CANADIAN IMMIGRATION OVERVIEW
Legislation, Regulations, Policies and Practices

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Nan Berezowski
Attorney-at-Law (New York)
Barrister & Solicitor (Ontario)

INTRODUCTION

Like many other industrialized nations, Canada has a declining birth rate and its population is becoming progressively older. Statistics Canada data confirms that the Canadian labour force is shrinking. Due to our small population and relatively comprehensive social welfare infrastructure many believe that the impact of such demographics is likely to be particularly pronounced. The growing consensus is that unless these demographics are addressed, Canadians can anticipate difficulty in maintaining existing levels of economic productivity, sustaining pension and social security systems and ensuring the care and health services required of an aging population.

Canada's *Immigration and Refugee Protection Act* (also referred to as IRPA)[1] became law on June 28, 2002. The corresponding federal legislative scheme was intended to encourage workers with flexible skills to immigrate to Canada as well as to help families reunite; be tough on those who pose a threat to Canadian security and provide a safe haven to people in need of protection. I will focus on the first of these objectives – the facilitation of skilled worker migration – in this paper.

According to academics, the growth of the global migration labour force will depend on a number of factors - individual decision, government, labour, enforcement, pension, trade and aid policies and their implementation. As such, Canadian immigration policy has come to play a critical part in determining the role of foreign labour in Canada's labour market. In Canada there is relatively widespread acceptance of the need for foreign skilled workers. There is also an understanding that immigration policy plays a key role in facilitating this means of alleviating demographically based labour market shortages. Indeed, a fundamental objective of the *Immigration and Refugee Protection Act* (IRPA) is to address existing and anticipated labour market shortages by attracting foreign workers to the country.

Three years after enactment, the success of the IRPA legislative scheme; in labour market terms, remains to be seen. For instance, the number of new permanent residence applications filed in the first three months after the new legislation was enacted represent roughly a quarter of the number for the same period the year before. As well, Canadian lawyers had no other option but to challenge, successfully, the fairness of the retroactivity provisions that imposed new requirements upon skilled worker application files back-logged in the system before the Federal Court of Canada. More recently, estimates of over 700,000 files backlogged in the system have come to the attention of the media. Some would say that these examples call into question the government's stated objectives or, at the very least, its ability to manage them.

This environment of official progressive immigration, in the context of numerous implementation challenges, has resulted in an evolving role for Canadian legal practitioners. From the practitioner's perspective, the legislation and regulatory provisions are more complex than those that predated them, yet much of the subjectivity of the Canadian immigration program remains. Processing procedures have become increasingly detailed and delayed, and the consequences of minor oversights have become dramatic. As a result, contrary to popular

[1] *The Immigration and Refugee Protection Act*, R.S.C. 2002.

opinion, the Canadian immigration program – both temporary and permanent - has become increasingly difficult for those trying to 'do it themselves'. With the recent difficulties of the fledgling regulatory body for consultants the area is by default, becoming the domain of legal practitioners who practice exclusivly in the area of immigration.

Below I have provided a snapshot of Canada's temporary and permanent programs. Be cautioned, however, this article is intended to serve as a brief overview of the federal temporary and permanent economic immigrant programs. In this paper I have not discussed the family-class immigrant or the Humanitarian & Compassionate programs. Moreover, the provinces have now negotiated separate immigration programs that exist either in parallel or as supplements to their Federal counterpart; these programs are also beyond the scope of this paper.

TEMPORARY IMMIGRATION - CANADIAN WORK PERMITS

The General Rule – Obtain a Labour Market Opinion

A foreign worker seeking temporary employment in Canada generally requires a work permit before he or she can commence employment. In order to obtain a work permit, the *IRPA Regulations*[2] normally require that an Immigration Officer make his or her determination on the basis of an opinion as to the economic effect of the employment on the Canadian labour market.

The Service Canada Labour Market Opinion process is somewhat similar to the H-1B labour certification process. Generally speaking, a positive opinion will be issued where Service Canada concludes that employment opportunities for Canadian citizens and permanent residents will not be adversely affected by the admission of foreign workers and that the foreign worker him or herself is otherwise suitable for the job. The regulatory test is whether temporary employment of the foreign national is likely to have a neutral or positive economic effect on the labour market in Canada. The following factors are considered[3]:

- Whether the work is likely to result in direct job creation or job retention for Canadian citizens or permanent residents;
- Whether the work is likely to result in the creation or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents;
- Whether the work is likely to fill a labour shortage;
- Whether the wages and working conditions offered are sufficient to attract Canadian citizens and permanent residents, and to retain them in that work;
- Whether the employer has made, or has agreed to make, reasonable efforts to hire or train Canadian citizens or permanent residents; and
- Whether the employment is likely to adversely affect the settlement of any labour disputes in progress or the employment of any person involved in the dispute.

In many instances, prior to issuing an opinion, the Canadian employer is required to advertise the position in a national newspaper and/or local newspaper or trade journal. However, in some instances Service Canada may conclude that it has information sufficient to confirm that there is

[2] *IRPA Regulation* S.203
[3] *IRPA Regulation* S. 202(3)(a)-(f)

a shortage of skilled workers in a particular field. If this is the case, the advertising requirement may be waived.

Once the legal practitioner has obtained a positive opinion, he or she can submit an application for a work permit to a visa office abroad. But, unlike the H-1B labour certification process, the Canadian process tends to be time-consuming and subjective. In fact, many Canadian companies find it difficult to obtain a positive opinion from Service Canada. It is therefore an essential part of the legal practitioner's job to be well acquainted with the alternative basis for Work Permit issuance.

Exemptions from the Labour Market Opinion

There are many exemptions from the Labour Market Opinion requirement. In the exemption scenario, the legal practitioner makes an application directly to an Immigration Office (Consulate, High Commission, Embassy or Port-of-Entry). Below is an overview of the most common exemptions:

Canadian Interests

Work Permits may be issued if they are in Canada's interests. Section 205 of the *IRPA* Regulations allows for work permit issuance where employment would create or maintain significant social, cultural or economic benefits or opportunities for Canadian citizens or permanent residents, or would create or maintain reciprocal employment of Canadian citizens or permanent residents in other countries. Note that the Citizenship & Immigration Canada (CIC) Policy Manual includes intra-company transfers under the rubric of Canadian interest.

Although not specifically set out in the regulations, there is nothing to preclude a foreign national from exemption from the Service Canada opinion requirement under the Canadian Interest provisions where the applicant can demonstrate that he or she is entering Canada to engage in business activities as an entrepreneur or self-employed person and such activities will result in benefits to Canada other than direct employment. Note, however, that these applications are no longer common.

The *IRPA Regulations* do not establish specific guidelines or defined criteria for acquiring a Work Permit on the basis of Canada's interest but much of the process is outlined in the various CIC Operations Manuals. The Canadian Immigration Officer has wide discretion to provide or deny work permits to individuals on the basis that they will create or maintain significant employment benefits or other opportunities for Canadian citizens or permanent residents. As such, the importance of a well-conceived and well documented submission has become paramount.

Agreements

Section 204 of the *IRPA Regulations* provide for Work Permit issuance pursuant to international agreement, agreement entered into by one or more countries and by one or more provinces (this is the authority for Provincial Nominee Programs); and agreement entered into by the Minister with a province or group of provinces.

A person who is coming to Canada to engage in employment under an international agreement between Canada and a foreign country or an arrangement entered into with a foreign country by

the Government of Canada or by, or on behalf of, one of the provinces (other than arrangements concerning seasonal workers), is exempt from the Labour Market Opinion requirement[4]. Agreements listed in the CIC Manual include:

- Film Co-production;
- Cultural;
- Reconstruction of the Alaska Highway and Haines Road;
- Co-operative Waterfowl Survey and Banding Program;
- Organization for Economic Co-operation and Development (OECD); and
- US Government Employees.

North American Free Trade Agreement (NAFTA)

This is perhaps the most commonly employed agreement. US and Mexican nationals have additional provisions available to them under the *North American Free Trade Agreement* ("*NAFTA*") as do Chilean nationals pursuant to the similar agreement with the government of that country. If a US or Mexican national qualifies for one of the categories of Professional Intra-Company Transferee or Trader and Investor he or she is exempt from the Labour Market Opinion requirement and may apply for a Work Permit directly to a port of entry or visa office.

> *TN Category for Professionals* - The TN category permits certain professionals[5] to enter Canada to engage in their profession on a temporary basis. Appendix 1603.D.1 also describes the required credentials for each enumerated occupation. Listed professions include occupations commonly considered professional (such as lawyers, accountants, and engineers) as well as some occupations which do not require bachelor degrees (such as computer systems analysts, management consultants and scientific technicians).
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> *The Intra-Company Transfer - The NAFTA* also provides for the issuance of work permits to intra-company transferees, not only in managerial or executive positions but also for positions of specialized knowledge. The intra-company transferee must have been employed by a branch, subsidiary or parent company outside Canada for at least one year of three immediately preceding the application for Work Permit.
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> *The Treaty Trader or Treaty Investor* - The Canadian treaty trader and treaty investor categories also arise from *NAFTA*. This category permits the issuance of work permits to business persons seeking temporary entry into Canada to carry on substantial trade in goods or services in a capacity that is managerial, executive or involves essential skills; principally between Canada and the United States, or solely to develop and direct the operations of an enterprise in which the business person has invested, or is actively in the process of investing, a substantial amount of capital.

As the NAFTA provisions are reciprocal most US Immigration Attorneys will be familiar with their basic requirements. Note, however, that the forms and the application process applicable, not to mention the adjudication norms, are different when using the NAFTA to bring someone to Canada.

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[4] S. 204, *IRPA Regulations*
[5] *NAFTA* Appendix 1603.D.1

General Agreement on Trades in Services (GATS)

The non-immigrant employment benefits available under the *GATS* are organized into two categories: Professionals and Intra-company Transferees.

The GATS Professional - In order to qualify under the *GATS*, the foreign national must be a citizen of, and be living in, a member country. The *GATS* defines a professional as a person who seeks to engage, as part of a services contract obtained by [a company in another member nation] in an activity at a professional level in a profession set out in Appendix [C] provided that the person possesses the necessary academic credentials and professional qualifications which have been duly recognized, where appropriate, by the professional association in Canada[6].The eligible *GATS* professions include Engineers, Architects, Land Surveys and Urban Planner.

However, to obtain a Work Permit the foreign national must have either a license from the province in which he or she will be working or documentation from an appropriate professional association in Canada recognizing his or her academic credentials and professional qualifications. As such, the *GATS* Professional category is limited in its applicability.

The GATS Intra-Company Transferee - The *GATS* intra-company transfer requirements are virtually identical to those of intra-company transferees under the *NAFTA*. The *GATS* defines intra-company transferees as persons of another [member nation] who have been employed for a period of not less than one year and who seek temporary entry in order to render services to (i) the same [company], which is engaged in substantive business operations in Canada, or (ii) a [company] constituted in Canada and engaged in substantive business operations in Canada which is owned by, or controlled by, or affiliated with, the aforementioned [company][7].

A foreign national seeking a Work Permit as an intra-company transferee under the *GATS* must therefore establish the following:

- The foreign national must have citizenship in a member nation or permanent residence in a member nation that has given formal notification that its permanent residents have the same rights as its citizens do.
- A qualifying relationship must exist between the Canadian company and the company located abroad. The Canadian company must be a parent, subsidiary, or affiliate of the company located abroad. They must also be engaged in substantive business operations -- that is, they must be large enough in both locations to support executive or managerial functions.
- The foreign national must have at least one continuous year of employment with the company located abroad *immediately* prior to the application for employment authorization (the *NAFTA* permits one year of employment within the three-year period preceding the application.)
- The prior employment abroad and proposed employment in Canada must be in a managerial, executive, or specialized knowledge capacity.
- The Canadian company must be in a service sector covered by the *GATS*.

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[6] The General Agreement on Trade in Services,
[7] The General Agreement on Trade in Services,

GATS intra-company transferees can apply for a Work Permit at a visa office or, if they are coming from a country for which Canada does not require a Temporary Resident Visa, at a port of entry. The Work Permit is granted at the time of entry and will be valid for one year and an extension of up to two years is permitted.

Other Options

There are, additionally, other sector-based temporary immigration programs such as the *Information Technology Workers Program.* In this case CIC collaborated with Service Canada's predecessor, Industry Canada and the Software Human Resource Council to develop a program that streamlined the entry of certain high demand IT workers to Canada. Foreign skilled workers are admitted pursuant to a blanket Service Canada LMO and while not technically exempt from the requirements set out in section 203 of the *Regulations,* the application is expedited. Service Canada also collaborates with CIC and industry on other sector-based and 'bulk' agreements that allow for the influx of specified workers. There is also a *Live-in Caregiver program* and a *Seasonal Agricultural Worker program.*

PERMANENT IMMIGRATION

The Skilled Worker

To immigrate to Canada one does not need an employer to petition on his or her behalf. In the past, Canada admitted more than 200,000 immigrants each year. Of this number approximately one half were selected under the Skilled Worker category based on their age, education, occupation demand, work experience, language capability and personal suitability. In its most recent incarnation, the immigration legislation moves away from an occupation-based model to one focused on flexible and transferable skills.

The federal skilled worker (also referred to as the Independent) applicant is a skilled foreign national who may become a permanent resident on the basis of his or her ability to become economically established in Canada and who intends to reside in a province other than Quebec[8].

Applicants are typically eligible for immigration to Canada if they meet the following basic requirements:

- Within the 10 years preceding the date of their application for a permanent resident visa, they have at least one year of continuous full-time work experience in one or more approved occupations (other than a restricted occupation), that are listed in Skill Type O Management Occupations or Skill Type A or B of the *National Occupation Classification* guide[9];
- They obtain a point assessment of at least 67 points (note that this benchmark fluctuates) based on a variety of selection criteria outlined in the skilled worker selection grid[10]; and
- They are able to satisfy the Settlement Fee requirements; and
- They are not inadmissible (i.e.: criminally or medically) to Canada.

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[8] *IRPA*, S. 75(1)
[9] *IRPA* S. 75(2)(a)(b)(c)
[10] *IRPA* S. 76(2)

The skilled worker selection criteria consists of six factors including: Age, Education, Language, Work Experience, Arranged Employment and Adaptability. Below is a brief description of the allocation of points for each factor.

1. Age

Under the Age Factor, applicants are awarded 10 points if they are between 21 and 49 years of age at the time the application is made. Two points are subtracted, to a maximum of 10 points, for each year the applicant is less than 21 or over the age of 49.

2. Education Factor

The Education Factor is an assessment of the applicant's years of completed education and education credentials. "Educational Credential" is defined as "any diploma, degree or trade or apprenticeship credential issued on the completion of a program of study or training at an educational or training institution recognized by the authorities responsible for registering, accrediting, supervising and regulating of such institutions in the country of issue"[11].

A specific number of points correspond to each level of completed education. However, for each educational credential, there is also a specific number of full-time (or full-time equivalent) years that an applicant must have completed in order to obtain the points that correspond to that education credential. Where the applicant has a particular educational credential but NOT the total number of years of study required, the applicant will be awarded the number of points set out in the category that refers to the number of years of study completed by the applicant.

In addition, if an applicant has more than one educational credential, they are assessed by whichever credential results in the applicant being awarded the highest number of points for this factor.

3. Language Proficiency

The regulations place a great deal of importance on the applicant's English and French language ability. All applicants must provide proof of their language skills by writing a language test or providing written documentation explaining their training, education, usage, and work experience.

A maximum of 24 points may be awarded for proficiency in English and French as follows[12]:

- A maximum of 16 points for proficiency in the "first" official language (that identified by the principal applicant on the application form as the one in which they are more proficient);
- A maximum of 8 points for proficiency in the "second" official language.
- The English language tests are issued by I.E.L.T.S (International English Language Testing Systems. To obtain points for French the applicant must either write the TEF French language test or provide proof of required proficiency.

4. Work Experience

To obtain points for the Experience Factor, the applicant must have at least one year of work experience in at least one occupation that is listed in the National Occupations List ("NOC") under the categories of "Skill Type 0 – Management", "Skill Level A" or "Skill Level B". Applicants must further be able to demonstrate that they have:

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[11] *IRPA Regulations*, S.73

[12] *IRPA Regulations*, S. 79(1)(2)

- performed the actions described in the lead statement for the occupation as set out in the occupational descriptions of the NOC;
- performed substantial number of the main duties, including all of the essential duties, of the occupation as set out in the occupational description of the NOC.

If the applicant is able to establish that the duties and responsibilities associated with his or her position fall within the job description for the occupation as outlined in the NOC, then he or she should be awarded a certain number of points per year of work experience up to a maximum of 21 points[13].

5. Arranged Employment in Canada

If the applicant has arranged employment in Canada he or she will be assigned an additional 10 points under the arranged employment category. The following fact scenarios qualify as situations of arranged employment in Canada:

> ***Job Offer in Canada***
> The applicant is outside Canada and does not intend to work in Canada before being issued a permanent resident visa and an employer in Canada has made a job offer to the applicant for ongoing full-time work, to begin after the applicant has obtained a permanent resident visa and entered Canada; and the job offer has been approved by Service Canada. (However, the employer does not have to show that there is no Canadian or existing resident to fill the position).
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> ***Presently working in Canada on a Work Permit (LMO approved)***
> At the time of filing the application, the applicant is working in Canada on a temporary Work Permit obtained pursuant to a job offer that was approved by HRDC; and the Work Permit is valid for at least 12 months after the date the application for permanent residence was submitted to the appropriate Visa post; and the employer has made an offer to continue employing the applicant indefinitely after the applicant's permanent residence visa is issued.
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> ***Presently working in Canada on a work permit (exempt from LMO approval).***
> At the time of filing the application, the applicant is working in Canada on a temporary Work Permit that is exempt from LMO approval according to international agreements (i.e.: *NAFTA*) or "significant benefits" (i.e.: intra-company transferee); the Work Permit is valid for at least 12 months after the date the application for permanent residence was submitted to the appropriate Visa post; and the employer has made an offer to continue employing the applicant indefinitely after the applicant's permanent residence visa is issued.

6. Adaptability

The applicant is now eligible to receive additional points for a variety of factors including[14]:

- The applicant's spouse's education;
- Prior work experience in Canada;
- Prior education in Canada;

[13] IRPA, Regulations S. 80 (1) (2)
[14] *IRPA Regulations* S. 83(1)

- The presence of a close family member in Canada;
- Having arranged employment in Canada.

A maximum of 10 points may be assigned to the applicant under the Adaptability Factor as follows:

Spouse's Education (3, 4 or 5 points)

If the applicant's spouse or common-law partner is accompanying the applicant to Canada, then the applicant may be assigned points for his or her education. To determine the points one looks at the description of the Education Factor then determines the number of points that the applicant's spouse's education corresponds to.

- if they correspond to 12 or 15 points, then the applicant may receive an additional 3 points under the Adaptability Factor;
- if they correspond to 20 or 22 points, the applicant may receive an additional 4 points under the Adaptability Factor;
- if they correspond to 25 points, the applicant may receive an additional 5 points under the Adaptability Factor.

Previous Work Experience in Canada (5 points) If the applicant or the applicant's accompanying spouse or common-law partner completed a minimum of 1 year of full-time (or full-time equivalent) authorized work in Canada, then the applicant may receive an additional 5 points under the Adaptability Factor.

Previous Study in Canada (5 points) If the applicant or the applicant's accompanying spouse or common-law partner completed a minimum of 2 years of full-time (or full-time equivalent) authorized post-secondary study in Canada, then the applicant may receive an additional 5 points under the Adaptability Factor.

Arranged Employment (5 points) If the applicant received points for the Arranged Employment Factor (see above), or if the applicant's accompanying spouse or common-law partner has arranged employment in Canada, then the applicant may also receive an additional 5 points for it under the Adaptability Factor.

Relative in Canada (5 points) If the applicant or the applicant's accompanying spouse or common-law partner has a blood relative who is a citizen or permanent resident of Canada, then the applicant may receive an additional 5 points under the Adaptability Factor. "Blood Relative" refers to the following familial relationships: father, mother, grandparent, son, daughter, grandchild, sister, brother, niece, nephew, aunt or uncle. Note that only 5 points may be awarded, even if there is more than one relative in Canada.

Settlement Funds

An applicant applying for immigration to Canada pursuant to the skilled worker class must have sufficient funds available for settlement in Canada. The amount of funds that an applicant must have is assessed according to the applicant's family size using 50% of Statistics Canada's most current Low Income Cut-off (LICO) for urban areas with populations of 500,000 or more[15]. Note, however, that if the applicant has arranged employment as outlined above, they do not have to meet these financial requirements.

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[15] *IRPA Regulations*

Determining Eligibility

To be eligible for immigration as a skilled worker applicant, one has to score 67 points or higher. If the applicant's total score in the six selection factors is equal to or greater than the pass mark, and he or she is not otherwise inadmissible, then the applicant will be approved for permanent residence in Canada as a skilled worker.

If the applicant's total score is less than the pass mark, the immigration officer reviewing the application will either refuse the application or consider substitution of evaluation[16]. The latter permits immigration officers to override the selection factors where the point total does not accurately reflect a skilled worker applicant's ability to establish economically in Canada.

While the underpinning of the new program makes sense, and the criteria for success are not unreasonable, the consensus among Canadian legal practitioners is twofold. First, the minimum pass threshold has, at times, been set too high – the result has been to greatly reduce the number of applicants applying. Second, the application process itself has become overly time consuming. With respect to the former, it is increasingly part of the legal practitioner's role to assist the client in strategizing on how best to make up the points that he or she falls short of the pass mark – perhaps by helping to arrange employment in Canada or by suggesting ways to improve upon English and/or French language test scores. With respect to the latter, diligence and up-to -date information on differing consular processing norms and processing policies has become critical to best ensuring a timely adjudicated application.

Business Immigrants

Citizenship & Immigration Canada also has a Business Immigrant program. Foreign nationals are chosen as members of the Business class based on their ability to become economically established in Canada. Business immigrants are selected to support the development of a strong and prosperous Canadian economy, in which the benefits of immigration are shared across all regions in Canada. The Business class includes three sub-categories - Investors, Entrepreneurs and Self-employed. The qualifying requirements are different for each of these categories.

The Immigrant Investor Program

The Immigrant Investor Program makes it possible for a foreign national to immigrate to Canada as a business immigrant based upon a determination of the applicant's business experience, net worth and investment in the country[17].

To qualify for the program, the applicant must have the requisite business experience in a Qualifying Business. A Qualifying Business is based upon the applicant's percentage of ownership in relation to the enterprise's number of employees, sales, net income and equity.

Business experience for the applicant under the Investor program can be demonstrated by showing previous ownership *or* management of a business in the applicant's country of origin. Ownership is established by the applicant having assumed financial risk of an enterprise and undertaking active management of its operations. The Investor applicant is required to provide documentation proving that, within any two of the last five years, he or she controlled and managed a Qualifying Business[18]. Alternatively, instead of actual ownership, the applicant may

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[16] *IRPA Regulations* S. 75(3)
[17] *IRPA Regulations* S. 88(1), S. 90(1)
[18] *IRPA Regulations*, S. 88 (1)

qualify by providing documentary proof that, over any two of the last five years, he or she managed at least five employees in a business.

The applicant must then satisfy the requisite net worth requirement. The required minimum net worth is CAD$800,000.00[19]. Net worth is calculated by taking the fair market value of all of the assets of the investor and their spouse minus the fair market value of all of their liabilities[20]. The required net worth must have been legally obtained by the applicant and readily verifiable.

Lastly, the applicant must make an investment in Canada. There are two ways to satisfy the investment requirement:

- The total requisite amount of the investment is CAD$400,000.00[21]. Once the application is approved, payment of the investment is made in the form of an interest free loan to the government, returnable in full to the investor after the completion of a five year term with no interest.

- The total investment is CAD$130,000.00. This payment is a one time non-refundable payment made to the Canadian government. The Investor applicant is asked to pay a deposit of CAD$10,000.00 after the application is filed (fully refundable if the application is not approved). Following an immigration interview and once an immigration officer advises the Investor that he or she is approved to immigrate to Canada; the Investor must make a non-refundable payment of CAD$120,000.00. However, the Investor does not have to pay the final CAD$120,000.00 until he or she is advised of the immigration approval.

The applicant will qualify for immigration to Canada as an Investor having demonstrated the requisite business experience, having legally obtained a net worth of at least CAD$800,000.00 and having indicated in writing an intention to make or having already made the required investment.

The Entrepreneur Program

The Entrepreneur Program makes it possible for a foreign national to immigrate to Canada as a member of the economic class based upon a determination of the applicant's intention to own and actively manage a business in Canada that will contribute to the economy and create at least one job[22]. This determination includes an evaluation of the applicant's business experience, net worth and ability to comply with terms and conditions imposed upon the establishment of the business in Canada. To qualify for the Entrepreneur Program, the applicant must have the requisite business experience in a Qualifying Business[23].

Business experience for the applicant under the Entrepreneur Program is demonstrated in the same manner as the applicant under the Investor Program described above. However, there is a significant difference. Whereas the Investor can demonstrate the requisite business experience by showing *either* ownership or management of a Qualifying Business, the Entrepreneur must demonstrate the requisite business experience exclusively through ownership. Management experience alone without actual ownership will not satisfy the business experience requirement under the Entrepreneur Program. Therefore, an entrepreneur applicant will be required to

[19] *IRPA Regulations,* S. 88(1)
[20] *IRPA Regulations*, S. 88(1)
[21] *IRPA Regulations*, S. 88(1)
[22] *IRPA Regulations,* S. 98 (1)
[23] *IRPA Regulations*, S. 88(1) (b)

provide documentation proving that within any two of the last five years, he or she has managed *and controlled* a Qualifying Business. Specifically, entrepreneurs must be able to show that within any two of the last five years, they satisfy two of the following four criteria:

- The percentage of the Entrepreneur's equity in the business multiplied by the number of full-time employees working for the Entrepreneur's company must be equal to or greater than two full-time job equivalents per year.
- The percentage of the Entrepreneur's equity in the business multiplied by the total annual sales of the company must be equal to or greater than CAD$500,000.00.
- The percentage of the Entrepreneur's equity in the business multiplied by the total net income of the company must be equal to or greater than CAD$50,000.00.
- The percentage of the Entrepreneur's equity in the business multiplied by the total net assets of the company at the end of the year must be equal to or greater than CAD$125,000.00.

As each applicant must only satisfy two of the four, if your client owns a company, then he or she will be able to meet (#1 and #3) of the above requirements, providing he or she has at least 2 employees working for him and providing that the company has earned a net income of CAD$50,000.00 or (USD$35,000.00) per year. Or, If the client has a 50% partnership then the he or she will be able to meet (#1 and #3) of the above requirements, provided he or she has at least four employees and that the company has earned a net income of CAD$100,000.00) or (approximately USD$70,000.00) per year.

Under the Entrepreneur Program, the applicant must then satisfy the requisite net worth requirements. The required minimum net worth is CAD$300,000[24]. The required net worth must have been legally obtained by the applicant and readily verifiable. The net worth of the applicant is calculated by taking the fair market value of all of the assets of the Entrepreneur and their spouse minus the fair market value of all of their liabilities.

Entrepreneur applicants are granted permanent residence in Canada on a conditional basis.

The Self-Employed Program

A Self-employed person is a foreign national who has relevant experience and has the intention and ability to be self-employed in Canada and to make a significant contribution to specified economic activities in Canada[25]. Under the new legislative regime, specified economic activities are defined as cultural activities, athletics or the purchase and management of a farm. As such, eligibility as a self-employed applicant is significantly restricted.

Relevant experience means at least two years of one of the following types of experience in the period beginning five years before the date of application for permanent residence and ending on the day a determination is made in respect of the application, namely[26]:

- self-employment in cultural activities or in athletics,
- participation at a world-class level in cultural activities or athletics, or
- Farm management experience.

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[24] *IRPA Regulations*, S88 (1)
[25] *IRPA Regulations, S88 (1)*
[26] *IRPA Regulations, S. 88(1)*

Although no minimum investment is required, self employed immigrants must also have the intention and ability to establish a business that, at a minimum, will create their own employment opportunity. The business must also make a significant contribution to cultural or athletic activities in Canada, or be the purchase and management of a farm.

CONCLUSION

In Canada generally, and among legislators and immigration policy makers in particular, there is increasing acceptance of the notion that Canada needs foreign workers to alleviate present and anticipated labour market shortages. However, the immigration program does not adequately reflect this. With the implementation of the *Immigration and Refugee Protection Act*, Canadian legal practitioners, government decision-makers, clients and the immigration bureaucracy alike have struggled to come to terms with a framework legislative regime that is in places forward thinking and progressive while in other places both technical and subjective. In Canada, the 'devil is in the details' – our legislation was intended to promote the migration of skilled workers to Canada but the legislative regime is not without its very significant logistical challenges.

Despite the general criticisms stated above, on the temporary immigration front, the process has indeed become more labour-market focused, with Service Canada opinions required in an increased number of cases. That having been said, the exemptions to the Labour Market Opinion remain and the broad language of the legislation makes these exemptions fair game for the experienced and well-informed legal practitioner. On the permanent immigration front, the program is characterized by a well thought out skilled worker selection program but the sad reality is that at least in certain parts of the world the processing is slow, in others it risks grinding to a halt. The business immigration program too is subject to the same processing complaints.

Whether permanent or temporary - the practice of immigration law in Canada has become more strategic. The technical nature of the enabling legislation, the remaining subjectivity of some of the requirements combined with the processing requisites and delays around the world make Canadian immigration law an area of practice that increasingly requires immigration specific experience and expertise.

Nan Berezowski BA. LL.B *practices business immigration law in Toronto, Canada. She provides experienced guidance and assistance to US law firms, companies, small businesses and professionals with respect to all aspects of Canadian immigration law and US Consular processing. Ms. Berezowski has chaired conferences and published and presented over 40 papers on Canadian and related relocation matters for organizations including the American Immigration Lawyers Association, the Law Society of Upper Canada, The International Bar Association, the Inter- Pacific Bar Association and The American Chamber of Commerce in Canada. She has also prepared briefs for and provided expert testimony before the Canadian House of Commons Standing Committee on Immigration. She is a past Executive Member of AILA Canada and has served as an Executive Member of the Citizenship and Immigration section of the Ontario Bar Association for seven years. Ms. Berezowski is also co-author of a leading practice guide on Canadian Citizenship. She can be reached at (416) 850 5112.*