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ImmQuest

"Qui bene interrogat bene docet" "He who questions well teaches well"

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New Wage Methodology in Labour Market Opinions and Immigration Applications

Cobus (Jacobus) Kriek

(Part One)[1]

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Immigration and Refugee Protection Regulation (IRPR) 203 (3) requires an officer of Human Resources and Skills Development Canada (HRSDC) to assess six factors before issuing a Labour Market Opinion (LMO). Subsection 203 (3)(d) specifically requires that officers determine: "whether the wages offered to

1 *Editor's Note: This article has been split into multiple parts and will run across two issues. This first part provides an in depth discussion of both the old and new wage methodology's used by Labour Market Officers at Services Canada. The second part analyzes the changes, giving an overview of the challenges they have created, and advice in navigating the new system.*

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the foreign national are consistent with the prevailing wage rate for the occupation and whether the working conditions meet generally accepted Canadian standards".

> **Regulation 203 (3) is conjunctive in nature, therefore an officer must assess all 6 factors before making a decision. An exception exists, however, where wages that are too low or labour disputes may be individually used to refuse an LMO. The intent of the law maker is clear in the regulatory impact assessment when the regulations where published in the Government Gazette:**[2] **"*The current Regulations restrict HRDC officers to considering whether the prospective employer has made reasonable efforts to hire a Canadian for the job opening and whether or not the wages and working conditions offered were sufficient to attract and retain a Canadian in the job. While these factors remain relevant considerations, the new Regulations allow HRDC to also consider other elements that might indicate a benefit for Canada and Canadian job-seekers. This recognizes that some of these benefits might offset concerns HRDC would otherwise have with respect to the employers' job search efforts. It should be noted that HRDC is to provide an opinion based on all the expertise and labour market information available to it, rather than being limited in the criteria that it can take into consideration, as in the past.*"

and further down

> ***Regardless of possible economic benefits, work permits will continue to be refused in situations where the HRDC opinion is that the wages and working conditions offered are insufficient to attract and retain Canadian job-seekers. This is to ensure that foreign workers are not improperly used by Canadian employers to drive down the wage structure in the Canadian labour market. In addition, employers will still not be allowed to use foreign workers to act as strike-breakers or otherwise interfere with a labour dispute.***

On June 8 2013, proposed new regulations were published in the Government Gazette.[3] Immigration and Refugee Protection Regulation 203 (3) (d) is now proposed to read as follows:

> ***whether the wages offered to the foreign national are consistent with the prevailing wage rate for the occupation — that rate being determined by the Minister of Human Resources and Skills Development by taking into account the rates that are made publicly available by that Minister and the wages paid to Canadian citizens and permanent residents by the employer making the offer, if that information is provided by the employer on request of that Minister — and whether the working conditions meet generally accepted Canadian standards.***

1. Previous Wage Methodology

Up to April 24, 2012, Labour Market Information (LMI) Officers of Service Canada could use any source of information that they deemed reliable, and employers could typically provide wage research as part of their submissions. In theory, officers could also consider the employer submissions. **Many employers complained and said they had to pay foreign nationals more than Canadian citizens or Canadian permanent residents. In a review of the wages obtained under this old methodology, Service Canada stated that they confirmed the legitimacy of these complaints, which "revealed a number of problems, including irregular wage updates, varying sample sizes, blending of data sources of unequal quality and unnecessary rounding of estimates".**[4]

2. Wage Changes

During 2011 and later in 2012, HRSDC developed a new wage methodology to calculate the "prevailing wage" in LMO requests. The Minister was notified of the new methodology on 27 February 2012 (file number 2011 HR-NHQ 031802).[5]

2 Canada Gazette, Part II of 14 June 2002 Extra Vol 136, No 9, page 187 & 188. Retrieved from http://publications.gc.ca/gazette/archives/p2/2002/2002-06-14-x/pdf/g2-136x9.pdf.

3 Canada Gazette (8 June 2013) "Regulations Amending the Immigration and Refugee Protection Regulations" vol. 147, no. 23. Retrieved from: http://gazette.gc.ca/rp-pr/p1/2013/2013-06-08/html/reg1-eng.html.

4 *Ibid*, note 3, pg. 38

5 Obtained under Access to Information Act, File A-2012-00185/186/187/188/189/JL dated 1 Oct 2012 that can be accessed here: http://www.matrixvisa.com/pages/Rules&Regs/Wage-Methdology-HRSDC-Oct2012.pdf.

On April 25, 2012, Service Canada implemented this new wage methodology to determine the prevailing wage for a specific occupation in a specific part of the country. This was described in a 44-page policy document titled *National Guidelines for Labour Market Information Wage*, dated December 2012.[6]

In the documents listed at footnote 3, Service Canada mentioned the following:

> **Since the new methodology was implemented, some occupations have seen radical changes in wages. For example, financial managers' wages in North Eastern Ontario have increased by 45% and wages of Food Counter Attendants in Athabasca-Grande Prairie decreased by 15%.**[7]

In addition to a complex new set of rules that are more scientific, employers were allowed to pay foreign nationals in Skill Level 0, A or B a rate that's 15 percent lower than the prevailing wage of Canadian citizens and permanent residents in the same NOC, in the same region, with the same working conditions at the employer. In Skill Level C and D, the employer was allowed to pay up to five percent lower than the prevailing wage under the same pre-requisites as mentioned above. If a reduction is motivated (motivated by what?), the wage paid may not be below the minimum wage of the province. The new methodology did not apply to the Seasonable Agricultural Workers Program, the National Occupation Classification C and D Agriculture stream and the Live-in Caregiver Program.

3. Political Reaction

The 15 and 5 percent rules were abolished on May 1, 2013 in what I see as a knee-jerk reaction of the federal government following two specific events. The first was the iGate fiasco when foreign workers were transferred via the intra company transferees (ICT) program from India to work at Royal Bank of Canada.

The ICT "problem" employing Information technology workers at RBC and iGate is actually the result of CIC's ineffective immigration policy. The rules of the ICT Program have no relevance to the enabling legislation under s. 205 (a) of the IRPR, which states that:

> **205. A work permit may be issued under section 200 to a foreign national who intends to perform work that**
>
> **(*a*) would create or maintain significant social, cultural or economic benefits or opportunities for Canadian citizens or permanent residents;**

There is no logical connection between 12 months of experience in a similar position (one of the requirements of the ICT program) and significant economic benefit for Canadian citizens or permanent residents. The ICT policy program places very little emphasis on providing a motivation for significant economic benefit. The foreign nationals (applicants), visa officer and program managers followed the existing (inappropriate) rules of the ICT program. Applicants are not required to provide arguments about significant economic benefit in applications for ICT work permits. It is my understanding that the ICT rules were mirrored from NAFTA and for that reason they make no connection to significant economic benefit.

The other high profile case involved the underground coal miners from China. HRSDC's Temporary Foreign Worker Manual[8] clearly indicates that basic English is required. If the foreign national cannot speak English an ESL program must be established. The Manual stipulates:

> **Section 3.2.6.5.10–Language Requirements**
>
> **This field is required. The employer must indicate the language requirement that is needed for this position.**
>
> **Note: It is important to understand that embassies assess educational and language requirements the same as we do, against the printed NOC requirements. If it is not in line with the NOC, it can be cause for refusal of a work permit, even a LMO is confirmed.**
>
> **For most work permits to be issued, CIC requires the foreign workers to have basic English and/or French language skills. If the employer does not request at minimum basic English and/or French language skills, TFWP Officers are to request a written rational from the employer requesting an exemption to the basic English and/or French language skill requirement.**
>
> **Examples:**
>
> **In the case of restaurants we insist that the foreign nationals are able to speak basic English and/or French. The**

6 *Ibid.*
7 *Ibid.*
8 Section 3.2.6.5.10 of the HRSDC Temporary Foreign Worker Manual, Released under the Access to Information Act File number A-2012-00360/SS.

employers may also provide basic ESL instruction -ask for the cost of this ESL instruction and where it will take place. In other words, ask the employer to explain what their plan is for English and/or French training.

In the case of Large bulk requests (in excess of 50) for example, Maple Leaf Fresh Foods/Springhill Farms Ltd and Palliser's, there is an established ESL program for all foreign workers, and that has been ascertained and provided during assessment with the application and HR plan.[9]

HD Mining followed the current rules in the internal HRSDC guidelines on wages. Although the Unions lost the case in Federal Court, was it fair to Canadians to list Mandarin as a prerequisite as there are English speaking coal miners that are willing to work in Canada? After the media outburst from both of the above employers and the temporary foreign worker program were scapegoated.

4. Participants

This new methodology was developed by the Labour Market Information Intelligence, Trend Analyses and Innovation Unit, that is part of the Labour Market Information Division (LMID). The LMID forms part of the Temporary Foreign Workers and Labour Market Information Directorate (under the leadership of Mr. Andrew Kenyon), which in turn is part of HRSDC's Skills and Employment Branch.

The new methodology was peer reviewed by Benoit Delage (Chief: Labour Market Policy at HRSDC), along with Jean Dumais, Statistician at Statistics Canada, and Lori Stratycuk, Senior Methodologist at Statistics Canada. There are 12 officers countrywide, under the leadership of Ginette Gervais, who collect and analyze information before it is published on www.workingincanada.gc.ca. Two officers are located in Vancouver, two in Manitoba, two in Saskatchewan, one officer in Edmonton, and the remainder are in Gatineau, Quebec at the HRSDC Head Office.

5. Sources of Information

On the website www.workingincanada.gc.ca only the following information is provided to the public about the new wage methodology:

The primary source of wage data is from Statistics Canada's Labour Force Survey (LFS) when sufficient data is available for a particular occupation. The survey is the most inclusive, timely and unbiased source of wage data by occupational group. Sometimes, Labour Force Survey (LFS) data is not available for calculating wages, and other sources are considered. LFS is done using a sample of respondents and data may be suppressed for reasons of confidentiality or data quality.[10]

However the methodology is more complicated and employers are not informed about the inner workings of this new methodology as well as the pitfalls that can be faced when LMO's are requested. According to the new methodology, eight types of sources can be used, including:[11]

- Labour Force Survey (LFS) from Statistics Canada
- Employment Insurance (EI) data
- Provincial Wage Surveys (such as the Alberta Wage Survey or the Saskatchewan Wage Survey)
- Census 2006 data
- Collective Bargaining Agreements
- Information obtained from the government website, www.jobbank.gc.ca.

In the document titled *National Guidelines for Labour Market Information Wage*, dated December 2011, the following sources of wage data are listed and described.[12]

i. Labour Force Survey (LFS)

The LFS is the highest-ranked data source because of its relevance to working Canadians, its accuracy, timeliness in results, accessibility, interpretability and coherence. Since the LFS is under the purview of Statistics Canada, and therefore subject to its rigorous data quality standards, it is to be used as the first source of wage information when calculating estimates for publication.

The LFS provides estimates of employment and unemployment which are among the most timely and important measures of performance of the Canadian economy. The survey

9 *Ibid.*

10 http://www.workingincanada.gc.ca/report_note.do?cid=5483.
11 *Ibid*, note 3.
12 *Ibid*, note 3.

is done on a monthly basis and results are released 13 days after its completion. LFS data are used to produce the well-known unemployment rate as well as other standard labour market indicators such as the employment rate and the participation rate.

The LFS also provides employment estimates by industry, occupation, public and private sector, hours worked, etc., all cross classifiable by a variety of demographic characteristics. Estimates are produced for Canada, the provinces, the territories and a large number of sub-provincial regions. Most importantly, it provides data by ER, the new sub-provincial boundaries for which LMI statistics are released.

LFS data are available by two, three and four-digit National Occupational Classification (NOC), by ER, by province, and for all of Canada. LFS estimates are released on the first Friday of every month. Although the LFS is released on a monthly basis, for the purpose of wage calculation, only annual LFS data should be considered to ensure sample sizes for wage estimates are sufficient.

ii. Employment Insurance (EI) Administrative Data

EI administrative data are collected by HRSDC/Service Canada from EI applicants when applying for benefits. On the application, there is a voluntary question which asks what the person's occupation was, and how much they earned while working in that occupation. The earnings and occupational information are self-reported and are not a requirement to receive EI benefits. The earnings information can be reported as an hourly wage or a non-hourly wage format (e.g., weekly, monthly, annually). These data are available on a quarterly basis.

In the past, EI administrative data have been a popular and productive source for calculating wages, largely due to the vast volume of data available. However, the significant limitation of these data is that they are only available for those who have applied for EI. This means that workers in occupations that traditionally do not go on EI are under-represented in the data.

However, to better align LMI wages with the new guiding principles, it is recommended that these data be consulted only after the LFS has been reviewed. EI administrative data contain significant challenges with respect to representing employed workers and providing a sample that considers all occupations in the labour market.

iii. Provincial Surveys

Provincial surveys can be very beneficial sources of wage information, especially if they are done by a respected, neutral party such as Statistics Canada or a recognized survey consultant. Because these surveys tend to have good quality data and high response rates, and are often more recent than census data, it is recommended that analysts and economists consult these sources when LFS and EI data are not available.

iv. Census

The Census is conducted every five years, compiling information for all Canadians. Like administrative data sources, the key advantage of the Census is the volume of information available. The major disadvantage of the Census is that it is only conducted once every five years, which for wage data usually requires the use of an inflator to bring estimates closer to current price levels.

Furthermore, as of 2011, the mandatory long form of the census was eliminated and replaced with the voluntary National Household Survey, which is now the source for detailed occupation and wage information.

The Census includes every person living in Canada, as well as Canadians who are abroad, be it on a military base, attached to a diplomatic mission, or at sea or in port aboard Canadian-registered merchant vessels. Persons in Canada, including those holding a temporary resident permit, a study permit or a work permit, and their dependents, are also part of the Census.

Since the Census is a very comprehensive survey that is reflective of observed wages, it is to be used as the fourth most important data source for analysts to consult when calculating wages. One major caveat of the Census is that the scope of the estimates from its replacement, the National Household Survey, will be unknown until they are released in 2012. Also, census data are derived variables, based on earnings and hours worked from the reference week in which the data were collected.

v. Job Bank Data

Since Job Bank data contain duplicate postings, wage ranges in lieu of specific wage points, issues with miscoding, and estimates that represent job offers (and unpaid wages), this source is not recommended unless the LFS, EI data, the Census and provincial surveys have been consulted first.

vi. Collective Bargaining Agreements (CBA)

CBAs, as a source of wage information, are only recommended under rare circumstances. These agreements can be reliable data sources because they represent wages that are negotiated in good faith and are agreed to by both employers and workers (market wage). However, CBAs only provide information on earnings and not sample size. Additionally, they only exist for select occupations with select employers – they do not apply to all workers.

vii. Stakeholder Surveys

While surveys commissioned by stakeholders can provide very timely, industry-specific wage data, they are inherently biased. Therefore, it is recommended that analysts refer to these sources only after the LFS, EI administrative data, the Census, provincial surveys, Job Bank data, and CBA data have been consulted.

viii. Consultations with Individual Employers

While stakeholder consultation can be very useful in validating other data sources, it should be noted that employers do not necessarily follow the NOC system, the sample size is usually too small to be suitable for any statistical purposes, and most importantly, employer-submitted data are inherently biased.

These data should be used as a last resort, only when all other data sources have been exhausted. Also, in order to ensure data comparability and accuracy, a consistent survey protocol should be applied and strictly followed.[13]

The LFS was identified as the most inclusive, timely and unbiased source of wage information. The methodology requires that the LFS be used for an economic region (ER) and if it is not available or reliable, other wage sources (listed above) may be used by Service Canada under certain conditions.

6. Comparisons of Different Sources

Service Canada and HRSDC will compare different sources of wage data to determine accuracy of the projected wage. In a document titled *Proposed Standardized Approach to Wage Verification by Labour Market Information Division of Service Canada*, which was disclosed under the Access to Information Act, Service Canada made the following comments with reference to comparisons of wages:[14]

***Comparing wage value for an occupation by geography level and over time*:**

1. When deciding on a data source to use for a specific economic region, a benchmarking exercise against other data sources should be conducted with available data sources to evaluate variability of wages for an occupation. The new wage methodology relies primarily on the use of the LFS data at the four-digit NOC at different geographic levels (Annex B). However, alternative data sources could be used based on data availability and quality.

2. Compare the median wage to the average wage to establish dispersion of wage within an occupation.

3. Analysing and verifying how wages for each occupation by Economic Region/Province change over time (using historical data), compare with other available data sources to evaluate variability of wages for an occupation. If for one data source the observed wage difference is significantly larger than the percentage differences for all occupations for that data source, a more in-depth analysis must be performed to provide a justification.

4. For EI data, compare the wages using two-year averages with the most recent data to evaluate impact on average and median wages for each occupation at the four-digit level.

The use of two-year averages might improve the reliability of estimates for detailed occupations in small geographic areas.

5. Compare wages for an occupation in a given economic region with the wages for this occupation at the provincial level – evaluate the difference in wages if two sources of data are used at the provincial and sub-provincial levels.

13 *Ibid*, note 3.

14 *Ibid*, note 3.

The acceptable difference level should be less than I0% and a justification must be provided otherwise. Please note that a provincial wage must be determined.

Comparing the wages with neighbouring economic regions:

6. Compare the median wage value for an occupation group (four-digit NOC Unit) with the median wage for its major occupation group (three-digit NOC):

7. Compare wages at the four-digit and three-digit level by occupations within a data source, and compare with other available data sources to evaluate variability of wages for an occupation. If the number of observations is insufficient at the unit group level, then the wage for the intermediate occupational group or the data for a higher geographical area should be used.

***Verifying for high percentage of self-employed and unionised workers*:**

8. For occupations where there is a high percentage of self-employed people, the LFS and EI data may not be the most accurate source of wage information. Other data sources should be considered (e.g. provincial surveys, the Census, etc.). One needs to decide what thresholds should be used in determining occupations that have a high proportion of self-employed, and therefore which data source should be used.

9. For occupations where there is a high percentage of unionised workers, Collective Bargaining Agreements may represent a more reliable source of data than EI or the LFS. In this case, the wage gap between the lowest and highest levels of pay will be published. One needs to decide what thresholds should be used in determining occupations that have a high proportion of unionised workers, and therefore which data source should be used.[15]

The important message is that representatives can conduct their own wage research and comparisons using the same sources of wage information. If the wages on www.workingincanada.gc.ca are not believed to be accurate, these comparisons could be helpful to demonstrate that a specific wage on the government's website is not representative of the actual mean wage. To use the expertise of a statistician may be wise.

15 *Ibid*, note 3.

7. Rules about using Wage Sources

The details of the new methodology and its associated rules can be viewed at the link at footnote 3. What follows is a rough approximation of the rules employed:

a. Comments about data from an Economic Region (ER)

Wage data for an ER are only published if LFS wage information for an ER is based on at least 30 observations and if the Census 2006 data are based on at least 25 observations. The coefficient of variation (CV) must not be higher than 33 percent.[16] It is also required that there may not be an erratic jump in wage figures between years as an indication of reliability of information. If LFS data are not available at an ER level, the LFS data for a province can be used as proxy.

If LFS data are not available in NOC level 4 on a provincial level, the LFS data on NOC level 3 can be used if the CV is less than 33%. If LFS data are unavailable or unreliable for an ER, the Alberta (AB) and Saskatchewan (SK) Wage Surveys can be used if the CV was classified as "highly reliable" (CV with 6% or less) or its reliability was classified as "good" (CV reliability of 6,01% and 15%).

In the Atlantic region, 81 occupations have a high percentage of unionised workers (50% or more). As a result, Collective Bargaining Agreements was the category used as the primary source of wage information for these 81 occupations.

b. Comments about data from a Provincial Region

LFS data can be used if available and the reliability is acceptable. If LFS data are not available, then provincial wage surveys from AB and SK may be used if the CV reliability is "high" or "good", as described above. If the data are not reliable, EI data may also be used if at least 30 observations are available.

If EI information is not available or reliable, Census 2006 wages can also be used for occupations that have a high proportion of people who are self-employed (family physicians, dentists, veterinarians, optometrists, chiropractors, pharmacists, denturists, lawyers, conductors, composers and arrangers). If a provincial wage could not be published, then the wage for that particular occupation would not be published at any ER.

16 In probability theory and statistics, the coefficient of variation (CV) is a normalised measure of dispersion of a probability distribution. It is also known as unitised risk or the variation coefficient. The absolute value of the CV is sometimes known as relative standard deviation (RSD), which is expressed as a percentage.

c. Comments about data on a National Level

In most cases, LFS data were used to determine the wages on a national level as most of the data were available and reliable (low CV, large sample size). In cases where LFS data and EI data were not reliable or based on samples sizes that were too small, Census 2006 data were used.

8. Fundamental Principles

The new wage methodology adheres to several principles:

a. Relevance: The statistical information should meet the needs of its users.

b. Accuracy: Statistical information should correctly describe what it was designed to measure.

c. Timeliness: Statistical information should be made available within a reasonable time period in order to maintain its relevance.

d. Accessibility: Statistical information should be easily attainable by users.

e. Interpretability: Statistical information should have transparent underlying concepts, variables and classifications.

f. Coherence: Statistical information should be able to be brought into a broad analytical framework that is applicable and relevant over time.

The publication, *Statistics Canada Quality Guidelines 2009*[17] was also considered and "heavily used" in the development of the new wage methodology.[18]

17 Statistics Canada (2009). Statistics Canada Quality Guidelines, Fifth Edition, Catalogue no 12-539-X.

18 Editor's Note: As provided at the beginning of this paper, the second part of this article will be published in next month's issue of IMMQuest. It will provide an overview of the challenges created by the changes and offer advice in navigating the new wage methodology.

Case Tracker: Cases You Should Know!

Provincial Nominee Program

Case: Rong v. Canada (Minister of Citizenship & Immigration)
Decider: Danièle Trembley-Lamer J.
Court: Federal Court
Citation: 2013 FC 364
Judgment: April 11, 2013
Docket: IMM-8323-12

[27] The officer's focus on the information provided by Mr. Han to the exclusion of the documentary evidence suggests a closed mind with disregard for the documentary evidence and an absence of any true weighing of the positive and negative evidence (*Paulino v Canada (Citizenship and Immigration)*, 2010 FC 542 (CanLII), 2010 FC 542 at paras 59-62).

[28] Furthermore, in my opinion the officer erred in fact by stating that the applicant did not address the inconsistency between her and Mr. Han's answers regarding the number of staff employed by the company. The applicant did indeed address this inconsistency. The officer ignored the fact that in the notarized letter from company management that the applicant submitted as part of her response to the fairness letter, the management explained that the Plant had more than 100 employees, but because the Plant had suffered a heavy loss in production in recent years, most of the employees had left the Plant on holiday and only a small number of the employees had stayed in the Plant to process incoming materials.

[29] I am also perplexed by the officer's statement that "under these circumstances verifying authorities may have been co-opted to provide false verifications". As noted by the applicant, there was no evidence before the officer that the applicant may have co-opted the authorities who verified her work experience and the accuracy of the information she gave RHO over the telephone on March 26, 2012.

[31] Moreover, it was unreasonable for the officer to not contact the representatives of the company on the basis that the letters

signed by the company representatives were provided after the applicant received the fairness letter and could not therefore be considered reliable sources of impartial information. This reason does not make sense to me, given that the goal of the fairness letter was to allow the applicant an opportunity to address certain concerns and documentation issued by the applicant's stated employer was the strongest and perhaps only way to address those concerns.

Federal Skilled Worker

Case: Hamza v. Canada (Minister of Citizenship & Immigration)
Decider: Marie-Josée Bédard J.
Court: Federal Court
Citation: 2013 FC 264
Judgment: March 12, 2013
Docket: IMM-3693-12

[41] In *Kamchibekov*, above, Justice Pinard found that there was no duty on the visa officer to offer the applicant an opportunity to disabuse him of his concerns because the employment letter mirrored the duties set out in the NOC. Justice Pinard was of the view that the evidence provided by the applicant was ambiguous and insufficient. One must keep in mind that every case is fact-driven. In *Kamchibekov*, the applicant had applied to be accepted in the category of Restaurant and Food Service Manager. The NOC for that position provided very generic duties and the letter of employment mirrored those generic duties. Furthermore, there was no indication in the officer's letter that his concerns were related to the veracity of the letter and the decision was limited to stating that the applicant had not provided satisfactory evidence of his work experience. In this case, the Officer was not satisfied with the employment letter because she found it to be self-serving and the job duties described mirrored the NOC description.

[42] This case can also be distinguished from *Obeta*, above. In that case, the Court concluded that there was no absolute obligation on the officer to allow the applicant an opportunity to respond to credibility concerns that he had in a context where the application was, on its face, void of credibility because the employment letter was likely fabricated. This is not the case here. It cannot be said that the employment letter is, on its face, fabricated or otherwise void of any credibility.

[43] Therefore, for the reasons set out above, I am of the view that the Officer had a duty to provide the applicant with an opportunity to address her concerns and that, by failing to do so, she breached the applicant's right to procedural fairness.

Case: Yuan v. Canada (Minister of Citizenship & Immigration)
Decider: James W. O'Reilly J.
Court: Federal Court
Citation: 2013 FC 230
Judgment: March 12, 2013
Docket: IMM-4073-12

[15] While the site visits yielded some contradictory evidence, they also generated independent evidence confirming that Mr Yuan had once worked at the Globelink restaurant and currently worked at the Shi Yin Shi Shi restaurant. In my view, the officer had an obligation to consider the corroborative evidence, including Mr Yuan's explanations about his work history and the documentary evidence confirming his employment record. These documents included government records and could have alleviated all of the officer's concerns. The officer's refusal to consider them or to confirm their contents was based on an assumption that Mr Yuan had obtained false documents by orchestrating, on short notice, an elaborate fraud involving co-workers, supervisors, employers, human resources personnel, and government functionaries.

Case: Abbasi v. Canada (Minister of Citizenship & Immigration)
Decider: Judith A. Snider J.
Court: Federal Court
Citation: 2013 FC 278
Judgment: March 18, 2013
Docket: IMM-4320-12

[7] The Respondent suggests that I look to the record and compare the employer's letter with the duties of NOC 0631. On the basis of the guidance of the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 (CanLII), 2011 SCC 62, [2011] 3 SCR 708 [*NL Nurses*], the Respondent argues I can supplement the reasons with such a review of the record. Frankly, in this case, if I were to compare the job duties in the employer's letter with those set out in NOC 0631, I would see a great number of similarities.

[8] In my view, the principles espoused in *NL Nurses* do not extend to rectifying a failure of the Officer to carry out his duty.

[9] The Officer's reasons did not need to be extensive. However, to be reasonable, the reasons must demonstrate that the Officer had performed his duty. In this regard, I note the words of Justice Mosley in *Gulati v Canada (Minister of Citizenship and Immigration)*, 2010 FC 451 (CanLII), 2010 FC 451 at paras 41-42, 89 Imm LR (3d) 238:

It is impossible to assess the officer's conclusion, that the applicant had not performed a substantial number of the main duties of NOC 6212, without knowing which duties the officer thought had not been performed and why.

According to *Dunsmuir*, above, at paragraph 47, the transparency and intelligibility of a decision are important elements of a reasonableness analysis. I conclude that their absence in the present decision render it unreasonable.

Case: Tabingo v. Canada (Minister of Citizenship and Immigration)
Decider: Donald J. Rennie J.
Court: Federal Court
Citation: 2013 FC 377
Judgment: April 18, 2013
Docket: IMM-5635-12

[37] My conclusion on the issue of statutory interpretation is that section 87.4 terminates the applications at issue by operation of law. The presumptions put forward by the applicants do not apply and there is no requirement for individualized adjudication. Therefore, the application for *mandamus* must fail unless the legislation is unconstitutional or contrary to the *Bill of Rights*.

[44] While I accept that the applicants have incurred various expenses in making their FSW applications this is not equivalent to a deprivation of property. Rather, the applicants have freely chosen to apply to come to Canada and to incur the related expense. Their FSW application did not provide any right to, or recognizable legal interest in, the potential future economic opportunities that might come their way if they were successful. At best, the applicants possessed a mere chance to gain access to economic opportunities in Canada. No economic right had vested and any opportunity remained prospective, contingent and speculative. In sum, a pending FSW application does not constitute property within the meaning of subsection 1(a) of the *Bill of Rights*. Even if it was considered property, the *Bill of Rights* does not prevent the expropriation of property without compensation by the passage of unambiguous legislation.

[52] As was the case in *Imperial Tobacco*, the applicants have argued for an understanding of unwritten constitutional principles that would expand on the rights specifically provided for in the written Constitution. In particular, the applicants have argued that, embedded in the rule of law, there is a broader equality right than that provided for in section 15 of the Charter. Acceptance of this argument would render the written constitutional rights redundant. The recognition of unwritten constitutional principles is not an invitation to dispense with the written text of the Constitution: *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 SCR 217, para 53, and, while the parameters of the unwritten principles of the Constitution remain undefined, they must be balanced against the concept of Parliamentary sovereignty which is also a component of the rule of law: Warren J Newman, *The Principles of the Rule of Law and Parliamentary Sovereignty in Constitutional Theory and Litigation* (2005) 16 NJCL 175.

[59] As I have previously explained, if any applicants believe their applications were improperly identified as terminated and can point to a positive selection decision before March 29, 2012, they may apply to the Court for an order of *mandamus*. The rule of law mandates that all administrative action must have its source in law. If CIC improperly identifies an application as terminated and refuses to process it, that action would be without a source in law and therefore amenable to the Court's jurisdiction. Additionally, this Court is not prevented from scrutinizing the legislation to ensure it is compliant with the Constitution and the *Bill of Rights*. Section 87.4 does not bar access to the courts.

[60] Finally, Crown immunity clauses, such as that contained in subsection 87.4(5), are not unconstitutional unless the statute itself is *ultra vires* on division of powers grounds: *Alberta v Kingsway General Insurance Company*, 2005 ABQB 662 (CanLII), 2005 ABQB 662, para 67. In *Kingsway General Insurance Company*, the legislature of Alberta passed legislation to immunize the government from liability resulting from insurance reforms, targeting a specific action which was pending before the Court of Queen's Bench. The Court determined that

the legislation was within the competence of the legislature and did not violate the rule of law even though it barred a specific, pending action.

[76] This limitation on the application of the Charter is not a recent development. Even prior to *Slahi*, the Federal Court and the Federal Court of Appeal had interpreted *Singh* as barring Charter claims from non-citizens outside Canada: *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, reflex, [1990] 2 FC 534 (CA) (aff'd on other grounds 1992 CanLII 116 (SCC), [1992] 1 SCR 236); *Ruparel v Canada (Minister of Employment and Immigration)*, reflex, [1990] 3 FC 615; *Lee v Canada (Minister of Citizenship and Immigration)*, [1997] FCJ No 242; *Deol v Canada (Minister of Citizenship and Immigration)*, [2001] FCJ No 1034 (aff'd on other grounds 2002 FCA 271 (CanLII), 2002 FCA 271).

[77] The only exception counsel identified involved an applicant claiming the right to citizenship, rather than the privilege of immigration: *Crease v Canada*, 1994 CanLII 3488 (FC), [1994] 3 FC 480. In that case the applicant had applied for citizenship from within Canada and had a Canadian mother.

[78] The respondent does not dispute either the applicants' standing or the application of the Charter. The parties appear to coalesce around the proposition that the FSW applications establish a sufficient nexus with Canada to extend the reach of sections 7 and 15. The jurisprudence does not support this concession. What is in issue involves the repercussions abroad of domestic legislation. In this case, there is no question of the extra-territorial application of the Charter as an adjunct of the actions of Canadian officials abroad, nor is there, as I conclude on the evidence, non-compliant administration of the legislation. The issue framed by this case is whether the protections provided by sections 7 and 15 reach foreign nationals, when residing outside of or beyond Canadian territory.

[79] Despite my reservations as to the correctness of the concession, given that there is no *lis* between the parties on the issue, I will not determine the point. Charter jurisprudence should develop incrementally through the interface of opposing positions and interests. In any event, it is unnecessary to determine the point, as I find that the claims of infringement fail on their merits.

[102] The loss of the expectation or hope is understandably distressing. I also accept that, given the passage of time, the effect on the points awarded on the basis of age and the shift in occupational priorities reflected in successive Ministerial Instructions, the opportunity of re-applying has evaporated. Nevertheless, I find that the interests protected by section 7 are not engaged in these circumstances. In my view, the applicants have experienced the ordinary stresses and anxieties that accompany an application to immigrate. All section 87.4 did was terminate the opportunity. Therefore, the section 7 argument fails at the threshold question.

[134] Having reviewed this evidence, I conclude that the applicants have not demonstrated that section 87.4 has had a disproportionate impact on the basis of national origin. The evidence is that CIC transferred files from high demand posts to lower demand posts in order to facilitate timelier processing. Additionally, the high clearance rate at the Buffalo post does not represent a bias towards applicants from the United States, as only 7% of the applicants at that office were in fact Americans. Rather, the Buffalo office managed time-sensitive and priority applications from individuals already lawfully in Canada. The applicants submit that CIC discriminated against individuals from Asia, the Middle East and Africa; however, 69% of the applications processed in Buffalo, which had one of the highest clearance rates, were from citizens of those regions.

[137] Section 87.4 must be considered in light of the wider immigration context. Visa offices do not only process FSW applications, but also a wide-range of visa applications, which have different priorities. Certain visa offices face unique challenges, such as weaker infrastructure, higher instances of fraud, or an influx of refugee claims. As the historical evidence consistently indicated, globally viewed, economic immigrants from Asia, the Middle East and Africa become Canadian permanent residents in large numbers. The evidence does not support the claim that section 87.4 is discriminatory.

Justification for Infringement

[138] As I have found that no section 7 interest is triggered by the termination of the FSW files, and that section 87.4, in its purpose or effect, is not discriminatory within the meaning of section 15, I will not address section 1 of the Charter.

[140] The applicants have argued that, even before section 87.4 came into force, the respondent had already breached their rights to timely processing of their applications and that there must be some remedy for this past breach. This argument fails as *mandamus* cannot remedy a past breach when there is no present duty.

[144] The applicants submit that if the underlying application had been terminated, then the Minister could not invoke section 25.2. Those individuals had already been issued permanent resident visas; some may have already landed in Canada. I see no conflict between the Minister's decision under section 25.2 and his position in the present applications. The nature of the discretion conferred under section 25.2 is very broad, and, in any event, no request has been made to the Minister nor is there a refusal. The argument is thus premature.

[146] There is no indication in the record that interest was earned or that the fees exceeded the costs associated with the applications. While the applications were not ultimately processed to conclusion, CIC still required resources to initially accept and manage the applications. In any event, even if there was an evidentiary foundation to the argument, any entitlement to interest was extinguished by section 87.4. For this reason, the applicants' unjust enrichment argument must also fail: *Authorson.*

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