THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

June 24, 2013

Via email: Philippe.Masse@cic.gc.ca

Philippe Massé
Director, Temporary Resident Policy and Program
Immigration Branch, Department of Citizenship and Immigration
365 Laurier Avenue West
Ottawa, ON K1A 1L1

Dear Mr. Massé:

Re: Immigration and Refugee Protection Regulations Amendments, Canada Gazette, Part I – June 8, 2013

I. INTRODUCTION

The National Immigration Law Section and the Canadian Corporate Counsel Association (CCCA) of the Canadian Bar Association (collectively the CBA Sections) appreciate the opportunity to comment on proposed regulatory amendments to the *Immigration and Refugee Protection Regulations.* The CBA is a national association of over 37,000 lawyers, notaries, students and law teachers, with a mandate to promote improvements in the law and the administration of justice. The Immigration Law Section comprises lawyers whose practices embrace all aspects of immigration and refugee law. CCCA members comprise in-house counsel employed in virtually every industry in Canada, encompassing public and private businesses, non-profit organizations, municipalities and crown corporations.

The objectives of the amendments are to protect the integrity of the Canadian labour market and to protect temporary foreign workers (TFWs) from the risk of abuse and exploitation. We support initiatives to deter non-compliance with the conditions imposed on users of the TFW Program. However, the proposed regulatory changes go too far in granting almost limitless powers of search and seizure, especially in situations where the department has no basis for suspecting abuse or non-compliance by that employer. Further, insufficient attention has been paid to the administrative burden caused by extending the period for compliance verification, and procedural protections for employers.

II. CONDITIONS IMPOSED ON ALL EMPLOYERS – SECTION 209.4

The CBA Sections have serious concerns about the conditions imposed on employers in Division 4 of the proposed regulations, including the requirement to report at any specified time and place to answer questions and provide documents, to provide any documents required, to attend any inspection, and to give all reasonable assistance to the person conducting the inspection.

These conditions are extremely broad and would authorize inspections without any warrant or due process.

Circumstances for Exercise of Powers – Sections 209.6 – 209.9

The powers in section 209.6 to209.9 may be exercised if an officer designated under the *Immigration and Refugee Protection Act* or the Minister of Human Resources and Skills Development has reason to suspect that the employer is not complying or has not complied in the past, or simply chooses the employer as part of a random verification of compliance.

The CBA Section recommends that in cases of suspected non-compliance, the officer or Minister of HRSDC should have the authority to:

- Require the employer to provide them with documentation and information relevant to the conditions imposed for the purpose of assessing employer compliance;
- Apply for a warrant authorizing an officer to conduct an inspection of the employer's business premises for the purpose of assessing employer compliance and to conduct such inspection; and
- Apply for an order directing certain personnel of the employer to perform interviews for the purpose of assessing employer compliance and to conduct the interviews.

For random verification of compliance, requiring the employer to provide documentation should be sufficient. If the amendments grant any additional authority for random verification, the scope of inspection should be limited to obtaining relevant documentation. Any additional authority should arise only if the officer or Minister of HRSDC have reason to believe, as a result of the production of those documents, that the employer is not complying and obtaining a warrant.

Examination of Documents

The CBA Sections recommend that proposed section 209.7 be revised to restrict the scope of documents to "such documents that are reasonably required to verify compliance with the conditions set out in sections 209.2 and 209.3." The requirement for "any document that relates to compliance with those conditions" is overly broad and could require employers to provide documents unrelated to the Temporary Foreign Worker Program (TFWP). As this certainly cannot be the intent, it follows such a broadly stated power needs to be qualified. We also recommend adding a clearly stated exception to documents that may be subject to solicitor-client privilege.

Entry to Verify Compliance

For random verification of compliance, section 209.8 could permit an officer to seek entry to a business premises to obtain and examine documents relevant to the employer's compliance with TFWP, if the officer has reason to believe that the employer would not provide the information on written request. However, any additional authority in section 209.8 for entry of a business premises, private property or dwelling-house to verify compliance should be limited to obtaining and examining information relevant to the employer's compliance with the TFWP (i.e. not "to examine any thing in the premises or place") and should require a search warrant unless there is an imminent threat of physical or mental abuse, injury or death to any person.

Person Accompanying Officer

In our view, it is unreasonable to authorize *any* person to accompany the Minister of HRSDC to assist in accessing the premises and conducting an inspection of the employer. Any "person" could include persons employed by other agencies of the Government of Canada or a province, including Canada Revenue Agency, Canadian Security Intelligence Service, Employment Standards, human rights commissions, a former employee, member of the media, or any other person having nothing to do with the purpose of inspection.

This is an open-ended power that could be exercised without respect for employer or employee privacy or other rights. The authority should be limited to only those persons reasonably required to provide security and to conduct the inspection authorized by the applicable warrant.

Additional Recommendations with Respect to Documents and Inspections

The CBA Sections recommend that the following rights of employers be specifically recognized either in the regulations or in government policy, to ensure their entitlement to procedural fairness is protected:

- the right to legal counsel and to be advised of such right upon initial contact under proposed sections 209.4 or 209.6-209.9;
- the right to receive copies of all information gathered in connection with assessing its compliance, including the notes and reports made during and after the inspection;
- the right of response to a determination that the employer did not comply with any of the conditions imposed on employers; and
- the right to appeal a decision by the Minister of HRSDC that an employer did not comply with any of the conditions imposed on employers.

Conditions Imposed on Employers – Section 209.2

The references to discharges in proposed ss. 209.2 (1)(a)(vi) and 209.3 (1)(a)(vii) are problematic. First, under s.730 of the *Criminal Code*, someone who is discharged is deemed not have been convicted. This seems to conflict with the proposed imposition of a prohibition against employing a foreign national based on a discharge.

Section 6.1 of the *Criminal Records Act* provides:

> 6.1 (1) No record of a discharge under section 730 of the Criminal Code that is in the custody of the Commissioner or of any department or agency of the Government of Canada shall be disclosed to any person, nor shall the existence of the record or the fact of the discharge be disclosed to any person, without the prior approval of the Minister, if
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> (a) more than one year has elapsed since the offender was discharged absolutely; or
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> (b) more than three years have elapsed since the offender was discharged on the conditions prescribed in a probation order.

As a discharge is not a conviction, there is no possibility of getting the other types of relief specified in proposed s.209.2 and 209.3 (acquittal, pardon, record suspension, etc.). This would mean that someone who was discharged has an indefinite bar against employing a foreign national, while someone who was convicted does not.

III. INCREASING PERIOD FOR COMPLIANCE VERIFICATION SIX YEARS NOT CONSISTENT WITH "ONE-TO-ONE" RULE FOR REGULATORY BURDEN

The proposed amendment to clause 200(1)(c)(ii.1)(B) of the Regulations increases the period of employer compliance verification from two to six years preceding the day on which the application for the work permit is received by the Department. It appears that the justification for increasing the period of verification may be for consistency with the requirements to keep books and records under the *Income Tax Act, Employment Insurance Act, Canada Pension Plan* and other legislation.[1]

The CBA Sections support protecting the integrity of the Canadian labour market and ensuring that employers uphold all requirements of the TFWP. However, we question the need to extend the compliance verification period beyond two years preceding the day on which a work permit application is received.

The proposed amendments would require employers to report, provide documents, answer questions and be subject to entry and inspection of premises for compliance verification over this extended period. This creates an additional administrative burden on employers that is not accounted for in the Regulatory Impact Analysis Statement accompanying the proposed amendments. It states that the "One-for-One" Rule applies — that this proposal is considered to have a small net burden for employers — and that the total administrative burden on employers has been calculated at $9 per business.[2] These additional costs are described as:

> … related to having to collect and store more documents. In particular, employers would have to collect and store information in order to enable them to demonstrate their compliance with TFWP requirements. Also, employers selected for an inspection, which could include an on-site visit, would have the additional burden of reporting the requested information to Government.

We do not agree with this assessment. The RIAS does not take into account the resources required by prudent employers to retain, store, manage, retrieve, review and report on information under the TFWP, as well as the internal and external advisory services required to participate and ensure compliance with TFWP requirements. Increasing the period for compliance verification from two to six years could effectively increase the burden by 300% or more. This would increase the cost and the risk of participation in the TFWP significantly for any employer.

The RIAS also states that "the necessary implementation measures, including training of CIC and HRSDC staff, would be funded out of existing departmental resources for this purpose." Proper training would be critical to the exercise of the broad powers being proposed. Limited resources for training and implementation, coupled with the longer period for compliance verification, means employer assessments may take significantly longer. This could negatively affect the employer's

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1 See Canada Revenue Agency, Income Tax Information Circular No. IC78-10R5 re: Books and Records Retention/Destruction, June 2010, online: http://www.cra-arc.gc.ca/E/pub/tp/ic78-10r5/ic78-10r5-10e.pdf

2 Treasury Board of Canada Secretariat, The "One-for-One" Rule, January 18, 2012, online: http://www.tbs-sct.gc.ca/media/nr-cp/2012/0118b-eng.asp. The "One-for-One" Rule reduces the administrative burden (i.e. the time and resources spent by business to show compliance with government regulations) in two ways:

1. It requires regulators to remove a regulation each time they introduce a new regulation that imposes administrative burdens.
2. When a new or amended regulation increases administrative burden on business, regulators will be required to offset - from their existing regulations - an equal amount of administrative burden costs on business.

ability to obtain Labour Market Opinions and work permits while the assessment is ongoing, and have adverse business consequences. The government should give consideration to permitting the continued processing of LMOs and work permits pending completion of the compliance verification unless evidence of unjustified non-compliance exists.

Periods for Compliance Verification and Inspection

Under these proposed amendments, employers must be compliant (and will have to attest to compliance on each LMO application) during the six year period prior to every work permit application received by the Department. In addition, employers would be required to report, provide documents and attend any inspection for six years after the last day of employment.

The proposed amendment replacing clause 200(1)(c)(ii.1)(B) of the Regulations states:

> (B) that the employer
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> (I) during the six-year period preceding the day on which the application for the work permit is received by the Department, provided each foreign national employed by the employer with employment in the same occupation as that set out in the foreign national's offer of employment and with wages and working conditions that were substantially the same as – but not less favourable than – those set out in that offer, or
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> (II) is able to justify, under subsection 203(1.1), any failure to satisfy the criteria set out in subclause (I), or

The proposed amendment to section 209.3(1)(c) states:

> (*c*) during the period beginning on the first day of the period of employment for which the work permit is issued to the foreign national and ending six years after the last day of that period of employment, the employer must
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> (i) be able to demonstrate that any information they provided under subsections 203(1) and (2.1) was accurate, and
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> (ii) retain any document that relates to compliance with the conditions set out in paragraphs (*a*) and (*b*).

The practical issues that arise include: (1) the importance of communicating and clarifying employer responsibilities under these new requirements to give them adequate opportunity to retain documents and conduct internal audits, if deemed necessary; (2) in practice, it may be difficult to determine the applicable time period for compliance verification for employers with multiple TFWs and proper training of officers involved in compliance verification would be critical; and (3) the requirement for compliance verification for the six year period preceding the day on which an application for the work permit is received by the Department should not be applied retroactively, as the legal requirement to retain documents will only be effective when the proposed amendments come into force.

IV. CONCLUSION

The CBA Sections commend the Government of Canada for its efforts to protect the integrity of the Canadian labour market and to protect temporary foreign workers from exploitation and employer non-compliance with TFWP requirements.

However, we recommend that the proposed amendments be revised to limit the exercise of powers for interviews and inspections, and to require a warrant except in circumstances where there is reason to believe a person is at risk of harm. Employers should also have the right to receive a written report on employer compliance verification audits and inspections and to respond and appeal to the subject matter thereof. In addition, we request reconsideration of the proposed amendments to increase the period for compliance verification from two to six years.

The CBA Sections recognize the benefit of CIC and HRSDC having additional authority to verify compliance with the TFWP. However, the scope of powers proposed in these amendments go against the principles of natural justice and may have the effect of jeopardizing Canadian jobs. If Canadian employers are subject to search, seizure, examination and suspension of privileges during verification of compliance, even as a result of their random selection for compliance verification, then many may seriously reconsider doing business in Canada.

The RIAS notes that HRSDC and CIC are consulting with national and regional employer, labour and other stakeholder organizations as part of the ongoing TFWP review, to seek input on possible options for improving the TFWP to better serve Canadians.

The CBA Sections encourage the government to consult further with the public and constituent associations on the development of its proposed amendments and changes in its compliance regime. The CBA Sections would welcome the opportunity to be involved in the consultations and to discuss the subject matter of this letter at your earliest opportunity.

Yours truly,

(original signed by Kerri Froc for Kevin Zemp and Grant Borbridge)

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