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

Third Party Representation in LMOs and AEOs

Cobus Kriek

It is well known that some Service Canada Foreign Worker Officers across Canada call employers directly and ignore third party representatives sporadically in cases where Canadian employers have chosen to use representatives. A specific officer once stated that he does not have to speak to third parties at all. How is it possible that an officer, who possibly has limited legal

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Please send your questions to *ImmQuest* care of Mario D. Bellissimo at mdb@obr-immigration.com. If you have any questions you would like asked of either Citizenship and Immigration Canada or the Canada Border Services Agency send it along and we will ask on your behalf.

THOMSON CARSWELL

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training, has such a definite opinion about such a fundamental issue? His statement seemed to have the support of his superiors and that this was definitely not a frolic of his own.

Relevant Authority for Representation

In most cases, the right of a party to use legal counsel will be provided in a specific statute, such as the *Statutory Powers Procedure Act* of Ontario, *Charter of Human Rights and Freedoms* of Quebec, and the Quebec *Administrative Justice Act* which specifically provides for representation.[1] In the absence of the *Immigration and Refugee Protection Act* and its *Regulations* specifically providing direction on the issue of representation, one should examine jurisprudence about representation before administrative tribunals such as the Foreign Worker Offices of Service Canada in providing Labour Market Opinions (LMOs) and Arranged Employment Opinions (AEOs). Five cases are quoted from the book by Prof. David Mullan.[2]

Case 1: *Ontario Men's Clothing Manufacturers Assn. v. Arthurs* (1979)[3]

The arbitrator had to decide whether there is an absolute right to representation and whether he should use discretion to allow representation. He wrote as follows: "As has been seen, the *common law did not guarantee representation by counsel*; to persons involved in either arbitrations before administrative tribunals. . . On the other hand, I recognize that Mr. Stringer has advanced a *serious legal argument concerning* the scope of the chairman's authority. I am therefore prepared to permit Mr. Stringer to participate in the hearing to the *limited extent of making the legal argument* to which I have referred, in accordance with the direction set forth below." [emphasis added]

1 D.J. Mullan, *Administrative Law: Cases, Text and Materials*, 5th ed. (Toronto, Canada: Edmon Montgommery Publications, 2003) at 381-403.

2 *Ibid.*

3 (1979), 22 L.A.C. (2nd) 328; quashed *Ontario Men's Clothing Manufacturers Assn. v. Arthurs*, 1979 CarswellOnt 453, 12 C.P.C. 138, 26 O.R. (2d) 20, 79 C.L.L.C. 14,224, 104 D.L.R. (3d) 441, 23 L.A.C. (2d) 145 (Ont. Div. Ct).

Therefore the arbitrator used his discretion and allowed limited representation due to the complex nature of the legal question.

Case 2: *Canadian Transportation Accident Investigation & Safety Board, Re* [4]

A captain of a ship that was involved in a collision was summoned to appear in front of an investigator as required by the terms of the *Canadian Transportation Accident Investigation and Safety Board Act*. The captain appeared with two representatives, but the investigator refused to allow legal counsel. The Board asked the Federal Court Trial Division under s. 18(3) of the *Federal Courts Act* whether the Captain could give evidence under oath without the presence of legal counsel. The judge commented as follows:

> The Canadian Transportation Accident Investigation and Safety Board offers to the Court but one valid argument or explanation as to why it wishes to deprive a witness of the right to counsel: that their presence would cause unwarranted delay and perhaps frustrate the immediate gathering of facts. This Court is asked to deprive an individual of his *right to silence*. In the event of a tragic and catastrophic incident, a witness is subpoenaed within hours and at best days to attend and give testimony under oath with the threat of penalty over his head while perhaps still in a traumatic state. He may not have the *presence of mind* to invoke the protection of the *Canada Evidence Act* and the *British Columbia Evidence Act*. The witness would be testifying before *an investigator who is usually not legally trained*, asking double barrelled questions that in some cases may even be beyond the scope of the Board's mandate; perhaps in the presence of the coroner, police authorities or some regulatory body that has the power to deprive him not only of *his reputation but his professional certification and his livelihood*. ... I am satisfied that in these circumstances the procedural fairness requires that the witness be permitted to be accompanied by counsel when at the inquiry. [emphasis added]

Case 3: *Howard v. Stony Mountain Institution* [5]

A prisoner wanted legal representation when he was charged with actions that were prejudiced towards good order and disci-

4 1993 CarswellNat 812, 16 Admin. L.R. (2d) 15, (sub nom. *Canadian Transportation Accident Investigation & Safety Board v. Parrish*) 60 F.T.R. 110, (sub nom. *Parrish, Re*) [1993] 2 F.C. 60 (Fed. T.D.).

5 1985 CarswellNat 2, 45 C.R. (3d) 242, [1984] 2 F.C. 642, 11 Admin. L.R. 63, 19 C.C.C. (3d) 195, 57 N.R. 280, 19 D.L.R. (4th) 502, 17 C.R.R. 5 (Fed. C.A.).

pline. Judge Thurlow held that the prisoner had the right to legal counsel considering the lack of knowledge of the prisoner to defend himself, whether points of law would arise, the need for fairness and complexity of the case, and the risk of a longer imprisonment if he were found guilty.

Case 4: ***Joplin v. Vancouver (City) Commissioners of Police***[6]

The British Columbia *Police Act* allowed the Lieutenant Governor to make regulations about the punishment and dismissal of officers. McEachern C.J.S.C. said: "I am satisfied that justice and fairness cannot tolerate a procedure where a layman is expected to deal with *legal concepts which are strange to him*, and at the same time advise himself objectively." [emphasis added] The regulations made by the Lieutenant Governor were found to be *ultra vires* and that legal counsel was allowed in all cases.

Case 5: ***New Brunswick (Minister of Health & Community Services) v. G. (J.)***[7]

In this case a mother resisted an application for Child Welfare for a renewal of an order to place her three children in custody. It was decided that the assistance of legal counsel would have ensured a fair hearing for the following reasons: "In proceedings as *serious and complex as these*, an unrepresented parent will *ordinarily need to possess superior intelligence or education, communication skills, composure, and familiarity with the legal system* in order to effectively present his or her case." [emphasis added]

Deduction from Jurisprudence

From the preceding cases it is clear that third party representation in LMOs and AEOs (which is a very specific type of case) is a common law right that employers are entitled too. There are four common issues or golden strands that run through these cases. These golden strands form the foundation for a right to representation in third party representation in LMOs and AEOs:

- the seriousness/outcome/importance of the issue or result of the adjudication;
- the complex legal nature of the matter being adjudicated;
- the legal expertise of the adjudicator/government representative;
- the lack of legal knowledge, ability to respond, and the frame of mind of the person being examined or adjudicated.

In each of the five cases only one or two of these factors where enough to invoke representation rights by the person being adjudicated. In the case of an LMO and an AEO, all *four factors* are present:

- **Importance of the outcome:** In an AEO or an LMO an employer might be denied the right to employ a foreign worker for his or her business; his or her livelihood might depend on this decision. A foreign worker might also be denied the right to enter Canada in case of a negative LMO or AEO. This is especially important if an application for a work permit was already submitted without a LMO pursuant to Rim Operational Instruction 06-40, dated 14 August 2006 (applying for a work permit while the applicant waits for the LMO). Therefore LMOs and AEOs are not merely opinions that CIC will take under consideration when a decision is made. A negative LMO states the following: ". . ..CIC *will not* issue a work permit for the job(s) offered" [emphasis added]. Therefore the opinion held by some that these are merely opinions is completely wrong.
- **Complex nature of the issue:** AEOs and LMOs are an area of the immigration field which is very complex and require special skills and knowledge in administrative law, labour law, labour economics, research methodology, and inferential statistics just to name a few sciences. Do not believe this is a simple and easy decision in which one can just transfer someone from one to another Service Canada Section, such as from the Employment Insurance Section to the Foreign Worker Section, and expect the person to perform the required duties in a fair manner.
- **Legal expertise of the adjudicator:** It is doubtful that Foreign Worker Officers are trained in all the sciences mentioned above. In addition, because of the lack of publicly available rules that essentially give these officers very wide latitude in decision making, there are genuine concerns

6 (1982), 1982 CarswellBC 365, [1982] B.C.J. No. 840, 42 B.C.L.R. 34, 2 C.C.C. (3d) 396, 144 D.L.R. (3d) 285, 4 C.R.R. 208, [1983] 2 W.W.R. 52 (B.C. S.C.); affirmed 1985 CarswellBC 85, [1985] B.C.J. No. 2311, [1985] 4 W.W.R. 538, 19 C.C.C. (3d) 331, 20 D.L.R. (4th) 314, 10 Admin. L.R. 204, 61 B.C.L.R. 398 (B.C. C.A.).

7 1999 CarswellNB 305, 26 C.R. (5th) 203, 244 N.R. 276, 177 D.L.R. (4th) 124, 50 R.F.L. (4th) 63, 66 C.R.R. (2d) 267, 216 N.B.R. (2d) 25, 552 A.P.R. 25, 1999 CarswellNB 306, [1999] S.C.J. No. 47, 7 B.H.R.C. 615, [1999] 3 S.C.R. 46, 90 A.C.W.S. (3d) 698, REJB 1999-14250, J.E. 99-1756.

about the quality of decisions made and whether the rules of natural justice are being adhered to.

- **Lack of legal expertise and "frame of mind" of the person being adjudicated:** Most employers do not have access to the hidden rules of the interpretation and implementation of *Immigration and Refugee Protection Regulations*, s. 203 and s. 82. Most have no legal training and do not understand the issues being discussed. Many employers get themselves into difficult positions as statements are being used by officers to deny applications or limit the periods of validity of LMOs. Many employers are at work standing on scaffolding or working in a kitchen or something similar and thus are not in the right frame of mind to answer a question that could result in a denial of a work permit to a foreign worker which affects the livelihood of the employer.

HRSDC & Service Canada Rules (Policy) about Third Parties

Given the jurisprudence and the role of representation in the rules of natural justice, it would be interesting to determine whether existing rules of HRSDC and Service Canada are in line with jurisprudence.

HRSDC Policy in terms of AEOs states that in terms of HRSDC National Policy Directive about Labour Market Opinions, dated 22 July 2004, para. 6.4.2, page 17, officers are instructed to "call employers to verify the job title of the employment on offer, the salary and that the job is still open. As a result of the assessment made, FWP Officers may take the opportunity to verify additional information with the employer such as the employer's accessibility and availability, employer's name, employer's address, contact name, number of employees..." Several other items to be discussed are also listed.

In HRSDC's FWP Bulletin dated 5 October 2006, instructions are given to officers about Third Party Representation in AEO and Live-in-Caregiver LMO applications. It is stated that officers must call employers to verify key information. In this policy it is clearly stated that the intent of the policy is to verify that the employer is aware of the request and to ensure that the third party was appointed. According to the bulletin these are the only questions to be asked and that officers should answers questions from any third party on behalf of employers and to contact the third party if there is any missing information. However the rules in the Directive dated 22 July 2004 were not withdrawn in this policy and are obviously still being followed by officers.

In the Directive for Developing a Labour Market Opinion from HRSDC (which is undated and without a number and therefore very difficult to refer to) it is only stated on page 8 that employers may choose third party representatives. It is clear that the authors of the policy dated 5 October 2006 are sensible and have an understanding of jurisprudence, but in this bulletin the directives of 2004 are also not withdrawn.

In a recent Expedited LMO policy the use of third parties was overlooked and the application forms made no reference to third parties. Is this just coincidence or is this an attitudinal indication of widespread ignorance of existing policy as well as management that condones this type of action?

On the form that is used in a request for a LMO (Form EMP5239) and Extension of a LMO (Form EMP5354) there is sentence that read as follows: "HRSDC reserve the right to contact the employer directly if needed". Given the jurisprudence and policy dated 5 October 2006 clearly acknowledging representatives, why is this written in here? This further confuses the foreign worker officers and gives the impression to officers that they have a blank cheque to ignore third party representatives.

Service Canada in Ontario has a policy dated 24 May 2007 in which officers are directed to contact third parties directly if any information is missing. Although this is a good rule, the development of regional policies is very strange and confusing to the industry, in addition to the fact that some officers do not follow this policy in Ontario.

Part II will deal with the reasons why the existing rules are not followed.

Cobus (Jacobus) Kriek is a Member in good standing of CSIC. He specializes in work permits for skilled workers and associated economic classes. His company is also involved in international recruitment of skilled workers. He can be reached at cobus@matrixvisa.com.