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Dear Ms. Philips, Mr. Smith and Mr. Hunsley:

**Re: Canada-United States-Mexico Agreement and Temporary Entry**

I write on behalf of the Immigration Law Section of the Canadian Bar Association (CBA Section) to respond to the request for information by Global Affairs Canada (GAC) and Immigration, Refugee and Citizenship Canada (IRCC) on the experiences of Canadians with the Temporary Entry for Business Persons provisions of the Canada-United States-Mexico Agreement (CUSMA).

The CBA is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. Our primary objectives include improvements in the law and the administration of justice. The CBA Section has approximately 1,200 members across Canada practising in all areas of immigration and refugee law.

For ease of reference, we have organized our comments as responses to the questions in the background. Our comments focus on entry into the US as we received minimal comment on Canadians entering Mexico under CUSMA. Our members shared some concerns about processing times during the pandemic for entry into Mexico, but those concerns are outside the scope of this consultation.

**Question 1:** What challenges have been, and/or continue to be encountered by Canadian business persons seeking access to the US and Mexico through the NAFTA/CUSMA commitments in the area of temporary entry?

The greatest challenge is the inexperience of front line officers with legitimate business activities, and the application of the professional category (TN) to particular occupations.

Another challenge is that some frontline officers do not receive new or updated guidance from the US Customs and Border Protection (CBP) – information they need to make determinations on applications – in a timely way.

Recent examples that occurred under NAFTA prior to CUSMA coming into effect, include:

- In June 2020, when a US presidential proclamation was implemented restricting L-1 visas, there was initial uncertainty on whether it applied to Canadian applicants. While this was quickly clarified formally, some ports would not allow L-1 applications from Canadians for several days until the guidance reached them.
- The requirements for "essential travel" implemented in March 2020 in response to the COVID-19 pandemic based on an agreement between Canada and the US for land ports was applied in error at some airports.

**Question 2:** what market(s), sector and/or type of company are involved?

Most if not all markets are impacted by NAFTA previously and now CUSMA. This includes companies that:

- engage in cross border trade
- wish to invest in or acquire a company in the US or Mexico
- have offices located in two or more of the three countries
- send employees to the US or Mexico to attend trade shows or seminars

Industries well known to CBP officer such as truck drivers rarely face issues at the border unless there are criminal or immigration concerns specific to the applicant. Professionals or business travelers tend to face more issues when they apply under a professional occupation less widely used or participate in business activities that are not as clearly defined.

**Question 3:** which ports of entry have noticeable challenges?

Although there have been challenges at all ports of entry, Sumas, Washington, Sweetgrass, Montana, the Detroit/Windsor area and the Toronto airport are particularly difficult ports to deal with. For example, our members report that entry is regularly denied to B-1 business visitors travelling for legitimate business purposes. These applicants are told they require an L-1B to undertake these business activities. This is inaccurate and causes serious complications for the traveller including the possibility of expedited removal from the US.

There has been increased scrutiny of business travellers under the current US administration. We hope the attitude of CBP officers will change with the new Presidential administration, but are concerned that some practices observed in recent years may continue at individual ports even after the change in administration.

**Question 4:** Have issues of interpretation of CUSMA and/or ambiguity in the specific coverage arisen?

Our members report many issues with individuals traveling to the US seeking TN status under the professional categories of computer systems analyst, "scientific technician/technologist" and "management consultant".

For example, issues often arise as to whether an applicant's technology, software or computer based position fits the outdated definition of a "computer systems analyst," or whether their education and credentials meet the requirements outlined in CUSMA/NAFTA.

The definition of computer systems was drafted more than 30 years ago, and computer based professions have developed significantly since then. We recommend expanding the defined list of occupations available for TN status to allow for more computer and technology based professions. An alternative solution would be to modify the format of the list to allow professionals to apply for TN status unless specifically excluded.

The professional occupation list of CUSMA should be updated to allow more technology based professions that may not have existed when NAFTA was drafted, but are in line with the professional requirements of the occupations on the list.

We acknowledge that this issue was discussed during the negotiations of CUSMA and that a suggestion of expanding or modifying the list of professional occupations for TN status was rejected by the US.

**Question 5:** have issues been raised pertaining to the availability of information about the relevant processes and procedures to get into the US or Mexico under CUSMA?

Many officers are not up to date on the latest information on the interpretation of CUSMA. The CBP Inspectors Field Manual used by CBP officers to admit Canadians to the US is a basic resource of general application. Even when guidance materials are available and the applicant supplies the necessary supporting information, some officers make incorrect determinations. In some cases the officer may not understand the visa or status being requested. In others, the officer's decision appears to clearly deviate from current guidelines. These decisions can limit applicants' ability to apply and seek proper status in the US, even when that status should be available to them.

Limited information about CBP practices and procedures is available to the public, and that information can change with little or no public notice. We appreciate that CBP may need to modify its processes and procedures in response to current trends, but there will be unnecessary errors in applications if applicants are not informed of changes.

It would be helpful if up-to-date information were shared with CBP officers and the public on a timely basis. Ongoing training for officers on eligibility requirements and interpreting the provisions of CUSMA would also be beneficial.

**Question 6:** have you encountered any issues related to processing fees and timelines, as well as renewal processes?

We have not encountered issues with fees for applications to the US. In the odd instance where the incorrect fee is charged for the type of visa applied for, US Citizenship and Immigration Services generally remedies the situation after the fact by sending correspondence to the applicant's address.

There are few issues arising with the timeliness of immigration processing for Canadians as they have the benefit of being eligible to apply for entry to the US as B-1 visitors, TN status and L status at pre-clearance designated airports, as well as at all land ports of entry. They receive immediate review and adjudication upon presentation to US Customs.

TN applicants typically do not have an issue when they seek renewal after having had approval for an initial three-year period, or subsequent three-year periods. That said, during inspection of subsequent TN status applications, CBP officers often question whether there is a dual intent to be in the US on TN status and at the same time to seek permanent residency. While scrutiny is higher for each subsequent renewal, so long as the applicant qualifies for the position, has the necessary education and credentials, and shows evidence that they do not intend to seek permanent residency in the US, renewals are generally permitted.

We have not heard general reports of issues with B-1 business visitor renewals due to the temporary nature of the travel and that it is often only granted for one-time admission. There is an assumption that frequent or multiple trips will likely occur.

The CBA Section appreciates the opportunity to comment. We would be pleased to discuss our comments if you have any questions.

Yours truly,

*(original letter signed by Nadia Sayed for Mark Holthe)*

Mark Holthe  
Chair, CBA Immigration Law Section