THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN
INFLUENCE. LEADERSHIP. PROTECTION.

May 12, 2014

Via email: nffn@sen.parl.gc.ca; soci@sen.parl.gc.ca; FINA@parl.gc.ca

The Honourable Senator Joseph A. Day
Chair, National Finance Committee
Senate of Canada
Ottawa, ON K1A 0A4

The Honourable Senator Kelvin K. Ogilvie
Chair, Social Affairs, Science and Technology Committee
Senate of Canada
Ottawa, ON K1A 0A4

Mr. James Rajotte, M.P.
Chair, Finance Committee
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, ON K1A 0A6

Dear Sirs:

**RE: Bill C-31, *Economic Action Plan 2014 Act,* No. 1, Part 6, Division 20, *Immigration and Refugee Protection Act* Amendments**

I write on behalf of the National Immigration Law Section of the Canadian Bar Association (CBA Section) to comment on the portion of Bill C-31 concerning changes affecting immigration law in Canada. Other CBA Sections will address other parts of Bill C-31 in separate letters.

The CBA is a national association of over 37,500 lawyers, notaries, students and law teachers, with a mandate to promote improvements in the law and the administration of justice. The CBA Section comprises lawyers whose practices embrace all aspects of immigration and refugee law.

In previous submissions, we have raised concerns about presenting significant changes to immigration law in omnibus budget legislation, which militates against meaningful comment or debate. This is compounded in immigration law with the growing reliance on Ministerial Instructions to effect substantial program and policy changes at the expense of Parliamentary oversight.

500-865 Carling Avenue, Ottawa, ON, Canada K1S 5S8
**tel/tél. :** 613.237.2925 | **toll free/sans frais :** 1.800.267.8860 | **fax/téléc. :** 613.237.0185 | www.cba.org
**Membership/Adhésion :** memberservice@cba.org | **PD/DP :** pd@cba.org | **Sections :** cba.sections@cba.org | **General/Générale :** info@cba.org

In brief, the CBA Section has concerns about the proposal to make electronic filing of certain applications mandatory, given the lack of internet access in many parts of the world and previous problems with electronic portals developed by Citizenship and Immigration Canada (CIC). The administrative monetary penalties imposed on employers for contravening conditions related to the employment of foreign workers lack clarity of application and lack procedural fairness with no review mechanism. Finally, the CBA Section questions whether it is necessary to terminate the Federal Investor and Entrepreneur classes, and have residual concerns due to the lack of specifics about the Expression of Interest system. We set out our concerns in further detail, and provide recommendations for amendments to the Bill.

## A. ELECTRONIC APPLICATIONS

### *Computer Access and Exclusion*

The proposed section 14(5) indicates that the regulations "may require" foreign nationals to submit certain applications electronically and may include provisions "respecting the circumstances in which those applications may be made by other means and respecting those other means".

Computers and the internet are still not available to many parts of the world. Even when they are available, applicants may not possess the computer literacy required to navigate and use the system. If it is mandatory to submit certain applications through the electronic system, it could arbitrarily exclude some applicants. The CBA Section therefore recommends that applications through the electronic system should be optional, and not mandatory.

### *Problems with current online system*

The online application system used by CIC continues to be problematic. Past issues have included:

- The inability to review documents already uploaded onto the system;
- Instances where applications were refused for lack of documents, when such documents were in fact already uploaded;
- Frequent occasions when the online portal is off-line or unavailable;
- Strict menu selections that constrain options and are confusing;
- Online forms for some immigration applications drafted in a way that did not permit accurate responses to some questions;
- The inability to provide additional information or documents in the event of a change of circumstances; and
- The inability of a representative to submit applications or respond to requests for information from CIC[1] or to add a representative in an efficient manner once an application has been filed.

This experience reinforces the value of maintaining paper applications as an option for applicants.

In the past, the CBA Section has offered to work with CIC to test new systems and provide constructive feedback through a select number of experienced immigration lawyers. We remain willing to test new systems. This will help ensure when the electronic system is revamped and expanded, it will meet the objective of being a more efficient processing tool.

Ensuring that any electronic filing system works through a variety of computer systems, operating systems, internet and modems, is an obvious first step. CIC would benefit from discovering what

---

1 See our February 17, 2010 letter to William Farrell, Director, E-Business Design and Application, Citizenship and Immigration Canada, online: http://www.cba.org/CBA/submissions/pdf/10-06-eng.pdf.

issues arise through experienced practitioners' use of the system. For example, drop-down menus may not provide all options. A Beta test of the proposed online process would also help to prevent glitches that would lead to a negative public perception of the system's efficiency and readiness for use. We ask your Committees to recommend in your reports that any new electronic system be tested with feedback from stakeholders, including immigration lawyers, before launching.

**Recommendations**

The CBA Section recommends:

1. That Bill C-31 should be amended to ensure that electronic applications are optional, not mandatory.
2. That any new electronic system be tested with feedback from stakeholders, including immigration lawyers, before launching.

## B. MONETARY PENALTIES

The CBA Section supports effective enforcement mechanisms for employers using the Temporary Foreign Worker Program. However, we have several concerns with the proposed system of administrative monetary penalties to be imposed on employers for contravening conditions related to the employment of foreign workers.

### *Lack of Formal Review Mechanism*

The bill includes no formal review options for employers found in breach. The penalties, both existing and proposed, are quite severe for employers. The most serious penalties can result in an inability to continue operating a business, as well as criminal consequences. Given the seriousness of these consequences, fairness and due process require a mechanism that permits review.

### *Lack of Detail and Clarity*

Bill C-31 permits the government to make regulations to establish "a system of administrative monetary penalties" for contravening employers, without any detail about amounts, the mechanism for imposing such fines or the circumstances in which they may be imposed. For instance, would they be only for existing offences in the Act, or for new offences? Would employers be subject to the new administrative penalties, criminal prosecution and other civil penalties concurrently for the same infractions?

The proposed wording also provides no clarity about the entity to whom the new penalties might apply. There is no definition of "employer" in the *Immigration and Refugee Protection Act* (IRPA) and relevant government departments and agencies disagree as to who should be considered the employer of foreign workers in certain circumstances, such as when a foreign company has contracted for services with a Canadian client. If a foreign company is considered the employer, it is unclear how the Act's jurisdiction would extend to it.

**Recommendations**

The CBA Section recommends:

3. That Bill C-31 be amended to add a formal review mechanism for employers against whom penalties, including fines, are imposed.
4. That Bill C-31 be amended to clarify who is the "employer" subject to monetary penalties, and how these provisions would apply to foreign employers.
5. That Bill C-31 proscribe imposing monetary penalties concurrently with other sanctions, to preclude double punishment for the same infraction.

## C. TERMINATION OF FEDERAL INVESTOR AND ENTREPRENEUR CLASSES

In May 2012, the CBA Section raised concerns about the proposal in another omnibus budget bill to summarily dismiss approximately 300,000 pending applications for permanent residence in the Federal Skilled Worker (FSW) class.[2] We cautioned that while it is important for Canada's immigration system to respond to changing labour market needs, the backlog reduction failed to meet principles of accountability and transparency. Accomplishing backlog reduction in this way harmed Canada's reputation and integrity in the immigration field, undermining public confidence and operating counter to Canada's economic interests.

It also gave rise to costly class action litigation, currently under appeal at the Federal Court of Appeal. Amongst the issues to be addressed are the legality of the retrospective amendments to IRPA, whether the *Canadian Bill of Rights* requires notice to affected applicants and an opportunity to make submissions prior to termination, and whether the legislation violates the right to liberty and security of the person under section 7 and the right to equality under section 15 of the *Canadian Charter of Rights and Freedoms.*

The proposed section 87.5, permitting termination of outstanding applications in any investor or entrepreneur class prescribed by regulation, is largely similar to the FSW legislation now before the courts. It will likely be subject to litigation if it is enacted. If section 87.5 is passed, CIC will no doubt begin the process of closing applications and refunding fees. If the law is found to be unconstitutional and is struck down, it will mean additional costs and an administrative nightmare to unravel termination proceedings.

In our view, the outcome of the FSW case will shed important light on the government's law-making powers and the administrative procedures it may validly use to manage applications. Proposed s.87.5 should be withdrawn pending a final decision from the courts.

Further, a hurried passage of proposed section 87.5 is not necessary. On June 26, 2010, CIC imposed an administrative pause for applications under the Federal Immigrant Investor Program. On December 1, 2010, the investment amount for investors was doubled from $400,000 to $800,000. On July 1, 2011, CIC imposed a temporary moratorium on new applications under the Federal Entrepreneur Class. As well, a cap of 700 new Immigrant Investor Program applications was imposed. On July 2, 2012, CIC put into place a second administrative pause on new Investor applications. In other words, since July 2011 (after the cap of 700 Investor applications had been reached), there have been no new Investor or Entrepreneur cases, and the backlog has been decreasing steadily.

### Recommendations

The CBA Section recommends:

6. That the amendments to terminate Federal Investor and Entrepreneur Class applications be withdrawn pending a final decision from the courts on whether similar legislation for federal skilled workers is constitutionally valid.

## D. EXPRESSION OF INTEREST ("EXPRESS ENTRY") MODEL

Efforts to modernize, adapt and adjust the selection system for economic class immigrants are important, and the CBA Section commends the government for taking steps to make improvements. However, we continue to have concerns about the manner in which the express entry system is being implemented and unanswered questions about what the system will entail, as outlined in our

---

[2] May 29, 2012 letter to James Rajotte, Chair, Commons Committee on Finance and the Honourable Joseph A. Day. Chair, Senate Committee on National Finance, online: www.cba.org/CBA/submissions/pdf/12-31-04-eng-Division54.pdf.

November 2013 submission[3] and highlighted below. While Bill C-31's summary indicates that it is to "clarify and strengthen requirements related to the expression of interest regime," the amendments are very modest and do not address these outstanding issues.

### *Consultation*

There have not yet been any specific details on the substantial shift in immigration policy, immigrant selection and application intake processes, represented by the express entry system. We understand that some employers have been invited to consultation sessions but invitations have yet to be advanced to other stakeholders, including immigration representatives.

Certainty of selection criteria and process is important to immigration applicants. Students and skilled workers often commit to work or study in Canada for years in advance to meet the selection criteria. The government must appropriately balance this need for certainty with flexibility, timeliness and underlying immigration policy objectives in order to attract the best applicants. Repeated changes to various immigration streams without public consultation or advance notice can undermine the confidence of potential immigrants and cause them to look elsewhere.

Meaningful consultation would enhance rather than impede the implementation process as there will be little opportunity to revisit the framework once the express entry system comes into effect. Key policy-making will now be made by Ministerial Instruction rather than regulatory amendment. We ask your Committees to recommend in your reports that the government consult relevant stakeholders over the next three to six months prior to implementing the express entry system.

### *Questions about the Express Entry System that Remain Unanswered*

In our previous submission, we listed questions that must be answered before the proposed express entry system can be meaningfully assessed:

1. What methodology and sources will the government rely upon to determine labour shortages and occupations that will be eligible for consideration under the Federal Skilled Worker and Trades programs?

2. What is the status of the technological and administrative systems that are being considered to implement the Express Entry system? Will electronic submissions be mandatory and if so, what if any exceptions will be permitted?

3. Will Express Entry include a Representatives Portal for submission of initial expressions of interest and subsequent permanent residence applications?

4. What will be required for Canadian employers to access candidates in the Express Entry system? How will job offers be validated? Will a labour market opinion continue to be required?

5. If labour market opinions will continue to be required for the Federal Skilled Worker category, will they be prioritized as compared to labour market opinions for temporary workers?

6. Will a fee be imposed for initial intake stage expressions of interest?

---

[3] November 20, 2013 letter to David Tilson, Chair, Commons Citizenship and Immigration Committee, and the Honourable Senator Raynell Andreychuk, Chair, Foreign Affairs and International Trade Committee, concerning Part 3, Division 16 of Bill C-4, *the Economic Action Plan 2013 Act No. 2,* online: www.cba.org/CBA/submissions/pdf/13-48-eng.pdf.

7. What aspects of the Express Entry system would be subject to judicial review or appeal? For example, what will be the procedures for review of the assessment of foreign credentials, language ability or other criteria used to determine whether an invitation to apply is issued?

8. What are the criteria that will be relied upon up-front to determine when candidates will be entered into the Express Entry pool and how will candidates be ranked? Will this be a completely automated process or will some of the criteria be subject to review and discretion on the part of an officer? How will the criteria be weighted?

9. How and when will the information in the initial intake process be validated?

10. Will there be a further elimination of Federal Skilled Worker backlog applications pre-dating January, 2015?

The further changes proposed in Bill C-31 do nothing to address any of these questions. The government's responses, including pre-publication of proposed selection criteria and weighted factors for express entry should be part of a robust consultation between government the public and stakeholders.

**Recommendations**

The CBA Section recommends:

7. That the government consult relevant stakeholders and the public over the next three to six months prior to implementation of the express entry system.
8. That as part of its consultation with stakeholders and the public, the government provide public responses to the questions posed by the CBA Section regarding the express entry system.

## E. CONCLUSION

Bill C-31 is the latest in a series of omnibus budget bills that have significantly changed the way in which applications of those seeking to immigrate to Canada are processed and determined, with little consultation of those affected and their representatives and with little time for considered study by Parliament. There is little evidence of urgency for these amendments and several risks:

- proceeding quickly with no plan for Beta testing with stakeholders of a greatly expanded system of electronic applications;
- outstanding litigation on the legality and constitutionality of similar legislation to that seeking to terminate outstanding investor and entrepreneur class applications;
- inadequate safeguards in new monetary penalties for employers; and
- inadequate details and robust consultations about the express entry system.

We recommend that provisions be clarified, safeguards be added, governmental powers to terminate applications be judicially determined, and further study and consultations be conducted before Parliament proceeds with these amendments to Canada's immigration system.

Yours truly,

*(original signed by Tamra Thomson for Mario D. Bellissimo)*

Mario D. Bellissimo
Chair, Immigration Law Section