THE RISING SIGNIFICANCE OF CROSS-BORDER EMPLOYMENT: ISSUES, DIFFICULTIES AND SOLUTION

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EMPLOYMENT IN CANADA

PART I

IMMIGRATION REQUIREMENTS FOR TEMPORARY FOREIGN WORKERS

General Requirements

Before a foreign worker is permitted to work within Canada, he/she must first obtain a work permit. In order to obtain a work permit, the foreign worker must meet a number of requirements.

Temporary Intent

An immigration officer must be satisfied that the foreign worker will not remain in Canada beyond the validity of status granted and meets the requirements applicable to the status for which he/she is applying.[1]

Temporary Resident Visa

Unless exempt, the foreign worker must also apply for and obtain a temporary resident visa before entering Canada. Citizens of the countries listed under section 190(1)(a)(b)(c) of the *Immigration and Refugee Protection Regulations* (IRPR) are not required to obtain a temporary resident visa prior to appearing at the port of entry. These exemptions include citizens of France and the United Kingdom, and citizens and permanent residents of the United States. Temporary resident visa exemptions are also available to persons listed under section 190(2) and 190(3). All other persons are required to obtain temporary resident visas in order to enter Canada.

[1] *Immigration and Refugee Protection Regulations,* SOR/2002-227, section 179 [*IRPR*]..

Labour Market Opinion

Under the *Immigration and Refugee Protection Act* (IRPA),[2] a work permit based on a positive Labour Market Opinion (LMO) from Service Canada remains the most common manner of relocating a foreign worker to Canada.

In many circumstances, however, an LMO is not necessary. Employers should first conduct an initial examination of whether an LMO-exempt category may apply that would categorize the foreign worker as being eligible for a work permit without first requiring Service Canada's intervention.

If no such exempt category is applicable, based on the facts, the next step involves an immigration officer determining, on the basis of an opinion provided by Service Canada, whether the job offer is genuine and whether the employment of the foreign national is likely to have a neutral or positive economic effect on the labour market in Canada. This process is referred to as an LMO.[3]

Work Permit

If a foreign worker requires a temporary resident visa to enter Canada, or if the foreign worker is already in Canada, he/she must submit an application for a work permit.[4] However, if a foreign worker is visa-exempt, the foreign worker may apply for a work permit at the port of entry, provided the employer has already been issued an LMO if it is required for the position.

The following foreign nationals must apply for work permits or work permit exempt visitor status outside of Canada:

- All persons who require a temporary resident visa;
- All persons who require a medical examination, unless valid medical examination results are available at the time of entry;
- International youth exchange program participants, other than U.S. citizens;
- Permanent residents, unless approved by the responsible visa office (that administers the DFAIT-granted quota) abroad;
- Seasonal agricultural workers; and
- Live-in caregivers.[5]

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[2] S.C. 2001, c. 27 [IRPA].

[3] Jacqueline R. Bart, "Temporary Entry to Canada" in Jacqueline R. Bart and Austin T. Fragomen, eds., *Canada/U.S. Relocation Manual: Immigration, Customs, Employment and Taxation*, looseleaf (consulted in February 2011), (Toronto: Thomson Reuters Canada Limited, 1998), ch. 1 at 1-13 to 1-14.

[4] IRPR 200.

[5] Bart, *supra* note 3, ch. 1 at 1-59

The following foreign nationals may apply for work permits or work permit exempt visitor status at the port of entry:

- All national or permanent residents of the U.S., and residents of Greenland and St. Pierre and Miquelon (contiguous territories);
- Persons whose work does not require an LMO;
- Persons whose work requires an LMO, as long as the confirmation has been issued before the worker seeks to enter.[6]

Exceptions to the Requirement to Obtain a Work Permit

There are some positions for which a foreign national does not require a work permit. These exemptions are listed in sections 186 and 187 of the IRPR. Foreign workers may apply for entry to engage in any of the activities listed below at the port of entry, unless a temporary resident visa is required, in which case he/she must apply through a Canadian Consulate, Embassy or High Commission outside Canada.

The following foreign workers do not require a work permit in order to engage in work within Canada:

1. Business visitors who are: a) not entering the labour market in Canada, b) conducting activities that are international in scope, and c) remunerated by a foreign employer;[7]

2. Foreign representatives and their personal servants who have been accredited by the Department of Foreign Affairs and International Trade (DFAIT) engaging in official functions;[8]

3. Family members of foreign representatives, provided they are issued a "no objection" letter by the Protocol Department of DFAIT;[9]

4. Military personnel and civilian personnel in possession of movement orders outlining that they are coming to Canada from countries designated under the terms of the *Visiting Forces Act*;[10]

[6] FW-1, s. 5.23.
[7] IRPR 186(a) and 187.
[8] IRPR 186(b).
[9] IRPR 186(c).
[10] IRPR 186(d).

5. Foreign government officers working for a department or agency of the Government of Canada or of a province in accordance with agreements with other nations;[11]

6. On-campus employment of students in possession of a study permit who is a full-time student at the local campus of a university or college and is employed on that campus;[12]

7. Performing artists and their essential crew;[13]

8. Athletes and coaches (professional and amateur);[14]

9. News reporters and media crews coming for the purpose of reporting on Canadian events;[15]

10. Public speakers coming for specific events and entering Canada for less than five days;[16]

11. Convention organizers and administrative support staff of the organizing committee;[17]

12. Clergy members who will engage in preaching of doctrine, presiding at liturgical functions or providing spiritual counselling;[18]

13. Judges, referees and similar officials involved in international sporting events, artistic or cultural events, music and dance festivals, animal shows and agricultural competitions;[19]

14. Examiners and evaluators who direct the studies and review the work of university students, as well as foreign professors and researchers entering to evaluate academic programs or research proposals;[20]

15. Expert witnesses or investigators who will conduct surveys or analyses to be used as evidence, or who will be expert witnesses before a regulatory body, tribunal or court of law;[21]

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[11] IRPR 186(e).
[12] IRPR 186(f).
[13] IRPR 186(g).
[14] IRPR 186(h).
[15] IRPR 186(i).
[16] IRPR 186(j).
[17] IRPR 186(k).
[18] IRPR 186(l).
[19] IRPR 186(m).
[20] IRPR 186(n).

16. Health care students registered at foreign educational institutions seeking to engage in clinical clerkships or short-term practicums;[22]

17. Civil aviation inspectors, including flight-operations inspectors and cabin-safety inspectors who enter to inspect safety procedures on commercial international flights;[23]

18. Aviation accident or incident inspectors participating in an aviation accident or incident investigation conducted under the authority of the *Canadian Transportation Accident Investigation and Safety Board Act*;[24]

19. Crew members working on vehicles of foreign ownership and registry who are engaged primarily in the international transport of cargo and passengers;[25]

20. Emergency service providers entering for the purpose of rendering services in times of emergency;[26] and

21. Those working under conditions of an expired work permit, provided he/she applied for a new work permit before the original work permit expired and has remained in Canada since the expiration of the work permit.[27]

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[21] IRPR 186(o).
[22] IRPR 186(p).
[23] IRPR 186(q).
[24] IRPR 186(r).
[25] IRPR 186(s).
[26] IRPR 186(t).
[27] IRPR 186(u).

PART II

LABOUR MARKET OPINIONS

Exemptions to the Requirement for a Labour Market Opinion

If a visa, immigration or Canadian Border Services Agency officer determines that a foreign national's intended activities involve "work" and the person is not eligible to be categorized under the work permit-exempt categories, a temporary foreign worker will require a work permit in order to enter or remain in Canada.

In most instances, visa and immigration officers will instruct a foreign national to have their prospective employer submit an application to Service Canada to obtain an LMO, unless they are able to identify an exemption to this process.

Sections 204 to 208 of the IRPR provide an officer with the regulatory authority to issue a work permit to a worker who does not have an LMO from Service Canada. The Service Canada-exempt categories and policy exemptions are as follows.

International Agreements

This exemption applies to a person coming to or in Canada to engage in work pursuant to an international agreement between Canada and one or more foreign countries. It also applies to an arrangement entered into with one or more foreign countries by the Government of Canada or by or on behalf of one of the provinces, other than an arrangement concerning seasonal workers. Finally, it applies to an agreement entered into with a province or group of provinces by the Minister.[28]

Significant Benefit

Circumstances sometimes present officers with situations where an LMO is not available, and a specific exemption is not applicable, but the balance of practical considerations argues for the issuance of a work permit in a time frame shorter than would be necessary to obtain the LMO. This exemption is intended to provide an officer with the flexibility to respond in these situations. It is intended to address those situations where the social, cultural or economic benefits to Canada of issuing the work permit are so clear and compelling that the importance of the LMO can be overcome.

The key to succeeding on a work permit application under this Service Canada-exempt work permit application significant-benefit provision is to demonstrate that the foreign worker's entry will be of significant benefit to Canada. This assessment is based on the nature of the benefit, whether it is financial, intellectual, cultural or skill- or service-

[28] IRPR 204.

related. There must be demonstrated and de facto benefit to Canada which will not impinge on Canadians.

This exemption is used by entrepreneurs and self-employed candidates, intra-company transferees (including specialized knowledge workers, senior managers/executives, and functional managers), and emergency repair personnel.[29]

Reciprocal Employment

This category provides a myriad of work permit options for intra-company and cross-corporate or cultural work-related arrangements. Generally, if reciprocity in the granting of a work permit can be demonstrated across borders, the foreign worker can qualify under this category. This is a useful category in the case of friendly corporate exchanges, not involving intra-company arrangements, where the reciprocal jurisdiction would issue a visa to a Canadian national.[30]

Work Related to Research, Educational or Training Programs

The following programs are designated as work which can be performed by a foreign national based on this exemption:

1. Foreign students, excluding those coming to work in medical residency or extern positions (but not those in the field of veterinary medicine), whose intended employment forms an essential and integral part of their course of study in Canada and this employment has been certified as such by a responsible academic official of the training institution and where the employment practicum does not form more than 50% of the total program of study;

2. Special program students under the sponsorship of the Canadian International Development Agency (CIDA) when the intended employment is part of the student's program arranged by CIDA;

3. Persons coming to Canada to work temporarily for the International Development Research Centre of Canada;

4. Persons sponsored by Atomic Energy of Canada Ltd., as distinguished scientists or post-doctoral fellows;

5. Persons sponsored by the National Research Council of Canada (NRC) and the Natural Sciences and Engineering Research Council of Canada (“NSERC”) as distinguished scientists or scholars coming to participate in research for the NRC and the NSERC;

[29] IRPR 205(a).
[30] IRPR 205(b).

6. Persons coming from Commonwealth Caribbean countries for training under the terms of the Official Development Assistance Program administered by the Canadian International Development Agency;

7. Holders of research chair positions at a Canadian university, nominated for their research excellence, and partially or wholly funded by federal or provincial governments.

This exemption also applies to persons who hold study permits but require work experience as an essential and integral part of their course of study in Canada.[31]

Public Policy

This exemption is for those who require limited access to the Canadian labour market for reasons of public policy relating to the competitiveness of Canada's academic institutions or economy.

Spouses or common-law partners of skilled workers coming to Canada as temporary foreign workers may be authorized to work without having a confirmed job offer, provided that the principal foreign worker is doing work at a level within NOC skill levels 0, A or B, which include management and professional occupations and technical or skilled tradespersons. Spouses or common-law partners of foreign students engaged in full time studies may also be authorized to work under this LMO-exempt category.

In addition, students who have successfully completed their studies at a Canadian institution in Canada may be issued an open work permit, with no restrictions, under the Post-Graduation Work Permit Program for up to three years. This LMO-exempt category is also available to post-doctoral fellows who hold a doctorate degree or its equivalent that are appointed to a time-limited position granting a stipend or a salary to compensate for periods of teaching, advanced study and/or research.[32]

Charitable or Religious Work

Charitable or religious workers who are entering Canada to perform duties for a Canadian charitable or religious organization may qualify for an LMO exemption under this category, provided that they would not receive remuneration (excluding a small stipend for living expenses) and provided that their duties would not compete directly with Canadian citizens or permanent residents in the labour market.[33]

[31] IRPR 205(c)(i).
[32] IRPR 205(c)(ii).
[33] IRPR 205(d).

Self- Support

Persons in Canada seeking refugee or protected-person status qualify for an LMO exemption if they are eligible for open work permits and cannot support themselves otherwise.[34]

Applicants in Canada

Applicants who are members of certain in-Canada permanent residence classes, including protected persons, are eligible for an LMO exemption, regardless of whether they have applied for permanent residence status. The following foreign nationals are eligible:

1. Live-in caregivers who have met the requirements of section 113 of the IRPR;

2. Spouses (including common-law spouses) who have met the requirements of section 124 of the IRPR;

3. Persons protected pursuant to section 95(2) of the IRPA;

4. Persons for whom an eligibility or admissibility requirement has been waived under section 25(1) of the IRPA (i.e., H and C); and

5. Family members of the above who are in Canada.[35]

Humanitarian Reasons

Foreign students in Canada who are unable to cover the costs of their studies, whether tuition or daily living expenses, due to circumstances beyond their control, may qualify for this exemption. This exemption also applies to temporary resident permit holders who will be in Canada for at least six months and have no other means of financial support.[36]

Factors in Forming a Labour Market Opinion

If a foreign worker does not qualify for a work permit exemption or an LMO exemption, the foreign worker must obtain an LMO before he/she will be issued a work permit.[37]

[34] IRPR 206.
[35] IRPR 207.
[36] IRPR 208.
[37] IRPR 203.

An opinion provided by Service Canada is based on the following factors, set out in section 203(3) of the IRPR:

- i Whether the employment of the foreign national is likely to result in direct job creation or job retention for Canadian citizens or permanent residents;
- i Whether the employment of the foreign national is likely to result in the creation or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents;
- i Whether the employment of the foreign national is likely to fill a labour shortage;
- i Whether the wages offered to the foreign national are consistent with the prevailing wage rate for the occupation and whether the working conditions meet generally accepted Canadian standards;
- i Whether the employer has made, or has agreed to make, reasonable efforts to hire or train Canadian citizens or permanent residents; and
- i Whether the employment of the foreign national is likely to adversely affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute.[38]

Benefits to the Canadian Labour Market

Service Canada will determine whether the entry of the foreign worker will result in labour-market benefits, including job creation or retention, the creation or transfer of skills or knowledge, and the filling of a labour shortage. The employer must provide supporting documentation that clearly demonstrates that there is a human-resource plan for the creation of positions for Canadians and/or the training of Canadians as a result of the entry of the foreign worker.[39]

Wages Consistent with Prevailing Wage Rate

Service Canada will review the salary being offered to the prospective employee in order to determine whether it is consistent with the industry norm. If the foreign worker is found to be "cheap labour," Service Canada will not issue an LMO.[40]

Reasonable Efforts to Hire/Train Canadians

Service Canada continues to place primary importance on whether the employer has made a conscientious effort to hire local employees first.[41] Service Canada relies heavily on human-resources recruitment and advertising in determining whether Canadians are available to fill the position or whether there is a genuine labour shortage that the employer is unable to fill.

[38] IRPR 203(3).
[39] IRPR 203(3)(a)-(c).
[40] IRPR 203(3)(d).
[41] IRPR 203(e).

All occupations are based on the National Occupational Classification ("NOC") system. Including the correct NOC code is an important aspect of the Service Canada LMO application. The duties of the position should match the duties set out in the selected NOC code. All occupations based on the NOC system are subject to minimum advertisement requirements. Failure to comply with the requirements will result in the application for a Labour Market Opinion (LMO) being denied.[42]

Employers seeking to hire temporary foreign workers must be prepared to demonstrate that the minimum advertising requirements are met by providing proof of advertisement and the results of the efforts to recruit Canadians or permanent residents. This proof includes copies of advertisements, number of Canadian applicants and why they were rejected. Records of recruitment efforts should be kept for a minimum of 2 years, in the event that a Service Canada counsellor seeks to verify advertising efforts.

In the case of **management occupations (NOC 0 occupations) and Skill Level A positions**, employers are required to conduct recruitment activities consistent with the practice within the occupation (e.g., advertise on recognized Internet job sites, in journals, newsletters or national newspapers or by consulting unions or professional associations) **or** advertise on the national Job Bank (or the equivalent in Newfoundland and Labrador, Saskatchewan or the Northwest Territories) for a minimum of fourteen (14) calendar days, during the three (3) months prior to applying for a LMO.

For **Skill Level B positions**, employers must conduct recruitment activities consistent with the practice within the occupation for a minimum of fourteen (14) calendar days (e.g., advertise on recognized Internet job sites, in journals, newsletters or national newspapers or by consulting unions or professional associations) **and** advertise on the national Job Bank (or the equivalent in Newfoundland and Labrador, Saskatchewan or the Northwest Territories) for a minimum of fourteen (14) calendar days during the three (3) months prior to applying for a LMO.

For **low-skilled occupations, including Skill Level C and D positions and seasonal agricultural workers**, employers are required to advertise on the national Job Bank (or the equivalent in Newfoundland and Labrador, Saskatchewan, Quebec or the Northwest Territories) for a minimum of 14 calendar days during the three (3) months prior to applying for an LMO **and** conduct recruitment activities consistent with the practice in the occupation. Advertisement must be for a minimum of 14 days, choosing one or more of the following options:

1. Advertise in weekly or periodic newspapers, journals, newsletters, national/regional newspapers, ethnic newspapers/newsletters or free local newspapers;

[42] Bart, *supra* note 3, ch. 1 at 1-16.

2. Advertise in the community, e.g., posting ads for two to three weeks in local stores, community resource centres, churches, or local regional employment centres;

3. Advertise on Internet sites e.g., posting during 14 calendar days/two weeks on recognized Internet job sites (union, community resource centres or ethnic sites).

For all advertisements for **Skill Levels B, C, and D**, the advertisement must include:

1. The company operating name;

2. Job duties (for each position, if advertising for more than one vacancy);

3. Wage range (i.e. an accurate range of wages being offered to Canadians and permanent residents). The wage range must always include the prevailing wage for the position (i.e. the average hourly wage for the requested occupation in the specified geographical area);

4. The location of work (local area, city, or town); and

5. The nature of the position (i.e. project based, or permanent position).

Variations to the minimum advertising requirements may apply to those in certain occupations or in certain circumstances, including:

- Academics;
- Camp Counsellors;
- Certificate of Selection from Quebec;
- Collective Bargaining Agreement that stipulates internal recruitment;
- Employer association;
- Entertainment sector;
- Exotic dancers;
- Foreign Government;
- IT specialists;
- International graduates;
- Live-in caregivers, including those already in Canada, those in emergency situations, and those whose employer moves provinces/territories;
- Owners/operators;
- Seasonal agricultural workers in Quebec;
- Specialized service technicians/specialized service providers; and
- Warranty work.

Genuineness of the Job Offer

In addition to the factors listed in section 203(3) of the IRPR, Service Canada will also consider the genuineness of the job offer. Section 200(5) of the IRPR outlines four factors on which genuineness of a job offer will be assessed:

1. Job offer made by an employer who is 'actively engaged' in the business;

2. Job offer is consistent with the reasonable employment needs of the employer;

3. Employer is reasonably able to fulfill the terms of the job offer; and

4. Employer or their authorized recruiter has shown past compliance with federal/provincial/territorial laws that regulate employment or recruitment in the province where the foreign national will be working.

The assessment of whether an employer is "actively engaged" in the business is meant to ensure that the offer of employment is coming from an employer that not only legally exists, but can also demonstrate the ability to provide stable employment for the requested period. The employer must have an operating/functioning business, providing either a good or a service, and must have a work location in Canada where the foreign worker could work.[43]

In assessing the reasonable employment needs of the employer, the officer must be satisfied that the offer of employment is reasonable in relation to the type of business the employer is engaged in. The employer must be able to satisfactorily explain the role that the foreign worker will play in their business and that it is a reasonable employment need, both in terms of occupation and business-wise.[44]

Consistency with Federal-Provincial/Territorial Agreements

Citizenship and Immigration Canada and the provinces/territories have developed Annexes that deal with the entry of temporary foreign workers to respond to provincial/territorial labour needs. Service Canada will assess the employer for all LMO-required job offers, which will include ensuring consistency with the terms of any agreement contained in the Annex that apply to the employers of foreign nationals.

Employers will be advised if the job for which they are seeking to hire a foreign national falls under a pilot program under a federal-provincial/territorial agreement where they would be exempt from the requirement to obtain an LMO. Service Canada will also

[43] Citizenship and Immigration Canada, *Operational Bulletin 275-C – Temporary Foreign Worker Program Operational Instructions for the Implementation of the Immigration and Refugee Protection Regulatory Amendments*, April 1, 2011, s. 3.3.1 [OB 275-C].
[44] OB 275-C, s. 3.3.2.

advise employers of any applicable obligations under a federal-provincial/territorial agreement.

Past Compliance – Substantially the Same (STS)

In order to determine an employer's past compliance with the terms of job offers extended to foreign workers, Service Canada will assess whether, during the period beginning two years prior to receipt of the opinion request by Service Canada, or the work permit (in cases of LMO-exempt applications), the employer has provided to previously employed foreign workers the wages, working conditions, and employment in an occupation that were substantially the same as those items set out in the employer's offer of employment to those foreign nationals.[45]

A negative STS assessment should reflect situations where the differences relating to wages, working conditions or occupation that were provided to a foreign national as compared to those in the job offer are considered detrimental or disadvantageous to the foreign national or would compromise program integrity.

In cases where the employer did not provide wages, working conditions, or employment in an occupation that were substantially the same as those offered, the failure to do so must be justified in accordance with section 203(1.1) of the IRPR. Acceptable justifications include:

- A change in the federal/provincial law or change in a collective agreement;
- Changes the employer had to make in the workplace in response to a dramatic change in economic conditions that were not directed disproportionately at foreign workers;
- Good faith employer error in interpreting obligations, wages, working conditions or occupation, and the employer has provided or made sufficient efforts to provide compensation to any foreign nationals that have suffered a disadvantage;
- Administrative accounting error by the employer, and the employer has provided or made sufficient efforts to provide compensation to any foreign nationals that have suffered a disadvantage; and
- Other circumstances similar to those set out above.

Employers will face serious repercussions if they do not comply with the terms of job offers extended to foreign workers. If a determination is made that the employer failed to meet their commitments and the failure is not assessed as justified, the employer will be ineligible to hire temporary foreign workers for a period of two years. The employer will also be listed on the publicly-available Employer Ineligibility List.

[45] IRPR 203(1)(e).

PART III

ADDITIONAL EMPLOYER RESPONSIBILITIES

Valid Work Permit

Employers must ensure that a foreign national is authorized to work in Canada. Paragraph 124(1)(c) of the IRPA states that every person commits an offence who employs a foreign national in a capacity in which the foreign national is not authorized under the Act to be employed.

This illegal employment provision is followed in subsection (2) by a "deemed knowledge" provision. An employer who fails to exercise due diligence to determine whether employment is authorized under the Act is deemed to know that it is not authorized.

Employers are therefore deemed to have knowledge and understanding of immigration law, notwithstanding the fact that the IRPA and related regulations and policies are sometimes neither clear nor straightforward.

Misrepresentation

The aiding and abetting and misrepresentation and counselling misrepresentation provisions in the IRPA cast an exceedingly wide net because they relate to persons who directly or indirectly misrepresent or withhold material facts relating to a relevant matter that induces or could induce an error in the administration of this Act.[46]

The issue of what is a "material fact" will differ markedly depending on the specific circumstances and is subject to varying interpretations.

Most work permit categories are set out in policy rather than specific legislative provisions. Work permit immigration policy is subject to varying interpretations and often Citizenship and Immigration officers do not even agree on whether an individual requires a work permit or a visitor record.

Penalties for Employer Non-Compliance

Employers and their lawyers are potentially liable for substantial penalties for contravening the IRPA under the illegal employment provisions, providing inadequate legal advice in contravention of the IRPA and its related regulations and policies, misrepresentation by omission or commission, and attempting to and/or counseling

[46] IRPA 126.

misrepresentation or attempting to and/or inducing, aiding or abetting misrepresentation.

Liabilities will involve fines of up to $50,000 or jail terms of up to two years or both.[47] Offences are punishable in Canada whether they occurred in Canada or outside of the country.[48] The IRPA has codified the extra-territoriality of enforcing immigration compliance. Illegal employment, misrepresentation, aiding and abetting and deemed knowledge provisions apply outside Canada also.

Penalties for non-compliance impact both employers and their counsel and also extend to employees, whose mobility to Canada can be affected. Section 40 of the IRPA renders a foreign national inadmissible for misrepresentation or withholding material facts which relate to a relevant matter that could induce an error in the administration of the Act.

A foreign national can be found to be inadmissible under Section 40 even if an error in the administration of the Act has not occurred. Withholding a material fact which **could** induce an error is sufficient for misrepresentation.[49]

In addition, due to the wording of Section 40, even an innocent failure to provide material information can result in a finding of inadmissibility, but an exception arises where a foreign national can show that he/she honestly and reasonably believed that he/she was not withholding material information.[50]

Once inadmissible, a foreign worker will be barred for a period of two years following that determination. Accordingly, employers who do not advise and/or assist their staff in obtaining required work permits not only risk prosecution, but also prejudice the mobility of their employees, who may be rendered inadmissible to Canada for misrepresentation or withholding a material fact.

If the employer's alleged misrepresentation is linked to the employer and/or counsel, the employer and counsel may also be charged under section 131 of the Act for inducing, aiding or abetting or attempting to induce, aid or abet the employee to contravene the Act.

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[47] IRPA 125.
[48] IRPA 135.
[49] *Kumar v Canada (Minister of Citizenship and Immigration)*, 2011 CarswellNat 2431, 2011 FC 781.
[50] *Baro v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1299; *Singh v Canada (Minister of Citizenship and Immigration)*, 2010 CarswellNat 817, 2010 FC 378.

Part IV

INADMISSIBILITY ISSUES

Officers may refuse a visa application if not all the statutory requirements have been met.[51] Sections 33-42 of the IRPA list a number of classes or categories of persons who are inadmissible to Canada for reasons such as security, human or international rights violations, criminality, organized criminality, medical grounds, financial reasons, and misrepresentation.

Criminal Inadmissibility

Who is Inadmissible

A foreign national may be denied entry to Canada based on his or her prior criminal record. Section 36(1) states that a foreign national is inadmissible to Canada on the grounds of serious criminality if:

- i He/she has been convicted in Canada of an offence under any Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;
- i He/she has been convicted outside Canada of an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment for at least 10 years; or
- i He/she committed an act outside of Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

In *Bankole v. Canada (Minister of Citizenship and Immigration)*,[52] the Federal Court found that the standard of proof for a finding that an applicant has committed an act outside Canada that would be considered an offence in Canada and in the country where the act was committed is "reasonable grounds to believe", which entails "a bona fide belief in a serious possibility based on credible evidence." The court cited *Mugesera v. Canada (Minister of Citizenship and Immigration)*,[53] where the Supreme Court defined this standard as "more than suspicion and less than the balance of probabilities". The court noted that IRPA 36(1)(c), as distinct from IRPA 36(1)(b), does not require a conviction in order to find the applicant inadmissible; the commission of an act is sufficient.

[51] IRPA 11.
[52] 2011 CarswellNat 985, 2011 FC 373.
[53] 2005 CarswellNat 1740, 2005 SCC 40.

A foreign national can also be found inadmissible for reasons of criminality if:

- i He/she was convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;
- i He/she was convicted outside of Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;
- i He/she committed an act outside of Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament; or
- i He/she committed, on entering Canada, an offence under an Act of Parliament prescribed by the Regulations.[54]

To determine if a person is criminally inadmissible to Canada, an examination of the elements of the non-Canadian crime must be conducted in order to determine whether it would be considered a crime in Canada. The examination process is referred to as criminal equivalency.

In Canada, many offences under the Criminal Code and other Acts of Parliament may be prosecuted either by summary conviction or by indictment, referred to as "hybrid" offences. Section 36(3)(a) states that for the purposes of determining the inadmissibility of a permanent resident or foreign national, these "hybrid" offences are deemed to be indictable offences, even if a permanent resident or foreign national was prosecuted summarily.

A person may not be found to be inadmissible for serious criminality under section 36(1) or for criminality under section 36(2) based on a conviction in respect of which a pardon has been granted and has not ceased to have been revoked under the Criminal Records Act or in respect of which there has been a final determination of an acquittal.[55]

Section 36(3)(c) provides for two ways in which a person may overcome criminal inadmissibility arising from offences committed outside Canada: deemed rehabilitation or an application for criminal rehabilitation.

<u>Deemed Rehabilitation</u>

The IRPR prescribes certain circumstances under which a foreign national may be deemed to be rehabilitated such that he/she is no longer inadmissible to Canada. Under

[54] IRPA 36(2). IRPR 19 prescribes all offences under the *Criminal Code*, the *Controlled Drugs and Substances Act*, the *Firearms Act*, the *Customs Act* and the IRPA as offences for the purposes of this ground of inadmissibility.
[55] IRPA 36(3)(b).

section 18(2) of the IRPR, persons who have committed or been convicted abroad of one offence that is equivalent to an indictable offence under an Act of Parliament are deemed rehabilitated if:

- The offence is punishable in Canada by a maximum term of imprisonment of less than 10 years;
- 10 years have passed since the sentence was served, or since the act was committed;
- The person has not been convicted in Canada of an indictable offence under an Act of Parliament;
- There has been no other convictions of any kind, inside or outside of Canada, in the past 10 years; and
- In the case of those convicted abroad, the person has not committed an act outside of Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament.

Persons who have been convicted outside Canada of the equivalent of two or more summary offences are deemed rehabilitated if:

- 5 years have passed since the sentence was served;
- The person has not been convicted in Canada of an indictable offence under an Act of Parliament;
- There has been no other convictions of any kind, inside or outside Canada, in the past 5 years; and
- The person has not committed an act outside of Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament.

Deemed rehabilitation eliminates the need for any special permit to enter Canada and renders the person no longer criminally inadmissible to Canada.

These provisions on deemed rehabilitation facilitate the entry of persons who pose a low risk and whose travel is in Canada's interest for purposes of tourism, trade or business.

Application for Criminal Rehabilitation

If a person does not qualify for deemed rehabilitation under section 18 of the IRPR, a person may be eligible to apply to the Minister for rehabilitation.

Applications for rehabilitation will only be granted in meritorious cases when the Minister or the delegated authority is satisfied that the person concerned meets certain criteria,

has been rehabilitated, and is highly unlikely to become involved in any further criminal activity.[56]

Medical Inadmissibility

Every visitor of a prescribed class is required to undergo a medical examination by a medical officer.[57] A medical examination includes a mental examination, a physical examination, a review of past medical history, laboratory tests, diagnostic tests and a "medical assessment of records respecting the applicant".[58]

The prescribed classes of foreign workers that are required to undergo a medical examination prior to entering and/or engaging in employment-related duties in Canada are:

- Applicants who will be in Canada for more than six months and have resided in a designated country for more than six months within the year preceding their arrival to Canada. For a list of designated countries, visit www.cic.gc.ca/english/information/medical/dcl.html;[59]
- Occupations in which the protection of public health is essential (i.e., workers in health-care services, teachers of small children or primary or secondary school, domestic workers or live-in caregivers, workers who give in-home care to children, the elderly, the ill or the disabled and daycare employees.); and
- Agricultural workers from the above list of designated countries.[60]

Medical restrictions, but not the foreign worker's medical condition which determined the restrictions, should be noted on the work permit by the immigration officer.

The results of the medical examination will be used to determine whether the foreign national is inadmissible on health grounds. Under section 38(1) of the IRPA, a foreign national is inadmissible on health grounds if their health condition:

- Is likely to be a danger to public health;
- Is likely to be a danger to public safety; or
- Might reasonably be expected to cause excessive demand on health or social services.

[56] Citizenship and Immigration Canada, *Enforcement Manual*, c. ENF-14, s. 5.
[57] IRPR 30(1).
[58] IRPR 29.
[59] IRPR 30(1)(c)(ii)
[60] FW-1, s. 9.1.

Excessive Demand

"Excessive demand" is defined in section 1(1) of the IRPR as:

1. A demand on health services or social services for which the anticipated costs would likely exceed average Canadian per capita health services and social services costs over a period of five consecutive years immediately following the most recent medical examination required by these Regulations, unless there is evidence that significant costs are likely to be incurred beyond that period, in which case the period is no more than 10 consecutive years; or

2. A demand on health services or social services that would add to existing waiting lists and would increase the rate of mortality and morbidity in Canada as a result of an inability to provide timely services to Canadian citizens or permanent residents.

"Social services" are defined as any social services, such as home care, specialized residence and residential services, special education services, social and vocational rehabilitation services, personal support services and the provision of devices related to those services:

i that are intended to assist a person in functioning physically, emotionally, socially, psychologically or vocationally; and
i for which the majority of the funding, including funding that provides direct or indirect financial support to an assisted person, is contributed by governments, either directly or through publically-funded agencies.

If a foreign national is found to be inadmissible on the basis that he/she may cause excessive demand on health or social services, clear evidence of the foreign national's ability and willingness to pay for the services are relevant factors to take into consideration, but these factors are not conclusive or determinative.[61] An officer may also consider any alternative arrangements that would relieve the demand on health or social services.[62]

Temporary Resident Permits

According to section 24(1) of the IRPA, a person may become a temporary resident even though he/she is legally inadmissible. This section provides immigration officers with the discretion and authority to issue a temporary resident permit (TRP) to authorize a foreign national to enter or remain in Canada in exceptional circumstances.

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[61] *Sökmen v. Canada (Minister of Citizenship and Immigration)*, 2011 CarswellNat 492, 2011 FC 47; *Colaco v. Canada (Minister of Citizenship and Immigration)*, 2007 CarswellNat 2909, 2007 FCA 282; *Hilewitz v. Canada (Minister of Citizenship and Immigration)*, 2005 CarswellNat 3235, 2005 SCC 57.
[62] *Vashishat v. Canada (Minister of Citizenship and Immigration)*. 2008 CarswellNat 4632, 2008 FC 1346.

This discretionary power may be exercised by an immigration officer in order to issue a TRP and the lawful entry of the foreign national into Canada. A TRP will also allow for a person to apply for a work or study permit.

TRPs are intended to facilitate the entry and stay in Canada of foreign nationals who are inadmissible or do not meet the requirements of the Act, but have compelling reasons for coming to Canada.[63]

In assessing whether an officer's discretion should be exercised to issue a TRP to a foreign national, an inadmissible person's need to enter or remain in Canada must be compelling and sufficient enough to overcome the health or safety risks to Canadian society. The degree of need is relative to the type of case. Even if the inadmissibility or violation is relatively minor, a permit may be unwarranted in the absence of compelling need.

Officers may issue a TRP if the need to enter or remain in Canada is compelling and sufficient to overcome the risk, and the risk to Canadians or Canadian society is minimal and the need for the presence in Canada outweighs the risk.[64]

Officers must consider the factors that make the person's presence in Canada necessary (e.g., family ties, job qualifications, economic contribution, temporary attendance at an event) and the intention of the legislation (e.g., protecting public health or the health care system). The assessment may involve:

- The essential purpose of the person's presence in Canada;
- The type/class of application and pertinent family composition, both in the home country and in Canada;
- If medical treatment is involved, whether or not the treatment is reasonably available in Canada or elsewhere (comments on the relative costs/accessibility may be helpful);
- Anticipated effectiveness of treatment;
- The tangible or intangible benefits which may accrue to the person concerned and to others; and
- The bona fides of the sponsor, host or employer (e.g. an ad hoc committee that exists solely to invite an inadmissible individual as a speaker may not be bona fide).[65]

Cases that may not warrant favourable consideration include criminal, security, and public health risks, an inadmissible sponsored parent with other children or family

[63] *Farhat v. Canada (Minister of Citizenship and Immigration),* 2006 CarswellNat 3418, 2006 FC 1275.
[64] Citizenship and Immigration Canada, *Overseas Processing Manual*, c. OP-20, s. 5.8.
[65] *Ibid*., s. 8.

members in the home country to provide care, or a criminally inadmissible spouse with a risk of violence or repeat offence.[66]

The TRP has similar characteristics to other type of permits issued to temporary residents. Authorization for the entry of temporary resident permit holders into Canada is given on an individual entry basis. The TRP will cease to be valid if the permit holder leaves Canada (unless the permit specifically authorizes the permit holder to re-enter Canada) regardless of its expiry date. Conditions related to work and study may be imposed under the TRP provisions.

TRP holders who do not comply with the provisions of the Act or with conditions imposed on them, may be subject to an inadmissibility report under subsection 44(1) and to removal from Canada. Where the TRP does not provide for an authorization to re-enter Canada the holder who leaves and then subsequently seeks to return to Canada must meet the usual requirements to enter Canada or obtain a new TRP.

[66] *Ibid.*

Part V

Legislation - What Governs Your Obligations

The first issue on which counsel must advise a new employer to Canada is the legislation that governs its obligations as an employer.

The first inquiry is whether the employer's enterprise is federally regulated (across-Canada) or whether it is provincially regulated. This is not determined by whether or not the employer conducts business in more than one province specifically, but rather by the nature of the business itself.

At the time of hiring, an employer must be sure that it is aware of its legal obligations under the relevant legislation and that it is taking steps to comply with those obligations.

Federally regulated undertakings include:

- banking;
- marine shipping, ferry and port services;
- air transportation, including airports, aerodromes and airlines;
- railway and road transportation that involves crossing provincial or international borders;
- canals, pipelines, tunnels and bridges (crossing provincial borders);
- telephone, telegraph and cable systems;
- radio and television broadcasting;
- grain elevators, feed and seed mills;
- uranium mining and processing;
- businesses dealing with the protection of fisheries as a natural resource;
- many First Nation activities;
- most federal Crown corporations; and
- private businesses necessary to the operation of a federal act[67]

If the enterprise is not federally regulated, it is provincially regulated by each province/territory (henceforth referred to simply as "province") in which it carries on business.[68] The employer may need to be advised of the relevant legislation in any number of provinces and the differences in legislation between them. Employees' rights are dictated by the legislation of the province in which the employees are regularly employed (not necessarily the same province as that in which they reside).

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[67] *Canada Labour Code*, R.S.C., 1985, c. L-2 s. 2.

[68] *Four B Manufacturing Ltd. v. United Garment Workers of America* (1979), 102 D.L.R. (3d) 385 at p. 395 (S.C.C.).

In each province, as well as federally, there are 3 core pieces of legislation of which the employer should be advised of:

1. Employment Standards – oftentimes an Employment Standards Act, Employment Standards Code or Labour Code. The name varies. The purpose is to regulate the minimum standards for employment in the regulated province/territory/country. It regulates:

    a. minimum wage
    b. vacation pay/time
    c. leaves of absence
    d. public holidays
    e. minimum termination obligations
    f. mechanisms for enforcement

2. Health and Safety – there is health and safety legislation in each jurisdiction. This legislation defines employer obligations concerning the protection of employees' health and safety in the workplace.

3. Human Rights – discrimination on protected grounds in hiring, employment or termination is prohibited in all jurisdictions. While the process can vary quite a bit by province, the principals are primarily comparable.

Legislation can be enforced by the applicable Ministry of Labour and gives employees the right to file complaints and seek enforcement. There are also mechanisms for workplace spot inspections by the Ministry. It is important that employers are advised that if such inspection is initiated, it may be with or without advance warning and employers are required to comply. Orders for compliance as well as fines and other penalties including imprisonment may be ordered.

There is other legislation in place that applies to employment that varies from one province to the next that counsel should be aware of. A list of the legislation and web links is attached at Appendix A.

Advising the employer of the applicable legislation to ensure compliance is an important first step to becoming an employer in Canada.

Part VI

Pre-Hiring Considerations

The Interview

Before an employer interviews a potential candidate, it is a good idea to advise the employer about the matters which the employer intends to ask that person about. An employer should determine in advance the types of questions it will ask and should prepare an outline which it can reprint to use with each candidate.

Counsel should advise the employer about what it can and cannot ask. Human Rights legislation lists prohibited grounds on which an employer cannot discriminate in employment or in contract. An employer must not ask questions intended to elicit information which it ought not to have as it may lead to the inference that the employer used the information to discriminate against the person.

This includes:

- sex (including pregnancy);
- sexual orientation;
- race, creed/religion, ethnic/place of origin, ancestry or colour;
- citizenship (though an employer can determine whether someone is legal to work in Canada, this is best left until it is making the job offer which can then be conditional upon them being legal to work in Canada) – an employer cannot discriminate if the applicant is a citizen of another country or if the applicant is not a citizen of Canada but otherwise legal to work in Canada;
- age (as long as they are over 18);
- family status (i.e. whether someone is married, single, or a single parent); or
- disability (including health and attendance questions)[69]

An employer may ask whether an applicant can perform the duties associated with the position and whether the applicant is available to work the days and hours required.

Some of the above information appears to be obvious (notably sex and/or colour). Nevertheless, an employer may not ask questions in this area.

Interview questions are a large source of complaints to the Human Rights Tribunals/Commissions.

[69] *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 s. 3(1). and see Appendix for comparable provincial legislation

Before the Offer

Before the employer makes an employment offer to the potential employee, counsel should advise the employer of its rights regarding the screening of employees.

An employer should take steps to verify the candidates' stated credentials and check their references. The employer may be glad that it did.

In Canada criminal background checks are not commonplace for most positions. They can be done; however, they do require time. The employer must to go to the police station and request their record of offences. This record takes at present roughly 2-3 weeks to obtain.

If an employer legitimately has this concern for its employee, it may need to make a conditional offer of employment. An employer is not permitted to discriminate based on a person's record of offences for which a pardon has been granted, or with respect to provincial offences (i.e. a driving record).

If an offer is to be made conditional on verification of anything - references, being legal to work, granting of a visa or work permit, verification of credentials and so forth - it can be made but it must be clear as to what the condition is, and to reserve the right to revoke the offer if there is an unsatisfactory result.

The Offer

Counsel should also advise the employer about the nature of the job offer and the manner in which it is provided to the employee.

Once the employer has selected a candidate, it should present him/her with a written job offer and the employer should leave it open for a reasonable period of time for the applicant's consideration.

If the employer intends to present a formal contract of employment, this is the time to do it. An employer cannot obtain an enforceable employment contract by presenting it to an employee on their first day of work, even if they have not resigned from other employment to accept the role. It will not be enforced.[70]

This is also the time for an employer to put in writing the matters that the employer was

[70] *Francis v. Canadian Imperial Bank of Commerce*, 120 D.L.R. (4th) 393 (Ont. C.A.).

to decide upon prior to interviewing the candidate, such as position duties, hours of work, and other matters which when defined, afford clarity in terms of expectations. The employer must also consider advising the candidate if there is going to be a probationary period (maximum 90 days if they are an employee). Absent express mention in writing and the use of appropriate language, no such right of termination without notice or obligation exists.

Employment standards legislations only establish minimums. There are many provisions not automatically incorporated into an employment contract. Notice of termination is one very important obligation that an employer should consider at the time of hiring. An employee cannot be bound by an agreement for less than the individual's entitlement under the applicable legislation, but the parties can contractually agree that the minimum is the sole entitlement.[71] Failing a stipulation, Canadian common law (across-Canada except in Quebec where the Civil Code applies which is a written legislative embodiment of these otherwise common law principles) recognizes the right to "reasonable notice" if you terminate an employee without cause.

The entitlement to reasonable notice will run in the range of 2-28 months of total compensation. The American construct of "employment at will" does not exist in Canada. Everyone is entitled to notice of termination, the more they earn, the older they are, the longer they worked for you, the more senior the role, the higher that entitlement will be.[72]

An employer should be advised to provide the candidate with the offer, in duplicate, and ask that he/she sign and return one copy if the employee accepts the position.

An employer should also ensure that the relationship is structured appropriately, be it as an employment relationship or that of an independent contractor. Failure to properly characterize the relationship can result in tax liability, risk for wrongful dismissal, liability for statutory withholdings and violation of legislation. The difference will impact the employer's legislative and common law obligations.[73]

Employees are on payroll. An employer deducts income tax from their salaries and there are Employment Insurance and Canada Pension Plan premiums to be paid. Conversely, contractors are responsible for their own income tax remittances and can elect in or out of the Employment Insurance system.

There are legal tests to determine whether someone is an employee or independent

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[71] *Machtinger v. HOJ Industries Ltd*., [1992] 1 S.C.R. 986 (S.C.C.).
[72] *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362 (S.C.C.); *Bardal v. Globe & Mail Ltd*. [1960] O.W.N. 253 (Ont. H.C.).
[73] *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*., [2001] 2 S.C.R. 983 (S.C.C.).

contractor. It is not a matter of the employer simply choosing. An employer should be advised to structure the relationship correctly or there can be adverse consequences.

The Signs – some of the considerations are:

Employee	Contractor
i on payroll	i Not on payroll
i dental office equipment and supplies used	i uses own equipment and supplies
i Usually does not work elsewhere	i Usually works elsewhere and certainly is free to work elsewhere if they choose
i hours set by the office	i free to accept or refuse work and sets own hours

The totality of the relationship as a whole requires examination.

How to Properly Fill Temporary Needs

Employers should seek advice from counsel in hiring an employee for a temporary position. There are two ways that an employer may hire for a temporary position:

1. An employer may hire on a fixed term contract ending when the other person returns to work, terminable on one week notice, presuming the contract term shall be less than one year; or,

2. An employer may hire with an employment contract that contains termination provisions, which are not unduly onerous so that if the position is in fact temporary and does not become permanent, it will not require extended notice or payment in order to terminate it.

What an employer should not do is hire a permanent employee because it believes it cannot hire a quality person on a temporary basis, without a contract. Even short term employees will be entitled to at least 2-3 months' notice of termination, and potentially greater amounts, in particular if they resign from long term employment to accept a position working for the new employer.

There are many claims in this area!

Employment Contracts – Myths Debunked – Pitfalls to Avoid

It is a common myth that contracts are standard; however, they are anything but. Each contract is different and so is each employee. No employer should ever pick up a contract not prepared for them and use it. Precedents found on the internet are the most dangerous of all! Further, employers will have no insurance on such a piece of work compared to a document drafted for their own use.

A second common myth is that contracts can be drafted and signed by staff and will magically come into force. The court has expressly rejected this. Contracts need certain ingredients to be enforceable, one of which is "consideration", being something of value in exchange for signing the contract. The courts have been clear that continued employment is not adequate consideration.[74] Before contracts are implemented, they should be professionally drafted and a strategy for implementation discussed with legal counsel. Ideally, contracts are put in place before the staff come on board.

A third common myth is that an employer can provide notice requiring staff to sign a contract and become bound by the contract. This is not necessarily the case. If the employee advises that the employee is not accepting the terms of the contract (i.e. refuses to sign it), the court has found that the terms do not become enforceable later. This is not, therefore, an appropriate risk management plan.[75]

The fourth common myth is that the employer can make the contract governed by the jurisdiction in which their head office is located. There is no "choice of law" for an employment contract.[76] Employment terms must comply with the jurisdiction in which the employee is regularly employed. An employer cannot have a British Columbia employee and suggest the terms of his/her employment are governed by the laws of the province of Ontario.

Forum Selection in Contracts

While an employer may be able to select the forum in such contracts as Shareholder Agreements, Stock Option Agreements and so forth, employment agreements are not typically subject to forum selection. An attempt to require an employee to litigate his or her employment entitlements out of province by virtue of a "forum" clause in an employment contract will not likely be enforced by a Canadian court. However, an

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[74] *Hobbs v. TDI Canada*, [2004] O.J. No. 4876 (Ont. C.A.) and *Wronko v. Western Inventory Service Ltd.* (2008), 90 O.R. (3d) 547 (Ont. C.A.).
[75] *Francis v. Canadian Imperial Bank of Commerce* (1994) 7 C.C.E.L. (2d) 1 (Ont. C.A.).
[76] *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (Ont. C.A.).

employee sent to work out of province, even out of Canada, does open the opportunity to select the forum of applicable law governing their employment, as well as the jurisdiction of any employment related dispute. If the parties have selected the applicable law, the court will generally defer to their selection, unless it is contrary to public interest, illegal or done in bad faith. The jurisdiction of the dispute must have a 'real and substantial' connection to the dispute for enforcement. Selection by the parties is far from an automatic answer. The court must consider it appropriate based on Canadian case law. For example, a suggestion that a Canadian employee is required to sue for wrongful dismissal in the U.S. is unlikely to be enforced**.**

If restrictive covenants are being included in the contract which may require enforcement outside Canada, choice of law and jurisdiction clauses are often best avoided or drafted with express attention to this issue or to expressly refer to jurisdiction of any court as required to enforce those provisions.

Risk Management

Risk management involves becoming aware of legal obligations as an employer by making operational decisions which establish processes to manage these obligations and by following the guidelines set out above to exercise prudence in the hiring process.

Risk management is also what contracts are all about. An appropriate contract can minimize the risk of misunderstanding, needing to pay overtime where that was never the intention, becoming engaged in disputes about roles, hours of work and so forth.

Having an appropriate employment contract can save an employer tens of thousands of dollars on termination. If the employer is an Ontario employer and its payroll is less than $2.5 million per annum, it can cap its exposure on termination to 8 weeks' pay.[77] However, without an employment contract, exposure may be as high as 24 months' pay.[78]

Contract drafting should not be dealt with in a less than professional manner, and should be drafted by experienced counsel. Challenges to the language used in employment contracts form the subject matter of a wealth of litigation.

If your company is being sold, enforceable employment contracts will add to the value of your company as the termination liabilities will be capped and capable of quantification.

Contracts can also prescribe and protect the employer's right to make changes to the

[77] *Employment Standards Act*, 2000, S.O. 2000, c. 41, ss. 57, 64.
[78] *Dey v. Valley Forest Products Ltd.* (1995), 162 N.B.R. (2d) 207 (N.B. C.A.).

workplace with the greatest degree of flexibility. Failing provision, reasonable notice (assessed again based on context) will be required for any change to be made.[79] An employer can change an employee's duties, hours, responsibilities, salary and so forth, but it must first get a legal opinion on how much notice will be required.

[79] *Techform Products Ltd. v. Wolda.* (2001), 56 O.R. (3d) 1 (Ont. C.A.).

Part VII

Human Rights in Employment

It is a matter of public policy to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law. Human rights legislation applies to many forms of dealings across Canada, including matters of employment and contract. It protects individuals against discrimination in those areas as set forth above. If there has been an act of discrimination, it can result in a complaint being filed with the applicable tribunal/commission or in some jurisdictions form part of a claim in the courts.

Freedom from discrimination in employment includes the process of hiring, career progression/performance management, compensation and termination.

In Canada, all that an employee/applicant must do is prove a *prima facie* case of discrimination in order to establish a complaint. In defence, the employer must show that its alleged discriminatory policy/practice:

- was for a purpose rationally connected to the performance of the job;
- was adopted in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
- is reasonably necessary to accomplish the work-related purpose.

There is no cap on damages caused by discrimination in some jurisdictions. Potential remedies also generally include the possibility of reinstatement in the case of termination of an employee.

Discrimination and the Foreign Worker

Once someone is legally entitled to work in Canada, they too are entitled to a workplace free from discrimination. One of the protected grounds of freedom from discrimination is "citizenship". This means that foreign workers cannot be paid less than their "Canadian" counterparts and that there cannot be discrimination in hiring, career progression and so forth on the basis that an employee is in Canada on a work permit or visa.

There are certain exceptions in some jurisdictions where citizenship can be made an employment requirement where: (i) it is a requirement imposed by law; (ii) it is related to purpose of fostering or developing participation in culture, educational, trade union or athletic activities by Canadian citizens or persons lawfully admitted to Canada for permanent residence; or (iii) it is a requirement for the holder of a chief or senior executive position.

Disability Accommodation Obligations

A very common issue encountered in Canada is the requirement to accommodate the needs of a disabled employee, a protected ground under human rights legislation. Disability includes any degree of physical disability or infirmity caused by injury, birth defect or illness and it includes past disabilities or perceived disabilities and temporary, as well as permanent disabilities.[80] There is a high duty to accommodate disabled employees which is subject to a detailed analysis.[81] Leaves of absence due to sickness or disability are also required to be accommodated.

There are obligations on both parties to be managed and it is important that the communication be careful and sensitive. Assessment of the flow of information between employer and employee, as well as the assessment of the reasonableness of the accommodation has resulted in a great deal of litigation in recent years.

In the case of disability, the duty to accommodate that disability is a legal obligation of all employers. The threshold for that accommodation is undue hardship to the employer.[82]

Undue hardship is assessed using 4 criteria:

3. Financial costs;

4. Health and safety requirements, if any;

5. Whether accommodation will interfere with employee moral or any Collective Agreement; and,

6. The size and interchangeability of the operation.[83]

In Ontario the factors also include outside sources of funding. The case law is not clear whether items 3 and 4 above are true considerations in Ontario.[84]

Other

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[80] Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, s. 10.
[81] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 (S.C.C.).
[82] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 (S.C.C.); *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 (S.C.C.).
[83] *British Columbia (Public Service Employee Relations Commission)* v. *BCGSEU*, 1999 CanLII 652 (SCC), [1999] 3 S.C.R. 3
[84] Ontario *Human Rights Code*, R.S.O. 1990, c. H.19

The test for what you have to do to accommodate a disability must be met with evidence which is objective and quantifiable. This is a very high threshold. It will apply to an employee as soon as they become an employee.

Employer's Obligations:

1. Accept requests for accommodation in good faith;
2. Request only information that is required to make the accommodation;
3. Obtain expert advice or opinion where necessary;
4. Take an active role in ensuring that possible solutions are examined;
5. Maintain the confidentiality of persons with disabilities;
6. Deal with accommodation requests in a timely way; and,
7. Bear the cost of any required medical information or documentation.

Employee's Obligations:

1. Inform the employer of needs;
2. Cooperate in obtaining necessary information, including medical or other expert opinions;
3. Participate in discussions about solutions, and work with the employer on an ongoing basis to manage the accommodation process; and,
4. Accept reasonable accommodation.

Obligations respecting the level of accommodation were recently also clarified by the Supreme Court of Canada.[85]

We know that:

- i it is not required that a new job be created;
- i a fundamental change in working conditions is not required and it need not be impossible to accommodate the employee;
- i accommodation does not modify the fundamental character of the employment relationship; namely, the provision of services for remuneration; and
- i the employee still needs to be able to perform services

[85] *Supra* note 82.

The correct approach continues to be assessing whether or not there is undue hardship to make that accommodation. The court shall apply the contextual approach at the start of the absences (i.e. when the decision is being made and not in hindsight) to determine whether or not the duty has been met.

Accommodation includes arranging the workplace or duties to enable the employee to work. It may include such things as:

- a variable schedule;
- lighter duties; or
- staff transfers

Termination and the Disabled Employee

Another issue which commonly arises is whether an employer can terminate an employee who has been absent due to illness for a prolonged period of time. This decision involves a legal analysis as to whether or not the employer is relieved of its obligation to continue to hold the employee's position owing to the fact that the employment contract is "frustrated" and no longer requiring of performance by either party. The determination of frustration again involves the application of the "contextual approach".[86]

The Contextual Approach:

Factors to be considered in the Contextual Approach:

- length of service;
- nature of employment;
- how integral the employee is to the success of the employer's business;
- whether prolonged absence will be harmful to the employer; and
- nature of the illness and prognosis for return to work

Even if an employee cannot be accommodated, the employer still needs to pay severance pay under employment standards legislation even though common law notice is not required.

Whenever the test is contextual, it requires the opinion of an expert in the area who is familiar with the case law and can apply the facts to the law and provide an opinion.

[86] *Yeager v. R.J. Hastings Agencies Ltd.*, [1984] B.C.J. No. 2722 (B.C.S.C.) citing with approval the test enunciated in *Marshall v. Harland & Wolff Ltd.*, [1972] 2 All E.R. 75 at para. 86 (N.I.R.C.)..

Part VIII

TERMINATION OF EMPLOYMENT

Entitlements Demystified

There are two regimes which govern employee rights and employer obligations with respect of termination in Canada.

The first is determined by the applicable employment standards legislation, which, as mentioned above, defines employee's minimum rights with respect to many matters concerning their employment, including rights on termination. There are also mass termination provisions in all jurisdictions which may require additional notice to employees, notification and planning submission to provincial ministries of labour.

The second, and overlapping regime, is the common law.

Whereas the employment standards legislation prescribes minimal entitlements, much like minimum wage, it does not set out the actual amount of notice required to be provided to employees upon termination. The common law needs to be considered to assess actual liability.

With global restructuring and redundancy eliminations, employers will need to account for their legal obligations to the employees in their jurisdictions of employment. There are no special exemptions in any Canadian jurisdiction which permit an employer the right to simply terminate employment of employees without notice owing to the fact of global restructuring, plant/office closure or position eliminations.

The Common Law

The actual obligation to be met is that of the common law obligation to provide reasonable notice.

The parties can have an employment contract by which they can agree as to what will constitute reasonable notice, subject to the ESA minimums being met.[87]

In the absence of such a contract, the assessment of reasonable notice is dependent on consideration of the factors established by the court in *Bardal v. The Globe and Mail* and expanded upon by the cases thereafter, namely:

- i age;
- i length of service;

[87] *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 (S.C.C.); *Wood v. Industrial Accident Prevention Association*, [2000] O.T.C. 605 (Ont. S.C.J.).

- nature of the position held;
- compensation;
- availability of other suitable alternate employment having consideration to the employee's training and experience; and
- availability of other suitable alternate employment having consideration for economic matters, geography, and other "uniqueness" factors.

Reasonable notice may fall as low as the ESA minimum and generally will not exceed 24 months (though 28 months has been awarded in unusual circumstances).

Assessment of what will constitute reasonable notice requires knowledge of the case law and requires a legal opinion.

Notice can generally be provided as either working notice of payment in lieu of notice.

"Wrongful dismissal" refers to a termination where the employer has failed to provide adequate working notice or payment in lieu of notice.

Termination Package Structuring Options:

When an employer calls counsel to discuss a potential termination and to obtain an assessment of the potential liability attached to that decision, counsel should also discuss with the employer various ways in which termination packages can be structured.

1. An employer will need to comply with the applicable employment standards legislation and its contract of employment, if applicable. However, it is often a good idea for an employer to consider offering something in addition in exchange for a release. The decision to be made is how much more, up to the potential exposure under the common law;

2. If something further is offered, it can be by way of working notice, salary continuance or payment of a lump sum;

3. If it is offered as salary continuance, the employer still can decide what to do if the employee finds other employment during that period of time with the salary continuance payments continuing, stopping, or, an employer can engage in a common practise of offering a lump sum payment of 50% of the remaining balance of the salary continuance;

4. If the employee has group benefits, a decision will need to be made as to how long these benefits will continue for (ensuring that compliance with employment standards legislation requirements and any insurance legislation requirements governing the notice of termination of coverage to employees);

5. An employer will also need to consider whether to offer a letter of reference, and if so whether it will be a positive letter of reference or merely a confirmatory one;

6. An employer may also consider whether to offer to pay for the employee to receive legal advice on the package presented; and,

7. It is a good idea for an employer to also address in the package anything else it may want to secure from the employee in exchange for a payment (non-solicitation agreement, release, etc.) and ensure that the employer requests a release if providing payment of more than the ESA minimum.

The Challenge of the Aging Workforce

This is a growing issue in Canada since it has been declared illegal to discriminate on the basis of age in employment which, hence, resulted in the removal of mandatory retirement. It is a "problem" that is not going to diminish. Counsel should advise employers to expect:

- performance will weaken and many will not know it is happening
- the old escape of retiring an employee is no longer available
- employers cannot implement other "across the board" determinations as to when an employee must leave your workplace
- downsizing cannot target those who are older
- mandatory retirement policies will be subject to scrutiny and generally not enforceable (subject to being justified in some fashion as a good faith and legitimate occupational requirement). To be permitted it must be rationally connected to the job, and adopted with a sincere believe that the requirement is necessary for legitimate work related purposes. The requirement must be objectively necessary for the carrying out of the work and it must be impossible to accommodate the employee without imposing undue hardship on the employer. Many believe it is difficult to imagine how this test could be met.

How to Deal with Aging and Under Performing Employees?

- performance reviews needed for those with lengthy service and thus used for all of the staff – when performance slips employers will hence be able to show termination was not as a result of an act of age discrimination
- incentives through creation of pension plans
- voluntary separation packages
- termination without cause
- termination with cause
- planning through employment contracts for cheaper terminations
- creative and open discussion with employees to transition to alternate work terms (i.e. part-time) to meet the needs and desires of both employer and employee (warning though: proceed with extreme caution and with advice of counsel).

Letters of Reference

There has not been a single case of liability for the provision of a letter of reference. There has however been liability for the failure to provide one.[88] The only warning is that counsel should advise the employer that it should ensure any reference it offers is true. There is something positive that can be said about most employees, even those with whom an employer has experienced issues. An employer should focus on the employee's strengths in the letter of reference. Sometimes offering a reference goes a long way to ending an employment relationship on a positive note. It is a good policy thereafter to keep verbal references in accordance with the written reference.

The Termination Meeting

It is important to consider what an employer's agenda is for the termination meeting. This should include who will be present, when it will take place and what the employer will do afterwards.

A suggested plan may be as follows:

1. An employer should plan the meeting for the end of the day by asking the staff member to stay behind after the others have left for the day.

2. If there is an office manager, or another dentist who can be present, it is a good idea to have a witness there. An employer should not have a subordinate or a peer to the employee being terminated present.

3. An employer should advise the employee that a decision had been made to let him/her go and should advise what the effective date is and present the termination letter.

4. If there is a package, it should be provided to the employee in duplicate, together with any release also in duplicate.

5. Whether reasons are to be given is circumstance dependant.

6. An employer should feel free to review the package with the employee or to ask the employee if he/she would like to review it together or if he/she would prefer to read it later.

7. If the employee offers to sign the package on the spot, an employer should tell the employee that is does not want him/her to do that; the employee should be advised to take it away and get it back to the employer no earlier than the next

[88] *Ditchburn v. Landis & Gyr Powers Ltd.*, [1997] O.J. No. 2401 (Ont. C.A.),

day. An employer should tell him/her to sleep on it, review it and ensure he/she has had time to consider it.

8. An employer should allow the employee to pack up his/her things (under supervision) and ask him/her to return keys and so forth, including any passwords the employer needs and any other property.

9. An employer should offer to call a taxi to take the employee home or to drive him/her in their own car if that is feasible (and have your witness follow and drive you back).

10. An employer should make notes of the termination meeting, including the demeanour of the employee, any questions asked and anything else worthy of note.

Intellectual Property

Intellectual property (copyrights, patents and industrial design) created by an employee during the course of employment are typically presumed to be the property of the employer.[89] This presumption does not apply to independent contractors or to work product not clearly within the scope of the employee's employment. However, authors of artistic and/or literary work, whether employees or not, retain 'moral rights' in their work product which may permit the author to prevent modification. Accordingly, it is prudent for an employer to address as required these issues by way of any employment contract for relevant employees.

Fiduciary Duties, Restrictive Covenants, Confidentiality

In Canada, employees in the upper echelons of management owe fiduciary duties to their employers both during the course of employment and for a reasonable period of time after the termination of that relationship (this is a common law duty in all provinces except Quebec where it is embodied in the Civil Code).[90] In the employment relationship, this duty, if applicable, includes the duties of fidelity, loyalty, avoidance of conflicts of interests, non-solicitation of staff and clients/customers and following termination, not to unfairly compete with the company. This duty is somewhat limited and dependent upon the context of the employment relationship, the degree of control/influence the employee had over the operation, access to confidential information, participation in strategic planning and so forth. Also, the duration of the duty post termination varies greatly and a large variable is how long the employee was employed by the company.

[89] *Elsley Estate v.J.G. Collins Insurance Agencies Ltd.* [1978]2 S.C.R. 916 (S.C.C.).
[90] *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592 (S.C.C.).

All employees owe a duty of fidelity which operates during the course of employment, irrespective of their level. This includes the duty not to compete with the employer or solicit its customers during the course of employment.

Owing to the obvious limitations of the duties above, many employers seek to protect their interests through various forms of restrictive covenants embodied in employment agreements. The most common varieties are: 1) non-solicitation of employees; 2) non-solicitation of customers/clients; 3) non-competition; and 4) confidentiality.

Confidentiality is a duty generally upheld by courts across Canada without limitation in terms of duration. Confidential information of the employer is considered to be the property of the employer, and until such information ceases to be confidential, if ever, employees are not permitted to use, disclose or possess this information. It is not their property. That being said, provisions concerning confidentiality in employment contracts are common. Including such provisions will afford the opportunity to list what information of the business is confidential as well as defining the obligation in black and white to the employee who otherwise may be ignorant of this obligation.
Foreign companies seeking to enforce this obligation in Canada will generally be met with a receptive court provided that the information is in fact confidential, was obtained during the course of employment and is being used or about to be used in an impermissible manner. The proof of existence of a contractual obligation defined in legally enforceable Canadian terms is not usually required.

At the other extreme, non-competition covenants in foreign agreements will be subject to scrutiny by Canadian standards and will not simply be enforced by the courts. There is generally a presumption that these covenants are not enforceable. They are considered *prima facie* void as being in restraint of trade. The onus will fall on the employer to show that the protection of a non-competition covenant is required owing to the specific role the individual played with the organization and the knowledge they have such that the needs of the employer could not be protected by a non-solicitation provision.[91] Further, the scope of the covenants needs to be not overly broad in terms of geography, duration and scope. A competitor must be defined as narrowly as possible to reasonably protect the needs of the company. The duration must be reflective of the operational needs and strategic planning of the company and must be proportionate to the duration of the employee's employment, and not extend past two years. The geographic scope is also very important and covenants which operate to prevent employment of the employee in their field of work anywhere in the globe will almost never be enforced. The court may also consider the fairness of the provision generally and refuse enforcement where not in the public interest.

The non-solicitation of clients/customers is one which is more often enforceable. Again, the character of the employee will be relevant and the provision will need to be considered by the court to be reasonable considering the role of the employee with the

[91] *Lyons v. Multari*, (2000), 50 O.R. (3d) 526 (Ont. C.A.).

company and the reasonable needs of the employer. It must also be proportionate in terms of subject matter, duration and geography. For example, it should not extend to the non-solicitation of thousands of clients when the employee serviced only a dozen.

Non-solicitation of a fellow employee is generally considered to be reasonable provided that the duration of the request is reasonable given the context of the employment relationship. The need of an employer to protect against a mass attrition of staff is recognized to be an important and reasonable one as prevention does not operate as an impediment to re-employment by the departing employee. As a result, there is little reason usually for a court to refuse enforcement.

All of this being said, the above are very general propositions only and the context and needs of the individual employer and the role of the particular employee require consideration in each case to ensure that a contract is prepared to address the needs of the employer. Further, the case law in this area is rapidly evolving. In recent years obtaining injunctive relief to prevent these actions has become increasingly difficult in all jurisdictions and it is generally thought to be the very rare case where such relief will be awarded on an interim basis.[92] The move has been towards the award of damages. Therefore, there is some question as to the utility of these covenants as they provide little immediate relief. Further, clarity of language is imperative to enforcement.

However, employers seeking to employ executives commonly will request the potential employee advise as to whether they are signatory to any contractual obligations concerning non-competition or non-solicitation which would impede their ability to accept an offer of employment. If answered in the affirmative, copies of the contracts are commonly requested (or of only the applicable provisions) and legal opinions are often sought by both the prospective hire and the employer at this preliminary stage to determine whether there is a potential problem if the employee is brought on board. Accordingly, the existence of such a provision may operate as a disincentive to a further employer in hiring someone in violation of the contract even if the courts are unlikely to offer any immediate relief if the employee is hired.

Foreign contracts sought to be enforced against those living in Canada will be required to show that the contract should be enforced here based on the standards established by Canadian law.

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[92] *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.); *Longyear Canada ULC v. 897173 Ontario Inc. (J.N. Precise)*, [2007] O.J. No. 4834 (Ont. S.C.J.).

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