THE CANADIAN BAR ASSOCIATION
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April 30, 2008

Mr. Rob Merrifield, M.P.
Chair, Standing Committee on Finance
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, ON K1A 0A6

Dear Sir:

Re: Bill C-50, *Budget Implementation Act, 2008*

I write on behalf of the National Citizenship and Immigration Section of the Canadian Bar Association (CBA Section) with respect to the Standing Committee on Finance's study of Bill C-50, *Budget Implementation Act, 2008.* The CBA Section believes the provisions of the Bill amending the *Immigration and Refugee Protection Act* (IRPA) are unnecessary to meet Canada's immigration goals. Further, we are concerned over the legislated entrenchment of ministerial authority to issue unreviewable instructions without prior public debate or opportunity for stakeholder input. This lack of transparency and Parliamentary oversight risks eroding the rule of law, which requires that governmental authority be legitimately exercised only in accordance with written, publicly disclosed laws and that the laws themselves are free from the influence of arbitrary authority.

Outline of the Bill

Generally, the proposed amendments to IRPA represent a step backwards in the evolution of Canadian immigration law. It returns to the time when a visa was a privilege given on a discretionary basis. IRPA brought Canada in line with many other jurisdictions by granting an applicant who meets regulatory prerequisites the entitlement to a visa. Under Bill C-50, this entitlement is removed, and a qualified applicant whose application is in the queue for processing, perhaps for several years, may be denied a visa due to a ministerial instruction. We examine the provisions of C-50 in detail below.

IRPA s. 11(1) requires that a visa officer "shall" issue an immigration visa if the person is not inadmissible and meets the requirements of the Act. Bill C-50 would change "shall" to "may," meaning that the visa officer would have the discretion not to issue the visa even if the person is otherwise qualified.[1]

[1] S. 116 of Bill C-50.

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Similarly, IRPA s. 25 requires the Minister, upon request, to consider granting exemptions from requirements under the Act (including requirements for permanent residency) on the basis of "humanitarian and compassionate grounds." The Bill would amend s. 25 so that the Minister would be required to consider requests only where the applications are made within Canada. For applications made outside of Canada, the Minister would have the discretion not to consider them at all.[2]

Proposed s. 87.3 establishes a regime whereby the Minister's existing power to issue instructions for processing visa applications and requests under IRPA s. 11 would be greatly expanded.[3] The Minister's power to issue instructions would include the ability to establish categories of applications to which the instructions apply, establish an order for processing of applications or requests, as well as setting annual quotas for the number of applications or requests to be processed, by category or otherwise.

Proposed s. 87.3(4) further requires officers and persons authorized to exercise the powers of the Minister under s. 25 to comply with any applicable instructions. The proposed subsection also provides that any applications or requests which are not processed may be retained, returned or otherwise disposed of in accordance with the instructions of the Minister.

Proposed s. 87.3(5) indicates the fact that an application or request is retained, returned, or otherwise disposed of does not constitute a decision not to issue the visa or other document, or grant the status or exemption, in relation to which the application or request is made. In essence, the Bill states that the decision not to decide an application based on its merits is not a decision. This appears to be for the purpose of limiting access to judicial review.

Ministerial instructions could have far-reaching implications, effectively covering most areas of processing, including the family class. Government officials have stated their intent to make processing changes only in the economic categories, but the proposed legislation is not limited to the economic categories alone.

Erosion of Transparency and Risk of Perceived Arbitrariness

Canada's history includes unfortunate episodes of immigration policy used as a tool of discrimination.[4] In light of this history, it is particularly critical that our immigration system is not only fair and just, but is also seen to be so. Both stakeholders and government have worked hard in recent years to ensure that Canada's immigration system meets this standard. The changes to IRPA contemplated by Bill C-50 risks public confidence in the system, because processing priorities would be decided outside the established, transparent, procedures for regulatory or legislative changes. The integrity of Canada's immigration system may be called into question.

When IRPA was originally debated in Parliament, there was significant concern that the regulation-making power under the Act was too broad and that most of the detail was left to regulation. In response, Parliament required many of the regulations under IRPA to be tabled in the House of

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2 S. 117 of Bill C-50.

3 S. 118 of Bill C-50.

4 The Chinese head tax, anti-Chinese, anti-Semitic and anti-black exclusionary immigration policies, and the Komagata Maru incident are but examples.

Commons and the Senate and then referred to the appropriate committee.[5] Further, proposed regulatory changes are subject to pre-publication in the *Canada Gazette*, which provides stakeholders with notification and opportunity for input.

The use of Ministerial instructions in the Act would circumvent these protections and greatly increase the risk of perceived arbitrariness. The legislated use of Ministerial instructions means that the objective and consistent application of the law cannot be assured – decisions on processing priorities would be made by ministerial fiat. Further, it appears the intention is for the application of the instructions not to be subject to judicial oversight. Publishing the instructions in the *Canada Gazette* after they have been made,[6] without opportunity for prior input, does not alleviate this concern.

Unilaterally Changing the Selection System

The suggestion that the Minister set priorities for processing certain occupations after private consultation with employers and trade unions[7] would not only erode transparency but would also threaten a return to the pre-IRPA selection system, where certain employers, unions and professional bodies would use their political influence to either include or exclude occupations to further their personal interests. In many cases, these decisions did not appear to be in Canada's best interests. An example is the exclusion of physicians and most skilled trades from the skilled worker selection process. Consultation should be done openly, with the opportunity for all stakeholders to have input.

A major criticism of the pre-IRPA independent selection system was that it selected applicants on the basis of their paper credentials without regard to their ability to work in their professions once they arrived. This resulted in the familiar complaint of engineers being forced to work as taxi drivers. That system was rejected in favour of a human capital model that selects workers based upon broader skills and economic adaptability. While the current system has not completely achieved the objectives of the human capital model, there is no basis for rejecting it entirely and reverting back to the previous flawed framework.

Laudable Goals, Unnecessary Changes

The government has made clear that the goal of these legislative changes is to introduce greater flexibility in processing, so that it can:

- devote greater resources to reducing the large immigration backlog (especially in the federal skilled worker category);
- respond, in consultation with the provinces, to immediate regional economic needs so that applicants in strategic occupations can be processed more quickly;
- send out officers in processing " swat" teams to mine the backlog where the inventory is the highest; and

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5 See IPRA s. 5.

6 See proposed s. 87.3(6) in Bill C-50.

7 See Citizenship and Immigration Canada, News Release, "Immigration instructions to be governed by fairness, consultation" (April 8, 2008), online: <http://www.cic.gc.ca/english/department/media/releases/2008/2008-04-08.asp>.

- conserve resources by declining to consider certain applications, specifically multiple applications from the same person on humanitarian and compassionate grounds.

Most of these goals are laudable. A legislative change is not necessary to accomplish them.

The Federal Court ruled in the *Vaziri* case that,

> The Minister is responsible for the administration of IRPA. In the absence of enacted regulations, he has the power to set policies governing the management of the flow of immigrants to Canada, so long as those policies and decisions are made in good faith and are consistent with the purpose, objectives and scheme of IRPA."[8]

In a further passage, the court ruled that, "where there is a vacuum of express statutory or regulatory authority, the minister must be permitted the flexible authority to administer the system."[9]

Accordingly, the government does not require the proposed changes in Bill C-50 to set processing priorities or send out "swat" teams to reduce the backlog. This was done by previous governments, without the need for legislative change, because the authority already exists within the scheme of the Act.

Further, nothing prevents the government from devoting resources to processing certain high-priority applications more quickly than others. The government already gives processing priority to anyone nominated under the provincial nomination schemes and could simply increase the number of nominees by way of agreement with the provinces. The government has also directed visa offices to give priority to skilled worker applicants who have arranged employment in Canada. Applicants languishing in a backlog can receive immediate priority processing simply by having a Canadian employer who wants to hire them. The government can also streamline processing for temporary foreign workers to address immediate labour market needs, and in fact has taken steps to do so. These existing tools can effectively address the concern about meeting Canada's immediate economic needs.

The only action that the government is unable to take under the current legislative and regulatory framework is to return applications unprocessed. Nevertheless, the government could issue regulations that slow the intake of new applications by changing one of the processing categories contained within the regulations. Similarly, a regulation could be amended to allow for points to be awarded for key strategic occupations.

Thus, the means are already at the government's disposal to accomplish its goals in a manner that preserves transparency and the rule of law.

Conclusion

The CBA Section agrees that the current backlog of visa application and the need for labour in particular strategic occupations are urgent issues that rightly require the government's attention and action. However, the measures in Bill C-50 are not necessary to address these problems. Bill C-50

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8 *Vaziri v. Canada (Minister of Citizenship and Immigration)* 2006 FC 115 at para. 35.

9 *Ibid.*

establishes a system of ministerial instructions that places essentially legislative power in the hands of the Minister, to be exercised at her discretion, and without Parliamentary oversight or stakeholder input. It changes the system from one based on objective legislative and regulatory criteria for visas to one of discretion and private consultation. This was the very mischief that IRPA sought to remedy. Further, it purports to render the application of the ministerial instructions beyond even the review of the courts. For these reasons the CBA Section believes that the Bill risks damaging public confidence in the immigration system. It is inconsistent with Canadian values, including respect for the rule of law.

We therefore urge the Committee to recommend that the amendments to IRPA in Bill C-50 be removed from the Bill and not passed.

Sincerely yours,

(original signed by Tamra L. Thomson for Alex Stojicevic)

Alex Stojicevic
Chair, National Citizenship and Immigration Section