Submission of the Inter-Clinic Immigration Working Group to:

The Senate of Canada, Standing Committee on Social Affairs, Science and Technology

Regarding Bill C-6 - An Act to amend the Citizenship Act and to make consequential amendments to another Act

February 24, 2017

INTRODUCTION

The Inter Clinic Immigration Working Group (ICIWG) is a network of lawyers and community legal workers in Ontario community legal clinics and student legal aid services societies. Clinics are funded by Legal Aid Ontario to provide services to low-income individuals and disadvantaged communities. We serve clients in a variety of ways including summary legal advice, representation, public legal education and law reform activities. There are currently over 30 clinics in Ontario that belong to ICIWG, which has been meeting monthly in Toronto for over 25 years. Members of ICIWG are particularly concerned with immigration law matters, including issues of refugee law, family reunification through immigration procedures, migrant worker issues and citizenship matters.

ICIWG welcomes the introduction of amendments to the Citizenship Act through Bill C-6, reversing many provisions of Bill C-24, the Strengthening Canadian Citizenship Act that we opposed.¹ ICIWG also commends the new government for making this a priority piece of legislation, and we have been keen observers of its movement through Parliament and the Senate. Some of our members have appeared before the Committees studying this Bill.

Bill C-6 provides an excellent opportunity to create an inclusive and accessible citizenship regime that promotes maximum civic participation and engagement. We need to bring down barriers to citizenship, especially for already disadvantaged groups such as refugees, older adults, and women. In line with Canada’s international

¹ The bill received Royal Assent on 19 June 2014.
obligations, we support and endorse the submissions made to the Standing Committee on Citizenship and Immigration, in April 2016, by the Canadian Council for Refugees and join the CCR in encouraging the government to craft a new citizenship regime to which all applicants will have equal access without discrimination.

The Problem: Discriminatory Barriers under the Citizenship Act

Over the past 5 years, demand for assistance with citizenship applications at our legal clinics has grown dramatically. We regularly represent clients who are unable to learn English or French to the requisite level of proficiency and/or to pass the citizenship exam. This is a very disturbing and very real trend, because the great majority of these clients came to Canada under the family class or humanitarian/refugee class, none of which require language proficiency as a prerequisite to immigrate to Canada. For refugees, this problem is particularly troubling since they are practically, if not legally, stateless. These clients often see their entire families acquire citizenship and they alone face shame and stigma for failing to meet the requirements for citizenship. This is despite the fact that they are active members of our communities and in reality, will never have another home apart from Canada.

Ahmed used to love learning, and was a student of law when he was kidnapped by the Taliban and tortured in Afghanistan. He and his family were resettled to Canada as refugees after they managed to escape to Pakistan. In due course they applied for citizenship with letters from his counsellor and his psychiatrist, which spoke about his torture and his great difficulty with memory and cognitive function. His doctor described the number of psychotropic medications Ahmed takes for his Post Traumatic Stress Disorder and Panic Attacks. Ahmed then had to write the citizenship exam on two separate occasions, and when he failed the second time, he was invited for an oral hearing. His family all received their citizenship but he did not. The officer did not think the evidence showed sufficient compassionate grounds, nor establish that he was “unable to learn,” since he was able to speak a bit of English.

The current citizenship regime over-medicalizes considerations for waivers from the language and knowledge eligibility requirements, despite the language of “compassion” for waivers under section 5(3) of the Act. In the process, applicants often receive no
accommodation of their human rights-related needs, and must prove their inability to meet these requirements multiple times, despite strong up-front evidence. This is undignified and leaves our clients feeling humiliated.

These barriers disproportionately discriminate against our clients, who are overwhelmingly racialized and living in poverty. Many of our clients may be able to establish that they are a person with disability-related needs, but the majority have low literacy in their own language and when combined with previous trauma, face significant barriers to inclusive learning. There is in fact a growing body of literature on the interplay of low literacy, trauma, and barriers to learning.²

Maria left school around age 10 in her home country, Honduras. She never learned to read or write in her own language. Years later, her family was targeted in the deteriorating political situation and she fled to Canada with her husband and children. She has applied for citizenship twice now, and both times been refused. The second time she submitted up-front evidence from her doctor about her struggles with memory and her cognitive challenges around learning, as well as her severe anxiety and 20-year history of insomnia. Nevertheless she was invited to write the citizenship exam twice, and then invited for an oral hearing, all of which were very stressful to her. At each exam, her daughter attended and advocated for her mother not to have to undertake it, since they had submitted doctor’s letters. Each time, Maria was told she had no choice. At the second exam, the officer administering the test told her daughter, “Your mother does not look disabled. She was able to get out of bed today, wasn’t she?”

Refugees are over-represented among newcomers who face barriers to learning due to the effects of the psychological and physical trauma they have suffered. Canada has a legal obligation to facilitate access to citizenship for refugees:

“The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.” (UN Convention Relating to the Status of Refugees, Article 34).

However, in reality, our clients often must wait to acquire citizenship until they are old enough to be exempted from the language and knowledge eligibility requirements. This is a heartfelt loss for a significant number of immigrants to Canada, and it is a loss for Canada, which is denied the political participation of a great number of voices. Now is the time for the Senate Committee to recommend changes to the Citizenship Act and how it is implemented, so that this important piece of legislation becomes a truly inclusive law.

Our submissions below urge the Committee to recommend a broad and flexible approach to ensuring that refugees and other permanent residents with low literacy do not face discriminatory barriers to Canadian citizenship. Reducing the age exemption to the requirement to pass the citizenship exam and show proficiency in English or French back to 18-54 from the current 14-64 is an important first step, but it should not end there.

**The Solution: A Human Rights-Based Approach to Waivers, and a Compassionate Test that is Truly Compassionate**

The Canadian Council for Refugees (of which we are a member) brought these concerns to the Standing Committee on Citizenship and Immigration (CIMM) when it studied Bill C-6 last spring. ARCH Disability Law Centre also raised these concerns. In response, CIMM recommended the following which is now part of Bill C-6:

**Disabled persons - 5(3.1)** For the purposes of this section, if an applicant for citizenship is a disabled person, the Minister shall take into consideration the measures that are reasonable to accommodate the needs of that person.

**We have serious concerns about this provision.** We are grateful that the CIMM was responsive to the submissions made, but for the reasons set out below we believe this
provision will create a whole new set of problems and we recommend deleting it. We offer the following recommendations to remedy this and our other key concerns about the Citizenship Act:

RECOMMENDATIONS

1. Add a stand-alone provision for automatic waivers from the language and knowledge requirements for those who are unable to comply due to mental or physical disabilities, or barriers to learning.

2. Maintain the language of “compassionate” waivers under section 5(3) of the Act, but recommend that the Minister amend the instructions to Officers which currently fetter their discretion.

RECOMMENDATION 1 – Add a stand-alone provision for waivers from knowledge and language requirements as of right

Currently, waivers from the language or knowledge eligibility requirements for citizenship can be granted by the Minister on compassionate grounds, provided for under section 5(3) of the Citizenship Act. Section 5(4) of the Act allows for waivers to be granted “to alleviate special or unusual hardship,” but to our knowledge, this provision has never been used for knowledge or language waivers.

Applicants who have disabilities or learning impairments should have a right to a waiver and not be required to request a discretionary grant of an exemption. As such we recommend that a new stand alone section be added that states that the Minister shall grant a waiver of the language or knowledge requirements to an applicant with a mental

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3 Note that the United States Immigration and Nationality Act similarly provides at Sec. 312, [8 U.S.C. 1423] that: (a) No person except as otherwise provided in this title shall hereafter be naturalized as a citizen of the United States upon his own application who cannot demonstrate- (1) an understanding of the English language, including an ability to read, write, and speak words in ordinary usage in the English language: Provided, That the requirements of this paragraph relating to ability to read and write shall be met if the applicant can read or write simple words and phrases to the end that a reasonable test of his literacy shall be made and that no extraordinary or unreasonable conditions shall be imposed upon the applicant: and (2) a knowledge and understanding of the fundamentals of the history, and of the principles and form of government, of the United States. (b) (1) The requirements of subsection (a) shall not apply to any person who is unable because of physical or developmental disability or mental impairment to comply therewith.
or physical disability or learning impairment. This recommendation would bring the 
\textit{Citizenship Act} more in line with Canada’s domestic and international human rights 
obligations, including but not limited to the equality guarantees set out in: s. 15 of the 
\textit{Charter of Rights and Freedoms}; the \textit{Canadian Human Rights Act}; Art. 26 of the 
of Persons with Disabilities}.

\textbf{For clarity, we recommend that this stand-alone provision not be subsumed 
under the compassionate waiver section.}

\textbf{As stated, we have serious concerns about the current s. 5(3.1).} We fear that this 
will create an unnecessary two-part test that will impose a new burden on citizenship 
officers’ decision-making and create a new body of jurisprudence to determine if 
decisions are properly carried out. For example, it will require officers to determine: Is 
the applicant someone with disability-related needs? What would the reasonable 
accommodation be, and how will we take it into consideration?

We fear it will entrench the current troubling practice that over-medicalizes the 
consideration of waivers, and that it maintains the current high bar of “disability”.

As well, the language of s. 5(3.1) (“take into consideration the measures that are 
reasonable to accommodate . . .”) could result in a lowering of the standard already 
required: providers of a government service already have a duty to accommodate to the 
point of undue hardship, a duty which arises from the common law interpretation of the 
rights set out in human rights legislation. Further, the existing duty to accommodate 
applies not only in respect of disability but all other grounds covered by the \textit{Canadian 
Human Rights Act}, so what would it mean to single out disability for this different 
standard?

As such we recommend that section 5(3.1) be removed from Bill C-6 and replaced with 
a stand-alone provision providing for waivers from the language and knowledge 
requirements for persons with mental or physical disabilities or barriers to learning.
RECOMMENDATION 2 – Maintain s. 5(3) to allow for compassionate waivers on other grounds, and recommend that the Minister ensure Instructions to decision-makers unfetter their discretion and are appropriately responsive to human rights principles.

We also believe that the current guidelines for determining waiver applications fetter officers’ discretion, are arbitrarily applied and provide for a cumbersome, time consuming and confusing process. The current guidelines fetter officers’ discretion by limiting the exercise of discretion to situations in which there is evidence of a severe and permanent disability.4

Currently officers have conflicting instructions regarding the processing of applications for persons with a disability. Operational Bulletin 530 B, Retesting and Communicating Results of Citizenship Knowledge Test instructs officers to schedule an oral examination for an applicant with a mental disability;5 however, many of our clients, despite providing up front medical evidence, are only scheduled for an oral examination after twice failing the written test.

4 Operational Guideline Citizenship: Ministerial discretion to waive some of the requirements for a grant of citizenship on compassionate grounds (updated Feb 5, 2016) states clearly that medical evidence of a permanent severe disability is required for a compassionate waiver: “The CMB [Case Management Branch] may approve a request for a waiver on compassionate grounds only in exceptional cases further to having reviewed an applicant’s particular circumstances. For example, an applicant may not be able to meet requirements because of a medical condition or disability. If the request to waive a certain requirement is on the basis of a medical condition or disability, the applicant should be asked to submit a medical opinion provided by their physician attesting to the fact that they are prevented from being able to meet the requirement by reason of their medical condition or disability.” http://www.cic.gc.ca/english/resources/tools/cit/admin/decision/compassionate.asp

5 Operational Bulletin 530-B – January 16, 2014: Retesting and communicating results of the citizenship knowledge test: http://www.cic.gc.ca/english/resources/manuals/bulletins/2014/ob530B.asp. Note this replaced OB 244-B, which provided for re-testing from March 2010 to February 2011 as a “temporary measure aimed at mitigating the impact of the new citizenship test introduced following publication of the new study guide”. OB 530-B provided that testing should be by-passed where a medical condition is “clear from information on file” or “if CIC staff only become aware of a medical condition at the time of testing/interview”.
The Citizenship Grants: Knowledge Testing guideline similarly instructs officers to refer an applicant with a disability for an oral examination but lists as a disability only hearing or sight impairment. Mental health or cognitive disabilities are not mentioned.6

This same guideline provides that in the interests of procedural fairness all applicants should have the same number of opportunities to pass the knowledge test (that is 2 chances to pass the written test and one chance to pass an oral examination). Although the intent of this instruction is fairness, in fact it is being applied so strictly (one officer advised a client that there is no choice; they must write the test again) that it undermines the principle of substantive equality.

Finally, another guideline does not require an officer to advise applicants of the availability of waivers and the process for applying.7

In practice, the cases we commonly see demonstrate that regardless of the upfront submission of evidence of a disability or learning impairment, applicants for citizenship are effectively put onto a conveyor-belt process. They are expected to write the citizenship exam twice and then are asked to undergo an oral exam. Only then will the request for a compassionate waiver be sent to Case Management Branch (CMB) at National Headquarters for consideration of the evidence, prompting significant further delay. Most of our citizenship applicants see little to no accommodation at any step of the processing of their citizenship applications.

In the final analysis, decisions to grant waivers rely heavily on the medical evidence and are granted only when the evidence establishes a permanent severe disability. Where the officer decides that the medical evidence does not establish a permanent severe disability, the applicant is instructed to try again, at a new cost of $630.

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7 Operational Guideline Language and knowledge hearings for adults, for applications received at the CPC-S before June 11, 2015 (updated Feb 5, 2016): http://www.cic.gc.ca/english/resources/tools/cit/grant/hearing.asp
This is a far cry from “compassion”; it sets a very high bar that many applicants cannot meet and puts applicants through a humiliating and undignified process. It also necessitates administratively burdensome and costly re-testing and oral hearings, and increased litigation of refused cases. Allowing for automatic waivers for those who identify as facing barriers to learning will save a great deal of administrative burden and cost. The remaining waiver determinations on compassionate grounds will face less judicial scrutiny if officers are instructed to exercise equitable broad discretion, and respect human rights norms in accommodating applicants.

To complement and support these recommendations, we also recommend:

1. Bring back Judicial Review of Application Refusals as of Right

Bill C-24 added a requirement to seek leave for judicial review of a citizenship refusal (now s. 22.1 of the Act); this leave requirement replaced the previous system of appeals to the Federal Court as of right. Pre-Bill C-24, refused citizenship applicants could not bring their matters to the Federal Court of Appeal; the previous government brought this change about ostensibly to provide a uniform system of access to judicial review for all immigration and citizenship matters. We believe this new leave requirement imposes an additional cost, as applicants must hire a lawyer to do the leave application. We see this as a barrier to access to justice for many citizenship applicants, particularly given the common problems in the processing of citizenship applications for the most vulnerable newcomers that we describe above. To remedy this problem we recommend:

- Eliminate the leave requirement so that applications can once again go to the Federal Court for judicial review without a leave requirement.

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2. Reduce the Application Fee and provide for fee waivers for people on social assistance

The application fee of $630 is particularly onerous for people living on limited income, and is a significant barrier to accessing citizenship for our clients. We recommend:

- Reducing the fee, and providing for a waiver from the fee for applicants on social assistance.

3. Bring the age range for knowledge and language back down to 18-54 years

We strongly reiterate our support for Bill C-6’s proposed reversion of the language and knowledge test requirements from applicants aged 14-64 years to the previous age range of those aged 18-54 years. We see first-hand at community legal aid clinics across Ontario how language acquisition is genuinely impeded for immigrants with low literacy and/or trauma.

CONCLUSION

Given that the right to citizenship is a gateway to so many other fundamental rights, the Canadian citizenship regime can and should do better to remove discriminatory barriers. When the evidence provided by an applicant identifies barriers to learning, the language and knowledge requirements should be waived. When the evidence identifies another human rights-protected ground, an individualized assessment of needs should be made under the s. 5(3) compassionate provision so that proper accommodation is provided in the process and in the substantive result.

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