NAFTA NEGOTIATIONS: Is CETA a Clue to the Future?
~ *A Look at the Professional and Investor Provisions*

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As the US President called the NAFTA the 'worst trade deal ever' and threatened to rip it up Canadian negotiators were putting the finishing touches on a major modern day trade agreement with the European Union[1]. The Canada-European Union: *Comprehensive Economic and Trade Agreement* or "CETA" came into force on September 21, 2017[2]. The agreement includes labour mobility provisions for Canadian citizens and citizens of EU member states. In many cases it exempts EU citizens from Canada's Labour Market Impact Assessment (LMIA) requirement thus allowing for a simplified and expedited pathway to temporary work authorization in Canada.

At present there are 28 EU member states covered in the CETA, they are: Austria, Belgium, Bulgaria Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romani Slovakia, Slovenia, Spain, Sweden, and United Kingdom. All but two countries, Bulgaria and Romania, are visa exempt from Canada. For citizens of the other 26 countries it is not generally necessary to apply for work authorization in advance of travel at a Canadian Consulate.

CETA represents a more comprehensive but complicated approach to the issue of services and mobility in the context of a trade agreement. Why? Because the CETA:

> Adopts a "negative list" approach to the liberalization of services. That is, all service sectors benefit from market access, except for those expressly excluded in a list of reservations. However, as Agreement allows for various country specific modifications and exemptions, thus permitting a certain degree of autonomy, it is more complicated to comprehend and administer[3].
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> Further aims to increase labour mobility through a binding and mutual recognition of certain professional qualifications. In Chapter 11 it establishes a framework to facilitate a fair, transparent and consistent regime and sets out the general conditions for negotiation through a joint committee[4].

The CETA's services provisions address Business Visitors, Contractual Service Suppliers and Independent Professionals, Inter-Company Transferees, and Investors. For our purposes today, I

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[1] *See*: Walkam, Trump's Hatred of NAFTA May do Canada a Favour; The Star.com September 4, 2017.
[2] *Comprehensive Economic and Trade Agreement (CETA*) between Canada, of the one part, and the European Union and its Member States, of the other part, 30 October 2016, Council Doc. 10973/16, OJ L 329 (entered into force 21 September 2017) [*CETA]*.
[3] CETA, Chapter 10, Article 10.8.2.
[4] CETA, Chapter 11, Articles 11.3 – 5.

will restrict my comments to a discussion of what correlates roughly to the NAFTA 'Professional' or Trade NAFTA" and the NAFTA 'Trader & Investor' or "E-1/E-2" provisions.

Trade NAFTA Professionals/CETA Contractual Service Suppliers & Independent Professionals

Unlike the current NAFTA, CETA contemplates present day work arrangements that have moved away from the traditional employer-employee paradigm and its origins in Master-Servant law. CETA contains provision for contractual service suppliers and independent professionals. Many contractual service suppliers and independent (self-employed) professionals who seek to supply services in Canada on a temporary basis may be eligible for a work permit.

Professionals of either category must:

a. Be citizens of an EU member state;
b. Be engaged in the temporary supply of services in Canada for a period not exceeding 12 months, and
c. Provide a service in accordance with the Annex 10-E concordance table.

Contractual service suppliers are employees of an EU enterprise that have a contract to supply a service to a Canadian consumer. The EU enterprise cannot have an establishment in Canada. A contractual service supplier must also:

1. Have been an employee of the EU-headquartered enterprise for at least one year, and
2. Possess three years of professional experience in the activity that is the subject of the contract; and
3. Receive remuneration from the EU employer for the services performed in Canada.

Independent professionals are self-employed professionals who:

1. Have been contracted to supply services to a Canadian consumer; and
2. Possess at least six years of professional experience in the sector of activity which is the subject of the contract.

Chapter 10, Annex 10-E excludes several sectors including: medical and dental services; veterinary services; midwifery services; nurse, physiotherapist and paramedical services; and higher education services. Moreover, there are also job specific exemptions to the Independent Professional category that do not apply to the Contractual Service Supplier category[5].

In addition to the above requirements, applicants under either category must possess:

a. university degree or qualification demonstrating knowledge of an equivalent level[6]; and
b. Professional qualifications, if required to practice an activity pursuant to the laws or requirements in the province or territory where the service will be supplied in Canada.

[5] CETA, Annex 10-E –Sectoral commitments on contractual service suppliers and independent professionals.

[6] Note however that Annex 10-C to the CETA indicates that certain engineering and scientific technologists are eligible to enter Canada as professionals without a university degree.

Additionally, it is important to consider that, with the except for Engineering and Scientific Technologists which are National Occupation Category ("NOC") "B" level, Canada's specific commitments are limited to the NOC "O" and "A" levels[7].

Ironically, in both cases, a Canadian company, the customer, must submit an 'Offer of Employment' through the IRCC Employer Portal and pay a $230 Employer Compliance Fee. According to the IRCC Temporary Residents Manual, this is necessary as:

> It is the Canadian company that is creating the need for the temporary worker to enter Canada. The 'offer of employment' is only for the assessment of a work permit and does not establish the standard employee/employer relationship as normally understood in the labour force. It is simply a requirement of the employer compliance program[8].

Evidently, the CETA has moved beyond the employer-employee paradigm but IRCC has not.

Under this category, nationals from the 28 EU states are eligible for work permits for a cumulative period of no more than 12 months in any 24-month period, or for the duration of the contract, whichever is less. Thus is a shorter duration than the NAFTA equivalent. Moreover, the validity period may only be extended at an Officer's discretion, provided that sufficient evidence is presented to justify the need for extension. Again, the extension provisions are less generous than the NAFTA equivalent.

Investors

The NAFTA allows individuals who have US or Mexican citizenship to apply for a NAFTA Trader or Investor based work permit. To be eligible, the applicant must have American or Mexican citizenship; and the employing enterprise must have American or Mexican nationality.

For Traders, the following additional threshold requirements also apply:

- activities must involve substantial trade in goods or services;
- trade must be principally between either the U.S. or Mexico, and Canada; and
- the position must be supervisory or executive, or involve essential skills.

For Investors, the following additional threshold requirements apply:

- a substantial investment must have been made, or is actively being made;
- the applicant must be seeking entry solely to develop and direct the enterprise; and
- if the applicant is an employee, the position must be executive or supervisory or involve essential skills;

Anecdotally, the Canadian E visa equivalent is rarely used; many senior practitioners have done no more than a handful during their careers while junior practioners may not be aware of its existence.

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[7] See CETA Annex 10-E; *also see:* http://www.cic.gc.ca/english/resources/tools/temp/work/international/canada-eu/a10-e.asp.

[8] see: http://www.cic.gc.ca/english/resources/tools/temp/work/international/canada-eu/a10-e.asp

Presumably this is because historically other more accessible and favourable options have been available under Canadian law.

Oddly, despite the NAFTA Investor program's lack of popularity inbound to Canada it clearly serves as the model for the CETA Investor provisions. So much so, that in its policy manual, Immigration, Refugees and Citizenship Canada (IRCC) states that: "The investor provisions listed under the key personnel category of CETA are similar to the North American Free Trade Agreement (NAFTA)" and refers Officers to the section pertaining to NAFTA Investors for adjudication guidance[9].

Nonetheless, CETA sets out how host countries must treat investors and investments, and both Canadian and EU investors will likely benefit from a more stable and predictable investment climate. Under CETA, investors cannot be treated less advantageously than domestic or other foreign investors and have access to an investor-state dispute settlement mechanism.

Investors are defined under CETA as persons who establish, develop, or administer the operation of an investment in a capacity that is supervisory or executive. CETA investor provisions apply to individual investors as well as employees of corporations. In either case, the individual investor or the investing employer must have committed, or be in the process of committing, a substantial amount of capital.

Like the present "E Visa" and its little used Canadian equivalent, under CETA there is no official minimum dollar threshold to fulfil the requirement of "substantial" investment capital. Similarly, 'Substantiality' is determined using a proportionality test, in which the amount invested is weighed against one of the following factors: (i) the total value of the particular enterprise in question; or (ii) the amount usually considered necessary to establish a viable enterprise of the nature contemplated. In all cases, the investment must be significantly proportional to the total investment.

Under the NAFTA, Canada will issue a qualifying Trader or Investor a Work Permit for an initial duration of up to one year. In both the Trader and the Investor scenarios, extensions are typically granted in two year increments provided that the requirements continue to be met. Again, the CETA Work Permit duration is relatively curtailed as the Investor Work Permit may be issued for up to one year initially but extensions will only be available at an Officer's discretion based on demonstration of sufficient need[10].

Conclusion ~ CETA as a Canadian Gateway?

Whereas the CETA Professional provisions represent a move toward a more comprehensive but sophisticated scheme of admittance for qualifying Professionals, the Investor provisions rely heavily upon their NAFTA counterpart as precedent. Regardless of the difference in emphasis, and given the antiquated status of the much of the NAFTA's present mobility provisions, it seems unlikely that either will remain completely untouched by the NAFTA negotiation process. With the CETA negotiation experience under its belt, the Canadian team is well positioned to introduce more

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[9] *See*: http://www.cic.gc.ca/english/resources/tools/temp/work/international/canada-eu/investor.asp Canada-European Union (EU) Comprehensive Economic and Trade Agreement (CETA) – Investors R204(a) (work permit required/LMIA exemption code).

[10] International Mobility Program: Canada-European Union (EU) Comprehensive Economic and Trade Agreement (CETA). http://www.cic.gc.ca/english/resources/tools/temp/work/international/canada-eu.asp#CETA

sophisticated second generation Professional (and Inter-Company Transferee) provisions to a renewed NAFTA. However, if the NAFTA Trader & Investor provisions are to be updated, negotiators will have considerably less Canadian expertise at their disposal.

Of course, whether the Americans and Mexicans at the bargaining table will ultimately be amenable to updating the NAFTA's mobility provisions, or using the CETA as a starting point, remain to be seen. However, as the fourth round of negotiations is scheduled in Washington D.C. from October 11-15, and the end of 2017 quickly approaching, many have speculated that negotiations will carry over into 2018.

CETA could nonetheless impact US businesses, employees and immigration practitioners. For example, a US company might consider shifting some of its manufacturing to Canada to create Canadian-origin products entitled to duty-free entry into the European Union. In this way, US companies might adjust their business models, supply chains and human talent to take advantage of favourable rules of origin and other comparative advantages offer through CETA. Conversely, given the low prospects for a free trade agreement between the EU and the United States under the Trump administration, EU businesses may choose to invest in Canada in order to access the U.S. market on a duty-free basis under a newly minted NAFTA[11].

11 *The Canada-Europe Free Trade Agreement: Advantages for Canadian and European Businesses*, Peter Glossop, Riyaz Dattu & Margaret Kim