THE CANADIAN BAR ASSOCIATION
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# Low Skilled Worker Pilot Project

NATIONAL CITIZENSHIP AND IMMIGRATION
LAW SECTION
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# 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 National Citizenship and Immigration Law Section with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Citizenship and Immigration Law Section of the Canadian Bar Association

# Low Skilled Worker Pilot Project

## I. INTRODUCTION

When the *Immigration and Refugee Protection Act* (IRPA) came into force in June 2002, the philosophy behind regulating the entry of economic workers changed dramatically. The former *Immigration Act* required an applicant for permanent residence to be on a designated Occupational List established by Citizenship and Immigration Canada (CIC). This requirement was supposedly based on skills shortages, but was often not up to date. It was dropped under IRPA in favour of a newly designed "Skilled Worker" program.

The stated purpose of this new program was to attract economic immigrants to Canada that were the "best and the brightest". The Skilled Worker program did this by limiting applications for permanent residence to only those persons in job classifications falling within the National Occupation Classification (NOC) Categories O, A, and B. Generally, these categories cover occupations in the managerial sphere, the professions, and those occupations requiring college or trade diplomas.

With the introduction of the Skilled Worker Program, Human Resources and Social Development (HRSD) introduced the requirement that, for an employer to be eligible to make an application under the Foreign Worker Program, the job for which the labour market opinion (LMO) was sought must also be within the same limited NOC categories.

Both the Skilled Worker program for Permanent Residents and the Temporary Foreign Worker Program for Skilled Workers have failed to meet the labour force demands of the constantly changing and fast-growing Canadian economy.

Pressure from employers to fill labour shortages in occupations outside the O, A, and B categories led to the introduction of the Low Skilled Worker Pilot Project (the Project). In other words, because the framework within IRPA was unresponsive to the actual demands of

the Canadian labour market, the Project was devised to fill the gap occasioned by these inherent problems.

The Project has evolved over its short existence, having been introduced quietly, initially not widely publicized, and now having grown in importance such that it must be addressed as more than just a pilot.

There is no debate that Canada faces a shortage of both skilled and low skilled workers, and that this is expected to continue for the near future. The demographic realities contributing to this cannot be changed or solved by individual employers. Rather, the continuing limited supply of workers in the C and D NOC categories (which include workers in primary industry, equipment operators, transport workers, and construction labourers) is something that must be addressed both by HRSD and CIC. Long-term commitments to providing a process to bring these types of workers to Canada are essential.

The National Citizenship and Immigration Law Section of the Canadian Bar Association (the CBA Section) is pleased to provide HRSD with the following comments about the Project, with a view to ensuring that the regulation of workers' entry into Canada is sufficiently flexible to respond to the needs of Canada's labour market.

## II. LEGISLATIVE BASIS FOR THE PROJECT

The CBA Section submits that there is no legislative foundation requiring HRSD to limit its foreign worker program to the O, A, and B NOC categories. While IRPA creates an economic class, the Regulations break this class into Skilled Workers and other classes and specify how the Act and the Regulations will apply to the various parts of the economic class. In doing so, permanent and temporary residents are dealt with differently.[1]

The Skilled Worker class is limited to individuals in the O, A, and B NOC categories. To be eligible to apply for a permanent resident visa, an applicant must be a member of the Skilled

[1] IRPA s. 14.

Worker class within one of the three NOC categories.[2] However, no reference in the Act or Regulations limits temporary foreign workers to the O, A, and B NOC categories. The portions of the Regulations outlining the mandate of HRSD to provide opinions to CIC on the economic effect of the entry of foreign nationals also do not state this.[3]

**RECOMMENDATION #1:**

**The CBA Section recommends that the Foreign Worker Program be re-defined to treat temporary foreign workers in all NOC categories, both skilled workers and low skilled workers, the same.**

## III. SHORTFALLS IN CURRENT PROGRAM

The requirements of the Low Skilled Pilot Project are more onerous than those under the standard Foreign Worker Program. The areas of particular concern are set out below.

### A. Limitation on Length of Labour Market Opinion

Perhaps the most limiting aspect of the Project is the restriction on the duration of employment for the LMO, and hence the length of the work permit, to a maximum of 12 months. No renewal of a work permit will be considered until four months have expired after the original work permit has lapsed.

In times of economic growth, there is no need to limit either the LMO or the work permit to a 12-month period. From the employers' perspective, it is barely cost effective to bring a foreign worker to Canada, train the foreign worker in the business, and then lose the worker within one year. In the current economy, the demand for foreign workers spans many years, not just one. This may be appropriate for seasonal labourers, but not low skilled.

From the perspective of an employee, it is a great hardship to move from one's country of residence to Canada for employment that will last one year only. The time to become

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2 IRPA Regulations, R.75.

3 Idem, R. 194 to 203.

familiar with the Canadian work environment, social and cultural climate, and to become productive in one's employment will likely take most of the allowable one year.

The foreign worker may not necessarily leave the country after the year is over. The shortsightedness of the one-year policy may lead to foreign workers converting their status to Visitor for four months and then re-applying for work permits. It may also lead to illegal work being done and other abuses of the immigration system such as overstays.

If the HRSD's goal in setting the one-year LMO maximum is to ensure that changes in the Canadian economic climate do not result in unemployment for Canadians and permanent residents, one year is too short a timeframe for HRSD to make these forecasts.

**RECOMMENDATION #2:**

**The CBA Section recommends that, if the Project is maintained, the one-year maximum duration of an LMO be removed. Applications under the Project should be assessed on their own merits and the length of the LMO should be determined after taking into account all economic circumstances, including regional, industry or business specific factors.**

## B. No Opportunity for Spousal Work Permit

Under the current Project, a spouse may accompany a low skilled foreign worker as a visitor but the spouse is not entitled to work in Canada, unlike a spouse of a foreign worker in the NOC O, A, and B categories.

A spouse of a low skilled worker who wishes to work in Canada must have a separate LMO to obtain a work permit. Most employers are not prepared to go to the additional time and expense to do this, yet given the demand for both skilled and low skilled workers, it would seem reasonable that the spouse should be able to apply for an open work permit for the same period of time of the original work permit. For example, there are many positions in the retail and service industry where workers are required.

**RECOMMENDATION #3:**

**The CBA Section recommends that spouses accompanying low skilled foreign workers be eligible for open work permits without the requirement of an LMO.**

## C. Employment Contract

The Project requires that a prospective employer must not only sign a contract with the low skilled foreign national, but that if the contract provided by HRSD is not used, the employer's contract must contain all the provisions in the sample contract.

First, the contents of the required contract appear to presume that "low skilled" equates with "low wage" and therefore, that HRSD must protect the terms and conditions of employment under which low skilled workers are hired. This presumption is not correct. It is already a requirement that employers pay the going wage in an industry, generally far above the minimum wage in a province or territory. In many cases, these wages and benefits are paid in accordance with union agreements. In others, such as long haul truckers, wages may exceed $45,000 per year. HRSD must reconsider the basis for acting as the protector of low skilled foreign workers when the situation does not require it and where, when compared with foreign skilled workers, low skilled workers are receiving extended benefits.

Second, from an employment law perspective, an employer is not necessarily advised to include certain aspects of the HRSD contract in an employment contract. For example:

- **Compliance with the Law**
  The contract states the employer agrees to follow the law.[4] This is a matter of statute that does not belong in an employment contract;

[4] Employment Contract, Annex 2, paragraphs 10 and 18.

- **Coffee Breaks**

  The contract includes specific coffee breaks. This ties an employer's hands and does not reflect the varying standards amongst different business operations;

- **Notice of Termination**

  The contract's notice of termination provides for at least one week's written notice to an employee being terminated after three months of service.[5] Notice is not a legal requirement if an employee is terminated for cause;

- **Return Airfare**

  The contract prevents the employer from recovering return airfare from the employee. While many employers provide return airfare to foreign nationals, as well as temporary foreign Skilled Workers, HRSD should not interfere in the negotiation of this contractual term. If the goal is to ensure the foreign worker has the means to return home at the conclusion of the contract, that concern is met by requiring the ticket to be provided, not by requiring it to be prepaid;

- **Health Care Insurance**

  The contract requires the employer to provide health care insurance for the employee. There is merit in ensuring that a foreign national has adequate health insurance in Canada prior to being able to opt into a provincial health care scheme. However, payment for this insurance is a matter between the employer and prospective employee;

- **Accommodations for Employee**

  HRSD requires the employer to agree to either "provide suitable accommodation to an employee" or "ensure that reasonable and proper accommodation is available."[6] The imposition of this requirement is out of line with most employment relationships. It is unreasonable to expect an employer to ensure accommodation. On the one hand, an employer cannot demand an employee live in a particular room or apartment. Similarly, an employer may find a landlord providing what the employer believes to be reasonable and proper accommodation for an employee, but the employer has no subsequent control over whether that continues to be so. The

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5 Idem, paragraph 17.

6 Idem, paragraph 13.

contractual requirement demanded by HRSD attempts to enforce an obligation upon an employer to monitor a third party landlord. It is improper and unreasonable for HRSD to impose this as a contractual condition; and

- **Cost of Accommodations**

  Similarly, if the employer provides its own accommodation, HRSD requires the employer to guarantee contractually that the cost of accommodation will not exceed an arbitrarily established percentage of the employee's wages. Again, HRSD has no mandate to enter into the contractual relationship between the employer and employee. HRSD does not do this for Canadian employees or foreign workers under the skilled worker category. To do so with low skilled workers creates further anomalies amongst employees within a business or company.

Some HRSD offices will not process an application if the employer does not have an employment contract with the employee using the exact wording of the HRSD contract. While the preamble to the contract states that the HRSD "has no authority to intervene in the employer/employee relationship or to enforce the terms and conditions of employment," it has done exactly that by requiring the use of the contractual terms it devised.

**RECOMMENDATION #4:**

**The CBA Section recommends that the employment contract required under the Project be limited to wages and hours, job description, and duration of employment.**

**RECOMMENDATION #5:**

**The CBA Section recommends that an employer be entitled to recover from a foreign national the costs of return airfare to Canada.**

**RECOMMENDATION #6:**

**The CBA Section recommends that the employer be able to recover the costs of health insurance provided to a low skilled foreign worker.**

**RECOMMENDATION #7:**

**The CBA Section recommends that any contractual requirements under the Project concerning accommodation be limited only to requiring the employer to use its best efforts to assist the employee to obtain accommodation.**

## D. Long Processing Times

Currently, processing times of foreign worker applications vary across the country from two to eight weeks. A two-week time frame is reasonable; an eight-week time frame is not. Employers must add into this process the additional time frame, sometime months, for the Application for Work Permit. This delay hinders employers' efforts to fill immediate labour shortages by bringing temporary workers to Canada.

Given the statistics provided by HRSD that more than 90% of applications are approved,[7] it appears that far too much time and emphasis is placed on processing, particularly when the LMO is valid for a maximum of 12 months. This may lead employers to file second applications almost as soon as the first ones have been decided or filing a large number of applications for pre-approvals.

**RECOMMENDATION #8:**

**If the Project is continued, the CBA Section recommends HRSD develop an occupational list of classifications in low skilled worker categories, by region if necessary, where there is a demonstrated shortage of labour. Applications in those occupational classifications should be expedited, both in the advertising requirements demanded of employers and in processing by HRSD.**

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7 Provided at CBA Immigration Continuing Legal Education Program, Quebec City, May 2006.

## E. No Opportunity to Apply for Permanent Residence

While this point may be beyond HRSD's jurisdiction, it is unfortunate that low skilled foreign workers who have proven themselves to be good employees and residents of Canada cannot make a standard application for permanent residence. This, of course, is due to the requirement to be within a job classification in the O, A, and B NOC categories to apply for permanent residence as a Skilled Worker. No other economic category would apply to low skilled foreign workers, unless developed under a Provincial Nominee Program.

Some low skilled workers become extremely experienced and valuable employees; some employers require these workers for an indefinite period. There should be a process to enable low skilled workers in demand to stay permanently in Canada.

**RECOMMENDATION #9:**

**The CBA Section recommends that HRSD and CIC develop a proposal to amend IRPA to allow for the retention of low skilled workers where there is employer support.**

# IV. CONCLUSION

Thank you for the opportunity to comment on the Project. We look forward to your consideration of our comments. We have addressed the issues keeping in mind the need for HRSD to consider and balance the interests of employers, the welfare of foreign workers, and the impact of this Project on citizens and permanent residents in the Canadian labour market. We would welcome the chance to continue to review any proposed changes when these are available.