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

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

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

Phil McColeman, M.P.
Chair, Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, ON K1A 0A6

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

Dear Senators Ogilvie and Day and Messrs. McColeman and Rajotte:

**Re: Bill C-43, Part 4, Division 24 – *Immigration and Refugee Protection Act***

I am writing on behalf of the National Immigration Law Section of the Canadian Bar Association (the CBA Section) to comment on Part 4, Division 24, of Bill C-43, the *Economic Action Plan 2014 Act, No. 2*, which amends the *Immigration and Refugee Protection Act* (IRPA). 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 CBA Section comprises lawyers whose practices embrace all aspects of immigration and refugee law.

The CBA Section has concerns with the IRPA amendments contained in Division 24 of Part 4 providing new authority for Ministers to publicly list the names and addresses of employers who have offended federal or provincial laws, amending the powers to inspect and to require documents for the purpose of verifying employer compliance with conditions imposed on the employment of foreign nationals, and imposing a new user fee that is exempt from the *User Fees Act*.

Our recommendations are aimed at ensuring the legislation better reflects the principles of transparency, proportionality, as well as procedural and substantive fairness in the exercise of government power.

Details regarding our concerns about Division 24 follow below.

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

## Part 4, Division 24 - Amendments to the *Immigration and Refugee Protection Act*

### Publication of Employer Names and Addresses

Proposed Section 30.1 of IRPA[1] provides new authority to the Minister of Citizenship and Immigration or Employment and Social Development Canada (ESDC), in accordance with the regulations, to publish on a list the names and addresses of employers who have:

- "been found guilty of an offence" arising from contravention of a designated IRPA provision; or
- "an offence under any other federal or provincial law that regulates employment or the recruiting of employees.[2]

The CBA Section has concerns with the proposed listing of offending employers. It is unclear whether its purpose is to further punish these employers, discourage other workers from becoming employed with them, or encourage public boycotting. The listing is not linked to any other related IRPA provisions, which may have clarified the intended object of the provision.

Because the listing may have significant consequences to the employer, it is important to ensure that the listing is carried out only in appropriate cases. For example, an employer may have hundreds of employees, multiple project locations and a small component of foreign workers, yet face listing for a breach of a local and isolated provincial safety regulation offence. The consequence of the listing may unreasonably outweigh the offence.

Non-compliance with provincial or territorial laws and determinations of non-compliance by government officials outside federal jurisdiction should rarely have federal consequences. Employers could potentially be found liable both under federal and provincial laws for the same act or omission and subject to multiple penalties.[3] We recommend removing the words "or provincial" from proposed s. 30.1(1), or alternatively, that only designated provincial offences should be the basis for federal listing.

The CBA Section further recommends that Bill C-43 be amended to provide consistent and reasonable protections against unwarranted listing. The provisions should clearly provide that being "found guilty of an offence" requires a judicial rather than an administrative finding. Employers should not be listed as a result of a "guilt" determination by a CIC, Canada Border Services Agency or ESDC officer in an administrative, non-judicial setting.

#### Recommendations

The CBA Section recommends that:

1. The words "or provincial" be deleted from proposed IRPA s. 30.1(1) or alternatively, that only designated provincial offences should be the basis for federal listing.
2. Proposed IRPA s.30.1(1) be amended so that that being "found guilty of an offence" requires a judicial determination rather than a determination by a CIC, CBSA or ESDC officer.

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1 Section 308 of Bill C-43.

2 The employer must also have requested a LMIA, employ or has employed a foreign national, or have provided s.32(d.5) information.

3 See our October 2014 letter to ESDC, online: www.cba.org/CBA/submissions/pdf/14-56-eng.pdf.

**Power to Inspect and Compel Production**

The powers to inspect without a search warrant and to compel the production of documents are an extraordinary invasion of both corporate and individual rights to privacy and security and to the right against self-incrimination.[4] They should be rarely granted and strictly limited.

The proposed amendment to s. 32(d.2) of IRPA[5] would designate "individuals and entities, including employers and educational institutions" as being subject to the power to inspect and compel productions of documents. The CBA Section continues to object to inspections and compelled production without warrant, due process, or statutory restraint.[6]

The IRPA regulatory scheme for compelled inspection and production of documents is based on suspicion, past non-compliance or random verifications of compliance. These are unreasonable justifications for warrantless and intrusive inspections and demands for documents. Compelled inspection and production of documents should be limited to the following:

- requiring the employer to provide only documentation and information that is **relevant** to the conditions imposed for the purpose of assessing employer compliance (with "relevance" to be defined);
- inspecting of the employer's business premises for the purpose of assessing employer compliance and to conduct such inspection only upon the officer obtaining a warrant authorizing the inspection; and
- directing certain personnel of the employer to attend interviews for the purpose of assessing employer compliance only upon obtaining a Federal Court order.

Bill C-43 would add a new provision, s.32(d.5),[7] authorizing regulations obliging employers to,

> …provide a prescribed person with prescribed information in relation to a foreign national's authorization to work in Canada for the employer, the electronic system by which that information must be provided, the electronic system by which that information must be provided, the circumstances in which that information may be provided by other means and those other means.

We oppose adding another layer of employer obligation for disclosure of employee information in relation to a program that already imposes extremely heavy administrative and financial burdens on employers, has fulsome requirements for production of records and reporting, and onerous sanctions for non-compliance.

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4 There are offences under IRPA concerning unauthorized employment of a foreign worker (ss.124 and 125) and an employer has the right not to incriminate themselves with respect to these offences and offences under provincial legislation.

5 Subsection 309(2) of Bill C-43.

6 See our letter to June 2013 letter to CIC, online: www.cba.org/CBA/submissions/pdf/13-31-eng.pdf.

7 Subsection 309(3) of Bill C-43.

**Recommendation**

3. The CBA Section recommends that the entire scheme of warrantless, compelled inspection of employers, production of documents and examination of individuals be reconsidered and restructured to provide judicial oversight of the exercise of these powers.

**User Fees**

The proposed s.89.2,[8] would authorize a new CIC fee regime and exempt it from the provisions of the *User Fees Act*. Section 4 of the *User Fees Act* requires all regulating authorities to:

(a) take reasonable measures to notify clients, and other regulating authorities with a similar clientele of the user fee proposed to be fixed, increased, expanded in application or increased in duration;

(b) give all clients or service users a reasonable opportunity to provide ideas or proposals for ways to improve the services to which the user fee relates;

(c) conduct an impact assessment to identify relevant factors, and take into account its findings in a decision to fix or change the user fee;

(d) explain to clients clearly how the user fee is determined and identify the cost and revenue elements of the user fee;

(e) establish an independent advisory panel to address a complaint submitted by a client regarding the user fee or change; and

(f) establish standards which are comparable to those established by other countries with which a comparison is relevant and against which the performance of the regulating authority can be measured.

These prudent measures should apply to all fees charged under the Temporary Foreign Worker Program and the International Mobility Program. The CBA Section submits that compliance with the requirements of the *User Fees Act* would not impede the sound administration of these programs, and no case has been made why these programs should be exempted from these generally applicable rules.

Exempting these fees from the User Fees Act invites the imposition of fees without accountability. The CBA Section recommends, therefore, that this provision be deleted.

**Recommendation**

The CBA Section recommends that:

4. Proposed IRPA s. 89.2(2) be deleted.

## Conclusion

To summarize, the CBA Section recommends that:

1. The words "or provincial" be deleted from proposed IRPA s.30.1(1), or alternatively, only designated provincial offences should be basis for federal listing.

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8 Section 312 of Bill C-43.

2. Proposed IRPA s.30.1(1) be amended so that that being "found guilty of an offence" requires a judicial determination rather than a determination by a CIC, CBSA or ESDC officer .
3. The entire scheme of warrantless compelled inspection of employers, production of documents and examination of individuals be reconsidered and restructured to provide judicial oversight of the exercise of these powers.
4. Proposed IRPA s. 89.2(2) be deleted.

We hope that these comments have been helpful to you in your study of Part 4, Division 24 of Bill C-43. We would be pleased to answer any questions you may have about our submission.

Yours truly,

*(original signed by Kerri Froc for Deanna L. Okun-Nachoff)*

Deanna L. Okun-Nachoff
Chair, Immigration Law Section