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ImmQuest

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

INSIDE

Focus—Temporary Foreign Worker Program

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The Structuring and Restructuring of the TFWP: An Impediment or Imperative for the Canadian Economy?

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accusation which flies directly in the face of the mandate and primary objective of the TFWP. Briefly speaking, the TFWP is aimed at enabling Canadian employers to hire foreign workers on a temporary basis to fill immediate skills and labour shortages when Canadians and permanent residents are not available. A Canadian employer must apply for a Labour Market Opinion ("LMO") through ESDC to obtain government approval to hire temporary foreign workers. The story garnered a significant degree of public outcry and even made international news. It culminated with RBC issuing a public apology.[3]

In an instant, the TFWP was back in the spotlight and was once again the subject of heated debate and controversy regarding the program's integrity. It was in this context that the Federal Government swiftly made the above noted announcement on 29 April 2013[4] of reform initiatives. Key changes included the elimination of the wage flexibility afforded to employers (*i.e.*, the ability to pay foreign workers 15% less than the prevailing wage in certain circumstances) and the temporary suspension of the Accelerated LMO process (where LMOs were being processed within 5-10 business days, rather than 3 months, for employers who met certain criteria). On 31 July 2013, additional major changes were formally implemented, including a processing fee of $275 per LMO application (which previously cost nothing), the restriction to English/French as job language requirements, and an increase in the length and breadth of an employer's advertising requirements prior to offering the job to a foreign worker. Furthermore, the application form introduced new questions intended to safeguard against outsourcing. There are still ongoing discussions regarding the program and it is likely that further amendments will grant the Federal Government greater power to revoke work permits and LMOs, as well as requiring that employers applying for an LMO demonstrate a concrete plan to transition to a Canadian workforce over time.

For Canadian employers who have utilized the program, this scenario seems all too familiar. Indeed, it was just two years ago, in April 2011, that sweeping changes to the program were introduced in an effort to – you guessed it – enhance program integrity. The changes focused on compliance with the program rules and provincial and federal employment/labour laws, including introducing compliance audits and penalties for findings of non-compliance.[5]

Again, Canadian employers both large and small must become reacquainted with the ever-changing process of hiring a foreign worker for their company. The most recent changes have been received with mix reviews. While the overarching intention behind these changes is to ensure that the TFWP is used as intended (i.e. to fill certain labour shortages in Canada on a temporary basis only after testing the Canadian labour market itself for available workers), many question remain regarding whether these objectives will be met through the new rules.

On one hand, some critics believe that more should be done to prevent abuses to the TFWP. For instance, NDP immigration, citizenship and multiculturalism critic Jinny Sims indicated that while the changes put more onus on the employer, what was missing was dialogue on enforcement measures.[6]

On the other hand, many other critics believe that the changes represent a blanket solution to a specific problem, which will

3 "Temporary foreign worker impacts felt far beyond RBC", published on 12 April 2013, CBC online at: http://www.cbc.ca/news/canada/british-columbia/temporary-foreign-worker-impacts-felt-far-beyond-rbc-1.1342395.

4 "Harper Government announces reforms to the Temporary Foreign Worker Program–Ensuring Canadians have first chance at available jobs", published on 29 April 2013, Canada News Centre online at: http://news.gc.ca/web/article-eng.do?mthd=advSrch&crtr.page=1&nid=736729&crtr.kw=temporary%2Bforeign%2Bworker%2Bprogram.

5 "Employer Compliance: Requirements for the Temporary Foreign Worker Program", undated, Employment and Social Development Canada site, online at: http://www.hrsdc.gc.ca/eng/jobs/foreign_workers/employer_compliance.shtml.

6 "Temporary Foreign Workers to cost $275 each", Susana Mas, published on 7 August 2013, CBC news online at: http://www.cbc.ca/news/politics/temporary-foreign-workers-to-cost-employers-275-each-1.1359845.

ultimately hurt small businesses throughout Canada.[7] Indeed, while the processing fee of $275, the extra advertising requirements and the new forms make it a longer, more meticulous and complicated process for all users of the TFWP, the larger companies such as RBC generally have enough resources and manpower to continue as planned, despite the added hurdles and costs. For a small business however, the effects could be crippling. For these smaller businesses who may have very few staff members and a particular need for a foreign worker, it suddenly becomes very costly for them to seek global talent. In addition to the cost factor is the added time and resources now required to implement and oversee the increased advertisement requirements, navigate the new forms and, soon, to devise a concrete plan to transition into a purely Canadian workforce. The new changes could very well serve as a deterrent for small businesses to utilize the program at all. In trying to attract only those Canadian employers who are serious and genuine about seeking global talent to fulfill shortages in the Canadian labour market, many argue that the changes serve to deter those who are serious, genuine yet unable due to financial, resource and/or time constraints – perhaps the very reason they are seeking additional staff in the first place.

This begs the question of whether and how Canadian businesses can remain competitive in a global economy where global talent is highly sought after, while observing the mandate of the TFWP to protect the Canadian labour market. This question becomes critical when increased time and costs compromise the efficiency of the program and the ability for Canadian businesses to access the program and to fill key positions quickly. There is no doubt that there are many competing interests at stake, making for a very difficult and sensitive balancing act. This is the very balancing act the Federal Government has grappled with for as many years as the TFWP has been in existence, as exemplified by the numerous changes to the program since its inception which have constantly shifted its parameters. While it is a safe assumption that it will still be under construction for the foreseeable future, one must consider whether the continuous structuring and restructuring of the program is an imperative or impediment to its objectives, the Canadian labour market, and the Canadian economy more generally.

7 See, for example, the statement issued by the Canadian Chamber of Commerce: "Temporary Foreign Worker Changes Penalize Canadian Businesses", Emilie Potvin, published on 29 April 2013, Canadian Chamber of Commerce – News Releases online at: http://www.chamber.ca/media/news-releases/130429-temporary-foreign-worker-changes-penalize-canadian-businesses/. Also, see, for example, the 2013 Proposed Resolution by the Chamber of Commerce, spearheaded by the Red Deer Chamber of Commerce, outlining what they believe are negative changes to the TFWP: "Reverse Negative Changes to the Temporary Foreign Worker Program" submitted by the Red Deer Chamber of Commerce, Co-Sponsored by the Calgary Chamber of Commerce, the Grande Prairie Chamber of Commerce, the Spruce Grove Chamber of Commerce and the B.C. Chamber of Commerce, undated, Canadian Chamber of Commerce online at: http://www.chamber.ca/advocacy/policy-resolutions/2013-proposed-resolutions/Reverse_Negative_Changes_to_the_Temporary_Foreign_Worker_Program.pdf.

New Wage Methodology in Labour Market Opinions and Immigration Applications

Cobus (Jacobus) Kriek

(Part Two)[1]

9. Challenges & Advice

The "new" wage methodology is a significant improvement on the older system. However there are still many problems being faced by employers and representatives in making LMO requests. I have outlined below 14 separate issues created by these changes. These problems show that the principles of relevance and accuracy are not truly being strived for when rules are developed.

a. Double Standard for Commissions and Overtime

One of the many similarities between the old and the new wage methodology is that commissions would not be accepted by Employment and Social Development Canada when an employer provides an estimate of the wage being paid to a foreign national. This is especially problematic in the case of positions that are related to sales and/or marketing. This creates a double standard in wages for foreign nationals in comparison to Canadians where foreign nationals must be paid a significantly greater amount to match Canadian wages.

The above problem has been created because many of the sources of wage information used in the new wage methodology include commissions. This is clear from an examination of the Labour

1 *Editor's Note: This piece represents the second part of Mr. Kriek's article on the new wage methodology. The first part, which ran in the September 2013 issue of IMMQuest, provided an in depth discussion of both the old and new wage methodologies used by Labour Market Officers at Employment Skills Development Canada (formerly HRSDC/Service Canada). This second part will now analyze these changes created with the introduction of the new wage methodology, giving an overview of the challenges they have created and advice in navigating the new system.*

Force Survey (LFS), which is administered to Canadians by Statistics Canada and includes the following questions about income:

> Now I'd like to ask a few short questions about [name]'s earnings from his/her [new] job [at name of employer].
>
> - Is he/she paid by the hour?
> - Does he/she usually receive tips or commissions?
> - [Including tips and commissions,] what is his/her hourly rate of pay?
> - What is the easiest way for you to tell us his/her wage or salary, [including tips and commissions,] before taxes and other deductions?
> - Would it be yearly, monthly, weekly, or on some other basis?
> - What is his/her weekly wage or salary, before taxes and other deductions?
> - [Including tips and commissions,] what is his/her bi-weekly wage or salary, before taxes and other deductions?
> - [Including tips and commissions,] what is his/her semi-monthly wage or salary, before taxes and other deductions?
> - [Including tips and commissions,] what is his/her monthly wage or salary, before taxes and other deductions?
> - Including tips and commissions,] what is his/her yearly wage or salary, before taxes and other deductions?[2]

In addition, the following questions are asked about the number of hours worked:

- Excluding overtime, how many paid hours [does/did] ... usually work per week at this job?
- Otherwise, How many hours [does/did] ... usually work per week at this [business/family business]?
- Last week, how many hours did ... actually work at this [job/business/family business]?[3]

Finally, in the Employment Insurance (EI) process, earnings are defined as follows:

> Earnings are any amount paid or payable that is related to or originated from employment, such as:
>
> - Wages or salary and commissions.
> - Monetary employment benefits, such as vacation pay, severance pay, wages in lieu of notice, retirement pension, statutory holidays, bonuses, etc. All other employment benefits, monetary or otherwise, such as housing, meals, insurance coverage, etc.
>
> You are responsible for reporting any income paid or payable to you, as well as any benefits, cash or other, received from an employer or income that you earn from any self-employment activities.[4]

Employment and Social Development Canada then uses information gathered from the LFS in making their wage calculations. Clearly, then, wage information developed by Employment and Social Development Canada includes commission. However, when an employer makes an offer to a foreign national, this may not include commission and thus may be under the mean wage. This is a double standard and is substantially unfair to employers.

In cases where wages would typically include commission, copies of the abovementioned definitions of wages can be provided. It is recommended that arguments about the above-noted oversight in the new wage methodology with regard to commission be provided. Until such time as the rules of Employment and Social Development Canada pertaining to the use of commissions are changed, representatives must be prepared to request a judicial review in Federal Court.

It would also be very important to request detailed reasons in the case of a refusal within the conclusion of the submission letter, as Employment and Social Development Canada officers do not routinely provide reasons for refusals. In the case of *Rolfe v. Canada,*[5] the Honourable Justice Gibson mentioned the following: "In essence, the applicant was presented with a conclusion without a meaningful explanation."

2 Statcan website accessed on 14 March 2013 http://www.statcan.gc.ca/pub/71-543-g/2012001/appendix-appendice2-eng.htm.
3 *Ibid.*
4 Source accessed on 7 November 2012: http://www.servicecanada.gc.ca/eng/ei/information/earnings_info.shtml.
5 *Rolfe v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1514 (CanLII) IMM-1990-05.

Employment and Social Development Canada's in-house rules specify that commissions will not be accepted in the calculation of the mean wage that must be paid to a foreign national. This rule is not intelligent, transparent or justifiable and is therefore unreasonable. Requesting detailed reasons would create a very difficult position for the deciding officer. Representatives are advised not to accept conclusions for a refusal for including commissions when detailed reasons were requested at the outset.

In addition to commission, many sources of wage information such as the LFS and the Census also include wages earned during overtime (beyond the standard numbers of hours worked in a provincial labour code which could be 40 or 44 hours). Overtime, therefore, increases the prevailing wage. However, when the wage for a foreign worker is determined it is based on a standard work week of 40 or 44 hours.

It would be advisable to provide copies of the document, *National Guidelines for Labour Market Information Wage*, as well as copies of the relevant pages of the different definitions of wage from each wage source (LFS, EI Wage, etc.) so that a Federal Court judge can clearly see the lack of reason shown by the officer when a judicial review is requested.

b. Using National Wage for Economic Region (ER) Wage

The rules of the new methodology require that under certain circumstances, a provincial or even a national wage (as listed on the website www.workingincanada.gc.ca) can be used as an approximation of a wage in an ER. The problematic nature of this rule can best be described with the following practical example that took place in 2011 and 2012:

NOC 3219 covers seven occupations: prosthetic technicians, prosthetic technologists, orthotic technicians, orthotic technologists, occularists, dietary technicians and pharmacy technicians.

For the Province of Manitoba or the City of Winnipeg on the website www.workingincanada.gc.ca there are no wages listed for NOC 3219. Therefore (according to the rules of the new wage methodology), the national wage for NOC 3219 must be used, which at the time of writing was CAD23.41. However, in the Winnipeg Region, there is a union that represents orthotic technicians. The CBA of the union identify five wage levels, starting at CAD19.11 and ending at CAD23.84.

All persons entering the occupation as unionized employers in the Winnipeg Region (with the same CBA) must go through four years of supervised work experience to become registered orthotic technicians with the Canadian Board for Certification of Prosthetists and Orthotists (CBCPO), which is one of Canada's rare national regulators. Therefore, a foreign national or Canadian Citizen or Permanent Resident must undergo these four years of supervised work.

If a Canadian is in their fifth year of working in the industry (let's say at a family practice in Canada where they completed their supervised four years), the wage that would be set by the CBA of the local union would be CAD19.11. If a local employer who does not have a unionized workplace were to follow the same wage rules as specified within the CBA of the local union when sponsoring a foreign national (as the CBA essentially sets the benchmark for the industry in Winnipeg), then Employment and Social Development Canada would not accept the wage set by the local CBA because it is lower than the national wage for NOC 3219.

To make matters worse, up to 24 April 2012, Employment and Social Development Canada used the wages set by the CBA from the local union to determine the wage that had to be paid to foreign nationals at non-unionized workplaces for NOC 3219 in the Winnipeg Region. However, based on the new wage methodology, from 25 April 2012, the national wage of NOC 3219 had to be paid to foreign nationals entering the occupation. The "new" methodology thus now discriminates against Canadians who enter the field of orthotics for formal supervised work experience for the first time, at non-unionized workplaces. These individuals continue to start at a wage of CAD19.11 compared to foreign nationals, who (at the time of writing) must start at a wage of CAD23.41 per hour.

A Manitoba employer was recently exposed to this strange phenomenon. They had previously received a LMO for Prosthetic technician in 2012 for CAD19.11. When the employer reapplied a few months later, the new wage methodology was in effect and suddenly the wage jumped to CAD23.74 per hour for the same NOC, same city, same year, etc. The only change was in methodology and that was a "sufficient" reason to increase the wage demanded by Employment and Social Development Canada. In terms of the Federal Court decision of *Siddiqui v. Minister of Citizenship and Immigration*,[6] it was held that if a tribunal reviews the same documents on the

6 *Siddiqui v. Minister of Citizenship and Immigration*, 2007 CarswellNat 21, 2007 F.C.J. No. 9.

same issue and reaches a different conclusion, reasons should be provided. Obviously, the reasons must be intelligent and fair. If the above noted employer relied on the *Siddiqui* case they could have provided additional support to requesting judicial review of the decision by Employment and Social Development Canada.

Representatives should be conducting in-depth wage research before submissions are made, especially in situations where the wages that are listed on workingincanada.gc.ca differ dramatically from what employers are paying to their Canadian employees and what employers are prepared to pay foreign nationals. Representatives should also be prepared to request Employment and Social Development Canada to review the wages on the website www.workingincanada.gc.ca, if it is found not to be representative of actual wages being paid to Canadians and too many regional disparities still exist.

c. Exact Date of Mean Wage Determination

According to the new wage methodology, the wages would be reviewed at the beginning of every calendar year. According to the rules of Employment and Social Development Canada, recruitment efforts must be conducted within the preceding 90 days of the request for the LMO – i.e. the first day of the minimum 14 days of recruitment must be within the preceding three months (assuming this to be 90 days). This creates a potential problem. For example: An employer conducts wage research on 1 October 2012 and determines that the wage for a specific occupation in Moose Jaw, Saskatchewan, is CAD20 per hour. He/she commences this research within 60 days of recruitment, which ends on 30 November 2012. The employer might use December 2012 to review all resumes and conduct interviews. On 20 December, the employer or his representative submits the LMO request. Then Employment and Social Development Canada can take 12 weeks to make a decision. By 20 March 2013, the officer could make a decision and refuse the LMO as the wage on the website www.workingincanada.gc.ca could have been updated in January 2013 to CAD21 per hour. This exact sequence of events has resulted in many LMOs being refused in the previous wage methodology. Therefore, it is important that printouts be made of the website www.workingincanada.gc.ca pertaining to the wage on the date advertising was commenced. Ensure that the printer clearly prints the day it was printed. Sometime screen shots (in Apple use Shift – Command-3 and in PC it is Print-Screen command) will also provide the day and time the wage data was printed. In this way, it may be possible to "lock in" the wage and an argument can be won in case of a dispute about wage accuracy that is affected by time.

If there are any differences, it would be wise to address these in the submission. Employment and Social Development Canada has indicated at the Canadian Bar Association Annual Immigration law summit of 2012 that the wage during the advertising period would be recognized. It is crucial that representatives keep record of these wages during the advertising period.

d. Excessive Employment Requirements

If the employer demands more experience or higher education levels than those mentioned under the heading "Employment Requirements", under the NOC system,[7] then it could be argued by Employment and Social Development Canada that a higher wage is required than the mean wage listed on the website. Therefore, care must be taken to compare experience and educational requirements with the NOC. If there is no logical link, a LMO refusal based on "excessive employment requirements" may be justified.

e. Change of NOC

Employment and Social Development Canada officers often change NOCs without requesting additional information from the employer or immigration representative. Here are a few examples of NOC changes in my experience that have been made by Employment and Social Development Canada without consulting the authorized representative:

Overhead Crane Technicians in the NOC of a millwright (NOC 7311) are often changed to Heavy Duty Mechanic (NOC 7312) as officers believe all cranes are similar (*i.e.*, "a crane is a crane"). However, cranes are divided into various types, including: tower cranes, gantry cranes, overhead cranes, jib cranes, mobile cranes, etc. The only cranes that require the skills of a heavy duty mechanic are mobile cranes as these cranes are moved with an internal combustion engine.

Fitter-Fabricators (NOC 7263) have been changed to Iron Workers (NOC 7236) by Employment and Social Development Canada officers without consulting with the employer or representative. If the NOC is changed, by implication, the wage may change as well.

7 See http://www5. Employment Skills Development Canada (Formerly HRSDC).gc.ca/noc/english/noc/2011/Welcome.aspx.

Given the above, LMO submissions should be accompanied with motivations in support of the choice of a specific NOC. This can help to prevent increased wages that would invoke LMO refusals based on the prevailing wage not correctly mentioned in the advertisement of Skill Level B, C and D. Obviously, the rationale behind wages being required in advertising is still a matter that requires further examination.

f. Multiple NOCs

In my opinion, Employment and Social Development Canada's policy does not provide any guidance to occupations spanning multiple NOCs. Here are a few examples:

Pursuant to the *Manitoba Worker Recruitment and Protection Act*[8] all recruiters must also be allowed to practice immigration law. It is therefore reasonable to expect that in the case of Manitoba certain individuals may work as international recruiters (Personnel Recruitment Officer, NOC 1223) and as a paralegal (NOC 4211) or lawyer (NOC 4112) at the same time. They may practice immigration law for half of the day and international recruitment the other half of the day. Also, a welder (NOC 7237) can also perform the duties of a fitter-fabricator (NOC 7235), which are two different NOCs. In the Information Technology industry it is also very typical for some people to perform duties of a Computer Engineer (NOC 2147) and Information System Analyst (NOC 2171). In similar situations it would be wise to explain the mix of NOCs in detail as part of the submission.

g. Wages for Pharmacists

In terms of the wage policy of Employment and Social Development Canada, intern pharmacists[9] may earn 66.7% of the mean wage therefore employers should be able to establish other exceptions, if appropriate. This became a formal exemption on 9 September 2010 and the date it was published. On 26 November 2012, a revised version of this exception was published on the website of Employment and Social Development Canada.

h. Wages in Cold Lake/Bonnyville/Lac La Biche area of North Eastern Alberta

Since 21 June 2012, employers in the Cold Lake region may pay their foreign workers the mean wage for Alberta. Otherwise, the wage for the Wood-Buffalo Region (where Fort McMurray and Cold Lake are located) may be too high.[10] This was a sensible option (*prima facie*) to allow some relief to employers in the Cold Lake region. Unfortunately, employers may not be aware of this exception as the new rules were not made public.

i. Minimum Wages specified Provincial Wages

It is possible that a minimum provincial wage for a specific NOC code (in skill level B) is higher than the median wage provided on www.workingincanada.gc.ca. For example, according to this website the median wage for an electrician for the northern part of Manitoba is CAD25, 64. However, the *Manitoba Construction Industry Wages Act* and the Employment Standards Code require that a construction electrician be paid CAD33, 90 after 1 January 2013. Therefore, there are unique circumstances that require an employer to pay more than the median wage. Practitioners should conduct thorough research about these exceptions and ensure that they are addressed in submissions.

j. Benefits are taxed as salary but not accepted by Employment and Social Development Canada

Employment and Social Development Canada has indicated in its policies that any non-cash benefits will not be recognized when the wage of a foreign national is evaluated. However Canadians in all occupations are expected to pay full tax on most benefits as explained in Canada Revenue Agency's *Employers' Guide — Taxable Benefits and Allowances.*[11]

These benefits are included in some wage sources such as Employment Insurance where the following question is asked: "All other employment benefits, monetary or otherwise, such as housing, meals, insurance coverage, etc." Once again, a double standard is used through arbitrary rules that have no scientific foundation. For example, in a recent case, Arranged Employment Opinions requested by a group of churches in Ontario were refused as Employment and Social Development Canada did not accept that free cars and accommodation are part the calculation of the median wage even though:

a) other members of the clergy in the same denomination received the same cash and non-cash benefits;

b) Everyone had to pay taxes on these benefits; and

8 *Manitoba Worker Recruitment and Protection Act.*
9 Obtained under Access to Information Act, File A-2012-00377/SS dated 4 January 2013, page 38, that can be accessed here: http://www.matrixvisa.com/pages/Rules&Regs/LMO-AEOhandbook.pdf (Temporary Foreign Worker program manual dated June 2010).
10 Temporary Foreign Worker Bulletin dated 21 June 2012.
11 Employers' Guide Taxable Benefits and Allowances, Publication number T4130(E) Revision 12.

c) The non-cash benefits were probably used to determine the wage for that NOC in that part of the country.

k. Effect of the Sex of the Worker

One of the participants (Ms. Lori Stratychuk from Statistics Canada) in the new wage methodology made an interesting observation in December 2011. She mentioned that men work more hours than women and also earn more than women per hour. Men are also over represented in EI claims. She said: "Combine all these and you end up with hourly earnings that tend to be even more biased if you do not adjust for sex in the usual hours worked." The rhetorical question is whether the existing wage information reflects this important factor.[12]

l. Effect of Government wages

The Canadian Federation of Independent Business conducted a wage survey in 2008 in which the wage information from the public and private sector were compared.[13] It was found that 19% of the working population was employed by federal, provincial or municipal government. This constituted 3.2 million people with a total wage of CAD160, 985.00 million.

Employees of provincial governments earned about 7.9% more than employees in the private sector and with benefits included, provincial government employees earn 24.9% higher. Employees of the federal government earn 17. 5% more and with benefits 41% more than their private sector counterparts. In PEI, for example, on average, a federal government employee earns 26.7% more than a private sector employee without benefits. Some of these benefits are included in the calculation of the median wage, which can result in a much higher median wage to be paid to foreign workers in certain occupations in certain parts of the country who work for employers in the private sector. This is an artificially higher wage than should be paid to a private sector employee. Once again the accuracy and reliability of wage information can be questioned. Private sector employers are being discriminated against if they are located in areas where there are many civil servants. A good example would be Ottawa or a smaller town such as Vegreville where there is a large CIC processing Centre.

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

13 Canadian Federation of independent Business, Report named Wage Watch dated December 2008.

m. Wages used to determine Genuineness of Experience

In a recent case of *Qin v. Minister of Citizenship and Immigration* the Honorable Justice Gleeson held that an officer may use wage information provided by Employment and Social Development Canada as a factor to determine whether an applicant in the Canada Experience Class (CEC) obtained the experience in a specific National Occupational Classification. The argument was that Ms. Qin earned less than the prevailing wage of a legal assistant (NOC 1242) then Translators, Terminologists and Interpreters (NOC 5125) in Toronto and that was a factor that the officer considered in refusing the application. The officer claimed that Ms. Qin did not have the required experience. The case was sent back for a redetermination by another officer as the immigration officer acted procedurally unfair by not disclosing the extrinsic evidence relating to wage determination (from Employment and Social Development Canada) to the applicant.[14] Therefore the new wage methodology is now also being used by CIC in determining whether the experience gained within Canada is genuine.

Until such time as the *Qin* decision has been challenged, representatives should review the wages provided in letters of experience of applicants in the Canada Experience Class (CEC) and provide arguments in support of wages that are below the median wage provided by Employment and Social Development Canada on the website www.workingincanada.gc.ca. If the wage is below the mean wage, arguments in support of the lower wage should be provided.

10. Conclusion

In order to obtain a higher rate of industry acceptance, the new wage methodology should have been explained to employers prior to or during its release in 2012. The federal government failed to obtain public support for a good policy (broadly speaking). The internal documents of Employment and Social Development Canada indicate that stakeholder consultation is an important source of information on wage data. Unfortunately many stakeholders do not know the importance of their role. Stakeholders, individual employers and authorized representatives have not been informed of a procedure on how to provide information

14 *Qin v. Minister of Citizenship and Immigration*, 2013 FC 147, dated 8 February 2012, Federal Court, IMM-1543-12.

to Employment and Social Development Canada when there are concerns about the accuracy of the wage calculation.

The new wage methodology is an improvement on the older methodology whereby officers used internal lists to determine whether the wage being offered is consistent with the prevailing wage. It is a genuine attempt to accurately predict the wages within Canada and the federal government should be praised for the effort and the intent to develop a scientific method of determining the wages to be paid to a foreign worker. It can be improved if certain problems highlighted were recognized, the program tweaked and a dispute mechanism established.

Currently, meetings with industry stakeholders such as Canadian Association of Professional Immigration Consultants (CAPIC) that represent close to 1000 members are limited to one hour every four months. Questions about the Temporary Foreign Worker program sent to the Minister's office in January 2013 have not been answered in August 2013. As a result, the lack of flow of communication to and from HRSDC does not create an effective mechanism for HRSDC to hear about industry concerns. A letter from the Canadian Bar Association addressed to HRSDC on 23 February 2009[15] about new adverting rules has been ignored. This has frustrated the industry and has resulted in 2 requests for leave to appeal for judicial review for LMO decisions. In *Henriksen v. HRSDC* a settlement was reached and the outcome of the negotiations is expected shortly.[16]

The questionable accuracy and relevance of wage for certain occupations and geographical areas should also be a cautionary note to visa and immigration officers when decisions are made about the genuineness of experience. In the case of *Qin* the officer accepted the wage information from the website www.workingincanad.gc.ca without questioning its accuracy or possibly even understanding the underlying methodology and pitfalls.

The arbitrary nature of certain rules with regards to the calculation of the prevailing wage for certain occupations, the refusal to allow for exceptions and the absence of a dispute mechanism should not be tolerated by employers.

It is hoped that Minister Alexander can intervene and ensure procedural fairness and transparency becomes the norm. After all, it is the investment and risk taking of Canadian employers and Canadian entrepreneurs in our relative free market economy that provide the tax base for the salaries, pensions and other benefits of the bureaucrats.

15 [1]http://www.cba.org/CBA/submissions/pdf/09-09-eng.pdf.
16 *Henriksen v. Minister of HRSDC*, Federal Court Docket #IMM-10668-12.