CARL ACAADR **Canadian Association of Refugee Lawyers**
Association canadienne des avocats et avocates en droit des réfugiés

January 16, 2024

Anders Sorensen
Manager, Asylum Policy Unit
Immigration and Asylum Policy Innovation Division
Strategic Policy Branch
Canada Border Services Agency
100 Metcalfe Street, 10th Floor
Ottawa ON KlA 0L8

Via email: Anders.Sorensen@cbsa-asfc.gc.ca

Dear Mr. Sorensen,

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 Canada Gazette Part 1, Volume 157, Number 48, posted on November 27, 2023 with respect to the proposed amendments to the regulations regarding the collection and recovery of removal costs.[1] These regulations are presently set out in section 243 of the *Immigration and Refugee Protection Regulations* (IRPR). 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 300 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.

We write in follow-up to our June 15, 2020 response to the Canada Border Services Agency's (CBSA) consultation on the same proposed amendments.While we welcome the amendment to not impose the escorted fee rate on minors and medical escorts, we remain deeply concerned by the proposed regulatory amendment and recommend that it be revised pursuant to our previous submissions.

We re-iterate in this submission our previous concerns outlined in 2020 that have not been addressed in the proposed amendments, and strongly recommend that the amendment be revised in accordance with the following concerns:

[1] https://www.gazette.gc.ca/rp-pr/p1/2023/2023-12-02/html/reg1-eng.html

(i) The proposed recovery cost increases still 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;
(ii) 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);
(iii) The recovery cost increases will disproportionately impact 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.*

A summary of the concerns previously submitted, that have not been addressed by the proposed new amendments, follows.

(i) Cost recovery increases remain excessive

The inflation rate in the period between 2002 and 2023 was 56%, based on the Consumer Price Index, as published by Statistics Canada under the *Statistics Act*, even taking into account the high inflation over the past two years.[2] The adjustment being proposed by this regulatory amendment is well beyond this - 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 $1,500 under the existing regulations to $12,541 under the proposed regulatory amendments). Such an increase is excessive in scale and does not reflect inflation.

While CARL welcomes the acknowledgement that costs for land removals are less than for other types of removals, imposing the unescorted fee of $3,739 on relatively low-cost removals to the United States is still excessive. 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 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 $3,739. Such a figure is excessive 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

We remain concerned with the shift of cost recovery being proposed by this amendment to include the recovery of staff and administrative costs related to the role of CBSA.

The text of s.243 of the IRPR states that cost recovery cannot occur where "expenses incurred by His 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

[2] https://www.bankofcanada.ca/rates/related/inflation-calculator/

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., staff related costs, which are noted to account for 80% of the new fees. 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 His Majesty's expense". This reflects that the fee is to be imposed when a person is unable or unwilling to pay for one's own removal arrangements. 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 the person's 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. 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, even including the proposed reduced fee of $3,739. Downloading CBSA staff costs on these individuals is particularly concerning.

We maintain that for these reasons, imposing detention and escort costs on deportees would be unfair and would be 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 such a fee on foreign nationals is discriminatory and penalizes vulnerable people who are unable to pay by imposing additional obligations for these individuals to cover the staff and salary costs of CBSA officers as compared to those who are able to pay for their own removal arrangements. This is deeply concerning and unfair.

Finally, we re-iterate our concerns with respect to imposing detention costs under s.243, and the fact that doing so may also be *ultra vires* the statutory authority under which the regulation is enacted. This has not been addressed in the current published consultation. As previously submitted, 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 a separate division: Division 6 of Part 1 of the IRPA: "Detention and Release". 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 remains contrary to these imperatives.

While the cost recovery fees would be applicable to all deportees, they can only be enforced against a small sub-set of deportees who subsequently succeed in obtaining authorization to return to Canada. 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 $12,500 for just one adult 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. The availability of s.24 and s.25 of IRPA is not a solution to these barriers.

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, even with the application of the reduced but prohibitive fee of $3,739.

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 imposed fees. Imposing on individuals these fees that include CBSA staffing costs not incurred by those who are able to pay for their removal arrangements themselves is discriminatory.

(iv) Recommendations

CARL remains 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, including for land removals to the U.S., and should not include internal CBSA staff costs;
- Cost recovery fees should not include costs for detention or escorts;
- Cost recovery fees should not apply to foreign nationals returning following a successful family sponsorship or humanitarian and compassionate application for permanent residence.

Yours truly,

Nicholas Hersh
President / Président
Canadian Association of Refugee Lawyers / Association canadienne des avocats et avocates en droit des réfugiés