THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Express Entry System and Temporary Foreign Worker Program

CANADIAN BAR ASSOCIATION
IMMIGRATION LAW SECTION

April 2016

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 | info@cba.org | **www.cba.org**

PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA Immigration Law Section, with assistance from the Legislation and Law Reform Directorate at the CBA office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the CBA Immigration Law Section.

TABLE OF CONTENTS

Express Entry System and Temporary Foreign Worker Program

Express Entry System and Temporary Foreign Worker Program

I. INTRODUCTION

The Canadian Bar Association's Immigration Law Section (the CBA Section) covers citizenship and immigration law issues, including legislative changes, administration and enforcement.

The Temporary Foreign Worker Program (TFWP) is a long-standing program originally designed to allow Canadian employers to hire foreign workers temporarily. The primary goal was to resolve skill shortages and facilitate economic growth. Express Entry (EE) was introduced as an intake management system for the majority of economic immigrants. The CBA Section supports the broad policy goals of both initiatives.

In recent years, the CBA Section has identified concerns with both the TFWP and EE.[1] The CBA Section has concluded that aspects of these programs present significant barriers to Canadian workforce development and prosperity.

In January 2016, the Canadian Chamber of Commerce released a report, *Immigration for a Competitive Canada: Why Highly Skilled International Talent Is at Risk*.[2] The report documents problems with the TFWP and EE from the employer's point of view. Many of the concerns identified in the Chamber of Commerce report are consistent with those expressed by the CBA Section in recent submissions.

The CBA Section welcomes the Government's decision to review the TFWP.[3] To assist in this review, this submission summarizes the CBA Section's concerns about the TFWP and about the EE system and makes recommendations to improve both.

---

1 Letter re: Temporary Foreign Worker Program, (Ottawa, CBA, October 21, 2014); Letter re: Temporary Foreign Worker Program, (Ottawa, CBA, June 5, 2014; Letter re: Express Entry (Ottawa, CBA, December 18, 2014); Submission re: Express Entry (Ottawa, CBA, December 2014); Letter re: Temporary Foreign Worker Program, (Ottawa, CBA, June 24, 2013); Letter re: Temporary Foreign Worker Program, (Ottawa, CBA, January 14, 2011); Submission re: Temporary Foreign Worker Program, (Ottawa, CBA, December 2009).

2 http://www.chamber.ca/download.aspx?t=0&pid=f6479846-2dba-e511-bb93-005056a00b05.

3 "Temporary foreign workers program faces federal review," *The Globe and Mail*, February 17, 2016.

II. TEMPORARY FOREIGN WORKER PROGRAM

A. Labour Market Impact Assessments

Before its overhaul in 2014, the TFWP allowed Canadian employers to hire foreign workers temporarily. The overhaul represented a dramatic turnabout. Though ostensibly designed to promote employment of Canadians, it introduced procedural and policy impediments that deterred the entry of temporary foreign workers altogether.

The overhaul rebranded Labour Market Opinions (LMOs) as Labour Market Impact Assessments (LMIAs). This was accompanied by prohibitive fees, long processing times, a bureaucratic maze of advertising requirements, a "zero tolerance" approach to procedural deficiencies, shortened work permits, and a myriad of invasive enforcement powers and harsh penalties. TFWP users now face virtually unrestrained powers of inspection, punitive compliance measures and potentially crippling financial penalties, all without due process or adequate recourse.

Employers must submit detailed two-year plans to transition out of the need for "high wage" foreign workers by training Canadians or transitioning the workers to Permanent Resident (PR) status. This is so even where government processing requirements and timelines frustrate employers' efforts to meet these requirements. Employers face substantial penalties for failing to adhere to these plans, even when it is unrealistic for the business, sector or region to eliminate the need for foreign workers within two years.

The LMIA overhaul imposed blanket caps on the employment of "low wage" workers. The 2016 cap is 10 per cent of an employer's workforce. This arbitrary limit is often economically unjustifiable and can produce devastating results for many employers who cannot find the necessary workforce within Canada. For example, ethnic restaurants may need highly specialized chefs and cooks. These can require years of training and experience and may be unavailable in Canada. As well, the hospitality industry in areas such as Banff may face labour shortages at a time when the low Canadian dollar is attracting foreign tourists.

RECOMMENDATIONS

1. **Eliminate the requirement for strict adherence to "one-size-fits-all" policies and adopt the following approaches:**
    a. **allow officers to exercise discretion in appropriate cases;**

b. **develop guidelines for specific employer or sector considerations, as necessary;**

c. **restore advertising exemptions for post-graduate work permit holders with offers of permanent employment;**

d. **eliminate or limit quotas on the percentage of temporary foreign workers who can work in one workplace;**

e. **modify the mandatory requirement and criteria for two-year transition plans for "high wage" workers;**

f. **develop a list of occupations exempt from advertising requirements.**

2. **Train Employment, Workforce Development and Labour (EWDL) officers processing LMIAs to adhere to the legislation and case law when assessing whether employing a foreign worker will have a neutral or positive effect on the labour market. In particular, officers should follow the Federal Court decision in *Canadian Reformed Church of Cloverdale B.C. v. Canada (Employment and Social Development)*, 2015 FC 1075 (CanLII), and not fetter their discretion by treating guidelines as mandatory obligations rather than useful benchmarks for interpreting regulatory requirements.**

3. **Help employers learn what is expected of them and make the TFWP more transparent by publishing officers' manuals, guidelines and operational instructions.**

4. **Move away from the "law and order" enforcement approach that makes the TFWP unreasonable and unpalatable for Canadian employers.**

5. **Restore a processing environment focused on high service standards and friendly and effective communication, particularly concerning the business interests that drive employers' needs for foreign workers.**

6. **Eliminate the unproductive policies of destroying or returning applications, or denying expedited processing, for flaws that are minor or can be quickly remedied.**

7. **Reduce the processing fee on LMIAs by charging $1000 per LMIA (not per worker) or by waiving or reducing the additional fee per worker on a bulk LMIA.**

B. Compliance Regime

The CBA Section welcomes reasonable efforts to protect foreign workers and the Canadian labour market from abuse and unfair practices by employers. However, the CBA Section shares the concerns expressed by the Canadian Chamber about the new compliance regime.

The onerous, costly and labour-intensive compliance scheme requires one of every four employers to be audited annually. Compliance reviews involve employers submitting to inspections on demand, compulsory examinations of individuals, and production of any document requested. Investigating officers may ban employers from hiring foreign workers and levy Administrative Monetary Penalties (AMPs) of up to $1 million for a myriad of compliance breaches. Officers have limited discretion in determining penalties and there is no formal appeal or review process.

As a basic principle of law, an administrative process with such serious potential consequences must be fair and reasonable. The subject of the process must be clearly informed of the test to meet and must have a reasonable opportunity to meet the test and address any related issues.

III. KEY CONCERNS

A. Chilling Effect of Focus on Compliance and Enforcement

Some employers may be unwilling to use the TFWP because of the excessive emphasis on enforcement and an unnecessarily harsh compliance regime that carries the risk of serious penalties for oversights or innocent errors. This unwillingness results in lost opportunities in both skills transfer and economic growth. While public confidence requires effective compliance enforcement, it must not be so strict that it defeats the economic goals of the program.

B. Intrusive Powers of Inspection

The new compliance framework provides overly broad powers of inspection. Officers can enter premises without notice or warrant, demand the production of documents and the inspection of computers and other technology, and interview anyone on the premises. These extensive and intrusive powers reinforce the sense that failings in employer conduct when hiring temporary foreign workers are treated as criminal issues and that employers who hire them are treated with suspicion.

Further, officials can require employers to submit to random and lengthy compliance reviews. A review may drag on for months, imposing excessive human resources costs on employers and causing unreasonable delays. Employers face further frustration when pending LMIA applications are placed on hold during the review.

C. Lack of Transparency

Although many compliance concepts in the new framework have been in place for years, some key concepts remain undefined. For example, there is no clear definition of what constitutes a "substantial change" in terms and conditions of employment, which payments to employees are considered "wages" or when a salary increase or performance bonus is a breach.

There is no guidance on how the points system works for determining the amount of an employer fine and the length of an employer ban on hiring temporary foreign workers. When determining the severity of the impact of a violation, for example, points range from 0 to 10, but there is no guidance on the conduct that attracts one point versus ten points.

Further, compliance manuals, guidelines and operational instructions to officers making compliance decisions are not public. Employers cannot determine with any certainty the standards they must meet.

D. Inconsistency

Compliance review decisions may be inconsistent. One officer may consider a particular change in terms and conditions of employment to be substantial, while another examining the same facts may decide that the change is not substantial and is therefore acceptable.

Key concepts must be clearly defined and the rules to determine what constitutes a compliance breach must be transparent and consistently applied.

E. Lack of Information about Processes

The new compliance regime came into effect on December 1, 2015. However, there is still little information about processes or the conduct of on-site inspections. For example, there is no established process for employers to notify Service Canada or Immigration, Refugees and Citizenship Canada (IRCC) before changing the terms and conditions of employment of a foreign worker. Notifications to Service Canada or IRCC often go unanswered and employers are not advised if the change is acceptable.

Changes to the *Immigration and Refugee Protection Regulations* (IRPR) in 2015 allow employers to disclose compliance breaches voluntarily. However, employers have received no guidance on how to do this, the test they must meet to avoid penalties, or the risks and liability they face if the voluntary disclosure is not accepted. Lack of a clearly defined process creates further uncertainty for employers.

F. Overly Harsh Penalties

The penalties employers face for compliance breaches can be very harsh and may be imposed by officers with broad discretionary powers and minimal guidance. Officers may impose AMPs of up to $1 million, ban employers from hiring temporary foreign workers for long periods and identify offending employers on a public website, resulting in reputational damage.

G. Lack of Flexibility

The compliance regime offers little flexibility to employers who need to alter the terms and conditions of a foreign worker's employment to address economic changes or to retain key talent. Employers today face rapidly changing business conditions. The ability to adapt is crucial to economic success. However, the compliance regime makes it difficult for employers to introduce changes, such as promoting a foreign worker to a more senior position or increasing a salary to reward exceptional performance, without risking penalties.

H. Lack of an Effective Appeal Process

The CBA Section agrees with the Canadian Chamber's concerns about the lack of an effective appeal process for employers found to be non-compliant. Given the serious consequences for employers, the Government should establish an effective appeal process to ensure due process and provide employers with an appropriate avenue of redress.

I. Allocation of Resources

Implementing an aggressive compliance enforcement system has required substantial additional government resources, at the expense of program operations. Processing times have increased from a few weeks to six months or more and there appears to be little appreciation of the urgent need of many employers to fill key positions.

RECOMMENDATIONS

8. **Increase transparency and clarity, and ensure consistency in decision making.**
9. **Clearly define key compliance concepts, including "substantially the same," what constitutes a change in occupation and what constitutes "wages."**
10. **Provide clear guidelines about the allocation of points relating to the severity of the impact of a violation and what actions or issues will be allocated points at the low, medium and high end of the ranges.**
11. **Publish compliance manuals, guidelines and operational instructions provided to officers so employers can understand the compliance standards to meet.**
12. **Set out a clear process for employers to make voluntary disclosure about compliance issues, and information on the expectations to be met for successful voluntary disclosure, as well as possible risks and consequences if the voluntary disclosure is not accepted.**
13. **Establish a means for employers to advise of changes in terms and conditions of employment before introducing them. Employers who advise of changes should receive a response within a reasonable time, which clearly indicates whether the employer may proceed with the change. Decisions to approve or deny requests for changes should be made in a fair, reasonable, consistent and efficient manner, taking into consideration all relevant factors.**
14. **Amend the compliance framework to allow flexibility for reasonable changes (for example, promotions, salary increases, changes in duties) and take into account industry norms as well as employers' needs to respond to rapid market changes. Officers should have discretion to reduce penalties or not impose them at all where breaches are less serious, inadvertent or well-intentioned.**
15. **Establish an effective process for employers to address non-compliance fairly and expeditiously and prior to the imposition of penalties.**

16. **Reduce penalties for non-compliance to ensure they are proportional to the harm resulting from the breach.**
17. **Shift some resources from compliance and enforcement to operational improvements to balance an effective compliance regime with meeting the TFWP's economic goals.**

IV. EXPRESS ENTRY

The introduction of Express Entry (EE) as an intake management system for the majority of economic immigrants has allowed IRCC to proactively manage intake levels and significantly reduce processing times. However, the need for program and system improvements has become apparent after EE's first year of operation.

A. Loss of the Most Talented Individuals

Previous economic selection programs were designed to favour candidates who had already successfully established themselves as students or workers in Canada. Now, many valuable potential immigrants are blocked from succeeding in the EE system because some employers are unwilling or unable to use the TFWP. This deprives candidates of the points awarded for LMIAs and in turn deprives Canada of the opportunity to select the most talented individuals.

International students are successfully integrated with a valuable Canadian education and language skills. However, as new graduates they typically receive an allocation of fewer than 450 points and, since they have less than two years of skilled work experience, they are unlikely or unable to obtain an LMIA. The Post-Graduation Work Permit (PGWP) LMIA that remedied the disadvantage by providing advertising and median wage exemptions was eliminated. As a result, many foreign graduates of Canadian post-secondary institutions are forced to leave Canada. The difficulties in qualifying for permanent residence also make Canada less attractive to foreign students considering studies in Canada – at a time when Canadian post-secondary institutions are competing with other countries to attract foreign students.

Many highly skilled foreign nationals (including National Occupation Classification Skill Level 0 management or Skill Level A professionals) hold work permits issued under IRPR sections 204 or 205 that are LMIA exempt. These include senior executive managers, specialized knowledge workers, research chairs and C44 postdoctoral researchers. Even though they have permanent employment offers, they are effectively excluded from the EE system because they are not

awarded points for arranged employment. These individuals are often key Canadian business personnel who are successfully established and are directly responsible for job creation, technology innovation and economic growth. Employers are prevented from keeping these senior managers and specialists because the employers are unable or unwilling to go through the process to obtain an LMIA. Besides the barriers to obtaining LMIAs described above, public and private Canadian companies may be unwilling to embark on a disingenuous public recruitment process that could alert the marketplace to changes in senior management and specialist roles at the company, with potential negative effects both internally and externally.

The TFWP formerly helped bring the best talent to Canada to stimulate economic growth. The program's benefits are now more limited.

RECOMMENDATIONS

18. **Amend the Comprehensive Ranking System (CRS) matrix to award additional points to highly skilled workers who hold work permits issued under sections 204 or 205 of the *Immigration and Refugee Protection Regulations.***

19. **Amend the CRS matrix to award additional points to post-graduate work permits holders for their Canadian post-secondary education and restore LMIA wage and recruitment exemptions.**

B. Technological Barriers

To date, inadequate investment in information technology infrastructure in immigration matters has caused severe problems, including system instability, service disruptions and growth and service restrictions.

IRCC is considering the development of a one-page electronic Application for Permanent Residence (eAPR) summary that would be produced before submission. The summary is a helpful first step and the CBA Section encourages further improvements to the platform to allow applicants and representatives to have a complete copy of the profile and electronic eAPR as single documents for review and records. Currently, each section is saved separately and does not show complete data entries. The ability to review applications thoroughly online will help both applicants and IRCC officials by reducing wasted time and avoidable errors that can result in unnecessary refusals or even findings of misrepresentation.

As well, users cannot see all the information typed into free text fields, forcing them to scroll through the text. It would help to expand these fields so that the entire text remains visible.

At present, applicants' travel history is limited to 30 entries. This may lead to unintended misrepresentations. The temporary remedy is to provide additional travel information in a separate document, but the platform should be changed to allow more than 30 entries.

The CBA Section recommends analyzing eAPRs submitted in 2015 to identify rejection and refusal trends. Some applicants and CBA Section members report high rejection and refusal rates. Many appear to result from members' misunderstanding of system requirements or simple administrative errors, such as uploading a wrong or slightly deficient document.

Officers should have increased flexibility to allow applicants to submit additional documentation or address deficiencies in eAPRs. This would benefit applicants and preserve IRCC resources by reducing post-refusal communications and litigation.

IRCC has responded to some feedback by improving specific fields or EE system requirements. The CBA Section encourages IRCC to take further advantage of our insights and experience as frequent system users. The CBA Section encourages IRCC to seek our input when creating or revising online services, user manuals and document checklists. Frequent updates to website instructions, including FAQs and NHQ clarifications to Immigration Representatives, would also avoid unnecessary demands on limited IRCC resources.

The Express Entry Employer Liaison Network is a useful resource for employers and representatives. It would help to improve IRCC Call Centre training, promote greater consistency of responses and better define agents' scope of duties. Agents increasingly respond that they cannot assist by looking in a file or answer program questions, where they once did so. Call Centre live chat functionality for online services would be useful for IRCC and the public. And, crucially, urgent Case Status Enquiries should generate a response within three days.

The CBA Section recommends the following to address technological issues:

RECOMMENDATIONS

20. Continue to improve IRCC's communication with the public when service is, or will be impaired, including:

a. **public notice of scheduled maintenance several days in advance, where possible, to allow:**

   i. **the public to plan accordingly, especially in meeting deadlines to submit documents, and**

   ii. **less reliance on IRCC resources because of a multitude of enquiries, complaints and litigation;**

b. **reporting widespread system errors on the IRCC website to avoid confusion and unnecessary resource expenditure for IRCC, applicants and authorized representatives alike.**

21. **Implement a one-click profile and eAPR printout.**
22. **Expand free text information fields for viewing/printing.**
23. **Allow "Education" and "Work History" entries to be automatically ordered chronologically and to populate the Personal History fields.**
24. **Allow applicants to provide complete travel history instead of limiting it to 30 entries.**
25. **Analyze eAPRs submitted in 2015 for refusal and rejection trends.**
26. **Give officers increased flexibility to allow applicants to submit additional documentation or address deficiencies in eAPRs.**
27. **Enhance representative consultation and improve website instructions and manuals.**
28. **Respond to urgent Case Status Enquiries within three days.**
29. **Accept the date of postmark or time of courier pick-up for paper filing when electronic system failures preclude electronic filing before deadlines.**

V. SUMMARY OF RECOMMENDATIONS

The CBA Section recommends several improvements to the TFWP and EE programs.

1. **Eliminate the requirement for strict adherence to "one-size-fits-all" policies and adopt the following approaches:**

   a. **allow officers to exercise discretion in appropriate cases;**

b. **develop guidelines for specific employer or sector considerations, as necessary;**

c. **restore advertising exemptions for post-graduate work permit holders with offers of permanent employment;**

d. **eliminate or limit quotas on the percentage of temporary foreign workers who can work in one workplace;**

e. **modify the mandatory requirement and criteria for two-year transition plans for "high wage" workers;**

f. **develop a list of occupations exempt from advertising requirements.**

2. **Train Employment, Workforce Development and Labour (EWDL) officers processing LMIAs to adhere to the legislation and case law when assessing whether employing a foreign worker will have a neutral or positive effect on the labour market. In particular, officers should follow the Federal Court decision in *Canadian Reformed Church of Cloverdale B.C. v. Canada (Employment and Social Development)*, 2015 FC 1075 (CanLII), and not fetter their discretion by treating guidelines as mandatory obligations rather than useful benchmarks for interpreting regulatory requirements.**

3. **Help employers learn what is expected of them and make the TFWP more transparent by publishing officers' manuals, guidelines and operational instructions.**

4. **Move away from the "law and order" enforcement approach that makes the TFWP unreasonable and unpalatable for Canadian employers.**

5. **Restore a processing environment focused on high service standards and friendly and effective communication, particularly concerning the business interests that drive employers' needs for foreign workers.**

6. **Eliminate the unproductive policies of destroying or returning applications, or denying expedited processing, for flaws that are minor or can be quickly remedied.**

7. **Reduce the processing fee on LMIAs by charging $1000 per LMIA (not per worker) or by waiving or reducing the additional fee per worker on a bulk LMIA.**

8. **Increase transparency and clarity, and ensure consistency in decision making.**
9. **Clearly define key compliance concepts, including "substantially the same," what constitutes a change in occupation and what constitutes "wages."**
10. **Provide clear guidelines about the allocation of points relating to the severity of the impact of a violation and what actions or issues will be allocated points at the low, medium and high end of the ranges.**
11. **Publish compliance manuals, guidelines and operational instructions provided to officers so employers can understand the compliance standards to meet.**
12. **Set out a clear process for employers to make voluntary disclosure about compliance issues, and information on the expectations to be met for successful voluntary disclosure, as well as possible risks and consequences if the voluntary disclosure is not accepted.**
13. **Establish a means for employers to advise of changes in terms and conditions of employment before introducing them. Employers who advise of changes should receive a response within a reasonable time, which clearly indicates whether the employer may proceed with the change. Decisions to approve or deny requests for changes should be made in a fair, reasonable, consistent and efficient manner, taking into consideration all relevant factors.**
14. **Amend the compliance framework to allow flexibility for reasonable changes (for example, promotions, salary increases, changes in duties) and take into account industry norms as well as employers' needs to respond to rapid market changes. Officers should have discretion to reduce penalties or not impose them at all where breaches are less serious, inadvertent or well-intentioned.**
15. **Establish an effective process for employers to address non-compliance fairly and expeditiously and prior to the imposition of penalties.**
16. **Reduce penalties for non-compliance to ensure they are proportional to the harm resulting from the breach.**

17. **Shift some resources from compliance and enforcement to operational improvements to balance an effective compliance regime with meeting the TFWP's economic goals.**
18. **Amend the Comprehensive Ranking System (CRS) matrix to award additional points to highly skilled workers who hold work permits issued under sections 204 or 205 of the *Immigration and Refugee Protection Regulations.***
19. **Amend the CRS matrix to award additional points to post-graduate work permits holders for their Canadian post-secondary education and restore LMIA wage and recruitment exemptions.**
20. **Continue to improve IRCC's communication with the public when service is, or will be impaired, including:**
    a. **public notice of scheduled maintenance several days in advance, where possible, to allow:**
        i. **the public to plan accordingly, especially in meeting deadlines to submit documents, and**
        ii. **less reliance on IRCC resources because of a multitude of enquiries, complaints and litigation;**
    b. **reporting widespread system errors on the IRCC website to avoid confusion and unnecessary resource expenditure for IRCC, applicants and authorized representatives alike.**
21. **Implement a one-click profile and eAPR printout.**
22. **Expand free text information fields for viewing/printing.**
23. **Allow "Education" and "Work History" entries to be automatically ordered chronologically and to populate the Personal History fields.**
24. **Allow applicants to provide complete travel history instead of limiting it to 30 entries.**
25. **Analyze eAPRs submitted in 2015 for refusal and rejection trends.**
26. **Give officers increased flexibility to allow applicants to submit additional documentation or address deficiencies in eAPRs.**

27. Enhance representative consultation and improve website instructions and manuals.

28. Respond to urgent Case Status Enquiries within three days.

29. Accept the date of postmark or time of courier pick-up for paper filing when electronic system failures preclude electronic filing before deadlines.