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BEREZOWSKI'S BORDERLAW®
* * * UPDATE * * *

To: Berezowski Business Immigration Law Clients
From: Nan Berezowski, Barrister & Solicitor, Attorney-at Law
Date: September 6, 2019
Re: Intra Company Transfers Canadian-Style

American colleagues recently asked me to speak about Canadian Intra Company Transfers. When considering an intra company transfer or ('ICT') in the Canadian context, it is important to first recognize that there are many. For Canada has negotiated trade agreements and these agreements - with Chile, the European Union, and Korea - not to mention the NAFTA/USMCA to name a few, usually contain intra-company transfer provisions.

There is however another intra company transfer, which I sometimes refer to as 'part of Canadian law proper'; it falls under R205(a) of the *Immigration and Refugee Protection Act*. Legislators intended that this intra-company transfer to enable work that would 'create or maintain significant social, cultural or economic benefits….' for Canadians. It is referred to as "C12" as this is the internal code that references its exemption from Labour Market Impact Assessment (LMIA) in the Immigration Refugees & Citizenship Canada ('IRCC') database.

The C-12 is the most influential of Canadian ICTs for at least two reasons. First, mobility provisions in trade agreements, perhaps because they are ancillary to the trade they are designed to support, are often broadly drafted. The C-12 and its related policy serve as the default norm as to how an ICT Work Permit is adjudicated when a trade agreement is silent. Second, the C-12 is often, although not always, more generous than similar trade agreement negotiated ICT provisions. C-12 is my focus here.

Intra Company Transfer Basics ~ Under C-12, Intra-company transferees may apply for a Work Permit if they:

- Are currently employed by a multi-national company and seeking entry to work in a parent, a subsidiary, a branch, or an affiliate of that enterprise;
- Are transferring to an enterprise that has a qualifying relationship with the enterprise in which they are currently employed, and will be undertaking employment at a legitimate and continuing establishment of that company (where 18–24 months can be used as a reasonable minimum guideline);
- Are being transferred to a position in an executive, senior managerial, or specialized knowledge capacity;
- Have been employed continuously (via payroll or by contract directly with the company), by the company that plans to transfer them outside Canada in a similar full-time position (not accumulated part-time) for at least one year in the three-year period immediately preceding the date of initial application.

Like the US counterpart, they may be granted up to five (5) and seven (7) year maximums. As such, Canada's basic ICT requirements are somewhat familiar to those who prepare L-1As and L-1Bs.

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The principal lawyer at Berezowski Business Immigration Law, I am an internationally recognized Canadian lawyer (Ontario) and a licensed US Attorney-at-Law (New York) who has been featured in Who's Who Corporate Immigration for over a decade.

Yet there are differences. Some differences derive from the enabling legislation, with its focus on 'significant benefit' while others have evolved as policy, not law, continues to inform how C-12 is adjudicated. I discuss some of these differences below:

'Immediately Preceding' Employment ~ For reasons that have never made sense to me, Canadian authorities insist that transferees be employed by the transferring company, for at least one year in the three-year period, *immediately preceding* the date of the initial application. In my experience this means that if an employee has the qualifying one year of experience, but is no longer on the transferring company payroll, he or she must be reinstated – re-hired abroad prior to the transfer.

Part-timers~ As per IRCC policy, if an applicant has not had full-time work experience with the foreign company, the adjudicating Officer should consider other factors 'before refusing' on this basis. The factors include:

- the number of years of work experience with the foreign company;
- the similarity of the positions and their terms;
- the extent of the part-time position (i.e., two days a week versus four days a week); and
- signs that this is an abuse of the ICT provisions.

Suffice to say, IRCC policy appears predisposed against part-time transferees.

Start-up Companies ~ the 'Start Up' scenario is the equivalent of the "New Office L" in US immigration vernacular. The Start Up company is generally expected to secure a physical premise to house its Canadian operation. I note that IRCC policy specifically references this as an expectation where the transfer is Specialized Knowledge based. IRCC does allow for some specific cases involving senior managers or executives, where the company premise has not yet been secured.

The Start Up must demonstrate:

- financial ability to commence business in Canada and compensate employees;
- that it will be large enough to support executive or management function (if transferring executives or managers); and
- that it will be doing business;
- that work will be guided and directed by management at the Canadian operation (when transferring a specialized knowledge worker).

It must also furnish realistic plans to staff the new Canadian operation.

Like its US counterpart, the initial Work Permit is issued for a one (1) year period. This can present a challenge, as in my experience, companies often take more than a year to establish. This is relevant because for renewals, the Start Up company is expected to provide evidence that the new office has engaged in the continuous provision of goods or services for the past year and the new office has been staffed. It must also demonstrate that the Canadian and foreign companies still have a qualifying relationship.

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Intermittent Transfers ~ Transferees are not strictly required to re-locate to Canada. On any given day I may be working on several 'intermittent' ICTs. However, they are clearly expected to 'occupy a position' within the Canadian company; there must be a clear employer-employee relationship with the Canadian company, and the Canadian company must direct the day-to-day activities of the foreign worker. This is especially challenging where transferees are working at client sites.

Recapture ~ Normally, the duration of the Work Permit will be used to calculate the maximum five, or seven, year time limit. However, documented time spent not working, either *inside or outside* Canada, during the duration of the Work Permit can be "recaptured". The duration of the recaptured time cannot exceed the respective caps for the intra-company transferee.

That having been said, as per policy, IRCC will not recapture time periods of less than 30 consecutive days. Moreover, IRCC will issue recaptured time in increments of no more than two years - from the date that has been determined within the cap period after the time not worked has been deducted. In other words, where an intra-company transferee has reached their cap and has documented evidence of time spent not working that is equal to two years, then he or she may apply for a two-year extension. However, IRCC specifically directs its Officers to insert a 'Remark' on the Work Permit to the effect the that no recaptured time may subsequently be requested for any time not worked during that two-year extension period.

Closing Remarks ~ On the plus-side, in recent policy documents, IRCC reflects favourably on the harmonization of NAFTA and other trade agreements with the C-12 ICT norms that I have described above. This should simplify, intra-company transfer based Work Permits for officers, lawyers and multi-national companies alike. On the downside, C-12 adjudication continues to be driven by bureaucrats not legislators, and as such it is subject to change with little or no notice. For both reasons I expect, the differences between Canadian and US intra-company transfers to grow and become more pronounced.