Immigration Law 2014: Big Brother comes knocking … with a battering ram

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I. Introduction

In the last 12 months, the immigration landscape for employers has become much more complicated. Citizenship and Immigration Canada has introduced warrantless searches of employer premises to better enforce immigration laws, increased fees for Labour Market Opinions and work permits, changed certain employer compliance rules, and changed the criteria for various temporary and permanent immigration programs.

The almost monthly changes to immigration law make it difficult for seasoned practitioners and HR personnel to keep up. Companies must now be more aware of potential liabilities that they may face in this field when it comes down to temporary foreign workers and the recruiting of immigrants to Canada.

II. Work Permits, Labour Market Opinions and Temporary Residency – Besides everything, what else is new for 2014?

A. The ticking time bomb of cumulative duration[1]

In April 2011, Citizenship and Immigration Canada set a 4-year maximum for work permits issued to certain temporary foreign workers. This ticking time bomb will go off in April 2015.

Known as the "cumulative duration" test, this test will apply to most temporary foreign workers. Under this test, once a temporary foreign worker has accumulated four years of work in Canada, he or she will be ineligible to work in Canada again as a temporary foreign worker until a further four years has elapsed. For example, a temporary foreign worker who reaches his or her 4-year maximum in April 2015 will not be able to work as a temporary foreign worker in Canada again until April 2019.

Because this 4-year maximum will come into effect in April 2015, employers should consider this when hiring temporary foreign workers to ensure that the temporary foreign worker they recruit can work for the full duration needed.

1. *How will "cumulative duration" impact work permits being issued?*

If a temporary foreign worker is subject to the 4-year maximum in April 2015, any new work permit issued to that temporary foreign worker will not be issued beyond April 2015.

[1] For this section of the paper, the legal references are Citizenship and Immigration Canada Operational Bulletin 523 and Section 200(g) of the *Immigration and Refugee Protection Regulations*.

2. *How does "cumulative duration" affect temporary foreign workers who have worked for another company in the past?*

All work performed in Canada for which "cumulative duration" applies is subject to the 4-year maximum.

For instance, if a temporary foreign worker has worked for your competitor since April 2011 and now wants to work for your company, any work permit that would be issued would only be valid until April 2015.

3. *What sort of work is not subject to the 4-year maximum?*

Virtually all work performed in Canada since April 1, 2011 — regardless of whether or not it was authorized by a work permit or exempt under regulations that allow foreign nationals to work as business visitors - counts towards the four-year total. This includes: work done as a volunteer, self-employed work, work in all occupations, work done under immigration implied status as well as work done while on an open work permit.

4. *What occupations fall within exceptions to the 4-year maximum?*

Under immigration regulations, temporary foreign workers in certain occupations fall within "exceptions" to the cumulative duration rule. However, the time they work in Canada is still counted toward the 4-year maximum. Occupations that fall within the exceptions include, but are not limited to, temporary foreign workers:

- in managerial or professional occupations,
- who have received a positive eligibility assessment in certain permanent residency applications,
- working pursuant to certain international agreements (including the North American Free Trade Agreement), and
- Intra-company transferees.

5. *What is the difference between an "exception" and work that is not subject to the 4-year maximum?*

In Citizenship and Immigration Canada's operational bulletin on cumulative duration, an example was cited that illustrates the difference between working in an occupation that is an "exception" to the 4-year maximum and work that is not subject to the 4-year maximum.

Citizenship and Immigration Canada uses an example of a university professor (an occupation covered by the exception) who has a work permit expiring on April 2, 2015 and is told in February 2015 that his services will no longer be required as a university professor. The professor, who would still like to remain in Canada, decides he would like to take a job planting trees in northern B.C. for one year (an occupation not covered by the exception). The professor applies for a new work permit on March 1, 2015. Since he has accumulated 4 years less a month of work in Canada, and, since the new position is not one of the "exception" categories, the work permit could either be issued until April 2, 2015 or denied altogether.

6. Do gaps in employment count towards the 4-year maximum?

Any periods of time a temporary foreign worker does not work (outside of the expectations stipulated in the job contract) that occurred after April 1, 2011, and during the validity period of any work permits issued after April 1, 2011, can be deducted from the 4-year maximum.

It is important to note that only gaps in employment of one consecutive month or more will be considered. Some examples of acceptable gaps in employment are:

1. Periods of time spent outside of Canada;
2. Periods of medical leave spent in Canada, if this period is not covered by the employment contract/agreement; and
3. Maternity/paternity leave spent in Canada.

Please note that weekends, vacation, part-time work, or alternative work arrangements will not be considered an acceptable gap.

7. How can a temporary foreign worker prove a gap in employment?

The onus is on a temporary foreign worker to provide documentation to prove a gap in employment. Forms of acceptable documentation include:

1. Passport entry and exit stamps;
2. Official documents indicating that the employment started and/or ended on certain dates (i.e. a Record of Employment);
3. Letters from a foreign educational institution stating that the foreign national was attending their institution during the time of the work permit;
4. Travel receipts, tickets and boarding passes demonstrating that the foreign national was out of the country during the work permit other than a period of paid leave;
5. Proof of receipt of maternity/parental benefits;

6. Letters from a physician confirming medical leave for a certain period of time (unless the leave was covered by the employment contract); and
7. If a foreign national did not complete the full duration of a work permit due to poor working conditions or workplace injury, a support letter from a Province or Territory indicating the gap in employment.

B. Changes to the Labour Market Opinion (LMO) Process

Other big changes to the immigration system were changes to the LMO process. In July and again in December, the Canadian government introduced changes to the LMO process that makes obtaining an LMO more expensive and difficult. As well, changes have been introduced that sets out circumstances by which LMOs can be revoked, suspended or left unprocessed.

A LMO is an opinion provided by Employment and Social Development Canada ("Service Canada") that allows employers to hire foreign nationals for jobs in Canada. In most cases, LMOs will only be granted if an employer can establish that there are no Canadian workers willing and able to take on the job.

1. New Fees and more costs[2]

As of July 31, employers must pay a $275 fee for each position for which an LMO is requested. Previously, no fees were charge for LMOs. This fee is payable regardless of whether the LMO is approved and is in addition to the $155 fee each temporary foreign worker must pay for a work permit[3].

The implementation of this fee will require employers recruiting multiple temporary foreign workers to look at their strategy. While it is still permissible to list multiple positions in one LMO application, it may not be advisable in marginal cases. In these situations, filing an LMO for one position as a single "test case" may be advisable.

2. Advertising, advertising and more advertising[4]

Employers are now required to advertise available positions in Canada for at least four weeks before applying for an LMO. This is up from the previous two week requirement.

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[2] Please see section 315.2(1) of the *Immigration and Refugee Protection Regulations*

[3] According to section 315.2(2) of the *Immigration and Refugee Protection Regulations*, no fees are payable for LMO applications for employees under the Seasonal Agricultural Workers Program and other workers in the primary agriculture section. The types of workers in the "primary agriculture sector" are found in section 315.2(5) and (5).

[4] Please see Service Canada's web page on the Temporary Foreign Worker Program found at http://www.esdc.gc.ca/eng/jobs/foreign_workers/index.shtml

In addition, employers must now advertise more broadly and in more mediums. In addition to advertising on the national job bank (or the equivalent provincial/territorial websites), employers must use at least two other recruitment methods consistent with the advertising practices for the occupation.

If hiring for what the government considers a higher-skilled occupation (such as executives, managers, professionals and tradespeople) one of the recruitment methods must be national in scope. If hiring for what the government considers a lower- skilled occupation, employers must demonstrate that they made efforts to target under-represented groups in the labour force.

The requirement for employers to recruit will no longer end once an LMO application is filed. Employers must now continue to actively seek qualified Canadians to fill the advertised positions until an LMO has been issued.

3. The battle against outsourcing

Another change in the process is the requirement for employers to answer additional questions to help ensure that the temporary foreign worker program is not used to facilitate the outsourcing of Canadian jobs.

A negative LMO will be issued if an assessment indicates that hiring a temporary foreign worker will have a negative impact on the Canadian labour market or if an employer has not complied with the program requirements.

4. English and French only[5]

Another change is that employers will not be able to require prospective employees to speak a language other than English or French unless the employer can demonstrate that another language is a "bona fide requirement for performing the duties associated with the employment".

While there is no definition of what is a "bona fide requirement", the regulatory impact statement that accompanied the release of the new regulations provides some guidance. According to the regulatory impact statement, the language requirement must be related to the nature of the business and consistent with the regular activities of the employer. The examples they give include translation companies or Korean tour companies[6].

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[5] Please see section 203(1.01) of the *Immigration and Refugee Protection Regulations*
[6] Please see Regulations Amending the Immigration and Refugee Protection Regulations in Vol. 147, No. 16 – July 31, 2013 of the Canada Gazette

5. When can LMOs be revoked?[7]

Under new ministerial instructions, LMOs can be revoked if:

1. New information becomes available indicating that the employment of a foreign worker will have a significant negative effect on the labour market in Canada;
2. Employers provide false, misleading or inaccurate information in connection with a LMO request; or
3. The employer has been added to the employer ineligibility list, an "immigration blacklist" kept by Service Canada which lists employers who have violated immigration laws and are not eligible to hire temporary foreign workers.

In the past, once a LMO was issued, it was not revoked. The ability to revoke a LMO will mean that employers should always be prepared to establish the neutral or positive effect that hiring a temporary foreign worker will have on the labour market in Canada. The employer must make the case beyond the scope of their own company and to the broader Canadian labour market as a whole.

6. When can LMOs be suspended?[8]

Under the new rules, LMOs can be suspended if:

1. New information becomes available that, if known at the time, would have led to a different opinion;
2. There are reasonable grounds to suspect that the employer provided false, misleading or inaccurate information in connection with a LMO request;
3. There are reasonable grounds to suspect that the employer is not complying with conditions of the current or previous work permits unless the noncompliance is justified under the law; or
4. The employer has been added to the immigration blacklist list.

This change allows for the suspension of a LMO much more easily than the revocation. For instance, to suspend a LMO all Service Canada needs to establish is that there is "new information" that "would have led to a different opinion" as opposed to having to be convinced that hiring of a foreign national would result in a "significant negative effect" on the Canadian labour market.

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[7] Please see section 3 of Ministerial Instructions Respecting Labour Market Opinions in Vol. 147, No. 52 – December 28, 2013 of the Canada Gazette

[8] Please see section 3 of Ministerial Instructions Respecting Labour Market Opinions in Vol. 147, No. 52 – December 28, 2013 of the Canada Gazette

7. When can Service Canada refuse to process a LMO?[9]

In addition to being able to revoke or suspend a LMO, Service Canada now has the power to refuse to process a LMO application. Service Canada can refuse to process a LMO application when there is information to indicate that the employment of the temporary foreign worker "in any portion, sector, region or occupational group of the labour market in Canada may or will have a significant negative effect on the labour market."

Essentially, a LMO may not be processed for a broad range of reasons, regardless of unique circumstances that a company may face when hiring a temporary foreign worker.

8. What happens to a work permit when a LMO has been revoked or suspended?[10]

The revocation or suspension of a LMO has a direct effect on the issuance of work permits.

In normal circumstances, if a positive LMO has been received by an employer, the next step is for the foreign national to apply for a work permit. If a foreign national is in the process of applying for a work permit, and a decision is made to suspend the LMO, the processing of work permit application will be put on hold until the LMO suspension has been lifted.

Similarly, if a positive LMO has been revoked, a work permit that has already been issued can also be revoked. Following the revocation, the foreign national is no longer permitted to work in Canada. As a result, just because an employer has been successful in getting a foreign worker to work in Canada, it does not mean that the temporary foreign worker will be able to complete his or her term.

9. Is Service Canada ignoring the common-law?

In May, the federal court decided the case of Construction and Specialized Workers' Union, Local 1611 v. Canada (Citizenship and Immigration), 2013 FC 512 (CanLII). One of the issues in this case was whether the officer made an error in deciding to issue a positive LMO to a mining company. The Federal Court found that as long as an officer's decision is reasonable, meaning "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility"[11], the court should not substitute its own view for

[9] Please see section 4 of Ministerial Instructions Respecting Labour Market Opinions in Vol. 147, No. 52 – December 28, 2013 of the Canada Gazette

[10] Please see section 2 of Ministerial Instructions Respecting The Revocation of Work Permits in Vol. 147, No. 52 – December 28, 2013 of the Canada Gazette

[11] Please see paragraph 138 of Construction and Specialized Workers' Union, Local 1611 v. Canada (Citizenship and Immigration), 2013 FC 512 (CanLII)

that of the officer. In this case, the court concluded that the decision of the officer was reasonable.

In making its decision, the court found that an officer must consider the factors found in the *Immigration and Refugee Protection Regulations* when making a decision on an LMO. These factors include:

1. Whether the employment of the foreign worker is likely to result in direct job creation or job retention for Canadian citizens or permanent residents;

2. Whether the employment of the foreign worker is likely to result in the creation or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents;

3. Whether the employment of the foreign worker is likely to fill a labour shortage;

4. 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;

5. Whether the employer has made, or has agreed to make, reasonable efforts to hire or train Canadian citizens or permanent residents; and

6. Whether the employment of the foreign worker is likely to adversely affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute.

In this case, the Federal Court discussed each of the six factors separately. The first factor did not raise any issues and favoured a positive LMO. The last factor was irrelevant as there was no labour dispute in progress.

Regarding the other factors, the court found that the officer concluded there would be some success in attracting, training and retraining Canadians even though the degree of success was open to question. On the issue of whether the employment of the foreign workers was likely to result in the creation or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents, a concern was raised that use of Mandarin in the workplace would affect HD Mining's ability to attract and train Canadians for positions at the mine. While the officer who assessed the case was concerned with this, the court found that after the consideration of all factors, the officer could reasonably conclude there would be some success in attracting, training and retraining Canadians - even though the degree of success was open to question. This factor weighed in the employer's favour, even if only slightly.

Another issue was whether there were excessive job requirements for HD Mining's lower skilled positions. In other words, were the qualifications required for the job written in such a way to make it difficult for Canadians to qualify? On this issue, it was found that since job requirements can vary depending on the type of mining, there was no reason to find the requirements excessive.

Finally, there was a question as to whether the officer's use of the Working in Canada website to determine prevailing wage rate was reasonable. On this issue, it was found that Working in Canada, a government site that compiles wage information from various objective sources, was a reasonable resource.

Despite this case, what I and other colleagues are seeing is a strict adherence by Service Canada officers to guidelines and instructions provided to them by their managers. Despite the fact that the common-law now clarifies that all factors set out in the *Immigration and Refugee Protection Regulations* must be analyzed, we are still seeing refusals of LMOs on very narrow grounds.

C. Five changes to immigration compliance tests for employers

Since 2011, Citizenship and Immigration Canada and Service Canada have had the power to verify that the wages, working conditions and occupation provided to previously employed temporary foreign workers were "substantially the same" as what was originally presented by the employer and employee in the immigration process.

On December 31, 2013, a number of changes were made to these tests. Some of the more significant changes include the following:

1. The original 2011 rules allowed employers to change the wages, working conditions and occupation provided to previously employed temporary foreign workers as long as those changes were "substantially the same". Under the new rules, wages and working conditions can still be varied but, in addition to these wages and working conditions to being "substantially the same", they cannot be less favourable than what was originally presented. The rules also indicate that the occupation offered must be the "same".
2. Since 2011, employers have had the ability to justify non-compliance under certain circumstances. While these circumstances continue to exist, an additional justification, force majeure (e.g. natural disasters or fires), has been added.
3. Previous to the rule changes, employers needed only to establish "substantially the same" wages, working conditions and employment for a two-year period immediately prior to a new LMO or work permit application being submitted. Under the new regulations, this two year period has been increased to six years.
4. Under the new rules, employers must now make reasonable efforts to provide a workplace that is free of abuse. Specifically, workplaces must be free of:

    a. physical abuse, including assault and forcible confinement;
    b. sexual abuse, including sexual contact without consent;
    c. psychological abuse, including threats and intimidation;
    d. financial abuse, including fraud and extortion;
5. In LMO applications, employers need to agree to additional conditions. These conditions can include:
    a. ensuring that the employment of the temporary foreign worker will result in direct job creation or job retention for Canadian citizens or permanent residents;
    b. ensuring that the employment of the temporary foreign worker will result in the development or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents; or
    c. hiring, training, or making reasonable efforts to hire or train, Canadian citizens or permanent residents.

The combined effect of these changes is that employers must now keep records and ensure compliance for a greater period of time. As well, employers must now incorporate in their human resource systems processes that ensure compliance with these expanded laws.

D. The Empire Strikes Back – Immigration Enforcement

1. Courts hit exploitative employers hard...

In August, the Manitoba Court of Appeal, in a unanimous 5 person decision, sent a strong message to employers who illegally hire foreign workers. In the case of R. v. Choi (J.W.), 2013 MBCA 75 (CanLII), the court was asked whether a conditional discharge given to Jung Won Choi was a "fit" sentence under the law. Mr. Choi had hired six foreign workers who were not allowed to work in Canada. At his trial, he was given the conditional discharge, put on supervised probation, and was ordered to make $12,000 in charitable donations.

In looking at the case, the court found Mr. Choi kept two sets of financial books, which showed illegal foreign workers were paid less than the legal workers. In fact, for one illegal employee the court found Mr. Choi did not pay him directly but instead sent money to his mother.

The court found the conditional discharge unfit. In overturning the sentence, the court indicated that judges should take into account the purposes of the *Immigration and Refugee Protection Act* to protect temporary foreign workers, to protect jobs of Canadians willing and qualified to work, and to preserve a competitive balance in the marketplace amongst employers.

The court said a significant penalty was needed to let other employers know a wilful violation of these immigration laws will result in a conviction and penalty that is "meaningful and not a token."

In the end, the court convicted Mr. Choi and imposed a $15,000 fine. In particular, when talking about the possibility of a conditional discharge, the court said to allow this was not "adequate denunciation." Mr. Choi will now have a criminal record.

2. … but not if the employee is a volunteer.

While the Manitoba Court of Appeal hit an employer hard, the B.C. Supreme Court, in a different case, made what some consider a surprising decision.

In this case, the question was whether an employer can hire a foreign worker without pay and not violate immigration law. According to the B.C. Supreme Court, this is possible.

In the June 2013 case of R. v. Huen, the B.C. Supreme Court was asked to rule on what "employ" means under the *Immigration and Refugee Protection Act*. In this case, the crown took the position that an employer is violating the law if it has a foreign national, who is not legally entitled to work in Canada, carry out unpaid work on its behalf. However, Mr. Justice Goepel had a different view.

Under section 124(1)(c) of the *Immigration and Refugee Protection Act*, an employer violates the law if the employer "employs a foreign national in a capacity in which the foreign national is not authorized under this Act to be employed." In other words, if a company hires an individual who is not legally entitled to work in Canada, the company will be breaking the law.

In section 2 of the *Immigration and Refugee Protection Regulations*, "work" is defined as "an activity for which wages are paid or commission is earned, or that is in direct competition with the activities of Canadian citizens or permanent residents in the Canadian labour market."

Now, while these two sections clearly means that an employee who works in Canada without the legal entitlement to do so will be breaking the law (even if the employee is not paid), what happens if the company does not actually *employ* a foreign national? What happens if the foreign national *works* without pay?

In his decision, Mr. Justice Goepel found that the word "employ" reflects an activity "for which a person receives or might reasonably expect to receive wages or other valuable consideration." Mr. Justice Goepel stated while an employer may be violating the law for employing someone who is not legally entitled to work in Canada; it would not be a violation if the work was unpaid. As a result, an employer who does not pay or provide some other valuable benefit to a foreign national in exchange for work is not guilty of violating immigration law.

As a result of this ruling, an interesting situation can exist. Foreign nationals who work without pay for a Canadian employer could be found to be in violation of the *Immigration and Refugee Protection Act* for illegal "work" while the companies they work for could be penalty free as long as the company does not pay them. This leaves foreign workers in a vulnerable position.

3. Other cases of employer and employee violations

The *Huen* case seems to be a bit of an outliner that turns on specific facts. A review of other cases in the last year shows that more employers are being charged and convicted of immigration violations. They include the following:

- In June, a Nova Scotia businessman was charged with 56 counts relating to allegedly advising foreign workers he employed to provide misleading and untruthful statements regarding employment conditions and their rate of pay. It was alleged in this case that some foreign workers were paid as low as $3.13/hour.[12]
- In October, two foreign students who were found to be inadmissible for working illegally at a big box retailer were removed from Canada after a lengthy process[13].
- In November, a Quebec retailer was found guilty of hiring 15 foreign nationals who were not authorized to be employed in Canada. All these employees were paid employees. As a result of this violation, the retailer was fined $40,000[14].
- In December, a B.C. company and its principals were charged with six counts of allegedly employing a foreign national without authorization for their construction company.[15]
- Also in December, six people were issued removal orders to leave Canada. These individuals were found working at a Shopping Centre in Ottawa. Two of the foreign

[12] Please see a Canada Border Services Agency news releases entitled "Prosecutions and Seizures: Atlantic Region: Dartmouth businessman charged with immigration fraud". On-line at http://www.cbsa.gc.ca/media/prosecutions-poursuites/atl/2013-06-14-eng.html

[13] Please see a Canada Border Services Agency news releases entitled "Prosecutions and Seizures: Prairie Region: CBSA resolves high profile case". On-line at http://www.cbsa.gc.ca/media/prosecutions-poursuites/pra/2013-10-18-eng.html

[14] Please see a Canada Border Services Agency news releases entitled Prosecutions and Seizures: Quebec Region: Toiletry product retailer found guilty of immigration fraud. On-line at http://www.cbsa.gc.ca/media/prosecutions-poursuites/que/2013-11-28-eng.html

[15]Please see a Canada Border Services Agency news releases entitled "New Westminster company charged with six counts of employing illegal workers". On-line at http://www.cbsa.gc.ca/media/prosecutions-poursuites/pac/2013-12-06-eng.html

nationals were found to be working without a work permit, while the other four were determined to have violated the terms of their work permits[16].

4. *The blacklist begins*

On April 6, 2014, Employment and Social Development Canada put the names of three employers on its blacklist[17]. Five restaurants, one in Ontario, one in Newfoundland and Labrador, and three in B.C. were put on this list. One business had their LMO revoked. The other four had their LMOs suspended.

The employer whose LMO was revoked was on the grounds that "the employer or group of employers provided false, misleading or inaccurate information in the context of the request for that [Labour Market] opinion." The suspended LMOs were as a result of the government a finding that "there are reasonable grounds to suspect that the employer or group of employers provided false, misleading or inaccurate information in the context of the request for that opinion" and, in the case of the B.C. restaurants, an additional finding that "new information becomes available after the positive opinion is provided and if known at the time would have led to a different opinion".

To date, no one has appeared on Citizenship and Immigration Canada's blacklist.

5. *The Era of the Warrantless search has arrived*

In order to allow for further enforcement of immigration compliance rules, the Canadian government has given itself the authority to carry out certain actions to verify compliance with conditions employers must adhere to in the immigration process. These new powers include the following:

1. Requiring an employer to provide documents and to report at any specified time and place in order to answer questions[18]
2. To enter and inspect any premises or place in which a temporary foreign worker performs work without a search warrant[19]

If an employer is being investigated under these new rules, the law allows officers to:

1. Require the employer to be available to be interviewed over the phone;

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[16] Please see a Canada Border Services Agency news releases entitled "Six foreign nationals issued removal orders for working illegally in Canada". On-line at http://www.cbsa.gc.ca/media/prosecutions-poursuites/nor/2013-12-30-eng.html

[17] Please see Employment and Social Development Canada's on-line blacklist found at http://www.esdc.gc.ca/eng/jobs/foreign_workers/employers_revoked.shtml

[18] Please see section 209.4(1)(a) and (b) of the *Immigration and Refugee Protection Regulations*

[19] Please see section 209.8 of the *Immigration and Refugee Protection Regulations*

2. Require the employer to provide any relevant documents requested by an officer;
3. Take photos and make audio or video recordings; and
4. Require the employer to use any computer or electronic device so that an officer can examine any relevant document contained on those devices[20]

In order to the government to carry out warrantless searches on an employer's premises, one of these three situations must exist:

1. There are reasons to suspect that the employer is not complying or has not complied with any conditions imposed;
2. The employer has not complied with the conditions in the past; or
3. The employer is chosen for random verification of compliance with the conditions[21].

While the first two reasons for an investigation apply to employers where there is knowledge or suspicion of current or past wrongdoing, the third reason for an investigation, random verification, can result in companies being targeted even if there is no suspicion or past record of wrongdoing.

6. "New" penalties for non-compliance

Under existing rules, if a finding of non-compliance reveals a criminal or other breach of the law, employers can be prosecuted. Nothing in the new rules changes these potential penalties.

What has changed is that employers who are non-compliant (without adequate justification) will be denied work permits for two years. As well, the employer's name and address will be immediately added to the immigration blacklist[22]. While the penalty has existed since 2011, the Canadian government has fixed a gap in the law that prevented them from adding employers to the immigration blacklist.

In addition, these new rule changes will now prevent an employer from making offers of employment in certain federal immigration programs for permanent residency.

7. Will answering a question wrong on an LMO result in prosecution?

This month, Employment Minister Jason Kenney indicated, through Twitter, that if an employer has been found to have made a misrepresentation in the LMO process that the file would be referred to the Canada Border Services Agency for a section 127 investigation. So what is section 127?

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[20] Please see sections 209.5 to 209.9 of the *Immigration and Refugee Protection Regulations*
[21] Please see section 209.5 of the *Immigration and Refugee Protection Regulations*
[22] Please see sections 209.91 of the *Immigration and Refugee Protection Regulations*

Under section 127 of the *Immigration and Refugee Protection Act*:

"No person shall knowingly

(*a*) 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;

(*b*) communicate, directly or indirectly, by any means, false or misleading information or declarations with intent to induce or deter immigration to Canada; or

(*c*) refuse to be sworn or to affirm or declare, as the case may be, or to answer a question put to the person at an examination or at a proceeding held under this Act.

If found guilty under section 127, a person could face a fine of up to $100,000 and a prison term of not more than five years.

By invoking section 127, the government has broadened the penalties and enforcement mechanisms available to prosecute not only employers but the specific employee who complete an LMO application incorrectly. It should be noted that s.127 has been on the books for years but it typically used for individuals who are guilty of immigration fraud. (I discuss misrepresentation in more detail later in this paper.) If the government seeks to prosecute employers under this provision, this may open up an entirely new line potential liability.

For employers and the employees who complete LMO applications, it should be noted that a person can be found guilty in section 127(a) for "indirect" misrepresentations and "withholding" material facts. As a result, a misrepresentation made by another individual on a person's behalf will still be a violation. Also, failure to disclose certain facts may be a violation.

It should also be noted that a person could be found to be in violation of section 127(a) if the misrepresentation "could induce an error in the administration of the Act". What this means it that even if an officer would have come to the same conclusion notwithstanding the misrepresentation, if the misrepresentation prevents an officer from canvassing issues thoroughly, this could also be a violation.

8. How non-LMO work permits will be revoked

As set out to above, Citizenship and Immigration Canada has a number of additional rules that allow for the revocation of work permits. In addition to rules affecting work permits that were issued on the basis of an LMO, other work permits can be revoked in the following scenarios:

1. New information becomes available indicating that the employment of the temporary foreign worker is having, or will have, a significantly greater negative effect than benefit on the development of a strong Canadian economy. The work permit may stand if

revocation would be inconsistent with any trade obligation of the government of Canada under an international agreement.
2. The employer provided false, misleading or inaccurate information in the context of the work permit application.
3. The employer has been added to the immigration blacklist[23].

As with work permit revocations based on LMO revocations, of note is the ability to revoke a work permit if the employment of the temporary foreign worker is having, or will have, a greater negative effect than benefit with respect to the development of a strong Canadian economy. As with some of the rules regarding the revocation and suspension of LMOs, the "benefit" test is not restricted to an industry, occupation or location.

E. Language requirements are hazy for work permit applications

Last year, the Federal Court decided the case of *Virk v. The Minister of Citizenship and Immigration*. In that case, Mr. Virk's work permit was refused because, among other things, he could not demonstrate that he met the English language requirements for the position.

In the Virk case, the approved LMO indicated that the successful candidate must have basic oral and written English. In his work permit application package, Mr. Virk provided nothing to verify his language skills. He argued that the fact that he submitted an English language version of the application form and a cover letter in English was evidence of his language proficiency. The judge did not accept this argument.

The judge found that the officer did not have an obligation to seek out the missing evidence. The judge clearly indicated that individuals applying for work permits are required to submit all evidence necessary to establish their case without being prompted or reminded by immigration officers.

For human resources personnel recruiting from abroad, it is important to pay attention to the position requirements that Service Canada lists on a LMO. In most cases, employers indicate that English or French are required for the job. In doing so, this may require prospective employees to prove their ability to communicate in one or both languages.

In Virk, the judge did not discuss what would constitute proof that Mr. Virk met the language requirements for the job. In permanent residency and citizenship applications, Citizenship and Immigration Canada accepts minimum scores from a number of language tests as proof of language proficiency. Does this mean that all work permit applications that require basic

[23] Please see section 2 of Ministerial Instructions Respecting The Revocation of Work Permits in Vol. 147, No. 52 – December 28, 2013 of the Canada Gazette

written and oral English require an applicant to submit language test results with work permit applications? If a language test or some other evidence of English language proficiency is not provided, the Virk case indicates that officers can refuse the work permit application.

III. Permanent Residency – Changes, Changes, and more Changes

A. Changes to bridging open work permits

In 2012, the Canadian government introduced "bridging open work permits" that allow temporary foreign workers to remain in Canada while their permanent residency applications are being processed. In order to obtain a bridging open work permit, a foreign national must be temporary foreign worker with a work permit and must file an application for permanent residency under the Federal Skilled Worker Program, the Canadian Experience Class, a Provincial Nominee Program, or the Federal Skilled Trades Class.

The filing of a permanent residency application, in and of itself, does not make one eligible for a bridging open work permit. In order to be eligible for a bridging open work permit, the following must be met:

1. The temporary foreign worker must currently be in Canada;
2. The temporary foreign worker must have valid status on a work permit due to expire within 4 months; and
3. The immigration application will have had to have received what is called a "positive eligibility assessment".

The importance of these work permits is that they are not subject to the cumulative duration test.

In September, the Canadian government clarified these rules[24]. These clarifications have the effect of restricting the use of these work permits. Under the rules, the following foreign nationals do not qualify for a bridging open work permits:

- Foreign nationals in Canada under section 186 of the *Immigration and Refugee Protection Regulations* (work permit exempt) situations.
- Foreign nationals who have let their status expire and must apply for restoration in order to return to temporary resident status.
- Foreign nationals whose work permits are valid for longer than four months and/or already have a new LMO that can be used as the basis for new work permit application
- Foreign nationals applying for a bridging work permit at the port of entry.

[24] Please see Citizenship and Immigration Canada Operational Bulletins 485-A September 19, 2013

- Spouses and dependents of the principal permanent resident applicant.

B. The Manitoba Provincial Nominee Program – Out of Province Students Must Work Longer

One of the major immigration programs used by temporary foreign workers to immigrate to Manitoba is the Manitoba Provincial Nominee Program. Under this program, temporary foreign workers must indicate an intention to settle and work in Manitoba and first submit an application to the provincial government. Once Manitoba approves the application, the temporary foreign worker must then submit the application to the Federal Government who has the final decision-making power with respect to whether the individual becomes a permanent resident.

There are two main paths by which an individual can immigrate to Canada as a Manitoba Provincial Nominee. The first path is for temporary foreign workers who are currently working in Manitoba. The second path is for skilled workers overseas.

In order to qualify as a temporary foreign worker under this program, a foreign national must have been working for at least 6 months in Manitoba on a full-time basis. In addition, the temporary foreign worker's employer must offer the worker full-time, long-term employment.

Last August, Manitoba carved out one exception to the 6-month full-time requirement for temporary foreign workers. This exception applies to temporary foreign workers who previously studied in another Canadian Province or Territory. For these individuals, it is necessary for the temporary foreign worker to have worked in Manitoba for 12 months on a full- time basis before applying[25].

For businesses that hire foreign students, particular attention must be paid to whether the further work – such as an LMO – may be needed to allow these students to continue working while they await the ability to apply to the Manitoba Provincial Nominee Program.

C. Canadian Experience Class – A Good Program Gets Worse

In November, Citizenship and Immigration Canada announced changes that dramatically reduce the number of foreign nationals eligible for permanent residency through the Canadian Experience Class. Companies who have been encouraging their temporary foreign worker employees to apply under the Canadian Experience Class may need to rethink their strategies. In many cases, Manitoba employers may want to take a second look at Manitoba's Provincial Nominee Program.

[25] Please see Manitoba Provincial Nominee Program release entitled "Change for out-of-province scholars". On-line at: http://www.immigratemanitoba.com/2014/04/05/manitoba-connection-for-out-of-province-scholars/

1. *What changes were announced to the Canadian Experience Class?*

The Canadian Experience Class is an immigration stream that allows certain foreigners who have worked in Canada for at least one year in the last three years to apply for Canadian permanent residency. Previous to November's changes, virtually any temporary foreign worker in a highly skilled position (executive, manager, professional, or skilled tradesperson) could apply. If an individual applied early enough, they could also be eligible for a bridging open work permit.

Foreign nationals with Canadian experience in these select high-skilled occupations are no longer eligible under the Canadian Experience Class: cooks, food service and retail sales supervisors, administrative officers and assistants, and accounting technicians and bookkeepers. As a result, an employee with work experience in these occupations must look to see what other immigration options they may have, if any.

In addition to restricting the types of occupations accepted under this program, Citizenship and Immigration Canada has placing a 12,000 application cap on the number of applications they will accept every year. In addition, there is a sub-cap of 200 applications for each job category for each occupation under this class. As a result, even if a person is eligible under the Canadian Experience Class, if the cap has been reached, the individual would not be able to apply[26].

2. *What are the options for businesses?*

Businesses that have temporary foreign worker employees looking to apply for permanent residency should carefully look at these changes. Employees who may no longer be qualified under the Canadian Experience Class should consider other options including the Provincial Nominee Program, the Federal Skilled Worker Class, the Federal Skilled Trades Class and other immigration programs. As well, even if an employee is eligible under the Canadian Experience Class, attention should be paid to the annual quota and sub-quotas to ensure applications are sent in early.

D. Why scoring the minimum on a language test can still result in a refused visa

Most people who receive provincial nominee certificates get Canadian permanent residency. For those whose applications are refused, the most common reasons for refusal are findings of

[26] Please see Ministerial Instructions 10(MI10): Canadian Experience Class. On-line at http://www.gazette.gc.ca/rp-pr/p1/2013/2013-11-09/html/notice-avis-eng.html#d101

"inadmissibility" for past criminal records, current medical conditions or past problems with immigration. However, a provincial nominee can be refused even after meeting all of the other criteria for immigration. This is because Citizenship and Immigration Canada can refuse a provincial nominee if they believe that the provincial nominee will not become "economically established" in Canada.

In Noreen v. Canada (Citizenship and Immigration), 2013 FC 1169 (CanLII), Ms Noreen was told by Citizenship and Immigration Canada that her visa may be refused because she had an English language score that was too low. She was told this despite the fact that she scored above the minimum required by Citizenship and Immigration Canada and the Saskatchewan Immigrant Nominee Program on the language test. (Ms Noreen was applying to Saskatchewan.)

In response to the visa officer, Ms Noreen gave 6 reasons why she could become "economically established". The 6 reasons, as set out in the court decision, were as follows:

1. First, she would be immigrating with her husband whom, she said, would have no difficulty obtaining employment as a security guard.

2. Second, as her husband would be working full-time and supporting the family, she would be "focusing more" on improving her English language abilities by taking courses at the University of Saskatchewan "and working any part time job to contribute to the family income to become economically independent."

3. Third, while she recognized that her ultimate goal of working in education requires strong communication skills, she was confident that by living in Canada and taking courses at the University, she would quickly achieve a "competent level of proficiency in English."

4. Fourth, she was prepared, like all immigrants, to "start any odd or basic job" and she foresaw no problem with communication given her overall score of 5 on the IELTS.

5. Fifth, while she also foresaw difficulty obtaining her Saskatchewan teaching certification while working part time, she pointed to her accomplishments to date as an indicator that she would be successful.

6. Sixth, she pointed to the $24,000 she had saved to assist her and her family in becoming economically established. Despite giving these reasons she lost her court case. In the court decision, the judge made a number of comments that all provincial nominees should be aware of.

While Ms Noreen thought the fact that she would be willing to take on odd jobs would prove she would become economically established, the judge in her case had the opposite view. In this case, the judge stated that "part-time or casual work" would not allow Ms Noreen to "fully support" herself. As a result, the judge found that the officer could find that Ms. Noreen would not be able to fully support herself and her family (even with the assistance of her husband) if she is only working on a part-time or casual basis. For people applying under a provincial nominee program, a commitment to take on whatever job that may come your way could result in your application being refused.

While Ms Noreen indicated a commitment to working in her chosen profession in Canada, she was unable to indicate to the visa officer how long this would take. Without the ability to indicate how long it would take, the judge said that while "she offers light at the end of the tunnel". She "does not tell the officer how long the tunnel is and perhaps it is never ending". As a result, a simple commitment to work hard may not be enough to get an immigration application approved.

Perhaps the most surprising finding of the judge in Ms Noreen's case is that the judge found that scoring above the minimum on an English language test does not guarantee that language will not be an issue in an immigration application. In this case, the judge stated that scoring in excess of the minimum IELTS requirement "only shows why she was not immediately screened out". As a result, this case clearly shows that an officer can refuse a visa on the basis of language ability even if a person scores above the minimum test requirement.

E. In an immigration application, documents are more important than words

Where do immigration officers draw the line between verifying what is true in an immigration application, and violating the rights of the applicant? If officers believe that false or erroneous information has been included in an application, do they have the obligation to inform the applicant as to where they found their evidence used against the applicant?

In November of 2013, the Federal Court heard the case of Khoshnavaz v. Canada (Citizenship and Immigration), 2013 FC 1134 (CanLII). In this case, Mr. Khoshnavaz, a citizen of Iran, submitted a permanent residency application as a skilled worker. In reviewing Mr. Khoshnavaz's application, the immigration officer was not satisfied that the information Mr. Khoshnavaz provided proof of where he worked. To verify that he worked in the job that he claimed, the officer asked for further information regarding Mr. Khoshnavaz's social security contributions.

In response to the request, Mr. Khoshnavaz's representative indicated that since he was a contractual employee, Mr. Khoshnavaz did not have to pay for social security. However, Mr. Khoshnavaz did not include any evidence to back up his claim such as letters from the

government, copies of the law regarding social security, or letters from tax lawyers or accountants. Still dissatisfied, the immigration officer again asked Mr. Khoshnavaz about his social security contributions, and again, Mr. Khoshnavaz indicated that he was not obligated to contribute to social security in Iran. Mr. Khoshnavaz once again failed to produce to evidence in support of this claim.

One of the big issues in this case was that he officer contacted the Social Security Office without specifically telling Mr. Khoshnavaz that he was doing so. In this case, the court found that all the officer had to do was provide a meaningful opportunity to Mr. Khoshnavaz to respond. By contacting Mr. Khoshnavaz with his concerns, the officer made his concerns clear. It was not necessary for the officer to specifically detail all of the steps he took to investigate Mr. Khoshnavaz's claims. Once the officer made his concerns clear, it was the responsibility of Mr. Khoshnavaz to respond. Simply indicating that he did not have to pay social security without providing evidence was not enough.

What can be learned from Mr. Khoshnavaz's case? Even if Mr. Khoshnavaz was correct, simply making a claim that something is factual without providing evidence is not enough to support an immigration application. In this case, Mr. Khoshnavaz should have provided documents to back up his claim. He could have provided letters from lawyers or accountants that indicated that making social security contributions was not necessary in his specific case. In the alternative, he could have included portions of the local law that made him exempt from making such payments.

When submitting any kind of immigration application, it is always necessary to provide as much evidence as possible to support the claims. If an officer is not satisfied with the evidence provided, they must give an opportunity to explain or provide further evidence. As can be seen with this case, as applicant's word is not gospel; documented proof is the best option.

F. <u>Writing reference letters for an immigration application is not as easy as it looks</u>

When writing a letter of reference for a temporary foreign worker employee who wants to immigrate to Canada, employers are required to provide very specific information. So, what happens if an employer's letter of reference does not include the required information? The federal court case of <u>Mollajafari v. Canada (Citizenship and Immigration),</u> 2013 FC 906 (CanLII) shows that an inaccurate or too general a reference letter can lead to an employee's immigration application being denied.

In this case, Mr. Mollajafari, a civil engineer from Iran, applied to come to Canada as a skilled worker. His first application, in 2009, was refused, and his second application, in 2010, was also refused. The basis for the second refusal was because it was unclear from his work

reference letter whether the duties he carried out met the definition under the occupational category which he had applied.

The visa officer who was reviewing Mr. Mollajafari's application found that the job duties listed in his employer's letter of reference did not match those required by his chosen occupation for immigration as set out in Canada's National Occupational Classification (NOC).

In the immigration process, occupational experience is assessed against job descriptions found in the NOC. If an applicant's experience does not coincide with what is found in a particular NOC code, the individual may not qualify to immigrate.

In his application, Mr. Mollajafari claimed work experience as a Construction Manager. The officer found that his duties more closely matched that of a Construction Engineer, which falls under a different NOC category. Since it was not possible to immigrate to Canada as a Construction Engineer at that time, Mr. Mollajafari's immigration application was refused.

In this case, the judge did find that, considering the level of education held by Mr. Mollajafari, there was bound to be some overlap between the categories under which he applied.

However, the law states that the applicant "is required to have performed the duties in the lead statement [of the NOC code under which he was applying] and all or more of the duties of the occupation. Applicants have the onus of providing documentation to demonstrate this."

Simply put, if an individual wishes to apply under a specific category of the NOC, it is their responsibility to provide documented proof that they meet the requirements of that category. It is not enough for a reference letter to describe the duties of the employee as based on the NOC; they must provide proof of having performed these duties. The importance of matching job duties with a corresponding NOC code cannot be stressed enough. Though the court recognized that there may be some overlap between NOC classifications, the decision of the visa officer was upheld, and Mr. Mollajafari's application was not open for review. It was noted that, though Mr. Mollajafari's education included some courses pertaining to the managerial level of the engineering field, his job description did not prove that he had adequate work experience at the managerial level, thus, he could not apply under that category.

As can be seen from this case, adhering to NOC specifications when writing a letter of reference for a temporary foreign worker is very important. That being said, it is equally as important that one does not "cut" the required job duties directly from the NOC and "paste" them into the letter. It is also equally important that employers are truthful in these letters. Though it is ultimately the responsibility of the employee who is making application to ensure that they are applying under the correct NOC category, it is wise for the individual who is writing the letter

of reference to have a look at the NOC for their own peace of mind. After all, they are the ones who are signing their names on the letter.

G. Why checking off the wrong box can bar you from Canada for two (or five) years

What does it mean to misrepresent oneself on your immigration application? According to Citizenship and Immigration Canada, a misrepresentation occurs "when a person makes false statements, submits false information, or submits false or altered documents".

It is important to note that, though not all cases of misrepresentation involve an individual intentionally withholding or leaving out information, it is always the responsibility of the individual making an application to make sure that all questions are answered honestly and truthfully. The importance of double-checking your immigration application is seen in the September 2013 case of Goburdhun v. Canada (Citizenship and Immigration), 2013 FC 971 (CanLII).

In this case, Mr. Goburdhun had applied for and was refused a temporary resident visa by Citizenship and Immigration Canada in 2011. Mr. Goburdhun then applied and was issued a work permit in 2012 which was valid for 2 years.

After applying for his work permit in 2012, Mr. Goburdhun reapplied for the second time for a temporary resident visa, and when answering the question "Have you ever been refused any kind of visa, admission, or been ordered to leave Canada or any other country?", checked the "no" answer checkbox. He did not disclose being refused a temporary resident visa in 2011.

The Immigration Officer who was reviewing his second temporary resident visa application refused it on the basis of misrepresentation. As a result, Mr. Goburdhun was barred from Canada for 2 years.

Before refusing the application, the Officer wrote to Mr. Goburdhun and gave him an opportunity to explain what happened. Mr. Goburdhun said that a clerical error was made by the immigration consultant who helped with his application and that it was not an intentional mistake. Although Goburdhun indicated that he did not fill out the application form himself, it was his responsibility to ensure that the answers were correct.

The Immigration and Refugee Protection Act (IRPA) indicates that "…a foreign national is inadmissible for misrepresentation for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that … could induce an error in the administration of this Act". Before deciding on whether there is a misrepresentation, the following principles must be considered:

I. Misrepresentations made by an immigration consultant, with or without the applicant's knowledge, is still a misrepresentation;
II. An exception to this can occur only when the applicant honestly and reasonably believes that the facts presented in their application are true;
III. In order to deter individuals from misrepresenting themselves on their applications, the onus is always placed on the individual making application;
IV. Although an applicant may have hired another individual to fill in their application form, the applicant is the one who is ultimately signing their name on the form, confirming the information contained within to be true. Therefore, claiming that a clerical error is the reason for the misrepresentation is still a misrepresentation ; and
V. An applicant cannot use to their advantage the fact that a misrepresentation may not be caught on the initial review of their application – the analysis of materiality is not limited to a specific time period of the review process.

When Mr. Goburdhun denied having been refused a temporary resident visa the previous year, all that the Immigration Officer needed to do was check his immigration history in order to see that he had been refused. Although the information is already available on the officer's computer, questions about previous immigration history still appear on immigration applications.

Because the officer had information on his past history, Mr. Goburdhun tried to argue that the incorrect answer was "immaterial"; essentially, he was saying that if Citizenship and Immigration Canada already knew the answer, then the clerical error should not matter. The reality of the situation is quite the contrary. Mr. Goburdhun's lack of diligence in ensuring the accuracy of his own application was the problem. Whether Citizenship and Immigration Canada had this information on its files did not take away from the fact that this was a misrepresentation.

Under a new law that has not yet been proclaimed, the bar from Canada for a misrepresentation could go from two years to five years. At this time, the time period for the bar is still two years.

IV. Civil Liabilities for Employers – Who can bring a court case to challenge and LMO?

The Construction and Specialized Workers' Union, Local 1611 v. Canada (Citizenship and Immigration) 2013 FC 512 (CanLII) case discussed earlier in this paper is interesting for another reason. While this case is significant in that it is the first time, a court ruled on how LMOs should be assessed, one of the most interesting aspects of this case was the fact that the applicants, two unions, did not represent any of the workers at the job site. By allowing the unions to bring this action, the Federal Court of Canada now allows persons not directly

affected by Service Canada's decision on an LMO to make a challenge based on public interest.

While this case dealt with a challenge by two unions, nothing in the decision would preclude others from challenging a positive LMO decision. This decision may open opportunities for industry organizations, competing companies, former employees and Canadian job applicants who were passed over for jobs to challenge approved LMOs.

Now, while this case does open the door for other to challenge approved LMOs, this ability was restricted somewhat by the following case that was decided a week before in the federal court.

In United Steel Workers v. Canada (Citizenship and Immigration), 2013 FC 496 (CanLII), the United Steel Workers sought a judicial review of a decision relating to an LMO that allegedly allowed for a number of foreign workers to enter Canada to displace Canadians working at the Royal Bank of Canada. This decision dealt with the preliminary matter of whether the United Steel Workers could bring this action.

In this case, the United Steel Workers admitted that id did not represent any workers at RBC and that there are no unionized workers at RBC. The United Steel Workers' argument was that this case was in the public interest.

In deciding that the United Steel Workers could not bring this action, the judge stated the following:

- There is no serious issue to determine as the issues will be ones of procedural fairness, correctness of the decision and whether the decision is reasonable. There are no constitutional issues.
- The United Steel Workers do not represent any persons affected by the decision NOR do they have a long history of representing workers in the industry. On this point, the judge specifically indicated that this was a main difference between this case and the Construction and Specialized Workers' Union, Local 1611 v. Canada (Citizenship and Immigration) 2013 FC 512 (CanLII) case.
- The United Steel Workers, despite advertising, were not able to find anyone who would become a party to the proceeding. Although the media identified one person who would have been an appropriate party, that individual did not come forward.

Reading between the lines, unions that represent individuals affected by an LMO and who can identify a particular person who would have been affected by the LMO may have a better chance at bringing this type of court action.

V. Why HR professionals should not help employees complete immigration applications?

Last May, Citizenship and Immigration Canada released a web page that sets out their interpretation as to what assistance human resources professionals and others can provide to individuals looking for immigration help. Unless the HR professional is also a lawyer or licensed immigration consultant, the following is a list of Citizenship and Immigration Canada's dos and don'ts as they pertain to HR professionals.[27]

Do:

- Direct someone to the CIC website to find information on:
  - immigration programs
  - application forms, or
  - authorized immigration representatives
- Provide services, such as:
  - translation
  - travel arrangements
  - couriers, and
- Conduct job interviews
- HR personnel can complete Labour Market Opinion (LMO) application forms on behalf of their employer

Do Not:

- Explain and/or advise on someone's immigration options
- Guide a client on how to select the best immigration stream
- Complete and/or submit immigration forms on a client's behalf
- Communicate with CIC and the CBSA on a client's behalf (except for the direct translation of a client's written or spoken submissions)
- Represent a client in an immigration application or proceeding
- Advertise that they can provide immigration advice for consideration
- HR personnel cannot complete applications forms, such as work permits and visa applications, on behalf of workers recruited

Of significance to HR staff is the last line in each list. In particular, while HR personnel can complete a LMO application for their employer. HR consultants are not allowed to complete an LMO application for a client.

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[27] Please see "Stakeholders dos and don'ts". On-line at http://www.cic.gc.ca/english/information/representative/do-dont.asp

As well, HR personnel cannot complete applications forms, such as work permits and visa applications, on behalf of workers recruited.

Under section 91(9) of the *Immigration and Refugee Protection Act*, HR personnel who violate these guidelines can be fined up to $100,000 and imprisoned for up to 2 years.

VI. What does the Future Hold? Crystal Ball Gazing for 2014-2015

A. The Worker Recruitment Act (WRAPA) let's up – a bit

Earlier this month, the Manitoba government introduced *Bill 50 – The Protection for Temporary Help Workers Act (Worker Recruitment and Protection Act and Employment Standards Code Amended)*. On the issue of foreign worker recruitment in Manitoba, Bill 50 proposes to allow an employer to use a non-licensed recruiter for temporary foreign workers who would be employed at an annual wage that is at least two times the Manitoba Industrial Average Wage, as defined in *The Employment Standards Regulation*.

As the current industrial average wage is $43,134.00. As a result, this change would affect temporary foreign workers who would make $86,268.00/year or more.

The significance of this change is that it would allow businesses to use recruiting companies who may be currently prevented from offering services in Manitoba. The *Worker Recruitment and Protection Act* indicates that only lawyers and licensed immigration consultants can become recruiters. As a result, recruiting companies who do not have lawyers or licensed immigration consultants on staff may not be able to recruit for positions in Manitoba.

For the most part, this change in the law will only affect higher skilled employees in Manitoba for which LMOs are needed. While theoretically, any type of occupation could be exempt from the *Worker Recruitment and Protection Act* as long as the wage cut-off is met, Service Canada's wage information indicates that no one in any of the "low skilled" occupations – occupations that fall within National Occupational Classification (NOC) C and D – are paid at or above $86,268.00/year in Manitoba.

In fact, there are very few NOC O, A or B occupations that are paid over this amount. It would appear that this exemption would only apply to higher level executives, managers and professionals.

As the *Worker Recruitment and Protection Act* never applied to foreign workers for which an LMO is NOT needed, this change would not affect this.

B. Show me the money – The federal government will introduce fines for employers who break the law

Last month, the federal government introduced Bill C-31 which is an omnibus budget bill that contains changes to immigration laws. One of the changes that has been proposed is a change to the *Immigration and Refugee Protection Act* that would set fines for employers who break the law.

While the amount of the fines is not contained in the Bill C-31, the fines will apply to violations of conditions imposed on employers in the immigration process.

C. Advance to "Go" … with Express Entry

This month, Citizenship and Immigration Canada announced that its "Express Entry" system, formally known as "Expression of Interest", will be launched in January 2015.

While details will have to be worked out, this system will be designed to speed up permanent residency applications of individuals with job offers to fill vacant jobs in Canada. "Express Entry" will not be a separate immigration program but will be connected to already existing permanent residency programs. "Express Entry" will not apply to the temporary foreign worker program.

D. Free trade = free movement (of some) people

In the last few months, Canada has announced tentative free trade deals with Korea and the European Union. While the text of the European Union agreement has not been released, the technical summary discusses mutual recognition of professional qualifications and preferential access for intra-company transfers, investors, contract service suppliers and independent professionals, short term business visitors, and certain spouses. Similarly, the agreement with Korean includes provisions that will allow for preferential access for business visitors, traders and investors, intra-company transfers, professionals and certain spouses.

Assuming that these agreements are adopted, this will open up a further source of foreign nationals who can come to Canada for temporary work.