Guardianship Regulations 2002-2005

Issue: there is a need to explain the context and rationale for the making of the guardianship regulations as part of the family class in 2002, and their repeal in 2005.

Summary:

- Concern for jurisdiction of PTs, protection of children, and a desire to accommodate more families were policy drivers of these regulations. However, the risks to children's welfare, and resource requirements to implement such a scheme prevented PTs from supporting it.
- Although lobbying from stakeholders (e.g. Muslim families) may have played a part, several references to a low level of public interest were made in various policy documents.

Sequence of events and key observations:

- **In 1998, a publicly available policy document stated the Department would explore the possibility to create guardianship regulations** for "countries in which adoption is not permitted". The origins of this issue are unclear.
- **Consultations with PTs** ensued and the Department worked to prepare guardianship regulations for pre-publication in Dec. 2001, along with a large package of new regulations.

- **The pre-published regulations** placed certain limitations on which cases could be approved, including a need for consent of the authorities in the PT where the sponsors reside, etc. The intent was to protect best interests of the children involved, and mirror to some extent the adoption regulations.

- **Department decided to make the regulations in June 2002** but did not bring into force, to give PTs opportunity to further review their positions.
- **Department continued to consult PTs.** In Fall 2002 after a round of written consultations, all PTs that responded (11) indicated they did not "opt in" to the guardianship provisions.

  CIF was deferred until April 2004, then again until April 2005.
- **Finally the Department repealed the regulations** when it was abundantly clear that no PT would participate in the regulatory scheme laid out which required PT participation due to their expertise and jurisdiction in child welfare.
- The on-going availability of **discretionary processing using H&C** was mentioned throughout, including in the RIAS for the repeal in 2005.

Background:

- In December 2001, the Department pre-published a complete new set of regulations, the *Immigration and Refugee Protection Regulations* (the Regulations) to govern Canada's immigration and refugee protection programs, following the passage of the new *Immigration and Refugee Protection Act* (the Act) in 2001. These Regulations, with some adjustments, were finalized via final publication in the Canada Gazette Part II on June 14, 2002, and for the most part they came into force, along with the Act, on June 28, 2002.

- The Act and Regulations brought in numerous policy changes, which were explained in the Regulatory Impact Assessment Statement (RIAS) that was published in the Canada Gazette; due to the large number of changes, most of the changes were explained only at a fairly high level.

- New provisions that would have allowed for the family class sponsorship of children in guardianship regulations were made as part of these regulatory amendments, but were not brought into force, and were eventually repealed in 2005. These provisions built on the pre-existing framework that allowed Canadians and permanent residents to adopt a child internationally.

The stated policy intent of the Department's proposal, and early PT engagement:

- In June 2001, while the proposed IRPA (Bill C-31) was being studied at the Standing Committee on Citizenship and Immigration (CIMM), the ADM of Policy Joan Atkinson stated at the CIMM that the Department intended to bring in regulations to allow for the sponsorship of children under guardianship or kafala, in certain limited situations. A requirement would be consent from provincial authorities: [1]

> *There are certain countries that do not allow for adoption, but recognize only guardianship. Probably the best example of this is some Muslim countries that recognize kafala, which is a guardianship arrangement, not a full adoption.*
>
> *In recognition of that particular situation, the regulations will provide for guardianship arrangements where the child is either orphaned or abandoned, is less than 18 years old, resides in a country that doesn't allow for full adoptions, and—very important here—consent is obtained from the competent foreign authorities and the province or territory of destination, and the child is guaranteed the same social benefits as come with full adoption in the province of designation. These regulations will only be used for children who are placed under these guardianship arrangements if the province of destination agrees to give them full rights and the originating country agrees to their leaving that jurisdiction to come to Canada*

[1] See Evidence for the Standing Committee on Citizenship and Immigration, April 3, 2001 at 09:50.

- This echoed earlier an earlier proposal included in a 1998 consultation paper entitled "Building a Strong Foundation for the 21st Century", in which the Minister of Citizenship and Immigration of the day publicly presented broad themes for immigration law reform. Under the theme of "strengthening family reunification" the paper outlined several priorities affecting international adoptions that would be further discussed with provinces and territories, given that "adoption is a provincial responsibility".[2] Among proposals intended to "better protect the interests of children," one was about "**examining the possibility of extending family class processing to certain children under guardianship orders** for countries where adoption is not permitted."

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- Following the passage of Bill C-31, the Department set about preparing the regulations. The Regulatory Impact Assessment Statement (RIAS) pre-published in December 2001 explained the guardianship provisions were intended to "provide rules that allow for equitable consideration of adoption and adoption-like cases",[4] and seem to have followed closely the outline described by Ms. Atkinson earlier that year.

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[2] Building on a Strong Foundation for the 21st Century: New Directions for Immigration and Refugee Policy and Legislation" (1998). Document located in IRCC library. (p. 24).

[4] See the pre-publication in Canada Gazette Part I, Dec 15, 2001.

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- The provisions were finally published in June 2002. The RIAS outlined the purpose and design of the guardianship regulations was to:

> *"protect the interests of children, of their birth parents, and their adoptive parents or caregivers…" similar to the ways these interests were protected in the adoption context.*[6] *For example, there must be an assessment of the best interests of the child by requiring that the competent authority of the province or territory has conducted or approved a home study of the guardians.*[7]

- In addition to the principles and procedures in the Hague Convention on Adoption, which were designed for the context of intercountry adoption, the RIAS also cited Canada's accession to the *United Nations Convention on the Rights of the Child* as a source of its pledge to ensure that "adoptions and other child care arrangements are done in the best interests of the child."[8]

Description of the guardianship regulations and their coming-into-force date:

- Under the guardianship regulations, several requirements were established, including (see R117(1)(e) in Annex):
  - the child is under 18 when the guardianship is entered into;
  - the child's parents are deceased, or the child is declared to be abandoned by a competent authority;
  - the child cannot be adopted in the country in which they reside
  - child's country of residence places the child in the guardianship of the Canadian or permanent resident sponsor, and authorizes the child to leave the country in care of the sponsor
  - the competent authority of the province of destination of the child has provided a written statement confirming that it does not oppose the guardianship and that the guardianship will be recognized for the purposes of provincial law

- Mirroring the adoption provisions, the Regulations stipulated a role for the provinces and territories in assessing specific cases involving guardianship. In particular, paragraphs 117(1)(e)(iv), and 117(6) to (8) provided that a provincial or territorial authority would need to provide a written statement before any applicant could be approved for a permanent residence visa.

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[6] Final publication in Canada Gazette Part II Volume 136, Extra, June 14, 2002, p. 262.
[7] Ibid, p. 262. See also paragraph 117(6)(a) of the Regulations reproduced in the Annex.
[8] Ibid, p. 264.

- The regulatory text stipulated the guardianship provisions would come into force April 1, 2003, rather than on June 28, 2002, (the latter being the date when the bulk of the Regulations was to come into force) (see Annex, paragraph 365).

- The reason for the difference between the "indefinite" deferral described in the RIAS and the actual provision in the Regulations is not clear.

"The provinces lack the legislation and programs needed to recognize and receive children who would be brought to Canada under the guardianship regulations. The Regulations asked for provincial involvement, essentially

agreeing to the guardianship and confirming that such children would not be disadvantaged under provincial law. Several provinces still hold the view that long-term guardianship in place of full adoption is not in the best interests of children since these children would not have all the legal protection and social benefits which come with full adoption. As the provinces are not in a position to support implementation on June 28, 2002, the coming into force of these provisions will be deferred until at least one province is able to do so." [11]

Provincial views expressed during the pre-publication and final publication periods (2001-02):

- The Department had consulted the provinces and territories about the guardianship regulations prior to pre-publication (as noted above).[12] As summarized in a policy note, reactions from PTs were mixed prior to pre-publication. (
  [13] Other PTs reportedly expressed concerns, such as the existence of gaps in legal and social benefits for these children, prior to pre-publication.

- In the period between pre- and final publication, not only were most PTs still reticent,

- Some records provide details about consultations with provinces surrounding the time of the pre-publication and final publication of the guardianship regulations. A document containing a table summarizing PT responses to a consultation letter is unfortunately undated, other than the year 2002 which appears in the document name.[14]

- Unfortunately the original documents which the table summarizes have not been located. This table likely summarizes information received prior to March 2002 since

[11] Ibid, p. 265.
[12] Ibid.

[14] Table PT 2002.PDF

the documents examined that were submitted by PTs between March to December 2002 appear to state different positions.

- [redacted]

Preparation for coming-into-force in 2003 and decision to delay again:

- The Department consulted PTs again in October 2002, in preparation for the pending CIF of the regulations in April 2003.[16] Response letters were located in paper format and scanned.[17] All PTs that responded (11) indicated they did not "opt in" to the guardianship provisions.

- [redacted]

- A briefing note of February 2003 explains that following the engagement with PTs in fall 2002, no provinces were ready to implement or "opt in" to the guardianship regulations.[19]

[redacted]. The purpose of this clause would be to render the guardianship regulations only applicable if a PT has opted in, saving the Department and PTs from having to process applications, only to refuse them, from sponsors residing in provinces that did not wish to participate.

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15 [redacted]

16 Draft out-going letter asks for responses by Nov 29, 2002, which aligns with responses received.

17 See folder in GCDOCS which contains scanned response letters from PTs.

18 [redacted]

19 Briefing note, Feb 4, 2003

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Note: Evidently the regulatory amendment was made to postpone CIF from April 2003 to April 2004 but I did not review this documentation. Should be published in CG prior to April 2003.

2004 – deferral again to April 2005:

The memo makes clear that Department did not consider it an option to proceed with a guardianship program without PT involvement given exclusive PT jurisdiction over child

welfare. Without PT involvement official would not be able to assure the best interests of the child are protected, as in the adoption program.

Note: CIF was postponed from April 2004 to April 2005, but I did not review the published documentation in Canada Gazette. Should be published in CG prior to April 2004.

2005 – Decision to repeal regulations:

In a memo prepared in fall 2004, the Department again sought the Minister's decision about whether to repeal regulations or to defer once more the CIF.[22] This memo stated nothing had changed in the past year with respect to PT positions and again recommended repeal.

Pre-publication of repeal was issued January 8 2005, and no comments received to date. One newspaper article in National Post.

Final publication of repeal was in Canada Gazette April 6, 2005.[23] The rationale was due to lack of provincial territorial capacity or agreement, and explained that the regulations had been made but not brought into force to give them time to consider and study the issue.

The RIAS says that children under guardianship are still accepted **using H&C** and a policy on "de facto family members":

> *"currently covered by the departmental policy on de facto family members, which are assessed under humanitarian and compassionate considerations. The impact on these applicants entry into Canada is therefore minimal. (p. 439).*

No documentation has been located about this "de facto family member" policy – could it have been something used in the H&C world?

[22] Memorandum F-199624 (Word version indicates it was signed) prepared September 29 2004, signed October 26, 2004).
[23] Canada Gazette Part II, Volume 139, No. 7, April 6, 2005, PDF excerpt about repeal of guardianship regulations.

Annex: Guardianship Provisions in the IRPR 2002.

Excerpts of the Immigration and Refugee Protection Regulations (published June 14, 2002)[24]:

Interpretation:

2. The definitions in this section apply in these Regulations:

Guardianship (tutelle) means the relationship between a person and a child whereby the person has, by a written decision of the competent authority of the country where the child resides, been entrusted with the legal responsibility for the child and is authorized to act on their behalf.

Dependent child (enfant à charge), in respect of a parent, means a child who
(*a*) has one of the following relationships with the parent, namely,
(i) is the biological child of the parent, if the child has not been adopted by a person other than the spouse or common-law partner of the parent, or
(ii) is the adopted child of the parent; and
(*b*) is in one of the following situations of dependency, namely,
(i) is less than 22 years of age and not a spouse or common-law partner,
(ii) has depended substantially on the financial support of the parent since before the age of 22 – or if the child became a spouse or common-law partner before the age of 22, since becoming a spouse or common-law partner – and, since before the age of 22 or since becoming a spouse or common-law partner, as the case may be, has been a student
(A) continuously enrolled in and attending a post-secondary institution that is accredited by the relevant government authority, and
(B) actively pursuing a course of academic, professional or vocational training on a full-time basis, or
(iii) is 22 years of age or older and has depended substantially on the financial support of the parent since before the age of 22 and is unable to be financially self-supporting due to a physical or mental condition.

[24] Complete IRPR RIAS, Canada Gazette Part II (PDF): https://gcdocs2.ci.gc.ca/otcs/cs.exe/link/97492783

Family class – relevant sections for person under guardianship:

117. (1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is

…

(*e*) a person described in subparagraph (*b*)(i), (ii) or (iii) of the definition dependent child in section 2 and in respect of whom the sponsor became the **guardian** while the person was under the age of 18, if

(i) the person's parents are deceased or the person has been declared, by a competent authority in the country where the person resides, to be abandoned,

(ii) it is not possible for the person to be adopted in the country where they reside,

(iii) the competent authority of the country where the person resides has authorized the person in writing to leave the country in the company of the sponsor or their authorized representative, and

(iv) the sponsor resided in Canada at the time they became the person's guardian and the competent authority of the person's **province** of intended destination has issued a written statement confirming that it does not oppose the guardianship and that the guardianship will be recognized for the purposes of provincial law; …

117 (5) A foreign national shall not be considered a member of the family class by virtue of their **guardianship** by a sponsor unless the guardianship is in the best interests of the child, as the subject of the guardianship, within the meaning of the Hague Convention on Adoption.

117 (6) The guardianship referred to in subsection (5) is considered to be in the best interests of a child if it took place under the following circumstances:

(*a*) a competent authority has conducted or approved a home study of the sponsor;

(*b*) the guardianship was not primarily for the purpose of acquiring a status or privilege under the Act;

(*c*) the guardianship was in accordance with the laws of the place where the child resides; and

(*d*) there is no evidence that the guardianship was for the purpose of child trafficking or undue gain within the meaning of the Hague Convention on Adoption.

117 (7) If a statement referred to in subparagraph (1)(*e*)(iv), clause (1)(*g*)(iii)(B) or paragraph (3)(*e*) or (*f*) has been provided to an officer by the foreign national's **province** of intended destination, that statement is, except in the case of an adoption where the adoption is primarily for the

purpose of acquiring a status or privilege under the Act, conclusive evidence that the foreign national meets the following applicable requirements:
(*a*) in the case of a person referred to in paragraph (1)(*e*), the requirements set out in paragraph (6)(*a*) or (*d*); …
(b) [relates to child to be adopted in Canada]
(c) [relates to adopted child]

117 (8) If, after the statement referred to in subsection (7) is provided to the officer, the officer receives evidence that the foreign national does not meet the applicable requirements set out in paragraph (7)(*a*), (*b*) or (*c*) for becoming a member of the family class, the processing of their application shall be suspended until the officer provides that evidence to the **province** and the **province** confirms or revises its statement.

Coming into force:

365. (1) These Regulations, except paragraph 117(1)(*e*), subsection 117(5) and paragraphs 259(*a*) and (*f*) come into force on June 28, 2002.

(2) Paragraph 117(1)(*e*) and subsection 117(5) come into force on April 1, 2003.