THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

February 15, 2008

Mr. Norman Doyle, M.P.
Chair, Standing Committee on Citizenship and Immigration
Room 605, 180 Wellington Street
House of Commons
Ottawa, ON K1A 0A6

Dear Mr. Doyle:

Re: Bill C-17 – *Immigration and Refugee Protection Act* amendments (vulnerable foreign nationals)

I am writing on behalf of the National Citizenship and Immigration Section of the Canadian Bar Association (CBA Section), to voice our concerns regarding Bill C-17. The Bill would amend the *Immigration and Refugee Protection Act* (IRPA) to allow immigration officers to refuse work permits for foreign nationals deemed to be at risk of exploitation based upon Ministerial instructions. The CBA Section has significant concerns about the manner in which the Bill gives the Minister wide-ranging authority to shape the substance of the protective legislation. While we acknowledge the serious problem of trafficked persons and the need for sound government policy to assist them, this particular scheme is unnecessary and in fact counterproductive.

The CBA is a national association representing over 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. Our primary objectives include improvement in the law and in the administration of justice. As the recognized voice of the legal profession in Canada, the CBA is an active participant in the policy and legislative development process. The CBA Section has appeared before your Committee on numerous occasions to suggest how to ensure that the law related to citizenship, immigration, and refugee claims works for everyone.

In the course of the review of the Bill (formerly Bill C-57), we wrote to the Minister in June 2007. We outlined our concerns and asked specific questions about the impetus for the Bill and the manner in which it would be operationalized. Both the letter and the response, dated August 15, 2007 are enclosed. We regret to say that the response did not alleviate our concerns and in fact heightened them. These concerns are outlined below.

Outline of the Bill

The Bill proposes that:

- The Minister could issue instructions prescribing public policy considerations guiding an officer's discretion to issue a work permit to a foreign national. The considerations would be aimed at protecting foreign nationals from humiliating or degrading treatment, including sexual exploitation.

- An officer would refuse to authorize a work permit to a foreign national if, in the officer's opinion, the public policy considerations in the Minister's instructions justify the refusal.

- A refusal to authorize a work permit would require concurrence of a second officer.

The government's Press Release and Backgrounder dated May 16, 2007 ("Canada's New Government Introduces Amendments to Deny Work Permits to Foreign Strippers"), indicates that the intention of the Bill is to prevent entry of "strippers" (exotic dancers) and other "vulnerable" applicants, including "low skilled labourers as well as potential victims of human trafficking." "The instructions would be based on clear public policy objectives and evidence that outlines the risk of exploitation [foreign worker applicants] face."

Scope of Ministerial Instructions is Ill-Defined

Despite the government's stated purpose for introducing the Bill, neither exotic dancers, nor victims of human trafficking, nor low skilled workers are mentioned in its terms. The Bill authorizes an officer to refuse an otherwise valid work permit to *any worker*, in *any* occupation or industry, subject only to (as yet, undisclosed) Minister's instructions.

Foreign worker applicants for work permits do not exist in a vacuum. For every applicant there is a corresponding employer in Canada who has offered employment and who will be affected by refusal of the work permit. In most cases the employer has applied to Human Resources and Social Development Canada (HRSDC) for a Labour Market Opinion (LMO). The LMO has been issued after HRSDC consideration of a labour market shortage for the offered occupation, efforts by the employer to locate an employee from the local labour market, the appropriateness of salary and economic benefits arising from the employment of the foreign worker.

The undefined scope of the legislation and its potential applicability to any work permit applicant is a matter of concern to the CBA Section. The conflict between the public statement focus on exotic dancers and trafficked persons and the unrestrained language of the legislation is an obvious incongruity that begs explanation.

It is impossible to discern from the Bill the scope of instructions that might be issued by the Minister, or the nature of opinion that must be formed by the officer. It is unclear:

- what degree of "risk" must be apparent before a Ministerial instruction could issue;

- what evidence of risk the Minister would have in making a decision. CIC's response to our questions indicated that the nature of the evidence required could not be "speculated on hypothetically." It would remain entirely in the discretion of the Minister;

- how the Minister or officers would apply the standard of "humiliating or degrading treatment". Would they apply the "community standards test" of obscenity in *R. v. Butler*[1] to a non-criminal, employment opportunity? CIC's response did not state what definition would be used, indicating that the "definition of that phrase will develop over time as it is given judicial consideration under IRPA";

- whether the Minister's instructions will designate specific occupations (i.e. exotic dancers), or name specific employers or locations of employment.

- whether the Minister's instructions would extend to workers such as live-in caregivers, store clerks, hotel workers, or agricultural workers. Again, the instructions need not be limited to preventing mistreatment solely of a sexual nature. In the response to our letter, CIC could not provide us with an example of a proposed instruction or the kind of criteria that would be used to instruct officers. Instead, the response indicated that, "The authority is meant to be issued for unanticipated situations that might arise, and as such instructions cannot be described in advance".

Application of the Scheme will not Help and Might be Harmful

A mere **four** new work permits were issued to exotic dancers in 2006 (the last year for which the Department has statistics).[2] If the "clear public policy objectives" behind Bill C-17 is to reduce the number of foreign exotic dancers coming to Canada, we question whether there is a legitimate social problem in that regard. If the policy objective is to assist trafficked and other vulnerable persons, the Bill's focus on limiting work permits is unlikely to be effective. Worse, it will promote unwarranted refusals of work permits for those seeking a better life in Canada.

The legislation depends upon accurate predictions of employees being at risk of exploitive and abusive conduct before that conduct ever occurs. Enforcement dependent on prediction is inherently fallible. We view this as the fundamental flaw in the legislation. The focus should instead be on ensuring that work conditions for newcomers in Canada are appropriate, safe and non-exploitive, and ensuring that our criminal laws are strictly enforced against those who exploit trafficked and other vulnerable persons.

The government has not provided examples of how instructions to officers will be worded. Without the content and form of Minister's instructions, it is impossible to know whether this scheme will be accurate, effective or fair. For example, we can surmise that the instructions are unlikely to be based purely on specific occupations, as this is incompatible with the Minister's

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[1] [1992] 1 S.C.R. 452

[2] See letter to the CBA dated August 15, 2007. Testimony from CIC officials to this Committee on January 30, 2008 suggests that 21 work permits (including both new permits and extensions) were granted to exotic dancers in 2006.

assurance in the Backgrounder that "each application would be assessed on its own merits" and that officers would make their decisions "on a case by case basis". With instructions published in the *Canada Gazette*, it is unlikely that specific employees or applicants would be identified. In these circumstances, the Minister's instructions will likely provide a degree of latitude to officers to decide whether the risk exists. The Bill establishes no standard of evidence for the officer to apply the instruction to deny the work permit based on a risk of offending conduct. There is no requirement for evidence at all – see the reference to the officer's "opinion" in proposed s. 30(1.2). These conditions will make wrong decisions more likely than not.

Inappropriate for Objective to be Accomplished by Ministerial Instructions

While we are not convinced of the need for additional regulation in this area, we note that the Minister (or Governor in Council) could implement this policy through an amendment to subsection 200(3) of the IRPA *Regulations*, listing exceptions to the issuance of work permits. The amendment could provide:

> (3) An officer shall not issue a work permit to a foreign national if….
> (f) there are reasonable grounds to believe that the foreign national will be engaged in treatment that is humiliating or degrading, including sexual exploitation.

It is not clear why Minister's instructions are preferable to an amendment to the *Regulations*. The Rule of Law requires that governmental authority be legitimately exercised only in accordance with written, publicly disclosed laws adopted and enforced in accordance with established democratic procedure. The principle is intended to be a safeguard against arbitrary governance. Legislated entrenchment of ministerial authority to issue unreviewable instructions with the power of law may risk eroding this safeguard.

Our difficulty in evaluating Bill C-17 from the perspective of the fair administration of justice is precisely because the content of the law is not complete until the Minister implements binding instructions. These instructions are not known to Parliament now and will be implemented without review by Parliamentary Committee or the public, as is done with Regulations. The Minister's instructions would be reported to Parliament and published in the *Canada Gazette*. Pursuant to s. 93 of IRPA, instructions are deemed *not* to be statutory instruments for the purposes of the *Statutory Instruments Act*, and will not be referred to Committee for review, public discussion or comment. If Bill C-17 is passed in its current form, Parliament will have no future oversight of the content of the Minister's instructions and the consequential substance of the law.

No Appeal from a Bad Decision

There is no appeal provided, by IRPA or the proposed amendments, to remedy a bad decision to refuse a work permit on grounds of risk of exploitation. The applicant's only remedy under IRPA is an application for leave and judicial review before Federal Court. This is an unsatisfactory procedure for a number of reasons:

- There is no right to judicial review. IRPA mandates that leave must be granted. Approximately 85% of applications for leave are denied without reasons and without appeal from refusal to hear the judicial review.

- The employer has no standing to participate in the leave or judicial review application.

- Judicial review proceedings are not appeals; new evidence to contradict the officer's decision cannot be brought forward.

- Judicial reviews are time consuming. Most applications take eight months or more to be heard and determined.

Decisions rendered through the proposed process should not be insulated from a meaningful appeal.

Conclusion

To conclude, providing assistance to trafficked and other vulnerable people is a laudable goal; however, the Bill proposes a scheme that is vague, confused and potentially harmful to the very people it seeks to protect. Accordingly, we recommend that it not be adopted in its current form.

Once again, thank you for allowing us to provide our perspective on this important Bill.

Yours truly,

(original signed by Tamra Thomson for Alex Stojicevic)

Alex Stojicevic
Chair, National Citizenship and Immigration Section

THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

The Voice of the Legal Profession

La voix de la profession juridique

June 29, 2007

The Honorable Diane Finley, P.C., M.P.
Minister of Citizenship and Immigration
House of Commons
Ottawa, ON K1A OA6

Dear Minister:

Re: Clarification of Bill C-57

I write on behalf of the National Citizenship and Immigration Law Section of the Canadian Bar Association (CBA Section) to seek some clarification regarding the purpose and intended operation of Bill C-57, amending the *Immigration and Refugee Protection Act* (IRPA) to allow immigration officers to refuse work permits for foreign nationals deemed to be at risk of exploitation based upon ministerial instructions. The CBA is a national association representing over 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. Our primary objectives include improvement in the law and in the administration of justice. As the recognized voice of the legal profession in Canada, the CBA is an active participant in the policy and legislative development process. The CBA Section in particular has regularly contributed suggestions to your Department and government as to how to improve the law related to citizenship, immigration, and refugee claims to ensure that it works for everyone.

The Bill proposes that:

- The Minister could issue instructions prescribing public policy considerations guiding an officer's discretion to issue a work permit to a foreign national. The considerations would be aimed at protecting foreign nationals from humiliating or degrading treatment, including sexual exploitation.

- An officer would refuse to authorize a work permit to a foreign national if, in the officer's opinion, the public policy considerations in the Minister's instructions justify the refusal.

- A refusal to authorize a work permit would require concurrence of a second officer.

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- The Minister's instructions would be reported to Parliament and published in the Canada Gazette. Pursuant to s.93 of IRPA, instructions are deemed *not* to be statutory instruments for the purposes of the *Statutory Instruments Act*, and will not be referred to Committee for review, public discussion or comment.

Your Press Release and Backgrounder dated May 16, 2007 ("Canada's New Government Introduces Amendments to Deny Work Permits to Foreign Strippers"), indicates that the intention of the Bill is to prevent entry of "strippers" (exotic dancers) and other "vulnerable" applicants, including "low skilled labourers as well as potential victims of human trafficking." In order to understand what the proposed ministerial instructions might contain and how the government intends the scheme to operate, the CBA Section has a number of questions, outlined below.

"Humiliating or degrading treatment, including sexual exploitation"

This language, describing the scope of the Minister's instructions, mirrors the judicial test for determining obscenity. Therefore, we have the following questions:

1. Will the Minister's instructions target mistreatment solely of a sexual nature?

2. If not, what is the "humiliating or degrading treatment" that the government intends to prevent?

Harms being addressed ("Strippers")

The following questions relate specifically to the restriction of work permits to "strippers":

3. Will the Minister's instructions provide that all "strippers" are at risk of humiliating and degrading treatment, including sexual exploitation?

4. Alternatively, will the Minister's instructions provide that some, but not all, strippers are at risk of being subjected to treatment that is humiliating and degrading?

5. If the answer to question 4 is "yes," will the Minister's instructions specify that "strippers" would be at risk of such treatment because of:
    - The requirement to engage in particular activities, such as lap dancing?
    - Employment by particular employers?
    - Other criteria? If so, what are these other criteria?

6. (a) How many new work permits have been approved for foreign nationals for employment as "strippers" in 2006 and in 2007 to date?

    (b) Has the government received any reports of ill treatment or abuse of "strippers" issued work permits in recent years?

Harms being addressed (low skilled labourers and other vulnerable persons)

The following questions relate to low skilled labourers and other vulnerable persons to whom the Bill is also intended to apply, not including "strippers":

7. Which low skilled or other worker occupations are expected to be addressed in the Minister instructions? For example, do you anticipate issuing instructions respecting agricultural workers or live-in caregivers?

8. What treatment experienced by low skilled or other vulnerable workers does the scheme seek to prevent?

Evidence and Risk of Harm

The Backgrounder states that, "*The instructions would be based on clear public policy objectives and evidence that outlines the risk of exploitation [foreign worker applicants] face.*" The following questions seek further details regarding this statement:

9. (a) What nature and source of evidence will the Minister rely upon to support issuance of instructions?

   (b) What are the "clear public policy objectives" upon which the instructions will be based?

10. How significant would the risk of harm need to be before the Minister would issue instructions?
    - Possibility of harm?
    - Reasonable grounds to believe harm will occur?
    - Probability of harm?

11. Would an officer need to satisfy herself that a certain risk of proscribed harm exists before refusing issuance of a work permit? If so, which, if any, of the three degrees of risk listed in question 10 would apply?

Minister's Instructions

The use of Minister's instructions to provide policy supporting officer refusal of work permits is an unusual process. Consequently:

12. Why are Minister's instructions being utilized, rather than amending the IRPA Regulations to authorize officers to refuse work permits in appropriate circumstances, and using Guidelines to assist officers in interpreting the authority?

13. Specifically, why are Minister's instructions preferable to a regulatory amendment to subsection 200(3) of the IRPA Regulations listing exceptions to the issuance of work permits? Such an amendment could provide:

    (3) An officer shall not issue a work permit to a foreign national if….

    (f) there are reasonable grounds to believe that the foreign national will be engaged in treatment that is humiliating or degrading, including sexual exploitation.

14. Have draft instructions been prepared? Can the Minister provide us with the draft instructions for review?

Employer Input

With only rare exceptions, workers applying for a work permit have a pre-arranged employer. In all cases involving "strippers" or low skill workers, the employer has the placement of the worker supported by a Labour Market Opinion (LMO) issued by HRSDC. A LMO is issued only after consideration of the employer's application, labour market shortages, efforts to recruit a Canadian citizen or Permanent Resident, salary, and whether the salary and working conditions of the employment are appropriate. Therefore:

15. What opportunity does the employer have for input into the decision:
    (a) to issue an instruction that will affect the employer's ability to attract and hire foreign workers?
    (b) by an officer to refuse issuance of work permit, based on Minister's instructions?

16. What opportunity does an employer have to challenge a decision by an officer to refuse issuance of work permit to an intended employee, based on Minister's instructions?

Objectives of the Legislation

17. What is the purpose or necessity of amending IRPA clause 3(1)(h) to refer to protection of "public health and safety," rather than protection of "health and safety of Canadians"?

We believe that the answers to these questions will clarify the objectives of this proposed legislation, and help to bring a more fruitful analysis of the Bill's implications for the administration of justice in Canada. We look forward to your early response.

Yours truly,

(original signed by Jean-Philippe Brunet)

Jean-Philippe Brunet
Chair, National Citizenship and Immigration Section

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Mr. Jean-Phillippe Brunet
Chair
National Citizenship and Immigration Section
The Canadian Bar Association
500 - 865 Carling Avenue
Ottawa ON K1S 5S8

Dear Mr. Brunet:

I am replying to your letter of June 29, 2007, addressed to the Honourable Diane Finley, Minister of Citizenship and Immigration, concerning the purpose and intended operation of Bill C-57.

Citizenship and Immigration Canada's (CIC's) Immigration Branch and Legal Services Branch have considered each of the questions you have posed, and their input is set out in the following response.

Any Ministerial instructions issued under the authority of C-57 must "prescribe public policy considerations that aim to protect foreign nationals who are at risk of being subjected to humiliating or degrading treatment, including sexual exploitation" as set out in the proposed section 30(1.4). Therefore, Ministerial instruction might include, but are not necessarily limited to, mistreatment solely of a sexual nature. Respecting your inquiry regarding the phrase "humiliating or degrading treatment", it is also used in s. 121(1)(d) of *Immigration and Refugee Protection Act* (IRPA), in the context of human smuggling and trafficking. The definition of that phrase will likely develop over time as it is given judicial consideration under IRPA and in other policy and factual situations as well

No Ministerial Instructions have yet been prepared, and so your questions regarding the specifics of any such instructions cannot be answered. Any instructions issued must be founded on evidence. If and when instructions are issued, the criteria will be stated clearly in the instructions. As well, please keep in mind that C-57 will simply provide the Minister of CIC with the authority to issue instructions as described. This authority can be exercised as many times as the Minister concludes are necessary. Instructions issued under C-57 would be similar to instructions issued under authorities currently found elsewhere in IRPA, such as A 13(4) and A24(3). The authority is meant to be issued for unanticipated situations that might arise, and as such instructions cannot be described in advance.

With respect to your questions about the entry of exotic dancer temporary foreign workers, the number of "new" work permits (i.e., not extensions) issued to foreign nationals coded as exotic dancers in 2006 was four. The numbers for 2007 to date are not yet available. Stories of the

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alleged abuse of specific foreign nationals working in Canada as exotic dancers come to the attention of CIC staff working both in Canada and at Missions abroad from time to time. This information is passed along to the appropriate authorities for their action where applicable. However, such information is not compiled as part of official CIC records, as the Department has neither the mandate nor authority to collect and retain such information.

Regarding the "significance of the risk of harm" that would trigger Ministerial action, this is not something that can be speculated on hypothetically. It is the Minister's responsibility to decide when the risk of harm is sufficiently significant to justify the issuance of instructions. This is no different than the Minister having to decide when the humanitarian and compassionate considerations are sufficiently compelling to justify the exercise of discretion under IRPA section 24(3). A threshold cannot be abstractly defined. In any case where instructions exist, the officer must satisfy him/herself that the instructions apply to the specific application under consideration.

Will the Minister's instructions provide that all "strippers" are at risk of humiliating and degrading treatment, including sexual exploitation?

The decision to issue an instruction or instructions under C-57 will rest with the Minister. Officers will make their decisions applying the instructions where appropriate. An employer can seek to participate in a leave to seek judicial review of a decision to refuse a work permit when a work permit is refused on Ministerial instructions, in the same manner that such a review can be currently sought for other work permit decisions. However, keep in mind that the Federal Court Act restricts the making of applications for judicial review to persons *directly* affected by the matter at hand. As the work permit application is made by the worker, and not the employer, the Court might decide that the employer is only indirectly affected, and as such could not on his or her own standing make application for judicial review. There is of course nothing preventing the employer from assisting an applicant in his/her efforts to obtain judicial review.

Regarding the amendment to IRPA clause 3(1)(h) referring to protection of "public health and safety," rather than protection of "health and safety of Canadians", it is the belief of the Minister and of the Department that all persons legally in Canada, including foreign nationals as well as Canadian citizens and permanent residents, deserve to have the protection of their health and safety recognized in legislation. This change is meant to reflect this.

Thank you for writing. I trust that this information is of assistance.

Sincerely,

L. Arseneau
Ministerial Enquiries Division