THE OVERHAUL OF CANADA'S IMMIGRATION LAWS
LEGISLATIVE, REGULATORY, AND POLICY CHANGES ONE YEAR AFTER IMPLEMENTATION

*by Nan Berezowski and Janet L. Bomza**

INTRODUCTION

Canada's Immigration and Refugee Protection Act (also referred to as IRPA)[1] became law on June 28, 2002. The new federal legislative scheme was intended to encourage workers with flexible skills to immigrate to Canada and help families reunite more quickly. Further stated objectives include being tough on those who pose a threat to Canadian security while continuing Canada's tradition of providing a safe haven to people who need protection.

Almost a year later, the new legislative scheme and its purported objectives remain controversial. For instance, Canadian lawyers have recently enjoyed success before the Federal Court of Canada in challenging the fairness of the retroactivity provisions that imposed new requirements upon applicant files back-logged in the system. Moreover, the number of new permanent residence applications filed in the first three months of 2003 represent roughly a quarter of the number for the same period of 2002. Both examples call into question the government's stated objectives and point to an evolving role for Canadian legal practitioners.

From the practitioner's perspective, the legislation and regulatory provisions are far more complex than those that predated them, yet much of the subjectivity of the former immigration program remains. Processing procedures have become increasingly detailed as well, and the consequences of mistakes more dramatic. As a result, the Canadian immigration program—both temporary and permanent—has become increasingly difficult for those trying to 'do it themselves' and is, by default, becoming the domain of legal practitioners who practice predominantly in the area of Canadian immigration.

This article provides a snapshot of Canada's new temporary and permanent programs. In reviewing the article it is important that the U.S. attorney keep two thoughts in mind. First, this article is intended to serve as a brief overview of the massive changes to the federal temporary worker and economic immigrant programs that have taken place in the last year. Second, in many instances the provinces have negotiated separate immigration programs that exist either in parallel or as supplements to their federal counterpart; as a result it is quite possible that some clients, while falling short of the federal immigration requirements, may still qualify under a provincial program. We note that in this article we have not discussed the various provincial nomination programs, the family-class immigrant or the Humanitarian & Compassionate programs.

TEMPORARY IMMIGRATION— CANADIAN WORK PERMITS

The General Rule— Obtain a Labor 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] nor-

* **Nan Berezowski** practices immigration law in Toronto. She recently testified before the Canadian House of Commons Standing Committee on Immigration with respect to regulations pertaining to the U.S.-Canada Smart Border Declaration. Ms. Berezowski, who is an Executive Member of AILA Canada and is its Consular Liaison, is also serving her fifth term as an Executive Member of the Citizenship and Immigration section of the Ontario Bar Association. Educated at Osgoode Hall Law School and Boston University, Ms. Berezowski is qualified to practice law in both the Province of Ontario and the State of New York. She is co-author of a leading practice guide on Canadian Citizenship.

Janet L. Bomza is the Founding Director of Janet L. Bomza & Associates, a full-service immigration law firm located in Toronto; her practice is focused on all aspects of Canadian and NAFTA related immigration law. Ms. Bomza has specialized in immigration and citizenship law since 1992. She is a member of The Law Society of Upper Canada, AILA, and has served as an executive member of the Ontario Bar Association's immigration section for six years. Ms. Bomza has written articles and lectured extensively on various aspects of Canadian immigration law in the United States, Canada, the Far East, and Central Asia.

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

[2] IRPA Regulations §203.

mally 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 labor market.

The Human Resources Development Canada Centre (HRDC) labor market opinion process is somewhat similar to the H-1B labor condition application process. Generally speaking, a positive opinion will be issued where HRDC 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 labor 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 labor shortage;
- Whether the wages and working conditions offered are sufficient to attract and retain Canadian citizens and permanent residents;
- 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 labor disputes in progress or the employment of any person involved in such a dispute.

In many instances, prior to HRDC issuing an opinion, the Canadian employer is required to advertise the position for two weeks in both a national newspaper and local newspaper or trade journal. However, in some instances the HRDC may conclude that it already has information to confirm that there is a shortage of skilled workers in a particular field. In such cases, 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 post abroad. Unlike the H-1B labor condition application process, the Canadian process tends to be time-consuming and subjective. As a result, many Canadian companies find it difficult to obtain a positive opinion from the HRDC; it is therefore an essential part of the legal practitioner's job to seek an alternative basis for the work permit whenever possible.

Exemptions from the HRDC Labor Market Opinion

Although less common under the new legislative scheme, there are still many exemptions from the HRDC opinion requirement. That is, immigration officers may still issue a work permit without the need for the prospective employer to obtain a labor market opinion. In this scenario, the legal practitioner makes an application directly to an immigration official at a consulate or port of entry. The following are the most common exemptions:

Canadian Interests

A foreign worker is exempt from the labor opinion process if in the opinion of an immigration officer the employment:

- Will create or maintain significant social, cultural or economic benefits or opportunities for Canadian citizens or permanent residents;[4]
- Will create or maintain the reciprocal employment of Canadian citizens or permanent residents in other countries;[5] or
- Relates to a research, education or training program.[6]

Although no longer specifically set out in the regulations, by policy a foreign national may be exempt from the HRDC 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. Similarly, intra-company transferees seeking to enter Canada to work at a senior executive or managerial level for a temporary period of employment at a permanent establishment of the company in Canada can be processed under the Canadian Interest provisions.

[3] IRPA Regulations §202(3)(a)–(f).

[4] IRPA Regulations §205(a).

[5] IRPA Regulations §205(b).

[6] IRPA Regulations §205(c).

The IRPA Regulations do not provide more specific guidelines or defined criteria to acquire a work permit on the basis of Canada's interest. Canadian immigration officers therefore have 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.

International Agreements

A person 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 HRDC Opinion requirement.[7] Agreements listed in the Immigration 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
- U.S. Government Employees.

North American Free Trade Agreement (NAFTA)

United States citizens 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 U.S. citizen qualifies under one of the categories listed below, he or she will be exempt from the HRDC opinion requirement and may apply for a work permit at a port of entry or Canadian visa post.

- TN Professional
- Intra-Company Transferee
- Trader and Investor

TN Category for Professionals

The TN category permits certain professionals[8] to enter Canada to engage in their profession on a temporary basis. NAFTA Appendix 1603.D.1 describes the credentials required 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).

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 the three years preceding the application for a work permit.

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, principally between Canada and the United States, in a capacity that is managerial, executive, or involves essential skills, 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.

General Agreement on Trades in Services (GATS)

The nonimmigrant employment benefits available under GATS are organized into two categories: Professionals and Intra-company Transferees.

The GATS Professional

In order to qualify under GATS, the foreign national must be a citizen of, and be living in, a member country.

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.[9]

[7] IRPA Regulations §204.

[8] NAFTA Appendix 1603.D.1.

[9] The General Agreement on Trade in Services.

The eligible GATS professions are as follows:

Group 1	Group 2
▪ Engineers ▪ Agrologists ▪ Architects ▪ Forestry Professionals ▪ Geomatics Professionals ▪ Land Surveyors	▪ Legal Consultants ▪ Urban Planners ▪ Senior Computer Specialists

To obtain a work permit, foreign nationals 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. A work permit to enter as a professional under GATS can be obtained by applying through a visa office or, for citizens of member countries that do not require a visitor's visa, at a port of entry.

The GATS Intra-Company Transferee

The GATS intra-company transfer requirements are similar to those of intra-company transferees under the NAFTA.

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].[10]

A foreign national seeking a work permit as an intra-company transferee under 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.
- 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 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 GATS.

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 visitor's visa, at a port of entry. The work permit is granted at the time of entry and will be valid for one year. An extension of up to two years is typically permitted.

PERMANENT IMMIGRATION

The Skilled Worker

In the past, Canada admitted roughly 200,000 immigrants each year. Of this number approximately one half were selected under the skilled worker category based on their age, education, occupational demand, work experience, language capability and personal suitability. The new legislation represents a move away from an occupation-based model to one focused on flexible and transferable skills. At the same time requirements for professional applicants under this category have become significantly more onerous and more restrictive.

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.[11]

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

- Within the ten 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) listed

[10] *Id.*

[11] IRPA Regulations §75(1).

in Skill Type O Management Occupations or Skill Type A or B of the *National Occupation Classification* guide;[12]

- They obtain a point assessment of at least 75 points based on a variety of selection criteria outlined in the skilled worker selection grid;[13]
- They are able to satisfy the Settlement Fee requirements; and
- They are not inadmissible (*i.e.*, criminally or medically) to Canada.

The skilled worker selection criterion now 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.

Age

Under the age factor, applicants shall be 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.[14]

The following chart outlines the points an applicant would receive depending on his or her age:

Age	Points
16 and younger	0 points (minimum)
17	2 points
18	4 points
19	6 points
20	8 points
21-49 years old	10 points (maximum)
50	8 points
51	6 points
52	4 points
53	2 points
54 and older	0 points (minimum)

Education

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 regulation of such institutions in the country of issue."[15]

A specific number of points corresponds 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 corresponding 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 corresponds to the number of years of study completed by the applicant.

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

The following chart sets out the points awarded for each education credential:

Education Credential	Maximum 25 Points
Master's Degree or Ph.D. **AND** at least 17 years of full-time or full-time equivalent study.	**25**
Two or more university degrees at the bachelor's level **AND** at least 15 years of full-time or full-time equivalent study.	**22**
Three-year diploma, trade certificate or apprenticeship **AND** at least 15 years of full-time or full-time equivalent study.	**22**
Two-year university degree at the bachelor's level **AND** at least 14 years of full-time or full-time equivalent study.	**20**
Two-year diploma, trade certificate or apprenticeship **AND** at least 14 years of full-time or full-time equivalent study.	**20**
One-year university degree at the bachelor's level **AND** at least 13 years of full-time or full-time equivalent study.	**15**

[12] IRPA Regulations §75(2)(a)(b)(c).

[13] IRPA Regulations §76(2)

[14] IRPA Regulations §81.

[15] IRPA Regulations §73.

Education Credential	Maximum 25 Points
One-year diploma, trade certificate or apprenticeship **AND** at least 13 years of full-time or full-time equivalent study.	**15**
One-year diploma, trade certificate or apprenticeship **AND** at least 12 years of full-time or full-time equivalent study.	**12**
Completed high school.	**5**

Language Proficiency

Under the new regulations significantly more importance is placed 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:[16]

- 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 International English Language Testing System (IELTS). To obtain points for French the applicant must either write the TEF French language test or provide proof of required proficiency.

The following chart outlines the point assessment assigned to the applicant based upon his or her level of proficiency (basic, moderate and high) in both English and French:

First Official Language (English or French)	Speaking	Listening	Reading	Writing
High Proficiency	4	4	4	4
Moderate Proficiency	2	2	2	2
Basic Proficiency*	1	1	1	1
No Ability	0	0	0	0

* Maximum of two points in total for basic-level proficiency.

Second Official Language (English or French)	Speaking	Listening	Reading	Writing
High Proficiency	2	2	2	2
Moderate Proficiency	2	2	2	2
Basic Proficiency*	1	1	1	1
No Ability	0	0	0	0

* Maximum of two points in total for basic-level proficiency.

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." The applicant must further be able to demonstrate that they have:

- performed the actions described in the lead statement for the occupation as set out in the occupational descriptions of the NOC; or
- 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 that occupation as outlined in the NOC, then he or she will be awarded a certain number of points per year of work experience up to a maximum of 21 points[17] as follows:

Years of Experience	Points
One year	**15**
Two years	**17**
Three years	**19**
Four or more years	**21**

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:

[16] IRPA Regulations §79(1)(2).

[17] IRPA Regulations §80(1), (2).

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 Human Resources Development Canada. (The employer does not have to show that there is no Canadian citizen or permanent resident to fill the position.)
Presently working in Canada on a valid work permit. (HRDC approved work.)	▪ 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.
Presently working in Canada on a valid work permit. (Exempt from HRDC approval.)	▪ At the time of filing the application, the applicant is working in Canada on a temporary work permit that is exempt from HRDC approval according to international agreements (*e.g.*, NAFTA) or "significant benefits" (*e.g.*, intra-company transferee); 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.

Adaptability

Under the new scheme, the applicant is now eligible to receive additional points for a variety of factors including:[18]

- His or her spouse's education;
- Prior work experience in Canada;
- Prior education in Canada;
- The presence of a close family member in Canada; and
- 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 to which the applicant's spouse's education corresponds.

- if it corresponds to 12 or 15 points, then the applicant may receive an additional 3 points under the adaptability factor;
- if it corresponds to 20 or 22 points, then the applicant may receive an additional 4 points under the adaptability factor;
- if it corresponds to 25 points, then 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

[18] IRPA Regulations §83(1).

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.[19] Note, however, that if the applicant has arranged employment as outlined above, he or she need not meet these financial requirements.

Determining Eligibility

To be eligible for immigration as a skilled worker applicant, one must score 75 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, 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.[20] 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 underpinnings of the new program make sense, and the criteria for success are not unreasonable, the consensus among Canadian legal practitioners is twofold. First, the minimum pass threshold has been set too high. Second, the application process itself has become overly itself has become overly technical. 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 encouraging arranged 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 successful application.

The Business Immigrant

Citizenship and Immigration Canada has also retooled the 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 subcategories—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.[21]

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 of 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.[22] Alternatively, instead of actual ownership, the appli-

[19] IRPA Regulations §76(1)(b)(i).

[20] IRPA Regulations §75(3).

[21] IRPA Regulations §§88(1), 90(1).

[22] IRPA Regulations §88 (1).

cant may 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[23] Net worth is calculated as the fair market value of all of the assets of the investor and their spouse, or common law partner, minus the fair market value of all of their liabilities.[24] The required net worth must have been legally obtained by the applicant and readily verifiable.

Finally, the applicant must make an investment in Canada of at least CAD$400,000.[25] 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.

Assuming all other applicable basic requirements of the IRPA are satisfied, 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, 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.[26] 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.[27]

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 is insufficient under the Entrepreneur Program. Therefore, an entrepreneur applicant must provide documentation proving that within any two of the last five years, he or she managed *and controlled* a qualifying business. Specifically, entrepreneurs must be able to show that within any two of the last five years, they satisfied 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.
- 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.
- 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.

As each applicant must only satisfy two of these four criteria, a client who owns a company, will be able to meet #1 and #3 of the above requirements, providing he or she has at least two employees and the company has earned a net income of CAD$50,000 or (USD$35,000) per year. If the client has a 50% partnership, then he or she will be able to meet #1 and #3 of the above requirements, providing he or she has at least four employees and the company has earned a net income of CAD$100,000 (approximately USD$70,000) 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.[28] The required net worth must have been legally obtained by the applicant and readily verifiable. The net worth of the applicant is calculated as the fair market value of all of the assets of the entrepreneur and his or her spouse minus the fair market value of all of their liabilities.

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[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] IRPA Regulations §98 (1).

[27] IRPA Regulations §88(1)(b).

[28] IRPA Regulations §88(1).

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.[29] 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 has been 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:[30]

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

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

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 legislative regime that is in places vague and subject to a wide degree of bureaucratic discretion while in other places overly complex and technical. Gone is the predictability of Canada's former immigration program.

On the temporary immigration front, the adjudication process has become more labor market focused, with HRDC opinions required in an increased number of cases. However, exemptions to the labor 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 new program is characterized by a more onerous skilled worker program that will likely result in a decrease in the total number of immigrants coming to Canada in the years to come. While the business immigration program has become more documentation focused, with the exception of the self-employed sub-category, prospects under this program remain good. Similarly, the parameters of the family-based immigration program have been expanded.

Whether permanent or temporary, the practice of immigration law in Canada has become more complex. The technical nature of the enabling legislation, the remaining subjectivity of some requirements, combined with numerous changes in processing requirements and procedures, make Canadian immigration law increasingly an area of practice that requires immigration-specific experience and expertise. In the future it will be far less likely that the occasional practitioner or applicant will be able to "do it themselves" successfully.

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[29] *Id.*

[30] *Id.*