Immigration Law Update 2012: The Good, the Bad and Extremely Frightening

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Table of Contents

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About the Author

Reis Pagtakhan is a Canadian corporate immigration lawyer who focuses on obtaining Canadian temporary entry and permanent residency for senior executives, managers, professionals and other company employees from all over the world.

A partner with Aikins Law, Reis has over 16 years of experience advising corporate clients and individuals in immigration matters. He has been invited to speak on immigration law to Canadian and international audiences by the Canadian Corporate Counsel Association, the Human Resource Management Association of Manitoba, the Law Society of Manitoba, the Manitoba Bar Association and the Community Legal Education Association of Manitoba.

Reis has presented position papers before the Minister of Citizenship and Immigration Canada and co-authored the Manitoba Bar Association's response to immigration recruitment legislation enacted in the province of Manitoba. He has written over 50 articles on immigration law which have appeared in the Winnipeg Free Press, human resource, professional services, construction, legal and ethnic publications.

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I. The Good

A. Citizenship and Immigration Canada introduces a policy allowing Intra-Company Transfers to "recapture" time

An intra-company transferee is an individual who has occupied an executive, managerial or specialized knowledge position outside of Canada for at least one year in the last three[1] and who is seeking to transfer to Canada to work in a similar position[2].

In most cases, intra-company executives and managers are allowed to work in Canada for a maximum of 7 years while specialized knowledge workers are only eligible to work in Canada for a maximum of 5 years[3].

Once an employee reaches their 7 or 5 year time limit, the employee must complete 1 year of full-time employment outside of Canada in the foreign company before reapplying to come back to Canada as an intra-company transferee. However, under new rules introduced last year, time spent by employees outside of Canada during their 7 or 5 year stay can be "recaptured"[4].

For example, if an intra-company transferee is in Canada for six months of every year but is back in his/her home country for the other six months of the year, those additional six months can be added to the employee's total time limit. In this example, if the individual has a seven year time limit, this could effectively give the individual the ability to enter Canada on this status for seven more "half years".

B. The Canada-Columbia Free Trade Agreement

Last year marked signing of the Canada-Columbia Free Trade Agreement. In addition to opening up trade between Canada and Columbia, this agreement now opens up expedited entry for certain professionals and technicians who are Columbian citizens.

Entry under this free trade agreement is similar to other free trade agreements such as the North America Free Trade Agreement ("NAFTA") that covers traders, investors, and intra-company transfers. It should be noted that these provisions are reciprocal and allow Canadians to work in Columbia under the same conditions.[5]

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[1] Under Free Trade Agreement with Peru and Columbia, the minimum period of work is 6 months
[2] Page 60 of Citizenship and Immigration Canada, *FWI Temporary Foreign Worker Guidelines*, 2012-01-11 ed. (the "Foreign Worker Manual")
[3] Page 89 of the Foreign Worker Manual
[4] Pages 70-71 of the Foreign Worker Manual
[5] Citizenship and Immigration Canada 'Operational Bulletin 342 – August 12, 2011 Implementation of the Canada-Colombia Free Trade Agreement' (August 12, 2011) <http://www.cic.gc.ca/english/resources/manuals/bulletins/2011/ob342.asp>

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Notable differences in this agreement from the NAFTA are as follows:

1. The "negative" list of professionals

Under this free trade agreement, a "negative" list of professionals has been created. Professionals on the "negative list" are not covered by the trade agreement while all other professionals are covered. This is opposite to the "positive" list found in NAFTA which requires that a professional be in a profession on a set list.

2. The "positive" list of technicians

In addition to the "negative list" of professionals, a "positive" list of technicians is included. This allows for the entry of many other occupations specifically listed under this agreement. In many cases, these occupations are not in NAFTA.

3. Spousal work permit

Another feature of this agreement is that spouses of individual obtaining work permits under the free trade agreement can be issued open work permits.

4. Only 6 months of previous work are required for Intra-Company Transfers

In addition, this free trade agreement modifies the general rule for intra-company transfers that require that a person be employed by the foreign company in a similar position and on a full-time basis for at least 1 year in the 3 years immediately preceding the date of the application. For individuals who qualify under this treaty (and the Canada-Peru Free Trade Agreement), the minimum term of employment is 6 months.

C. Easier entry to Canada for individuals convicted of one minor offence[6]

In February, Citizenship and Immigration Canada changed its policy to allow a one-time fee exemption for individuals convicted of certain offences such as driving under the influence.

Under this new policy, individuals entering Canada for one visit will no longer have to pay the $200 fee for a temporary resident permit. In order to be eligible, the individual must have been convicted of a minor offence (as defined by Citizenship and Immigration Canada), could not have received a term of imprisonment, and cannot have had any other convictions that would

[6] Citizenship and Immigration Canada 'Operational Bulletin 389 – February 27, 2012 Cost Recovery Fee Exemption for Temporary Resident Permits Issued to Foreign Nationals who are Inadmissible on Criminality Grounds' (February 27, 2012) < http://www.cic.gc.ca/english/resources/manuals/bulletins/2012/ob389.asp>

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otherwise prevent the individual from entering Canada. If these criteria are met, immigration officers are encouraged to allow the individual to visit without paying a fee.

While this policy was released as a fee exemption only, the more notable aspect is that it defined what crimes are "minor". As a result, even if the person is not eligible for a fee exemption, this policy can be used to argue a lower benchmark for individuals seeking entry to Canada with "minor" criminal records.

This policy change is helpful for Canadian businesses seeking to bring in customers, clients and employees to Canada for short term meetings. However, this is only a one time solution. If the individual needs to come to Canada on a more frequent basis, a longer term solution is necessary.

D. The introduction of National Occupational Classification ("NOC") 2011[7] changes immigration assessments

On January 31, 2012, the 2006 edition of the National Occupation Classification was replaced with the 2011 edition.

Because of this change, permanent residency applicants have been advised that they will have the benefit of having their applications considered under either the NOC 2006 or the NOC 2011. Now applications received after January 31, 2012 will be assessed under whichever of these NOC codes is the most advantageous to the applicant.

While some NOC codes have changed, most of the job duties in NOC 2006 are similar to those in the NOC 2011 job. The change of the NOC codes will not affect how occupation caps for permanent residency are counted.

For temporary foreign workers Service Canada has advised that it will continue to use the 2006 NOC for Labour Market Opinions[8] and Arranged Employment Opinions[9] until further notice.

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[7] Citizenship and Immigration Canada 'Operational Bulletin 393 – March 5, 2012 Release of the National Occupation Classification (NOC) 2011' (March 5, 2012) < http://www.cic.gc.ca/english/resources/manuals/bulletins/2012/ob393.asp>

[8] A Labour Market Opinion is an opinion rendered by Service Canada as to whether a job being offered to a foreign worker is genuine and that the employment of that foreign worker is likely to have a neutral or positive effect on the Canadian labour market. Human Resources and Skills Development Canada 'Part I - Summary and Procedures' (May 27, 2011) <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/lmodir/lmodir-2.shtml>

[9] An Arranged Employment Opinion is similar to a Labour Market Opinion with the exception that an employee who obtains this type of opinion can use it for an application for permanent residency as opposed to a temporary work permit. Human Resources and Skills Development Canada 'Hiring Skilled Workers and Supporting their Permanent Immigration' (February 9, 2012) <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/poarremp.shtml>

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When and if Service Canada changes to NOC 2011, businesses should be aware of this. In regulations released in April 2011, a 4 year time cap was placed on certain foreign workers depending on their occupations. As a result, if NOC 2011 is adopted and a foreign worker's occupation falls with certain NOC codes, that foreign worker may be subject to a 4 year time cap on working in Canada.

E. The Cracking Down on Crooked Consultants Act becomes law

On June 30, 2011, the Cracking Down on Crooked Consultants Act became law[10]. Originally passed in March 2011, this law makes it a crime for individuals not authorized under the *Immigration and Refugee Protection Act* to provide immigration advice for a fee[11].

Prior to the passing of this law, any individual could provide immigration advice to clients for a fee as long as the matter was not before an immigration officer. It was only that after the matter came before an immigration officer that paid representation was restricted to lawyers and consultants. Because of this "gap", unlicensed immigration consultants would charge fees for the preparation and filing of an immigration application.

1. Who can now provide immigration advice for a fee?

As of June 30, 2011, only "authorized representatives" will be allowed to provide immigration advice for "consideration". Consideration includes a fee or anything else that could be received as payment. Of note is that the law prohibits both "direct" and "indirect" payments for immigration advice if the representative is not authorized[12]. As a result, this can have a dramatic effect on HR consultants who deal with clients with current or potential foreign workers.

If an HR consultant gives HR advice for a fee but gives immigration advice for "free", this may be seen as receiving a fee "indirectly". If this is found, penalties range from fines up to $100,000 and 2 years (less a day) in jail[13].

2. Who are "authorized representatives"?

"Authorized representatives" are lawyers licensed to practice law in a Canadian jurisdiction, Quebec notaries, certain paralegals and law students, licensed immigration consultants, and certain organizations that have agreements with the Government of Canada[14].

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[10] Citizenship and Immigration Canada 'Operational Bulletin 317 – July 29, 2011 Coming Into Force of Bill C-35, An Act to Amend the Immigration and Refugee Protection Act (Authorized Representatives)' (July 29, 2011) < http://www.cic.gc.ca/english/resources/manuals/bulletins/2011/ob317.asp>

[11] S. 91(1) of Immigration and Refugee Protection Act

[12] S. 91(1) of Immigration and Refugee Protection Act

[13] S. 91(9) of Immigration and Refugee Protection Act

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Organizations and individuals who do not charge fees to assist individuals with immigration matters are still allowed to provide advice on immigration matters.

3. What happens if my business hires a representative who is not "authorized"?

Businesses who hire representatives who are not authorized, may see their applications returned resulting in delays[15].

4. What if the name of a representative is not disclosed?

The failure to disclose the name of a representative may be a violation of the law and could result in an immigration application being returned or a person being refused entry to Canada[16].

5. What are some examples of what an authorized immigration representative can do for a fee?[17]

According to Citizenship and Immigration Canada, only authorized representatives can do the following for a fee:

- Explain and provide advice on someone's immigration options
- Provide guidance to someone on how to select the best immigration stream and complete the appropriate forms
- Communicate with Citizenship and Immigration Canada/Canada Border Services Agency/Immigration and Refugee Board on someone's behalf
- Represent someone in an immigration application or proceeding
- Represent someone in Arranged Employment Opinion or Labour Market Opinion applications
- Advertise that they can provide immigration advice

In general, if a person is providing services which do not involve advising or representing the applicant then he or she are not required to be authorized. Examples of services falling into this category would include:

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[14] S. 91(2), 91(3), 91(4) and 91(5) of Immigration and Refugee Protection Act
[15] Citizenship and Immigration Canada 'Operational Bulletin 317 – July 29, 2011 Coming Into Force of Bill C-35, An Act to Amend the Immigration and Refugee Protection Act (Authorized Representatives)' (July 29, 2011) <http://www.cic.gc.ca/english/resources/manuals/bulletins/2011/ob317.asp>
[16] Citizenship and Immigration Canada 'Operational Bulletin 317 – July 29, 2011 Coming Into Force of Bill C-35, An Act to Amend the Immigration and Refugee Protection Act (Authorized Representatives)' (July 29, 2011) <http://www.cic.gc.ca/english/resources/manuals/bulletins/2011/ob317.asp>
[17] Citizenship and Immigration Canada 'Operational Bulletin 317 – July 29, 2011 Coming Into Force of Bill C-35, An Act to Amend the Immigration and Refugee Protection Act (Authorized Representatives)' (July 29, 2011) <http://www.cic.gc.ca/english/resources/manuals/bulletins/2011/ob317.asp>

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- Directing someone to the Citizenship and Immigration Canada's website to find information on immigration programs;
- Directing someone to the Citizenship and Immigration Canada's website to access immigration application forms;
- Directing someone to an immigration representative;
- Providing translation services;
- Providing medical services (i.e. medical exams, DNA testing); and
- Making travel arrangements.

F. The introduction of Long Term Multiple Entry Visas for business travelers[18]

Under immigration law, citizens of certain countries must obtain visas before visiting Canada. While there are notable exceptions to this requirement[19], it is the general rule.

Since 2010, Visa offices have been encouraged to issue long term multiple-entry visas wherever possible, to business travelers, amongst others. However, in 2011, visa offices were again reminded that in cases where multiple-entry visas can be issued, they should be issued to the maximum validity of the person's passport minus one month[20] (up to 10 years minus one month).

If a client has applied and paid for a multiple-entry visa and the visa officer is satisfied that the client is a *bona fide* temporary resident and is not inadmissible to Canada, a multiple-entry visa with the maximum validity period should be issued.

The following will now be considered by visa officers when encouraging business travelers to apply for multiple-entry visas:

- Is the applicant known to visa office?
- Does the applicant have a history of travelling to and returning from Canada[21]?

Visa officers are instructed that the issuance of a multiple-entry visa should now be considered to be the norm and any single-entry visa issuance needs explanation if a multiple-entry visa could have been issued.

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[18] Citizenship and Immigration Canada 'Operational Bulletin 306 – June 3, 2011 Long Term Multiple-entry Visas' (June 3, 2011) < http://www.cic.gc.ca/english/resources/manuals/bulletins/2011/ob306.asp>

[19] s.190 of the Immigration and Refugee Protection Regulations. While this is not an exhaustive list, countries whose citizens do not normally need visas to enter Canada include citizens of most European Union countries and citizens of Japan, Australia, New Zealand, South Korea, the U.S.A. and some Caribbean countries.

[20] As stated in Citizenship and Immigration Canada, *OP11 Temporary Residents*, 2010-07-05 ed. (2010) ("OP 11") section 12, the maximum validity period of a multiple-entry visa can be given for the validity of the passport, minus one month; which at present is five years, less 30 days prior to the expiry of the passport. Until recently, most countries issued passports valid for five years, but increasingly countries are opting for 10-year validity.

[21] OP 11, section 12

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If the applicant requests a single-entry visa and the officer could have issued a multiple-entry visa, the visa office is instructed to send a letter to the applicant in order to encourage him or her to apply for a multiple-entry visa rather than a single-entry visa for subsequent applications.

G. Validity of Arranged Employment Opinions[22]

Effective last month, officers do not require a new Arranged Employment Opinion (AEO) from Service Canada, in cases where the AEO has expired while a Federal Skilled Worker application is in process. Officers may still issue a permanent resident visa as long as the AEO was valid at time of receipt of the application and they are satisfied that the job offer is still valid and no adverse information on the employer has come to light.

This is an important change as it eliminates additional work on companies and their employees applying for permanent residency under this category.

II. The Bad

A. Changes to Rules for Specialized Knowledge employees entering Canada as Intra-Company Transfers

In 2011, Citizenship and Immigration Canada tightened the rules for specialized knowledge employees entering Canada as Intra-Company Transfers. These new rules make it harder to qualify as a specialized knowledge worker and will eliminate some occupations from this category.

1. Who is a specialized knowledge worker?

In order to be considered a *specialized knowledge worker*, the employee must demonstrate:

- specialized knowledge of the company's product or service and its application in international markets, or
- an advanced level of knowledge or expertise in the organization's processes and procedures (product, process and service can include research, equipment, techniques, management, or other interests)[23].

While the above definition makes it seem that a large number of occupations could qualify under this category, recent changes now make the "specialized knowledge" category more challenging.

[22] Citizenship and Immigration Canada 'Operational Bulletin 394 – March 8, 2012 Validity of Arranged Employment Opinions' (March 8, 2012) <http://www.cic.gc.ca/english/resources/manuals/bulletins/2012/ob394.asp>

[23] Page 63 of the Foreign Worker Manual

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Today, when assessing a specialized knowledge employee, officers are instructed to consider a number of factors to determine if the application supports the claim of specialized knowledge. These factors include:

- Whether is a diploma or degree required for the position
- Whether the employee`s knowledge is relatively unique within the company and industry or whether the knowledge is commonly held
- Whether the employee`s experience with the foreign company and in the industry support the claim of specialized knowledge
- Whether the employee's previous training support the claim to specialized knowledge
- Whether the employee's resume and reference letters support the claim for specialized knowledge

In addition, officers are also instructed that a specialized knowledge employee normally possess the following characteristics:

- knowledge that is uncommon (i.e., beyond that generally found in a particular industry and within the company);
- knowledge that has been gained through extensive experience and is difficult to acquire in a short period of time;
- difficulty to train another worker to assume such duties;
- the required knowledge is complex in that it cannot be easily transferred;
- a person possessing such knowledge would be in a position that is critical to the well-being or productivity of the Canadian employer.[24]

These changes were in direct response to the case of *Arora v. The Minister of Citizenship and Immigration* which, for a short time, made qualifying as an intra-company transferee easier.

2. The *Arora* Case and its aftermath

In *Arora*, a 23 year old business development manager with a grade 12 education and less than 3 years of experience with the company, applied for a work permit as manager. In refusing the application, the visa officer considered Mr. Arora's relatively young age, high school education, limited experience with the company, lack of evidence of past work experience, and modest salary. In overturning the refusal, Mr. Justice O'Keefe stated that these factors could not be used to refuse the application since they were not criteria found in Citizenship and Immigration Canada's Foreign Worker Manual when assessing whether a person qualifies as an intra-company manager.

[24] Citizenship and Immigration Canada 'Operational Bulletin 316 - July 4, 2011 Assessing Intra-Company Transferees under Specialized Knowledge' (July 4, 2011) <http://www.cic.gc.ca/english/resources/manuals/bulletins/2011/ob316.asp>

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After *Arora*, Citizenship and Immigration Canada updated its Foreign Worker Manual allowing officers to take into account these factors when assessing specialized knowledge employees. Interestingly, the update applied these factors to specialized knowledge workers only and not managers, as was the case in *Arora*.

3. How is experience now assessed?

Amongst other things, immigration officials will look closely at the skill level needed for the position to determine whether the knowledge is sufficiently "specialized"[25]. Even though an individual only needs to be working in the company for one year to qualify for intra-company transfer status (6 months for Columbia and Peru free trade individuals), officers are now instructed to look at the level of experience to determine the sufficiency of the knowledge. Even though an individual may have one year or even more of experience, the knowledge they may have accumulated may not considered specialized.

4. Are trades people specialized knowledge employees?

Another new rule, that did not arise in the *Arora* case but was also added, is that the immigration officers are now instructed that an employee's knowledge of proprietary tools used or developed by an employer will not be sufficient, in and of itself, to qualify an individual as specialized knowledge worker [26]. In the past, this fact was often used to claim specialized knowledge. It appears that this change is targeted towards limiting the number of tradespeople and hands-on workers who can claim specialized knowledge.

5. How are education and training now assessed?

By asking officers to consider whether a diploma or degree is required for the position, Citizenship and Immigration Canada seems to be suggesting that the level of education an employee has may be indication of his/her knowledge. While this may be the case in some occupations, by asking officers to consider this, de facto educational criteria may be imposed. This makes it more challenging to claim specialized knowledge for employees who have learned their position on-the-job.

Officers are instructed that an employee with knowledge that comes from a series of progressively more complex training combined with hands-on experience increases the chances of finding specialized knowledge[27].

[25] Page 65 of the Foreign Worker Manual
[26] Operational Bulletin 316 – July 4, 2011: Assessing Intra-Company Transferees Under Specialized Knowledge
[27] Page 66 of the Foreign Worker Manual

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6. What happens if there is no formalized training process?

Employees without formalized training can face difficulties as officers are instructed that if the knowledge can be obtained over a short period of time of in-house or on-the-job training, there is an increased likelihood the work is not specialized[28].

7. Is the position itself a specialized knowledge position?

Officers are instructed to compare an employee's job description with similar job descriptions in Canada's National Occupational Classification[29] ("NOC"). If the employee's proposed Canadian position will be at a lower level on the NOC than the one they occupied abroad, the employee must show that "an exceptional situation exists" to be considered a specialized knowledge employee[30]. This raises the prospect that a person may not be found to be a specialized knowledge employee simply because of duties they may be taking up in Canada.

8. What employee wages must be paid?

In the past, how much a specialized knowledge worker was paid was irrelevant. Now, officers are instructed that specialized knowledge workers should "normally" be paid a salary that "approximates the average wage" for the occupation and the location where the employee will be working in Canada[31]. In calculating the wage, non-cash per diems cannot be included. As a result, this will greatly affect wages paid to employees seconded to Canada for short periods and may require that remuneration packages with non-cash per diems be restructured.

B. The Government reduces the caps on certain applications[32]

Effective July 1, 2011, a cap of 10,000 Federal Skilled Worker applications without an offer of arranged employment was set for the 12 month period ending June 30, 2012. Within the 10,000 cap, a maximum of 500 new applications per designated occupation was also set. As of April 16, 2012, over 9,500 applications had been received[33]. As this number only reflects what Citizenship and Immigration Canada has recorded, it would seem likely that the cap has now been met.

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[28] Page 65 and 66 of the Foreign Worker Manual
[29] The National Occupational Classification is a Government of Canada reference on occupations in Canada that consists of over 30,000 job titles
[30] Operational Bulletin 316 – July 4, 2011: Assessing Intra-Company Transferees Under Specialized Knowledge
[31] Operational Bulletin 316 – July 4, 2011: Assessing Intra-Company Transferees Under Specialized Knowledge
[32] Citizenship and Immigration Canada 'Operational Bulletin 318 – June 27, 2011 Updated Ministerial Instructions: New Cap on Federal Skilled Worker Applications' (June 27, 2011) < http://www.cic.gc.ca/english/resources/manuals/bulletins/2011/ob318.asp>
[33] Citizenship and Immigration Canada 'Total complete applications received since July 1, 2011' (April 16, 2012) <http://www.cic.gc.ca/english/immigrate/skilled/complete-applications.asp>

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In addition, the following caps were also announced:

- Federal Entrepreneur Program: A temporary moratorium on new applications was placed on this program[34].
- Federal Immigrant Investor Program: A cap of 700 applications per year[35] was set for this program. This cap was met within the first few days.

III. The Extremely Frightening: Immigration Audits and the Culture of Enforcement

A. Immigration Audits

Under immigration regulations enacted last year, an employer who hires a non-Canadian or non-Canadian Permanent Resident (a Temporary Foreign Worker) may now be subject to a Canadian government Employer Compliance Review.

1. What is an Employer Compliance Review?

An Employer Compliance Review is essentially an immigration audit. In this audit, the government of Canada looks to see whether a company that has hired temporary foreign workers in the past has paid wages, offered working conditions and employment in accordance with representations the company made in the immigration process. This is known as the "substantially the same" test.

2. How does an Employer Compliance Review arise?

There are essentially three types of situations where immigration audits will arise:

1. The "spot audit", where an employer is randomly selected to provide a variety of documents to establish compliance with immigration laws[36];
2. A "full audit", that arises when an employee seeks to hire a new foreign worker and Service Canada wishes to see if compliance has occurred;
3. The "voluntary audit" which will arise if your company agrees to the "voluntary monitoring initiative" when applying for a labour market opinion.

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[34] Citizenship and Immigration Canada 'Operational Bulletin 319 - June 27, 2011 Updated Ministerial Instructions: Temporary Moratorium on Federal Entrepreneur Class Applications' (June 27, 2011) <http://www.cic.gc.ca/english/resources/manuals/bulletins/2011/ob319.asp>

[35] Citizenship and Immigration Canada 'Operational Bulletin 320 - June 27, 2011 Updated Ministerial Instructions: Centralized intake of applications under the federal Immigrant Investor Program' (June 27, 2011) <http://www.cic.gc.ca/english/resources/manuals/bulletins/2011/ob320.asp>

[36] Peter Rekai, *HRSDC and Employer Compliance the New Reality – Where Is This Heading?* Ontario Bar Association Institute 2012 of Continuing Professional Development Citizenship and Immigration Law Immigration Audits and Enforcement: The New Reality February 9 – 11, 2012

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In the spot audit, some of the questions that have been asked include the following for temporary foreign workers that Service Canada has in its records that a company employs:

1. The total number of hours per week;
2. Their hourly wage;
3. Their first day of work and, if applicable, the last day of work; and
4. A copy of the work permit[37]

3. How is "Substantially the Same" assessed?

Unfortunately, one of the difficulties in interpreting the "substantially the same" test is that there is no definition of this phrase in the Immigration and Refugee Protection Act or Regulations. Clearly, the phrase "substantially the same" does not mean "identical". As a result, some variation to wages, working conditions and employment are allowed as long as they remain "substantially the same".

In cases where an employer has hired a foreign worker in the past two years, an assessment can be made as to whether the employer provided "substantially the same" wages, working conditions and employment to their past or existing foreign workers as set out in the offers of employment to these foreign workers. If an employer cannot pass this test, work permits for new foreign workers will not be issued[38].

According to Human Resources and Skills Development Canada, potential violations of the "substantially the same" test includes:

- Changing the terms and conditions of employment from what the employer agreed to in a Labour Market Opinion confirmation;
- Changing the hours of work per week a foreign national is to work;
- Changing the wage paid to a foreign national;
- Changing the location of work of a foreign national; and
- Changing the job duties of a foreign national[39]

In addition, there has been no clear guidance as to whether the following could be seen as violations of the "substantially the same" test:

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[37] Peter Rekai, *HRSDC and Employer Compliance the New Reality – Where Is This Heading?* Ontario Bar Association Institute 2012 of Continuing Professional Development Citizenship and Immigration Law Immigration Audits and Enforcement: The New Reality February 9 – 11, 2012, p.17

[38] s.200(1)(c)(B) of the Immigration and Refugee Protection Regulations

[39] Human Resources and Skills Development Canada. *Temporary Foreign Worker Program Employer Compliance: Requirements for the Temporary Foreign Worker Program: New Rules*, p.8.

R. Reis Pagtakhkan
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- Payment of discretionary bonuses[40];
- A change in benefits including changes made by the insurance carrier, reductions in coverage, or increases in deductibles[41];
- A change in vacation policy[42];
- Changes in personnel policies such as a new policy to grant employees "personal days" or reduction in sick days[43];

While there is no definition of "substantially the same" in immigration legislation or regulations, this phrase used in dozens of regulations and acts in other areas of the law. As a result, if an allegation is made that your company has not complied with the "substantially the same" test, it would be useful to analyze cases that have considered this phrase in other areas of the law to determine if an analogy can be made to your company's situation. As we are in the early days of these regulations, some of the following may be useful to consider:

1. If an engineering firm changes their professional liability insurance, would the firm still be in compliance with the immigration definition of "substantially the same" if the Association of Professional Engineers and Geoscientists Manitoba provides the firm with an opinion that their new professional liability coverage meets the "substantially the same" provisions in Manitoba's *Engineering and Geoscientific Professions Act* [44]?
2. If, in the course of a labour grievance with respect to a sick leave policy, the Manitoba Court of Appeal mentions that a sick leave policy that has been in effect since a certain year has been in "substantially the same" terms, does this mean that any changes to his policy over those years meets the immigration definition of "substantially the same"[45]?
3. Under section 82(1) of Manitoba's Employment Standards Code, employers are prohibited from discriminating between male and female employees by paying one gender on a different scale of wages if the kind or quality of work and the amount of work required of the employees is "the same or substantially the same". If there is litigation brought pursuant to this section and the ultimate decision is that the work is

[40] Ramo, Gabriela. *Maintaining Compliance in the Era of "Substantially the Same"*, Ontario Bar Association Institute 2012 of Continuing Professional Development Citizenship and Immigration Law Immigration Audits and Enforcement: The New Reality February 9 – 11, 2012, p. 6
[41] Ramo, Gabriela. *Maintaining Compliance in the Era of "Substantially the Same"*, Ontario Bar Association Institute 2012 of Continuing Professional Development Citizenship and Immigration Law Immigration Audits and Enforcement: The New Reality February 9 – 11, 2012, p. 7
[42] Ramo, Gabriela. *Maintaining Compliance in the Era of "Substantially the Same"*, Ontario Bar Association Institute 2012 of Continuing Professional Development Citizenship and Immigration Law Immigration Audits and Enforcement: The New Reality February 9 – 11, 2012, p.7
[43] Ramo, Gabriela. *Maintaining Compliance in the Era of "Substantially the Same"*, Ontario Bar Association Institute 2012 of Continuing Professional Development Citizenship and Immigration Law Immigration Audits and Enforcement: The New Reality February 9 – 11, 2012, p.7
[44] *Engineering and Geoscientific Professions Act* CCSM ce120 s. 16(2)(e)(ii)
[45] *St. James Assiniboia Teachers Association No. 2. v. Board of Education of St. James Assiniboia School Division No.* 2, 2002 170 NR2D69(c).a.

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"substantially the same", does this answer the substantially the same question for immigration purposes?[46]

4. If a family law court compares two incomes and concludes, that the former spouses are earning "substantially the same" income, can a decrease or increase in pay within the same range meet the immigration definition of "substantially the same"[47]?
5. If the a labour board finds two different occupations to be "substantially the same" work when deciding a pay equity dispute, can an employer move an employee from one of those positions to another and still comply with the immigration regulations for "substantially the same"[48]?
6. If a labour board finds that an employee accepted a position and performs a "substantially the same duties at substantially the same rate of compensation" can similar position changes and differences in compensation meet the immigration definition of "substantially the same"[49]?

4. Is there a defense for failing the "substantially the same" test?

If it does not appear that the employer will pass the "substantially the same" test, employers should explore whether they can establish a "reasonable justification" defense. If a "reasonable justification" defense is established, there will be no "substantially the same" violation. Examples of "reasonable justification" include:

- Changes to federal or provincial laws;
- Changes to a collective agreement;
- A dramatic change in economic conditions;
- Good faith employer error; or
- An administrative accounting error.[50]

5. What are the consequences of failing an Immigration Audit?

If an employer is non-compliant, the employer may be found to be ineligible to hire any Temporary Foreign Workers for the next 2 years. In addition, the employer's name may be published on a Citizenship and Immigration Canada website these two years[51] which can be

[46] S. 82(1) of the Employment Standards Codes CCSMCE 110
[47] *Paris v. Paris*, 1980 CanLii 747 (Ontario CJ)
[48] *Davey v. Canadian Union of Public Employees, Local 16*, 1983 CanLii 842 (Ontario LRB). In this case an Employment Standards officer found that the Sault St. Marie Board of Education should have paid female employees classified as Cleaners Class 2 at the same rate as male employees classified as Caretaker Class 4 because they were performing substantially the same work
[49] *Group Mark Canada Ltd. v. Campbell*, 2002 CanLii 3773 (Ontario LRB)
[50] s.203(1.1) of the Immigration and Refugee Protection Regulations
[51] Ss. 203(5) and (6) of the Immigration and Refugee protection Regulations

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found here: http://www.cic.gc.ca/english/work/list.asp. As of the date of the writing of this paper, no employers are on this "blacklist".

In addition, since the requirement to pass the "substantially the same" test does not depend on whether a work permit is being sought for a new or existing employee, noncompliance with respect to one foreign national can affect the ability to hire any new foreign nationals – even those working in unrelated jobs and at different sites.

Because of the national impact of these regulations, companies with offices and operations in various areas of Canada could be prevented from hiring foreign workers because of an immigration violation that took place in another office. As a result, company-wide procedures when dealing with foreign workers should be clearly developed to ensure compliance.

For instance, if an employer represents that it will hire a foreign national as a mechanic at $25/hour and only pays the mechanic $20/hour, the employer could fail this test. If, within two years of this violation, the employer seeks to hire another foreign worker as the company CEO in an office in another province, the failure to pay the mechanic the stipulated wage could result in the refusal of a work permit to the CEO.

6. Are there other penalties for non-compliance?

In addition to penalties for violating the substantially the same test, an employer who employs a foreign worker who is not authorized to be employed in Canada can face additional penalties. These can include fines of up to $50,000 as well as a term of imprisonment of not more than two years[52]. In addition, a person who counsels an individual to misrepresent themselves can face fines of up to $100,000 and terms of imprisonment of not more than five years[53]. I discuss a number of such cases later in this paper.

7. What documentation should employers maintain to prepare for an Employer Compliance Review?

Documentation that may be needed to answer an Employer Compliance Review includes the following:

- Payroll records - To prove the appropriate wage and overtime are being paid, source deductions are being made, and to explain any non-standard deductions
- Time sheets – To prove that workers are working the number of hours set out in the immigration related filings.

[52] ss.124(1)(c) and 125 of the Immigration and Refugee Protection Act
[53] ss. 126 and 128 of the Immigration and Refugee Protection Act

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- The Temporary Foreign Worker's job description – To determine if the Temporary Foreign Worker is working in an approved occupation and under the same labour standards as their Canadian counterparts.
- The Temporary Foreign Worker's work permit – To ensure the work permit's information reflects information on any associated Labour Market Opinion.
- Registration with provincial/territorial workplace safety – To ensure that Temporary Foreign Workers are covered in case of injury.

Employers of Temporary Foreign Workers in occupations requiring lower levels of formal training or hired under the Seasonal Agricultural Worker Program or the Live-in Caregiver Program may need to provide additional information.

8. If I can pass an Employer Compliance Review, does that mean I am compliant with all immigration regulations relating to Temporary Foreign Workers?

Passing an Employer Compliance Review only means that a company is compliant with some of the regulations relating to hiring Temporary Foreign Workers. Employer Compliance Reviews do not necessarily address all compliance issues relating to employers and their Temporary Foreign Workers.

B. New Labour Market Opinion Questions: Ongoing corporate representations

When hiring foreign workers through the Labour Market Opinion process, the new application form asks a number of additional questions that appear as innocuous check boxes. However, the answers to these questions can have dramatic affects both on the company and on the individual who is signing the application form. Of note, many of these questions bind the company to ongoing obligations. The more significant representations companies must now make are as follows:

1. *I will provide any temporary foreign worker employed by me with wages, working conditions and employment in an occupation that are substantially the same as those described in the Labour Market Opinion confirmation letter, annex and employment contract.*

   The way that this representation is worded, a company agrees to an ongoing obligation regarding the terms and conditions of employment of the temporary foreign worker *after* the Labour Market Opinion application has been submitted and approved. As a result, unless a new Labour Market Opinion is obtained, employers cannot substantially veer from the terms of the contract unless such a variation is allowed under the legislation.

   This overrides the decision in *Koo v. 5220459 Manitoba Inc., 2010 MBQB 132* that was decided in November 2009. In that case, 5220459 Manitoba Inc. (Shogun Restaurant)

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employed Mr. Koo as a sushi chef. In the Labour Market Opinion application, Shogun Restaurant represented that they would pay Mr. Koo $14.50 per hour. They did not. If Shogun Restaurant were required to pay the Labour Market Opinion salary, Mr. Koo would be entitled to a judgement of $9,000.

In this case, Mr. Justice Schulman found that Mr. Koo agreed with Shogun Restaurant to be paid a different salary commensurate with his skills. Mr. Justice Schulman found that the representation as to salary in the Labour Market Opinion application did not constitute a contract between Mr. Koo and Shogun Restaurant and that Mr. Koo. Because this case did not deal with whether Shogun Restaurant made a misrepresentation under the *Immigration and Refugee Protection Act*, Shogun Restaurant did not face any additional penalties in this case.

Since this case, Manitoba has passed the *Worker Recruitment and Protection Act* that makes it illegal for an employer to reduce the wages of a foreign worker or reduce or eliminate any other benefit or term of condition of a foreign worker's employment that the employer undertook to provide as a result in participating in the recruitment of a foreign worker that a subject to this Act[54]. As a result, the conduct of Shogun Restaurant would be illegal in Manitoba at the present time.

This being said, the *Worker Recruitment and Protection Act* does not apply to all foreign worker recruitment to Manitoba. As a result, it is arguable that the Shogun Restaurant case is still good law in certain circumstances. This being said, the actions of Shogun Restaurant would result in a violation of the *Immigration and Refugee Protection Act* today.

2. *I will immediately inform Service Canada/Temporary Foreign Worker Program officers of any subsequent changes related to the temporary foreign workers' terms and conditions of employment, as described in the Labour Market Opinion confirmation letter and annex.*

This representation puts an additional requirement on businesses that are not found in the regulations. The way this representation reads is that any change regarding a temporary foreign worker's terms and conditions of employment will require an employer to "immediately" inform Service Canada. Although the regulations will only find a violation if changes in terms and conditions are not "substantially the same", this representation goes farther in requiring business to immediately notify of *any change*, including ones that would be "substantially the same".

[54] S. 17 of the Worker Recruitment and Protection Act SM2008, c.23

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3. *I am compliant with, and agree to continue to abide by the relevant federal/provincial /territorial laws that regulate employment in the occupation specified and, if applicable, the terms and conditions of any collective agreement in place. I recognize that any terms and conditions of the attached offer of employment are considered null and void if they are less favourable to the temporary foreign worker than the standards stipulated in the relevant Labour Standards Act.*

4. *I am compliant with, and agree to continue to abide by federal/provincial/territorial legislation related to the temporary foreign worker's recruitment applicable in the jurisdiction where the job is located. I declare that all recruitment done or that will be done on my behalf by a third party, was or will be done in compliance with federal/provincial/territorial laws governing recruitment. I am aware that I will be held responsible for the actions of any person recruiting temporary foreign workers on my behalf.*

   These last two representations basically restate what is in the Immigration and Refugee Protection Act regulations, they are, however, placed in the application to remind companies that a violation of provincial or territorial labour related and recruitment laws can also result in negative consequences under immigration legislation.

In addition to the above, for the lower skilled level occupations, companies must also make the following representations:

1. *I signed the employment contract containing all the provisions required by the Pilot Project for Occupations Requiring Lower Levels of Formal Training (NOC C and D). This contract accurately represents the actual terms and conditions of employment that I intend to provide to the temporary foreign worker.*

2. *I will pay all recruitment costs related to the hiring of the temporary foreign worker and will not recoup, directly or indirectly, any of these costs from the worker.*

3. *I will pay full transportation costs for the temporary foreign worker to travel from his/her country of residence (or from his/her residence in Canada) to the location of work in Canada and for the return to the country of residence (as stipulated in the employment contract) and will not recoup, directly or indirectly, any of these costs from the worker.*

4. *I will provide the temporary foreign worker with medical coverage, at least equivalent to provincial/territorial health care coverage, until he/she is eligible for provincial/territorial health care insurance coverage (where applicable).*

5. *I agree to review and adjust, when applicable, the temporary foreign worker's wages after 12 months of employment to ensure he/she continues to receive the prevailing wage rate of the occupation and region where he/she is employed.*

6. *I am in good standing with the applicable workers' compensation program and I will register the temporary foreign worker under the appropriate provincial/territorial workers' compensation / workplace safety insurance plans, where available, or purchase a personal for free, on-the-job-injury or illness insurance that provides the temporary foreign worker with a protection equivalent to the one offered by the applicable provincial/territorial law.*

For the most part, these representations restate the basic contractual provisions that companies must offer temporary foreign workers in lower skilled occupations.

Finally, additional representations must be made in Labour Market Opinion applications for these specific occupations: exotic dancers, live-in caregivers, seasonal agricultural worker.

C. The culture of enforcement

In addition to enacting a number of compliance regulations, over the last 12 months, Citizenship and Immigration Canada and the Canada Border Services Agency have stepped up their enforcement of existing immigration laws. The following are some recent enforcement cases relating to businesses that hire foreign workers:

1. The Gordinier Case

On September 28, 2011, a U.S. resident by the name of Steven Mark Gordinier pled guilty to one count of "counselling misrepresentation" and one count of "misrepresentation" under the *Immigration and Refugee Protection Act*.

This case arose from a July 10, 2011 incident in which a U.S. traveller arriving at Vancouver International Airport (not Mr. Gordinier) was examined by a border services officer. The traveller indicated that he was entering Canada to meet friends and attend a week long mountain bike celebration in Whistler. When the traveller was questioned, the border services officer found e-mails on the traveller's phone from Mr. Gordinier addressed to the traveller and ten other individuals. These emails provided information on the work they would be performing in Whistler and instructed the traveller and the other recipients to state when entering Canada that they were only coming to attend the event. Mr. Gordinier was already in Whistler when this traveller was stopped.

After receiving this information, the Canada Border Services Agency went to the hotel in Whistler where Mr. Gordinier and his staff were staying. Thirteen individuals were questioned

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and all thirteen admitted that they were U.S. residents and that they had misrepresented themselves as visitors as instructed by Mr. Gordinier. None of the individuals had work permits.

Mr. Gordinier was subsequently arrested and charged by the Criminal Investigations Division of the Canada Border Services Agency. He received two fines totalling $8,000 and his employees were returned to the U.S.[55]

In the past, the Canada Border Services Agency would normally just send everyone out of the country for such an offense. The fact that they criminally charged Mr. Gordinier and that he was convicted and fined shows an escalation in the enforcement regime of Citizenship and Immigration Canada.

2. The Kenko Niwa Restaurant Case[56]

Earlier this month, a former restaurant owner in Winnipeg was convicted of illegally employing 6 immigrants from 2008 to 2009. It was also found that the owner paid the workers below the minimum Canadian wage. As a result, the owner was ordered to pay fines of $12,000, which were split up as two donations to organizations that worked with newcomers to Canada.

3. The Garden City Growers Case[57]

In February 2011, a greenhouse business in Niagara-on-the-Lake was fined $5,000 for employing three foreign nationals who were not allowed to work. In this case, the company was led to believe that the three employees were legally entitled to work in Canada after hiring them through an employment agency. In a joint plea agreement, the company admitted that it did not exercise due diligence to determine whether the workers were legal. The workers, at one point in time were legal but their work authorizations had expired. If the company exercised due diligence, they could have defended their actions as due diligence is a defense to hiring illegal workers[58].

4. The Empire Drywall Case

[55] The Canada Border Services Agency, '*Misrepresentation nets man $8,000 fine'* (October 7, 2011) ‹http://www.cbsa-asfc.gc.ca/media/prosecutions-poursuites/pac/2011-10-07-eng.html›.
[56] Ex-restaurateur fined $12K for illegal workers', *CBC News* (online), April 10, 2012 <http://www.cbc.ca/news/canada/manitoba/story/2012/04/10/mb-restaurant-owner-fined-winnipeg.html>
[57] Karena Walter 'Greenhouse fined for illegal workers', *St. Catherines Standards* (online), February 4, 2011, <http://www.stcatharinesstandard.ca/ArticleDisplay.aspx?e=2963368>
[58] S. 124(2) and (3) of the Immigration and Refugee Protection Act.

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In October, 2011, an Edmonton company plead guilty to four counts of employing temporary foreign workers without proper authorization (e.g. without work permits). The company was fined $9,000 for each count for a total of $36,000.[59]

5. The Scotia Square Mall Case

In December, 2011, Canada Border Services Agency officers and Halifax police raided a home and kiosks in three shopping malls and arrested 10 suspected illegal immigrants. News reports showed that two of the individuals pled guilty and were ordered to pay $1,000 fines. One of these workers did have a work permit but was authorized to work in Calgary, not Halifax[60].

Since the initial news reports, it has come out that the total number of arrests were 11. Eight of the 11 have pled guilty, were fined $1,000 each, and left Canada. One person was released without charge and two are awaiting trial. The employer has also been charged[61].

[59] 'Edmonton company fined for foreign workers', *CBC News* (online), October 25, 2011, ‹http://www.cbc.ca/news/canada/edmonton/story/2011/10/25/edmonton-company-foreign-workers.html›.
[60] 'Suspected illegal workers arrested in Halifax' *CBC News* (online), December 21, 2011, <http://www.cbc.ca/news/canada/nova-scotia/story/2011/12/21/ns-illegal-workers-arrests-halifax.html>
[61] Israelis plead not guilty to immigration breaches', *Herald News* (online), April 17, 2012, <http://thechronicleherald.ca/metro/87572-israelis-plead-not-guilty-to-immigration-breaches>

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