in classrooms, and individualized costs tied to specific forms of need or disability are no longer available in many jurisdictions.⁸ However, although it is more difficult, this information can still be obtained.

For example, in Ontario's Inclusive Education Model funding allocation is based on the funding profile for each school board, starting with the foundation grant that gives every board a basic level of funding for all students. Ontario also gives its boards additional operating funding through annual grants for students.⁹ The Special Education Grant (SEG) gives boards envelope funding made up of six allocations, which can be used only for students who need special programs, services and equipment. Any money remaining after these needs are met must be placed in a special education reserve fund. Although the SEG is not directed to specific students, certain student-specific expenses can be drawn from the six grant allocations.

Prescription drugs also present a challenge. While medically required services are covered in full by the beneficiary's home province, outpatient prescription drug costs are not necessarily covered. Each province has criteria for who can be reimbursed and how much. The variation in amount of coverage by each province conflicts with the notion of equally distributed health care and costs for applicants. Those with medical conditions requiring prescription drugs could cost the government different amounts depending on where they reside.

Role of Centralized Medical Accessibility Unit

The introduction of IRCC's Centralized Medical Accessibility Unit (CMAU) may help address these operational challenges. This unit is knowledgeable, accessible and proactive, and the CBA Section recommends making additional funding and resources available to expand the CMAU's research and decision making role.

Increasing the CMAU's research capacity and information collection – including development and application of epidemiological knowledge – would provide additional information to better inform Fairness Letters and excessive demand assessments. This should also include focused regional research on provincial and territorial costing for social services (including special

⁸ *Supra* note 2 at page x

⁹ See Ontario Ministry of Education, *2016-17 Education Funding: A Guide to the Special Education Grant*, (2016) at page 4, available [online](http://ow.ly/xLXW309RM0b) (<http://ow.ly/xLXW309RM0b>)

education and prescription drug coverage), as well as extensive collaboration with appropriate authorities to obtain more realistic information. We also recommend that the CMAU update the Medical Officer's Handbook, which would help address challenges to timely and accurate information gathering.

Once a robust system is in place for ongoing research and information collection across Canada, the excessive demand assessment process should eventually be centralized to this unit. This would require staffing with additional Medical Officers, equipped with the information and expertise to engage effectively in the assessments and properly produce Fairness Letters.

RECOMMENDATIONS

- 1. The CBA Section recommends expanding the CMAU's research and decision making role to better inform Procedural Fairness Letters and excessive demand assessments.**
- 2. The CBA Section recommends updating the Medical Officer's Handbook to address challenges to timely and accurate information gathering.**
- 3. The CBA Section recommends centralizing the excessive demand assessment process to the CMAU once a robust research and information system is in place.**

B. Distinct roles of Medical and Immigration Officers

The publicly available policy, guidance and directions on assessing excessive demand show errors in IRCC's instructions about the distinct roles of Medical and Visa/Immigration officers (Immigration Officers). These instructions do not reflect the leading case law – including *Sapru v. Canada (M.C.I.)* – and regulations that specifically address the roles of these Officers.¹⁰ Finally, inconsistent and contradictory information is provided on IRCC's webpages on *Process for medical refusals* and *Excessive demand on health and social services* pages¹¹. This has likely resulted in duplicate decision making and contributed to the many excessive demand decisions that have been overturned.

¹⁰ *Supra* note 3 at s. 34. See also *Sapru v. Canada (M.C.I.)*, 2011 FCA 35, available [online](http://canlii.ca/t/2flwr) (http://canlii.ca/t/2flwr).

¹¹ See Immigration, Refugees and Citizenship Canada, *Process for Medical Refusals* (May 7, 2013), available [online](http://ow.ly/e0ld309RM5j) (http://ow.ly/e0ld309RM5j) and IRCC, *Excessive demand on health and social services* (December 30, 2016), available [online](http://ow.ly/GkEU309RMca) (http://ow.ly/GkEU309RMca)

Canadian courts have established that an individualized medical assessment is required to determine excessive demand.¹² When considering excessive demand, the Medical Officer's role is to make an informed assessment of the demands likely to be made on social services by an applicant using the information available to them, taking both medical and non-medical factors into account.¹³ The Medical Officer gives the Immigration Officer a medical opinion about any health condition an applicant has, and the likely cost of treating the condition.

The Immigration Officer's responsibility is to review the reasonableness of the Medical Officer's opinion, and decide on admissibility. The Medical Officer must provide sufficient information to allow the Immigration Officer to do so. It is a clear breach of process when an Immigration Officer, who is not a medical expert, makes a final decision on medical inadmissibility without the benefit of a Medical Officer's individualized medical assessment based on all of the applicant's submissions.¹⁴

When an applicant submits a mitigation plan, the Medical Officer must assess if it will provide appropriate treatment for the medical condition while reducing the burden on publicly funded social services, and then advise the Immigration Officer about the plan's feasibility.¹⁵ The Medical Officer cannot be relieved of the responsibility to assess a mitigation plan regardless of whether the applicant disputes the Medical Officer's initial medical opinions or cost estimates.

Many Medical Officers still defer in error to Immigration Officers when considering the feasibility of a mitigation plan, which results in two officers often reviewing the same information. A common argument in favour of this approach is that financial information is outside the scope of a Medical Officer's expertise, and therefore Immigration Officers should evaluate this evidence.

IRCC's current instructions support this approach – however it contravenes existing case law, and ignores the holistic and qualitative nature of an excessive demand assessment. Clarifying instructions to Medical and Immigration Officers on their distinct roles in excessive demand assessments will enable more consistent, timely and effective decision making without duplication of efforts.

¹² See *Hilewitz v. Canada (M.C.I.); De Jong v. Canada (M.C.I.)*, 2005 SCC 57, available [online](http://canlii.ca/t/1lsvm) (<http://canlii.ca/t/1lsvm>). See also *Colaco v. Canada (M.C.I.)*, 2007 FCA 282, available [online](http://canlii.ca/t/1sxm5) (<http://canlii.ca/t/1sxm5>).

¹³ *Supra* note 10 (*Sapru*)

¹⁴ See *Adewusi v. Canada*, 2012 FC 75, available [online](http://canlii.ca/t/fpsdn) (<http://canlii.ca/t/fpsdn>).

¹⁵ See *Canada (M.C.I.) v Lawrence*, 2013 FCA 257, available [online](http://canlii.ca/t/g1srr) (<http://canlii.ca/t/g1srr>).

RECOMMENDATION

- 4. The CBA Section recommends clarifying instructions to Medical and Immigration Officers on their distinct roles in excessive demand assessments based on legislation and case law.**

C. Procedural fairness letters

Fairness Letters must clearly set out all relevant concerns of the Medical Officer so the applicant knows the case to be met, and provide a true opportunity to meaningfully respond. The Fairness Letters currently in use by IRCC follow the letter considered in *Sapru*,¹⁶ which was found to accord with the principles of procedural fairness – however the Court commented that they could be clearer.

In certain cases the current Fairness Letters effectively deny an applicant a meaningful opportunity to respond to an Officer's concerns. An applicant not represented by counsel often does not understand that they cannot merely show evidence that they will cover the cost of the services outlined in the letter, like public education or health care, as these costs cannot be subsidized nor can the province be reimbursed for these costs.

The CBA Section recommends that IRCC improve the Fairness Letter precedents to help achieve straightforward, consistent, and timely assessments. The letters should also recommend that applicants consider obtaining independent legal advice. These changes would likely result in more effective mitigation plans, assisting all parties to move forward, saving time and resources.

RECOMMENDATION

- 5. The CBA Section recommends rewriting the Procedural Fairness Letters in plain language with clear instructions, including an explanation of which services are public, and which can be privately disbursed. The Letters should also recommend that applicants consider obtaining independent legal advice.**

D. IRCC website

Self-representation and underrepresentation can pose serious challenges in responding to Fairness Letters. Helping applicants make an informed decision about hiring effective

¹⁶ *Supra* note 10 (*Sapru*)

representation when it is needed begins with messaging. The CBA Section recommends that IRCC websites include more comprehensive information on what is involved in excessive demand assessments, and what information is required in making them. This should result in more effective Fairness Letter responses and mitigation plans.

The focus of IRCC websites is on protecting the public by helping applicants understand the risks of unregulated representation, including unlawful and unscrupulous practitioners. While this is important, it results in a distorted picture of representation available to applicants, and should not be the sole focus of messaging on IRCC's websites.

It is also important that IRCC's sites portray lawyers positively, highlighting their qualifications and expertise, as well as the critical role they play in the immigration system. They should encourage applicants to consider obtaining proper information and timely, independent legal advice from an immigration lawyer, especially in complex cases like medical inadmissibility. For example, a Justice Canada webpage on divorce and separation states, *"This website provides general information. Family law is complex. You are encouraged to contact a lawyer for help with family law issues."*¹⁷ IRCC could also provide links to assist in locating effective representation.

RECOMMENDATIONS

- 6. The CBA Section recommends that IRCC websites provide more information for applicants on what is involved in excessive demand assessments, and what information is required in making them.**
- 7. The CBA Section recommends that IRCC websites portray immigration lawyers positively, and encourage applicants to consider obtaining independent legal advice.**

E. Other suggestions from interviewees in the IRCC Report

For its Report, IRCC interviewed individuals, including IRCC Officers and staff, representatives from other government departments, panel physicians and external experts with knowledge of the HSN Program or its delivery.¹⁸ The interviewees raised suggestions to improve the excessive demand assessment process, which we address below.

¹⁷ *Supra* note 7.

¹⁸ *Supra* note 2 at page 24

Identify specific conditions that would render an applicant inadmissible

The CBA Section does not support the identification of conditions that would render an applicant inadmissible. All of IRPA, including sections related to excessive demand, must be considered in light of the standards set in Canadian cases, including *Hilewitz v. Canada (M.C.I.)*, as well as the *Canadian Charter of Rights and Freedoms* (section 15 in particular) and international human rights obligations.¹⁹

Categorical exclusion based on condition remains a problem, which can perpetuate historical exclusion. The Canadian Association of the Deaf, for example, argues that medical inadmissibility discriminates against people who are deaf or have disabilities.²⁰ There are still too many refusals based on an improper consideration of an applicant's *individualized* needs, and this will continue to be at the forefront of litigation on medical inadmissibility refusals. A list of conditions that would automatically render an applicant inadmissible would perpetuate these concerns.

Remove the ability to mitigate excessive demand

The suggestion to remove the ability to mitigate excessive demand would be unlawful and inconsistent with Canadian case law.

Require a bond to cover the costs of treatment

It is not legally possible to require a bond to cover the costs of treatment. Nothing in the *Canada Health Act* supports the personal coverage of costs.²¹ Any decision to amend the Act to allow for bonds would need to consider the impact on Canadian citizens and permanent residents, from both a cost and an ability to provide timely services perspective.

Better alignment and information sharing with provinces and territories

The CBA Section supports the suggestion for better alignment and information sharing with provinces and territories.

¹⁹ *Supra* note 12 (*Hilewitz*)

²⁰ See Canadian Association of the Deaf, *Immigration and Medical Inadmissibility* (July 3 2015), available [online](http://ow.ly/KR4W309RMoB): (<http://ow.ly/KR4W309RMoB>)

²¹ See *Canada Health Act*, R.S.C., 1985, c. C-6, available [online](http://ow.ly/6QjM309RMwx) (<http://ow.ly/6QjM309RMwx>).

IV. REDUCING THE NUMBER OF OVERTURNED CASES

The IRCC Report concludes that the considerable number of positive decisions on appeals related to excessive demand limits the application of excessive demand policy. This inference is based on an analysis of data from the Immigration Appeal Division (IAD), which did not include Federal Court decisions. The analysis revealed that 34% of all sponsorship applications refused based on health grounds were allowed by the IAD.

Insofar as a 34% success rate is considered problematic, the CMAU (in conjunction with other units in IRCC) should examine the issue more broadly to assess why excessive demand decisions are being overturned. Further research is required to determine – of the total number of refusals – how many were overturned on appeal based on the legal invalidity of the medical admissibility decision, and how many were overturned based on humanitarian and compassionate grounds by the IAD and on judicial review at the Federal Courts.

The IRCC Report noted that Immigration Officers find medical cases difficult to process because of the jurisprudence they must understand to make their decisions legally defensible. Some IAD members and Canada Border Services Agency (CBSA) Hearings Officers also struggle with the respective decision making functions of Medical and Immigration Officers under IRPA. Focused and coordinated training between IRCC and CBSA would complement research on the number of excessive demand cases that are overturned and assist in reducing successful appeals.

RECOMMENDATIONS

- 8. The CBA Section recommends that IRCC undertake further research to assess why excessive demand decisions are being overturned.**
- 9. The CBA Section recommends focused and coordinated training between IRCC and CBSA explaining excessive demand case law and emphasizing the respective decision making functions of Officers under the IRPA.**

V. ENFORCING MITIGATION PLANS

A major concern highlighted in IRCC Report, limiting the application and intended results of the excessive demand policy, is the inability to monitor and enforce mitigation plans. However, no evidence to support this concern was in the IRCC Report. The Report also noted that a large proportion of clients comply with the medical surveillance requirement, albeit not in the

excessive demand regime.²² To assess whether applicants are complying with their Mitigation Plans, the CBA Section recommends that this issue be explored through further research, such as the implementation of new tracking measures as a pilot. If compliance is found to be a valid problem, then existing enforcement measures could be explored without the need for legislative or regulatory amendment.

A. Existing monitoring and enforcement mechanisms

Where an excessive demand finding is based on social services, Medical Officers must be satisfied that an applicant has the ability and intent to mitigate the cost of the required social services to make a positive medical admissibility decision.

In a Declaration of Ability and Intent (Declaration) provided with the Fairness Letter, the applicant must affirm that they assume responsibility for arranging the social services that they (or a family member) would require in Canada, and will not hold government authorities responsible for associated costs. The signed Declaration is retained on the applicant's file.

A signed Declaration is not sufficient on its own to demonstrate that an applicant (or their family member) will not cause an excessive demand – it must be supported by a detailed, credible and viable Mitigation Plan that reflects the applicant's (or family member's) individual needs.

Once an applicant has landed as a permanent resident, however, they have no ongoing obligation to update IRCC on compliance with their Mitigation Plan, and IRCC's ability to track whether the Mitigation Plan is being respected is limited.

B. Proposed monitoring and enforcement mechanisms

To enhance IRCC's ability to monitor and enforce undertakings related to the excessive demand regime, the CBA Section proposes a number of measures, some of which may require regulatory amendment.

Amended Declaration of Ability and Intent

The current Declaration does not include any statement to underpin the weight of the document that applicants are signing. For example, it does not indicate that it forms part of the

²² *Supra* note 2 at page vii

overall application, and that false statements or failure to abide by the Declaration could result in a finding of misrepresentation.

The CBA Section recommends that the Declaration be amended to align with the overall format of IRCC's immigration forms, and given an IMM number. The Declaration should include an additional undertaking, acknowledging the binding weight of the Declaration being signed and its length (five years). Like the undertaking on the IMM0008 form, there should be an acknowledgment that any false statements by the applicant may result in their exclusion from Canada, and may be grounds for their prosecution or removal, and that the signed Declaration will form a part of their immigration record. A disclosure paragraph – similar to one on the IMM1344 (Application to Sponsor, Sponsorship Agreement and Undertaking), which clarifies that the information provided may be used for enforcement – may also be effective.

These changes would reinforce the seriousness of the Declaration, making applicants aware of their responsibilities when signing. This may reduce the number of applicants who fail to abide by the commitments in their Mitigation Plans. The changes are unlikely to require a legislative or regulatory amendment.

RECOMMENDATION

10. The CBA Section recommends amending the Declaration of Ability and Intent to align with the overall format of IRCC's immigration forms, and include an undertaking acknowledging the binding weight of the Declaration being signed.

Reporting Framework Pilot

To address tracking deficiencies, the CBA Section recommends that IRCC initiate a random, time-limited reporting framework as a pilot, to collect additional information on whether applicants are abiding by their signed Declarations. To collect a usable sample size, mandatory reporting could be required annually, as a condition of landing, over a two year pilot period.

If the pilot reveals evidence of a widespread compliance issue, additional tracking measures would be reasonable given the significance of Declarations to applicants in overcoming inadmissibility and obtaining permanent residence based on their Mitigation Plans. They are also supported by IRPA s. 13.1, which sets out the binding weight of an undertaking by a foreign national. Other immigration programs, such as the entrepreneur, fiancé visa, and

conditional permanent residence for spouses, have imposed specific conditions on permanent residents related to the basis on which they applied.

The reporting requirement could be standardized at four years into the relevant five year period for permanent residence cards, reducing administrative burden on all parties.²³ This would also allow the reported compliance information to be factored in to potential Canadian citizenship applications – which can be filed by permanent residents four years after landing in Canada and currently take approximately one year to process. A statement should be included in the amended Declaration that acknowledges the requirement that applicants report on their mitigation activities at the end of the time period specified.

To facilitate this process, applicants who file a Mitigation Plan addressing social services would need to be coded in GCMS. Specific codes already distinguish excessive demand categories – T9 for social services and H9 for health services. With a positive decision, these codes are changed to T1 and H1, though the medical assessment code (M5) remains unchanged. On landing, applicant files flagged with a T1 code indicating that reporting requirements apply, should be given a bring-forward date. Applicants should be counselled on the conditions of their entry and given specific instructions on the requirement to report. The benefit of this approach would be that all permanent residents with this code on their file would have to complete reporting. This would ensure consistency and avoid differential treatment for those with certain medical conditions.

On a file's bring-forward date, a template letter could be triggered and sent to the permanent resident requesting evidence of compliance with their Mitigation Plan (or an explanation and supporting evidence for why their plan was no longer operational and that they are not causing an excessive demand). In many cases, the necessary evidence would be minimal, such as receipts for private social services or confirmation of enrolment in private school. The letter could also indicate that failure to provide satisfactory evidence could lead to a section 44(1) report and referral on the basis of misrepresentation.

An Officer reviewing a permanent resident's file for renewal would consult the GCMS notes, which would identify that the applicant requires the compliance review. Citizenship

²³ Permanent Residence Cards are issued for a 5-year period. Exceptions to this rule are in IRPR s. 54(2)– in such cases a Card is only issued for a period of 1 year.

applicants with a reporting requirement on their file could also be flagged and placed on hold pending receipt of their report.²⁴

Officers should have discretion to assess extenuating circumstances, and cautioned to only assess whether an applicant has caused an excessive demand (and not whether they followed through on their Mitigation Plan exactly). This reflects the fact that an applicant's circumstances may change over time, and the undertakings in their Declaration are made in relation to excessive demand, and not the specifics of their Mitigation Plan.

RECOMMENDATIONS

11. The CBA Section recommends implementing a mandatory time-limited reporting pilot to ensure applicants are fulfilling the undertakings made in their signed Declaration of Ability and Intent.

12. The CBA Section recommends that if non-compliance is determined to be an issue, a formal mandatory reporting requirement at 4 years post landing be implemented for all applicants who enter Canada based on a mitigation plan.

Require evidence of compliance for Permanent Resident Card renewal

If a compliance issue is identified on a smaller-scale, or if a reporting framework would unduly burden IRCC resources, the CBA Section recommends that IRCC consider an alternative measure using processes already in place. This might include linking the first renewal of an applicant's Permanent Residence Card to a requirement to submit evidence that the applicant complied with the undertakings in their Declaration and did not cause an excessive demand.

Where a Mitigation Plan is submitted to overcome inadmissibility, the applicant's file could be flagged with the requirement to demonstrate fulfilment of the undertakings in their Declaration. On application for renewal, the Officer would refer to the reporting flag (T1) and send a letter to the applicant to submit evidence of compliance with their Mitigation Plan. The applicant's file would be held in abeyance pending receipt of the information using current procedures for PR Card applications where additional information is required (*ENF 27, 8.5*).

Where satisfactory evidence supporting compliance is received, the applicant would be issued a new PR Card for five years. Where unsatisfactory evidence was received, a letter would be

²⁴ There would be exceptions, including for permanent resident applicants already in Canada prior to landing.

sent to the applicant requesting additional evidence, and the file would be referred to the local IRCC office for more in-depth review. If the applicant was found to non-compliant, then the Officer would write a report under section 44(1) and return the file to CPC-PRC to issue a PR card valid for one year, as per procedures currently in place (*ENF 27, 8.6*).

RECOMMENDATION

13. The CBA Section recommends that an alternative measure for monitoring could include requiring evidence of compliance with an applicant's Declaration of Ability and Intent for Permanent Resident Card renewal.

Monitoring when excessive demand is suspected

Another alternative is that IRCC could take an "only when needed" approach to monitoring. Similar to the current process in IRPR section 72.1 for sponsored spouses, evidence of compliance with an applicant's undertakings in their Declaration could be required if IRCC had reason to suspect that excessive demand had taken place in the relevant five-year period. Monitoring could also be based on random spot audits. A number of Memorandums of Understandings (MOUs) already in place with government programs could be used in the same way they are for defaults in sponsorship undertakings to flag the use of social services in question. For example, the Canada Revenue Agency is able to confirm receipt of any social services and child care services, and the Ontario Ministry of Community and Social Services has records of application for (or issuance of) social benefits under its umbrella.

RECOMMENDATION

14. The CBA Section recommends that another alternative measure could include monitoring only when non-compliance is suspected.

Enhanced applicant counselling on Mitigation Plan obligations

When approving an application for permanent residence where a positive admissibility decision is based on a Mitigation Plan, the CBA Section also recommends that applicants be counselled on the binding nature of the undertakings in their Declarations. This should clarify their obligation to maintain updated contact information, as well as any reporting requirements, and that a finding of misrepresentation could be made if their undertaking was entered into without a genuine intent to follow through. Applicants should also receive an information sheet reminding them of their undertakings along with the Permanent Resident

Visa Instructions letter mailed to them with their Confirmation of Permanent Residence (COPR).

RECOMMENDATION

15. The CBA recommends providing applicants with enhanced counselling and information on their Mitigation Plan obligations.

Application of existing misrepresentation regime

Legal mechanisms already in place can be used to enforce the excessive demand regime without legislative and regulatory amendment. Once it has been determined that a permanent residence is not in compliance with their Mitigation Plan, this would amount to misrepresentation, and the enforcement mechanism in IRPA section 40(1) could be engaged.

In the medical inadmissibility context, lack of compliance could be discovered through a permanent resident's report or spot audit, triggering a section 44(1) report with the potential of referral to the Immigration Division. At this stage, the permanent resident would have the opportunity to provide additional evidence demonstrating that they are, in fact, in compliance with their mitigation plan, as well as why a removal order should not be sought.

Unavoidable and good faith changes in circumstances could warrant an Officer's discretion. For example, a permanent resident may have intended to have their child attend a private school, but the school later determined that their programs were not suitable for the child's needs, and there were no other appropriate alternatives available in the region.

Should a report be referred to the Immigration Division, the permanent resident would attend an admissibility hearing to determine if they were inadmissible on the basis of misrepresentation. If they were found to be non-compliant with their Mitigation Plan, a removal (exclusion) order would be issued on the basis of misrepresentation. They would then have recourse through the Immigration Appeal Division.

RECOMMENDATION

16. The CBA Section recommends that the existing misrepresentation regime could apply to Mitigation Plan violations without the need for legislative and regulatory amendment.

VI. CONCLUSION

The CBA Section supports IRCC's efforts to streamline the excessive demand process, while maintaining inclusiveness and individualized assessments, and suggests that the process could be improved without the need for a significant overhaul of the program or legislative and regulatory amendment at this time.

We trust that our comments will be of assistance, and would be pleased to provide any clarifications requested.

VII. SUMMARY OF RECOMMENDATIONS

The CBA Section recommends:

- 1. expanding the CMAU's research and decision making role to better inform Procedural Fairness Letters and excessive demand assessments.**
- 2. updating the Medical Officer's Handbook to address challenges to timely and accurate information gathering.**
- 3. centralizing the excessive demand assessment process to the CMAU once a robust research and information system is in place.**
- 4. rewriting the Procedural Fairness Letters in plain language with clear instructions, including an explanation of which services are public, and which can be privately disbursed. The Letters should also recommend that applicants consider obtaining independent legal advice.**
- 5. rewriting the Procedural Fairness Letters in plain language with clear instructions, including an explanation of which services are public, and which can be privately disbursed. The Letters should also recommend that applicants consider obtaining independent legal advice.**
- 6. that IRCC websites provide more information for applicants on what is involved in excessive demand assessments, and what information is required in making them.**
- 7. that IRCC websites portray immigration lawyers positively, and encourage applicants to consider obtaining independent legal advice.**

- 8. that IRCC engage in further research in order to properly assess why excessive demand decisions are being overturned.**
- 9. focused and coordinated training between IRCC and CBSA explaining excessive demand case law and emphasizing the respective decision making functions of Officers under the IRPA.**
- 10. amending the Declaration of Ability and Intent to align more closely with the overall format of IRCC's immigration forms, and include an undertaking acknowledging the binding weight of the Declaration being signed.**
- 11. implementing a mandatory time-limited reporting pilot to ensure applicants are fulfilling the undertakings made in their signed Declaration of Ability and Intent.**
- 12. that if non-compliance is determined to be an issue, a formal mandatory reporting requirement at 4 years post landing be implemented for all applicants who enter Canada based on a mitigation plan.**
- 13. that an alternative measure for monitoring could include requiring evidence of compliance.**
- 14. that another alternative measure could include monitoring only when non-compliance is suspected.**
- 15. providing applicants with enhanced counselling and information on their Mitigation Plan obligations.**
- 16. that the existing misrepresentation regime could apply to Mitigation Plan violations without the need for legislative and regulatory amendment.**