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immigration (business)

In today's increasingly global economy, Canadian employers often turn to foreign nationals to maintain a competitive edge and to remedy skill shortages in the domestic labor market.

Recent developments in Canadian immigration law have made it more challenging for Canadian employers and foreign entities with Canadian operations to conveniently move skilled and key personnel into Canada. In April 2011, new regulations were implemented under the *Immigration and Refugee Protection Act* ("*IRPA*"). Although the new regulations are aimed at protecting foreign workers, they directly impact all employers by implementing a more rigorous application process and by imposing a four-year cap on certain types of work permits. At the same time, employers are facing a more restrictive work permit process, it is also becoming more difficult for foreign nationals to obtain permanent resident status as caps have been implemented under the federal skilled worker program and higher monetary thresholds have been implemented under immigrant investor programs. Layered on top of these changes is the fact that Canada's overall approach to immigration is being reviewed as part of a comprehensive public consultation on immigration priorities.

This paper focuses on recent developments in Canadian business immigration law. We address the following:

1. the impact of new foreign worker regulations;
2. new restrictions under the federal skilled worker category for obtaining permanent resident status;
3. developments with respect to immigrant investor and provincial nominee programs; and
4. the public consultation process on immigration mix.

introduction of new foreign worker regulations

A significant development in business immigration law was the April 2011 implementation of regulations under the *IRPA* aimed at protecting foreign workers. Until these regulations came into force, there were few practical safeguards to protect foreign workers from unscrupulous employers. Widely viewed as a reaction to media reports regarding the exploitation and poor treatment of low skilled foreign workers by Canadian employers and their recruiters, these regulations, for the most part, do not differentiate between foreign workers at various skill levels. As implementation continues, we should expect more extensive information sharing between federal and provincial agencies and retention of more detailed, immediately accessible information about Canadian employers and their past employment practices.

The centerpiece of the new regulations is a more rigorous assessment of the job offer and of the employer's past commitments to foreign nationals it has employed. For positions requiring a Labour Market Opinion (government certification that, among other things, no Canadian citizens or permanent residents are available for the position and that the employee will be paid the prevailing wage for the position), the assessment will be completed by Service Canada as part of that process. For Labour Market Opinion-exempt positions, the assessment will be completed by Citizenship and Immigration Canada ("CIC") or the Canada Border Services Agency when a work permit is requested.

The assessing agency is required to consider the genuineness of the job offer. Four factors are to be considered, being whether:

- the employer is actively engaged in the business in respect of which the offer is made;
- the job offer is consistent with the reasonable employment needs of the employer;
- the employer is reasonably able to fulfill the terms of the job offer; and

- the employer or a recruiter acting on its behalf has complied with federal/provincial/territorial laws regulating employment or recruitment in the province/territory where the worker will be employed.

If the employer has previously employed foreign workers, the assessing agency will also consider whether the employer has, in the two years preceding the application at hand, provided to such foreign workers wages, working conditions and occupation type that are substantially the same ("STS") as those set out in their job offer. Where the information available indicates non-compliance, the employer will have the opportunity to provide reasonable justification. Such justification may include:

- a change in federal or provincial laws or applicable collective agreements;
- the implementation of measures by the employer in response to a dramatic change in economic conditions that directly affected the employer, provided that the measures were not directed disproportionately at foreign workers;
- an error in interpretation made in good faith by the employer with respect to its obligations to the foreign worker, if the employer subsequently provided compensation or made sufficient attempts to do so to all foreign nationals who suffered a disadvantage as a result of the error;
- an unintentional accounting or administrative error made by the employer, if the employer subsequently provided compensation or made sufficient attempts to do so to all foreign nationals who suffered a disadvantage as a result of the error; or
- similar or related justifications.

While we were initially concerned about the compliance burden that the more rigorous assessments might impose on Canadian employers, we have been pleased that the practical impact to date has been minimal. Some application forms were revised, new certifications were introduced and additional documentation is sometimes required by the assessing agency. As a whole, however, these measures have not substantially increased red tape. We have

noted that the period for review of Labour Market Opinion applications has increased by 30 per cent or more. We trust that Service Canada will seek to reduce processing times to more acceptable levels, either through streamlining its internal procedures or by allocating additional resources.

Employers that fail, without reasonable justification, to provide substantially the same wages, working conditions or occupation type may face refusal of work permit applications in respect of any foreign national offered employment by that employer, may render the employer ineligible to hire any foreign nationals for a period of two years, and may lead to the employer's name being posted on the CIC website. The regulations also prohibit a foreign national from entering into, or extending, an employment agreement with an ineligible employer.

Obviously, a negative STS determination can immediately and irreparably harm the employer's reputation and ability to access foreign talent to alleviate shortages in the domestic labor market. At this point, there is no appeal process for a negative STS determination or listing on the CIC website. CIC is well aware of the consequences of a negative assessment and we would expect that they will act with a commensurate level of prudence and caution. Six months after the implementation of the regulations, no employers have been listed on the ineligibility list. Still, the negative impacts associated with such an event should cause employers to audit their current situations with respect to foreign workers and to take appropriate measures now to remedy any non-compliance.

The regulations also introduced a maximum cumulative duration for the period that a foreign national can work in Canada. This four-year cap highlights the temporary nature of the work permit regime and will encourage longer-term foreign workers to apply for permanent residence to formalize their status.

Calculation of the four-year cap started on April 1, 2011. With certain notable exceptions, all work in Canada after that date counts towards the four-year cap, including work done while under implied status, unless the work was

performed during a period of authorized full-time study. Work in Canada prior to April 2011 does not count towards the four-year total. Once a foreign national has accumulated four years of work in Canada, CIC is authorized to refuse the issuance of a further work permit. Foreign nationals applying for work permit renewals near the end of the four-year period are likely to see work permit validity periods truncated in keeping with the cap.

If caught by the cap, a foreign national must spend four years either outside Canada or in Canada but not working in order to restart the clock on a new four-year period.

There are certain useful exemptions and exceptions to the four-year cap including those for foreign nationals working in managerial or professional occupations, under work permits issued under international agreements such as the North American Free Trade Agreement and the General Agreement on Trade in Services, and under work permits issued under the significant benefit provisions of the regulations.

Work permit duration will generally be used to calculate cumulative duration. Upon presentation of appropriate evidence, however, CIC will consider not counting gaps in employment such as extended medical leaves, maternity/parental leaves, international assignments or other absences from Canada. Clearly, foreign workers intending to 'recapture' time in this manner should accumulate appropriate documentation or other evidence over the course of their employment and keep detailed records to support such claims.

In response to these regulatory changes, we have advised clients to place an increased emphasis on record keeping with respect to their foreign workers and applicable terms of employment, to consolidate hiring and decision-making authority with respect to foreign workers in one person or department, and to promptly notify Service Canada or CIC of any changes in the employment relationship.

federal skilled worker restrictions

Canada has granted permanent resident status to approximately a quarter of a million immigrants each year since 2002. One class of permanent residents is referred to as the "economic immigrant class". Among the categories of immigrants in the economic immigrant class is the federal skilled worker category. A "federal skilled worker" refers to a skilled worker applying to live anywhere in Canada, other than in Québec which has its own immigration requirements, who is selected based on his or her ability to become economically established in Canada.

Applicants under the Federal Skilled Workers ("FSW") program must pass an approved language proficiency test and have either a valid offer of arranged employment or a minimum of one year of continuous full-time (or equivalent) work experience within the last ten years in one of 29 occupations. For a list of eligible occupations, see www.cic.gc.ca/english/immigrate/skilled/apply-who-instructions.asp. The eligible occupations were selected based on Canadian labor market needs.

Once a federal skilled worker meets the eligibility requirements to apply, he or she is evaluated in the areas of education, work experience, language proficiency, age, adaptability and whether he or she has arranged employment in Canada. These criteria are demonstrated indicators of how well immigrants economically establish themselves in Canada. Points are assigned to an applicant for each criteria up to a possible maximum of 100 points. A pass mark of 67 points or higher is not determinative but indicates that an applicant "may qualify to immigrate".

The FSW program is a popular route for immigrants applying for permanent resident status, and, as a result, the program has been plagued with backlogs. In 2008, amendments to the *IRPA* and the Action Plan for Fast Immigration (the "Action Plan"), an initiative implemented to deal with processing backlogs, led to changes in how applications are processed. Prior to the Action Plan, it was mandatory that all applications be processed which led to a backlog of more than 640,000 people in the FSW program with wait

times of up to six years. The amendments to the *IRPA* authorized the Minister of Immigration to issue ministerial instructions to visa officers. Ministerial instructions addressing the eligibility of applications for processing were contained in the Action Plan. The eligibility criteria contained in the ministerial instructions (for example, an original list of 38 in-demand occupations) applied to all federal skilled worker applications received on or after February 27, 2008. Since implementation of the Action Plan, the backlog has been reduced to approximately 316,000 people with wait times ranging from approximately six to 12 months.

On June 26, 2010, a second set of ministerial instructions introduced a cap on the number of applications that would be processed in the FSW category. A total of 20,000 applications would be processed under the FSW category per year with a corresponding 1,000 applications cap per occupation per year. This cap did not apply to applicants with a valid offer of arranged employment. Effective July 1, 2011, the total applications cap was decreased to 10,000 with a corresponding cap of 500 applications per eligible occupation. The cap on the total number of applications was introduced because there were more applications in the FSW category than the government could process while the cap per occupation was introduced to mitigate against "over-representation of any one occupation". Three months after the reduced caps were imposed, Registered Nurses and Professional Occupations in Business Services to Management have reached the occupational caps and, accordingly, no more applications will be accepted for those occupations until July 2012.

CIC has emphasized that the objective of introducing the caps is to improve processing times. Prior to the Action Plan in 2008, wait times grew as the backlog increased, forcing applicants to wait years before knowing if they would be granted permanent resident status. CIC emphasizes that an important distinction to recognize is that the program has not led to a reduction in applicants granted permanent resident status, or in the proportionate representation of FSW applicants among those granted permanent resident status, it has only limited the number of applications that will be processed.

immigrant investor and provincial nominee program developments

The Canadian federal government and the province of Québec both offer passive investment options for foreign nationals seeking permanent resident status in Canada. These programs allow applicants to obtain such status in exchange for a five-year interest-free loan to the government. The federal government distributes the proceeds generated to fund economic development and local job creation initiatives in participating provinces and territories. Funds raised by the Québec program are used exclusively in Québec for similar purposes. Both programs have undergone changes in the last year to accommodate a growing volume of applications and to better align Canada's passive investment requirements with those of other comparable immigrant-receiving countries.

The purpose of the federal Immigrant Investor Program (the "Federal Program") is to attract "experienced business people who bring significant economic benefits to Canada". Research has demonstrated that the Federal Program has been instrumental both in securing up front capital investments from immigrants and in gaining the "business acumen, important links to global economies and an understanding of international markets" immigrants contribute once they are permanent residents or Canadian citizens.

The Federal Program requires that an applicant meet three eligibility criteria. An applicant must:

1. demonstrate that he or she has at least two years of business experience in the last five years which requires ownership of a business or managerial experience;
2. have a minimum personal net worth of C$1,600,000 obtained legally; and
3. make an investment of C$800,000 which will be returned five years later on an interest-free basis, and which is secured by the provinces or territories using the funds for their own economic initiatives.

In June 2010, the Federal Program was suspended until December 1, 2010, to allow CIC an opportunity to deal with backlogs. The Federal Program was in need of an overhaul in order to bring it in line with comparable programs in other immigrant-receiving countries as the eligibility criteria had not changed since 1999. For example, Australia, the United Kingdom, New Zealand and the United States all required investments of at least C$1,000,000, while at that time the Federal Program only required an investment of C$400,000. Effective December 1, 2010, the investment requirement under the Federal Program was increased to C$800,000 and the personal net worth requirement was increased from C$800,000 to C$1,600,000. Another objective of introducing more demanding eligibility criteria was to reduce the flow of applications. The number of applications to the Federal Program had almost tripled between 2007 and 2010, contributing to excessive wait times. Furthermore, a cost-benefit analysis estimated that implementation of the more demanding criteria would provide an increase of approximately C$72,300,000 per year in investment capital.

Effective July 1, 2011, a cap of 700 applications was introduced for the first time. This cap was introduced because CIC was still receiving more applications than it could process. Despite the more demanding eligibility requirements, we understand that the Federal Program was flooded within applications within a few days. The program was suspended at that time and, until the cap is reset on July 1, 2012, no more new applications will be accepted.

The Québec Immigrant Investor Program (the "Québec Program") has similar eligibility requirements and is available to applicants intending to settle in Québec. Prior to December 2010, the Québec Program had the same requirements as the Federal Program previously had. After changes in December 2010, applicants must have a net worth of C$1,600,000 and agree to invest C$800,000 with the province of Québec for five years on an interest-free basis. Applicants who meet the eligibility criteria of the Québec Program and pass the selection interview, if required, are issued a selection certificate. Once selected, the applicant applies to CIC for permanent resident status.

The Québec Program has experienced similar issues with backlogs as the Federal Program. As a result, the Québec Program was temporarily suspended in October 2010 until the new changes in the eligibility criteria took effect in December of that year. However, the Québec Program did not adopt a cap on the number of applications and, as a result, the Québec Program is still accepting applications. While we have no direct information about oversubscription of the program, it is not difficult to imagine that the Québec Program could be experiencing heightened strain as a result of the suspension of the Federal Program.

Most provinces have a provincial nominee program ("PNP") that allows the province to nominate foreign nationals who intend to settle in that province. These programs require that certain "active investment" criteria be satisfied which reflect an applicant's ability to make an economic contribution to Canada. By agreement with the federal government, the provinces have broad discretion to develop their own eligibility criteria which reflect local immigration needs and policies. Depending on the province, immigrants may be nominated if they are skilled workers, semi-skilled workers, international graduates of Canadian universities, entrepreneurs intending to own a business in the province, self-employed persons or are persons with family connections in Canada. Once nominated, an applicant applies to CIC for permanent resident status. Prince Edward Island has a PNP and prior to being shut down in September 2008, the PEI PNP had an immigrant investor stream which allowed immigrants to invest in a local business in exchange for nomination. After the federal government announced that the immigrant investor portion of the PNP program would be shut down, thousands of immigrants were rushed through in only a few months, with media reports stating that C$400 million was saved.

In 2008, allegations of fraud and bribery surrounding the PEI PNP surfaced and have recently resurfaced. In September 2011, three former provincial government workers came forward claiming that senior bureaucrats pressured them to approve certain applications. The federal government has asked the RCMP and Canada Border Services Agency to investigate. Whether or not these allegations are proven, we expect the federal government to re-

evaluate the efficacy and appropriateness of PNPs. This will entail a careful balancing of provincial demands to select immigrants and generate local investment with the perception held by some that these programs can be used to buy permanent resident status.

public consultation on immigration mix

The *IRPA* identifies 19 objectives with respect to immigration and refugees. These objectives may be classified as either economic priorities, family priorities or refugee and humanitarian priorities, all of which must be balanced in Canada's approach to immigration. Statistics on immigration levels indicate that CIC granted permanent resident status to 251,642 applicants in 2010, 138,251 of which were economic immigrants. These numbers reveal that 55 per cent of the applicants CIC admitted last year were economic immigrants, which is consistent with its track record between 2005 and 2009 of admitting between 55 per cent and 61 per cent of applicants based on economic factors.

The *IRPA* does not provide guidance on how to balance these objectives and, consequently, it is difficult to know if the current approach to immigration in Canada is optimal. A tension exists between all three classes of priorities and trade-offs are necessary to achieve an appropriate balance. In particular, the apparent emphasis on admitting applicants who can contribute to Canada's economy and labor market, as demonstrated by the data, may call into question CIC's selection approach. While it is widely accepted that immigration is important for meeting labor market needs and building a skilled workforce, the economic priorities of immigration must be reconciled with the other objectives identified under the *IRPA*. CIC has recently reached out to the Canadian public for its advice on how the government should prioritize these conflicting objectives.

In July 2011, the Minister of Immigration launched a series of cross-country consultations on immigration levels and mix which was followed by an online consultation process that closed in September 2011. The public consultation sought feedback from various stakeholders, including employers, unions, academics, academic institutions, professional organizations, businesses and

municipalities, among other interested groups. CIC asked participants to respond to the following questions respecting Canada's immigration program:

- What is the right level of immigration in Canada?
- How many applicants in each of the three immigrant classes (economic, family, and protected persons) should be admitted?
- Should immigration levels be higher?
- Which of these areas should be a priority?
- If we raise levels in one of the areas, where should we take less?

CIC reports that during the cross-country consultations in July and August, stakeholders "identified immigration as a critical way to meet labor market needs, citing economic factors as among the most important considerations when establishing immigration levels". A report providing a more comprehensive overview of the public response will be published by CIC sometime in late 2011 or early 2012.

In early 2011, CIC conducted another public consultation regarding its proposed changes to the FSW program. The proposed changes involved adjustments to the number of points attributable to each of the following six eligibility criteria: education; proficiency in English and/or French; experience; age; arranged employment in Canada; and adaptability. The purpose of the proposed adjustments is to weigh the criteria in a way that more accurately reflects their value as indicia of an applicant's ability to become economically established in Canada. Specifically, CIC proposed increasing the importance of proficiency in official languages and age while decreasing the importance of work experience and the number of years of education required for skilled tradespeople. In support of this position, CIC cited research suggesting that people who are proficient in an official language, or are younger (aged 20-30), have the greatest economic impact on the receiving country. The results of this public consultation will be published by CIC sometime in the fall of 2011.

Although comprehensive results of these two public consultations have not yet been published, there is some information available that may provide insight into how the Canadian public has responded to CIC's inquiries. For example, in an evaluation of the FSW program released in August 2010, surveys of stakeholders revealed that employers had found it difficult to fill positions for which federal skilled workers were subsequently hired.

Furthermore, stakeholders expressed their views on the importance of economic immigration by citing labor shortages and the aging population as reasons for maintaining the FSW program. These endorsements of the FSW program may not provide a full picture on the views of Canadians with respect to balancing economic immigration with other classes of immigration; however, they do demonstrate that economic immigration is valued by Canadians.

The results of another public consultation performed in 2010, respecting what levels of immigration should be maintained in 2011, may also provide some insight on how the Canadian public values economic versus non-economic factors in the context of immigration selection. While a number of objectives and selection factors were cited by respondents, the overall conclusion of the consultation was that "economic factors [were] primary considerations when establishing immigration levels and objectives".

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a cautionary note

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