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Heather Roberts
Integrity and Innovation Policy Unit
Immigration Enforcement, Customs, and External Review Policy Directorate
Canada Border Services Agency
100 Metcalfe Street
Ottawa ON K1A 0L8

Via email: iepu-upeli@cbsa-asfc.gc.ca

Dear Ms. Roberts,

Re: Proposed Regulatory Amendments to Removal Costs (IRPR s. 243)

I write on behalf of the Canadian Association of Refugee Lawyers (CARL) to provide our submission in response to the consultation notice posted on May 16, 2020 with respect to the Canada Border Services Agency's (CBSA) proposed amendments to the regulations regarding the collection and recovery of removal costs. These regulations are presently set out in section 243 of the *Immigration and Refugee Protection Regulations* (IRPR).[1] The proposed regulatory amendments would, *inter alia*, significantly increase the recovery costs imposed for all removals and introduce additional cost recovery for escorted removals and for detention prior to removal.

CARL is a non-partisan and non-profit association that serves as an informed national voice on refugee law and human rights. CARL's membership includes close to 400 lawyers, academics, articling students and law students from across Canada with an interest in legal issues related to refugees, asylum seekers, immigrants and the human rights of migrants. Relying on the broad experience of this membership, CARL has a mandate to research, litigate and advocate on behalf of these groups. CARL carries out this mandate in public interest litigation in the courts, before parliamentary committees, in the media and elsewhere in the public sphere.

At this time, CARL is deeply concerned by the proposed regulatory amendment and recommends that it be revised. Firstly, the proposed recovery cost increases significantly exceed the rate of inflation between 2002 (when s.243 of the IRPR was first adopted) and today and do not appear to be justified. Secondly, recovery of detention and escort costs is unfair and, in the case of the former, appears to be *ultra vires* the *Immigration and Refugee Protection Act* (IRPA). Thirdly, the recovery cost increases will disproportionately impact

[1] Canada Border Services Agency, Consultation Notice: "Proposed regulatory amendments to modernize the

on those seeking family reunification and those requiring a medical escort during removal – contrary to the objectives of IRPA and the *Canadian Charter of Rights and Freedoms,* respectively.

(i) Cost recovery increases are excessive

CARL acknowledges that inflation has occurred since s.243 of the IRPR was adopted in 2002. But, based on the Consumer Price Index (CPI), as published by Statistics Canada under the *Statistics Act*, the inflation rate in that period was 36%.[2] An adjustment in this range would accord with the stated goal of better aligning the fees with today's costs. The immediate proposal goes well beyond this. It proposes an exponential increase in fees of more than 800% of the current maximum fee in the case of a person who is detained for removal to a country other than United States or St. Pierre and Miquelon (rising from $1500 under the existing regulations to $12,200 under the proposed regulatory amendments). Such an increase is excessive in scale and does not reflect inflation.

The consultation notice states that the recovery cost increases are "based on actual average enforcement expenditures incurred by the CBSA". But this statement appears to be inconsistent with the steady decline in airline ticket costs in the past two decades. According to *The Economist* (2018): "Between 1995 and 2014 they halved in real terms, according to the International Air Transport Association. But in 2014 that descent became a nosedive. In the following two years, the average airfare dropped by nearly a quarter."[3] Greater transparency in how CBSA arrived at the estimated enforcement costs reflected in the proposed amendment is needed.

Even assuming CBSA's cost estimates are accurate, the proposed amendment scraps the existing regulatory distinction in the cost recovery fee between relatively low-cost removals to the United States (which can be achieved by land) and comparatively higher-cost removals to all other counties (which necessarily involve air travel). This will result in saddling U.S. deportees with a recovery cost fee that has no connection to the actual operational costs incurred by CBSA. For example, under the proposed amendments, a U.S. citizen who is driven by CBSA escort from the Niagara Detention Center across the Rainbow Bridge to the U.S. – a 15km drive – would be subject to a cost recovery fee of $10,900 as a "foreign national who was removed under escort". Such a figure is excessive

[2] Bank of Canada, *Inflation Calculator*, https://www.bankofcanada.ca/rates/related/inflation-calculator/
[3] *The Economist*, "Why ticket prices on long-haul flights have plummeted" (December 8, 2018) https://www.economist.com/graphic-detail/2018/12/08/why-ticket-prices-on-long-haul-flights-have-plummeted. See also: *The Atlantic,* "How Airline Ticket Prices Fell 50 Percent in 30 Years (And Why Nobody Noticed)" (February 28, 2013) https://www.theatlantic.com/business/archive/2013/02/how-airline-ticket-prices-fell-50-in-30-years-and-why-nobody-noticed/273506/

and has little bearing to the actual operations costs incurred by CBSA to execute such a removal.

(ii) Cost recovery of detention and escort costs is unfair and, in respect of the former, appears to be *ultra vires* the IRPA

The text of s.243 of the IRPR states that cost recovery cannot occur where "expenses incurred by Her Majesty in right of Canada have been recovered **from a transporter**." This reflects the fact that fees levied under s.243 were traditionally only for external third-party costs that would normally be covered by a commercial transporter – i.e., the cost of the airline ticket. The proposed regulatory amendment would depart significantly from the text and history of the provision, expanding the scope of costs that can be recovered under s.243 of the IRPR to also include purely internal operational costs associated with removal – i.e., the cost of detention prior to removal and escorts during a removal. As detailed below, imposing these internal operational costs on deportees is unfair and should not be pursued.

Section 243 only permits cost recovery against "a foreign national who is removed from Canada at Her Majesty's expense". This reflects that, as stated by Immigration, Refugees and Citizenship Canada, fees imposed under s.243 are an "administrative penalty", presumably for having chosen not to pay for one's own removal arrangements.[4] But unlike the decision whether to pay for one's own removal arrangements, the Minister – and not the foreign national – chooses whether to detain a foreign national and whether an escort is used; the foreign national has no control over these decisions. To the contrary, in most cases, they are taken over her/his objection.

Moreover, in many cases, there is no opportunity for the foreign national to challenge the lawfulness of CBSA's decisions in those matters before removal takes place. For removals that occur less than 48 hours after arrest, the lawfulness of CBSA's decision to detain will not have been reviewed by the Immigration and Refugee Board. And there is no administrative mechanism to challenge CBSA's decision to impose an escort.

Even more troubling, the decision to detain and/or to impose an escort is often made for reasons of disability, especially mental health disability, for which the foreign national bears no moral responsibility – and thus, should also bear no financial liability. For these reasons, imposing detention and escort costs on deportees would be unfair and would be

[4] IRCC, *Payment of removal costs - R243*, (accessed: June 15, 2020) https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/fees/immigration/general/payment-removal-costs-r243.html.

poor public policy. To our knowledge, in no other area of law do individuals incur a debt to the Crown for the cost of their detention and other law enforcement expenditures.

Imposing detention costs under s.243 may also be *ultra vires* the statutory authority under which the regulation is enacted. That authority is s.53(g) of the IRPA which states: "The regulations may provide for any matter relating to the **application of this Division**, and may include provisions respecting [...] (g) the financial obligations that may be imposed with respect to a removal order." The Division referred to is Division 5 of Part 1 of the IRPA: "Loss of Status and Removal". But detention is not addressed anywhere in Division 5. Instead, detention is addressed exclusively in totally separate division: Division 6 of Part 1 of the IRPA: "Detention and Release". And, therein, the IRPA grants no power to adopt regulations respecting financial obligations that may be imposed with respect to a detention order. As such, regulations adopted under s.53(g) of the IRPA cannot be used to recover detention costs as detention is not a "matter relating to the application of the Division" in which that enabling provision is found.

(iii) Increased cost recovery fees would impede family unification and impose discriminatory burdens on those with disabilities

Section 3(1)(d) of the IRPA states that: "The objectives of this Act with respect to immigration are [...] (d) to see that families are reunited in Canada". Section 3(3)(d) and (e) of the IRPA states that: "This Act is to be construed and applied in a manner that [...] (d) ensures that decisions taken under this Act are consistent with the Canadian Charter of Rights and Freedoms, including its principles of equality and freedom from discrimination" and "(f) complies with international human rights instruments to which Canada is signatory." The proposed regulatory amendment is contrary to these imperatives.

While the cost recovery fees would be applicable to all deportees, they can be actually enforced only against a small sub-set of deportees who are subsequently successful in gaining authorization to return to Canada. In our experience, these are often individuals who are granted permanent resident visas to return through family class sponsorships or on humanitarian and compassionate grounds due to their deep-seated ties to Canada. Such visas are the principal means through which Canada meets its objectives under the IRPA to see that families are united in Canada. They are also the principal means through which Canada complies with its international law obligations around preserving the integrity of the family and facilitating family reunification under Article 17 of the *International Covenant on Civil and Political Rights* and Articles 9 and 10 of the *Convention on the Rights of the Child*.

The proposed elevated cost recovery fees – exceeding $10,000 in many cases – would be financially unattainable for many families. Their imposition will create a major barrier to family reunification and the best interests of children, contrary to Canada's statutory and

international law obligations. The ability of family members and children to be reunited should not be dependent on their financial capacity.

In addition, as mentioned above, the decision to detain a foreign national for removal is often made for reasons of disability, especially mental health disability, for which the foreign national bears no moral responsibility. Even more troublingly, the decision to impose a medical escort for removal is almost *always* made for reasons of disability or disease. To impose an "administrative penalty" on such individuals to recover the operational costs associated with accommodating their disability would be discriminatory.

This measure would also be contrary to Canada's equality obligations under s.15 of the *Charter* and the *Canadian Human Rights Code*. Indeed, persons living with serious disabilities will often, for that same reason, have the fewest financial resources available with which to pay the cost recovery fees.

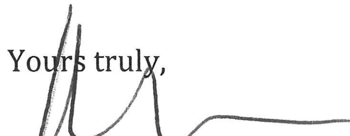
(iv) Recommendations

CARL is deeply concerned by the proposed regulatory amendment and recommends that it be revised to reflect the concerns set out in this submission. In particular:

- Any increases in the cost recovery fees should reflect the actual rate of inflation since 2002
- The regulatory distinction in cost recovery fees between land removals to the U.S. and air removals to all other countries should be preserved
- Cost recovery fees should not include costs for detention or escorts, especially medical escorts
- Cost recovery fees should not apply to foreign nationals returning following a successful family sponsorship or humanitarian and compassionate application for permanent residence

We would respectfully request an opportunity to discuss this issue further should you consider moving forward with next steps.

Yours truly,



Maureen Silcoff
President / Présidente
Canadian Association of Refugee Lawyers / Association canadienne des avocats et avocates en droit des réfugiés