

Registry No.: IMM-3210-14

FEDERAL COURT

BETWEEN:

**JEFFREY MICHAEL STAPLES, MIRIAM STAPLES and 59077
NEWFOUNDLAND AND LABRADOR LIMITED**

Applicants

-and-

**THE MINISTER OF EMPLOYMENT AND SOCIAL DEVELOPMENT,
THE ATTORNEY GENERAL and THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondents

AFFIDAVIT OF JACOBUS KRIEK

I, Jacobus Kriek, of the City of Calgary, in the Province of Alberta, MAKE OATH AND SAY:

1. I am a member in good standing of the Immigration Consultants of Canada Regulatory Counsel (ICCRC). As such I have knowledge of the matters hereinafter deposed to in this my affidavit, except and insofar as information was told to me by others in which case I verily believe that what I have been told was true.
2. As a member of the ICCRC, I regularly assist my clients with Labour Market Opinions (LMOs) now called Labour Market Impact Assessments (LMIAs) and also actively engage with the Department of Economic and Social Development Canada (ESDC) in order to seek clarity and transparency in Department processes and procedures and have done so since 2004.

3. Throughout my affidavit, reference will be made to the new name (LMIA) even though reference will be made to cases where the terminology at the time was to refer to LMOs.
4. In 1989 I completed my first degree in Economics and in 1995 I completed post graduate degree studies in Economics. In my post graduate degree I also majored in Labour Economics. During most of the nineties I worked as an economic and industry analyst before starting to practice immigration law as a Regulated Immigration Consultant. During 2002 I completed a course in Immigration Law at Seneca College (presented by Seneca College and the University of British Columbia). My education is therefore a mix of both economics and law. Soon after I began to work in the field of immigration law (2002) my practice focused on Labour Market Opinions (and now LMIA). A LMIA is a forecast about the effect of the appointment of a foreign national on the Canadian labour market (and the economy). Essentially it is a question of both economics and law. My university education and experience serve me well in providing legal advice to my clients in this specialized field of immigration law.
5. I have been involved in different federal court related LMIA matters including the following:
 - a. As stated LMIA's were previously known as LMOs and before that it was known as Employment Confirmations (1978 *Immigration Act*). In the past 35 years a decision of a Service Canada officer in LMO, LMIA or Employment Confirmation has not been overturned except for one historical case which was my client, an information technology firm from Vancouver. In 2008 we represented our client in a matter before Service Canada. In our submission to Service Canada we argued that the rules of Service Canada at the time to determine the genuineness of job offers made to foreign nationals were ultra-vires and unreasonable. The request was refused (negative) as the officer claimed that the job offer was not genuine and essentially ignoring our arguments. Leave to appeal was submitted and the Honourable Judge Barnes set the decision aside on 11 August 2008 and sent the matter back for redetermination (*Integration Solutions Service Inc v The Minister of HRSDC*, IMM-852-08). As a result of the court case the specific policy of Service Canada changed.

- b. Pursuant to a settlement agreement on the Henriksen (Federal Court Docket #IMM-10668-12 litigation) matter between Human Resources and Skills Development Canada (HRSDC) and the applicant (Mr. Henriksen from Edmonton), a national working group for the purpose of designing a new Temporary Foreign Worker (TFW) Program Directive (outlining the policy with regard to the use by employers of third party representatives for Labour Market Opinions) was established. I am part of that national working group.
6. I published numerous articles on issues related to LMIA's in a national Immigration Law publication entitled *ImmQuest* (a Thomson, Reuters Carswell product) and temporary foreign worker issues including:
- a. In February, March and April 2008 I published an article in *ImmQuest* named "*Third Party Representation in LMO and AEO's*" in which the right to counsel by employers in LMOs was examined.
 - b. In March 2010 and April 2010 I published an article in *ImmQuest* entitled "*Unions and Disputes in LMOs*"
 - c. One of the factors that must be considered before a LMIA is issued is whether a labour shortage exists. The Federal Government does not have a formal definition that is consistently applied throughout the country. In Oct 2010 I published an article in *ImmQuest* entitled "*The Labour Shortage Factor in LMOs.*" The objective was to highlight the need for a definition of the concept. This was the first time an article was published about the term "labour shortage" since the *Immigration and Refugee Protection Act* was promulgated in June 2002.
 - d. In Sept 2011 I published an article in *ImmQuest* named "*Financial Analyses in the Test of Genuineness*" The article analyzed the use of financial information (inter alia by Service Canada) to determine the genuine nature of job offers made to foreign nationals in LMIA requests.

- e. In Sept 2012, October 2012 and November 2012 I co-authored a lengthy article/study in *ImmQuest* with Emeritus Professor DeVoretz from Simon Frazer University named “*The Use of the Term Significant Economic Benefit in Immigration Law*” The term “significant economic benefit” is referred to in Immigration and Refugee Protection Regulation 205 (a) and it is the authority for many intra-company transfers of temporary foreign workers from foreign branches to Canadian branches.
 - f. One of the factors that must be considered when a LMIA is issued is if the foreign national will paid the “prevailing wage”. The methodology is not publically available to Canada employers. I obtained a copy through an Access to Information Act request. The information was used to publish an article in *ImmQuest* (Sept 20-13 and Oct 20130) named “*New Wage Methodology in Labour Market Opinions and Immigration Applications*” The article attempts to educate the profession on this very important technical issue and highlight deficiencies in current policy.
7. In October 2010 I appeared before the *Parliamentary Standing Committee on Citizenship and Immigration* on changes to the *Immigration and Refugee Protection Act* with specific reference to legislative changes about authorized representatives.
 8. In the past number of years I have regularly expressed my concerns or suggestions for policy improvement about LMIA policy matters to regional managers of Service Canada, regional policy advisors of Service Canada, Directors of Service Canada at a national level, the policy advisor to the Minister of Citizenship and Immigration and the senior policy advisor to the Minister of Employment and Social Development. Examples that can be quoted are as follows:
 - a. In July and Aug 2012 it became clear that Service Canada had an incorrect interpretation of a Citizenship and Immigration Operational Memorandum numbered 279 that focused on seven LMIA exempted occupations in Alberta. As

a result of the incorrect interpretation by Service Canada, Service refused to issue LMIA's to Alberta employers in these seven occupations. On 29 August I wrote to ESDC Minister Jason Kenney and expressed my concern about the erroneous interpretation of the policy by Service Canada. On 27 Sept 2012 Operational Memorandum 279 D was changed and essentially Service Canada was directed to issue the LMIA if requested by an employer in Alberta.

- b. On 14 Aug 2012 I wrote to Minister of Human Resources and Skills Development (HRSDC) in which I highlighted the policy utilized by HRSDC about the use of retained earnings of employers to determine whether a job offers made to temporary foreign workers is genuine is erroneous. My arguments were supported by two expert opinions. This erroneous policy has not yet been corrected and I have continued to pursue the matter with the Senior Policy Advisor to the Minister of ESDC in a personal meeting on 6 Sept 2013 at the offices of the Minister of ESDC in Gatineau.
- c. During May 2013 I wrote to the Director General of the Immigration Branch at Citizenship and Immigration Canada (CIC) about the Royal Bank of Canada (RBC) that used the services I-Gate information technology consulting firm. The issue received a lot of media attention during 2013 after I-Gate transferred foreign nationals to their Canadian Operations that provided a service to RBC. In my letter I provided the research by myself and Professor DeVoretz (as discussed in par 6 e above). It was explained that part of the problem was that CIC did not have a in-depth definition of "significant economic benefit" As a result of my letter I was invited to meet with policy advisor of the Minister of CIC during July 2013.
- d. Currently Service Canada in Western Canada seems to have an incorrect interpretation of the jurisdiction of provinces to regulate their own occupations. I have written about this policy shortcoming to the Regional Advisor of Service Canada, Mr. Howard Jones on 2 June 2014 as well as the Director Policy ESDC

Mr. Collin James. On 30 June 2014 I wrote to the Regional Manager of Service Canada Mr Thomas Gonzales. My office is awaiting a response.

- e. Since 2005 Service Canada refused to issue LMIA's to certain compulsory trades without the employer providing evidence that the applicants have been eligible to challenge their provincial examination. This is an ultra-vires requirement and I sent a letter to the Minister of ESDC in July 2011. In response the head office of ESDC in Gatineau confirmed to me in a letter dated 8 Aug 2011 that my interpretation is correct and the requirement by Service Canada in the Western Territories is ultra-vires the *Immigration and Refugee Protection Regulations*. However officers of Service Canada in Western Canada refused to follow the guidelines provided by the head office of ESDC. I again wrote to the Minister of HRSDC on 3 April 2012. On 9 July 2012 CIC released Operational Bulletin 434 in which it was clearly stated that the only federal organizations that may determine if a foreign worker is eligible to work in a regulated occupation is CIC and the Canadian Border Services Agency. From that date onwards Service Canada followed the rules with regards to regulated occupations.
9. I have also been actively involved in immigration policy and policy related to foreign workers on a provincial level for several years. The following examples can be provided:
- a. During April 2012 I was invited by the Ontario Government to attend an immigration round table meeting that focused on establishing an immigration strategy for Ontario.
 - b. In 2011 the Saskatchewan Apprenticeship and Trade Certification Commission (SATCC) refused to allow foreign trained industrial electricians to challenge the Electrician examination in Saskatchewan and Service Canada refused to issue LMIA's to these electricians. I made representations to the SATCC that the interpretation of provincial statutes were erroneous and the matter was elevated to the Premier's office and in May 2012 the SATCC officially changed their

interpretation of the *Electrical Inspection Act* of 1993 and The Apprenticeship and Trade Certification Commission Regulation and the experience of foreign trained industrial electricians where recognized and they were allowed to challenge the Interprovincial Red Seal Examination in Saskatchewan.

- c. During April 2007 the Province of Ontario refused to allow foreign nationals (without permanent resident status or work permits) to challenge the Red Seal Examinations in all trades. I approached the Ministry of Training, Colleges and Universities in Ontario and questioned the sensibility and validity of the refusal. On 16 May 2007 the Minister agreed that these foreign nationals (without permanent residence visa or work permits) became eligible to challenge their examinations in Ontario if they complied with provincial legislation regulating the trade.
10. One of my ongoing concerns is the deficiencies in the TFW Manual used by the Department to evaluate LMIA applications is the lack of clear definitions of employment conditions, the role of authorized third party representatives and the lack of jurisdiction to impose employment requirements (a factor that is assessed in LMIA requests), etc.
11. In all I am extremely impassioned in bringing about clarity and transparency in this very important area of law for the profession, the many Canadian employers my company represents and for Canada's economy.
12. To this end, I endeavour to be as informed as possible. As noted the TFW Manual is not publically available and may only be obtained under the *Access to Information Act*. I request updates regularly.
13. I have recently made a complaint to the Office of the Privacy Commissioner in regards to the redactions made to ESDC's TFW Manual. ***Attached to this my affidavit and marked exhibit "A" is a true copy of the complaint I submitted on 24 February 2014 together with***

the acknowledgement of receipt dated 18 March 2014. The events leading to this complaint are as follows:

- a. The Immigration and Refugee Protection Regulations require that employers of TFWs provide “substantially the same” wages and working conditions as offered in the LMO application. This has posed difficulties for employers and those assisting employers, as what is meant by “substantially the same” and “working conditions” are not defined in legislation.
- b. On 2 January 2013 I wrote to the Honourable Minister Finlay for clarification of the Employer Compliance Review (ECR) process that included questions relating to employment conditions. *This letter is provided on page 32- 36 of exhibit A.*
- c. On 4 January 2014 I wrote to Michael Bonner, a Senior Policy Advisor in Minister Kenney’s office. I attached the materials I had sent the year previous to Minister Finlay, confirmed that I had not received a response, and continued to seek answers. *This letter is in page 31 of exhibit A.*
- d. I have actually sat down with Mr. Bonner to discuss my concerns on 6 Sept 2013 at the office of the Minister of ESDC. During the discussion I mentioned seventeen policy concerns related to LMIAs including the lack of clear rules on specific policy issues and the trend to have internal rules with ESDC not made available to the public, etc.
- e. On 8 January 2014 I again wrote to Mr. Bonner to express my concerns with Departmental transparency. I was particularly concerned with the language of the new Regulations, which were published in the Canada Gazette on 8 July 2013 and came into force on 31 December 2013. *This letter is from page 20 to 24 in exhibit A.*

14. The published materials, in the Regulations and on the Department's website, refer regularly to "conditions." Employers are to meet certain conditions, provide substantially the same working conditions, etc. In my letter dated 8 January 2014 I highlighted to The Senior Policy Advisor of the Minister of ESDC, Mr. Bonner, the concerns with this language as it was not at all clear what the conditions were or what an employer would be required to do to ensure that these conditions were met.
15. In particular, the TFW Manual provides that a comprehensive list of working conditions that are to be assessed and the documents that are to be requested are at section 3.5.5.2.13.1." Section 3.5.5.2.13.1 is entirely redacted. ***The redacted portions of the manual are in pages 9 to 14 of exhibit A.***
16. I requested copies of certain pages of the TFW Manual pursuant to the Access to Information Act. I received in a letter dated 14 February 2014 omitting certain pages from production under section 16.2 of the Access to Information Act. ***The omitted pages are at page 18- 19 in exhibit A.***
17. I am very unclear as to how section 16.2 of the Access to Information Act can justify the omission of these pages. The provision provides that redaction is permitted where there is "information that could reasonably be expected to facilitate the commission of an offence...", amongst other things. I have put this question to the Privacy Commissioner in my letter dated 24 February 2014.
18. I expressed my concern in a letter to Mr. Bonner that employers expected to respond ECRs do not know what is meant by working conditions nor do employers know what documentation may be requested of them in that process. I question the lawfulness of this approach particularly for Canadian employers who need to understand how to operate their businesses in accordance with the law.

19. From my review of the TFW Manual, what is meant by “conditions,” “working conditions” and “substantially the same” are not set forth in detail. I did see a reference to certain conditions (page 29 and page 41 of exhibit A), as being required to comply with provincial labour laws, but this appears to be the extent of the information provided within the online rules. This remains a very serious problem.

20. I make this Affidavit for the purpose of assisting the Court in making a decision on the Applicants’ Application for Leave and Judicial Review and for no other or improper purpose.

SWORN BEFORE ME at the City of)
Calgary, in the Province of Alberta, this)
20th day of July, 2014.)

Eva Eaton
Eva Eaton Commissioner of Oaths.

Jacobus Kriek
Jacobus Kriek

Eva Eaton
A Commissioner for Oaths
in and for the Province of Alberta
My Appointment Expires
Dec. 6, 2015

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Respondents

EXHIBIT "A"

This is Exhibit "A" and referred to in the
Affidavit of Jacobus Kriek sworn
before me on this 20th day of July, 2014



Eva Eaton, Commissioner of Oaths

**Eva Eaton
A Commissioner for Oaths
in and for the Province of Alberta
My Appointment Expires**

Dec. 6, 2015

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EXHIBIT "B"

This is Exhibit "B" and referred to in the
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Eva Eaton, Commissioner of Oaths

**Eva Eaton
A Commissioner for Oaths
in and for the Province of Alberta
My Appointment Expires**

Dec. 6, 2015