



June 29, 2007

The Honorable Diane Finley, P.C., M.P.
Minister of Citizenship and Immigration
House of Commons
Ottawa, ON K1A 0A6

Dear Minister:

Re: Clarification of Bill C-57

I write on behalf of the National Citizenship and Immigration Law Section of the Canadian Bar Association (CBA Section) to seek some clarification regarding the purpose and intended operation of Bill C-57, amending the *Immigration and Refugee Protection Act* (IRPA) to allow immigration officers to refuse work permits for foreign nationals deemed to be at risk of exploitation based upon ministerial instructions. The CBA is a national association representing over 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. Our primary objectives include improvement in the law and in the administration of justice. As the recognized voice of the legal profession in Canada, the CBA is an active participant in the policy and legislative development process. The CBA Section in particular has regularly contributed suggestions to your Department and government as to how to improve the law related to citizenship, immigration, and refugee claims to ensure that it works for everyone.

The Bill proposes that:

- The Minister could issue instructions prescribing public policy considerations guiding an officer's discretion to issue a work permit to a foreign national. The considerations would be aimed at protecting foreign nationals from humiliating or degrading treatment, including sexual exploitation.
- An officer would refuse to authorize a work permit to a foreign national if, in the officer's opinion, the public policy considerations in the Minister's instructions justify the refusal.
- A refusal to authorize a work permit would require concurrence of a second officer.

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- The Minister's instructions would be reported to Parliament and published in the Canada Gazette. Pursuant to s.93 of IRPA, instructions are deemed *not* to be statutory instruments for the purposes of the *Statutory Instruments Act*, and will not be referred to Committee for review, public discussion or comment.

Your Press Release and Backgrounder dated May 16, 2007 ("Canada's New Government Introduces Amendments to Deny Work Permits to Foreign Strippers"), indicates that the intention of the Bill is to prevent entry of "strippers" (exotic dancers) and other "vulnerable" applicants, including "low skilled labourers as well as potential victims of human trafficking." In order to understand what the proposed ministerial instructions might contain and how the government intends the scheme to operate, the CBA Section has a number of questions, outlined below.

"Humiliating or degrading treatment, including sexual exploitation"

This language, describing the scope of the Minister's instructions, mirrors the judicial test for determining obscenity. Therefore, we have the following questions:

1. Will the Minister's instructions target mistreatment solely of a sexual nature?
2. If not, what is the "humiliating or degrading treatment" that the government intends to prevent?

Harms being addressed ("Strippers")

The following questions relate specifically to the restriction of work permits to "strippers":

3. Will the Minister's instructions provide that all "strippers" are at risk of humiliating and degrading treatment, including sexual exploitation?
4. Alternatively, will the Minister's instructions provide that some, but not all, strippers are at risk of being subjected to treatment that is humiliating and degrading?
5. If the answer to question 4 is "yes," will the Minister's instructions specify that "strippers" would be at risk of such treatment because of:
 - The requirement to engage in particular activities, such as lap dancing?
 - Employment by particular employers?
 - Other criteria? If so, what are these other criteria?
6. (a) How many new work permits have been approved for foreign nationals for employment as "strippers" in 2006 and in 2007 to date?

(b) Has the government received any reports of ill treatment or abuse of "strippers" issued work permits in recent years?

Harms being addressed (low skilled labourers and other vulnerable persons)

The following questions relate to low skilled labourers and other vulnerable persons to whom the Bill is also intended to apply, not including “strippers”:

7. Which low skilled or other worker occupations are expected to be addressed in the Minister instructions? For example, do you anticipate issuing instructions respecting agricultural workers or live-in caregivers?
8. What treatment experienced by low skilled or other vulnerable workers does the scheme seek to prevent?

Evidence and Risk of Harm

The Backgrounder states that, “*The instructions would be based on clear public policy objectives and evidence that outlines the risk of exploitation [foreign worker applicants] face.*” The following questions seek further details regarding this statement:

9. (a) What nature and source of evidence will the Minister rely upon to support issuance of instructions?

(b) What are the "clear public policy objectives" upon which the instructions will be based?
10. How significant would the risk of harm need to be before the Minister would issue instructions?
 - Possibility of harm?
 - Reasonable grounds to believe harm will occur?
 - Probability of harm?
11. Would an officer need to satisfy herself that a certain risk of proscribed harm exists before refusing issuance of a work permit? If so, which, if any, of the three degrees of risk listed in question 10 would apply?

Minister’s Instructions

The use of Minister’s instructions to provide policy supporting officer refusal of work permits is an unusual process. Consequently:

12. Why are Minister’s instructions being utilized, rather than amending the IRPA Regulations to authorize officers to refuse work permits in appropriate circumstances, and using Guidelines to assist officers in interpreting the authority?

13. Specifically, why are Minister's instructions preferable to a regulatory amendment to subsection 200(3) of the IRPA Regulations listing exceptions to the issuance of work permits? Such an amendment could provide:
 - (3) An officer shall not issue a work permit to a foreign national if...
 - (f) there are reasonable grounds to believe that the foreign national will be engaged in treatment that is humiliating or degrading, including sexual exploitation.
14. Have draft instructions been prepared? Can the Minister provide us with the draft instructions for review?

Employer Input

With only rare exceptions, workers applying for a work permit have a pre-arranged employer. In all cases involving "strippers" or low skill workers, the employer has the placement of the worker supported by a Labour Market Opinion (LMO) issued by HRSDC. A LMO is issued only after consideration of the employer's application, labour market shortages, efforts to recruit a Canadian citizen or Permanent Resident, salary, and whether the salary and working conditions of the employment are appropriate. Therefore:

15. What opportunity does the employer have for input into the decision:
 - (a) to issue an instruction that will affect the employer's ability to attract and hire foreign workers?
 - (b) by an officer to refuse issuance of work permit, based on Minister's instructions?
16. What opportunity does an employer have to challenge a decision by an officer to refuse issuance of work permit to an intended employee, based on Minister's instructions?

Objectives of the Legislation

17. What is the purpose or necessity of amending IRPA clause 3(1)(h) to refer to protection of "public health and safety," rather than protection of "health and safety of Canadians"?

We believe that the answers to these questions will clarify the objectives of this proposed legislation, and help to bring a more fruitful analysis of the Bill's implications for the administration of justice in Canada. We look forward to your early response.

Yours truly,

(original signed by Jean-Philippe Brunet)

Jean-Philippe Brunet
Chair, National Citizenship and Immigration Section