

Current Methodologies of Identifying Labour Shortage

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1. Background

Immigration and Refugee Protection Regulation 203 (3) stipulates that officers must assess 7 factors when a Labour Market Impact Assessment (LMIA) decision is rendered. Regulation 203 (3) (c) stipulates the following: “whether the employment of the foreign national is likely to fill a labour shortage ”

Since 2002, the Service Canada (SC) and Employment and Social Development Canada (ESDC) have never had a single national definition of the term “labor shortage”. Officers of Service Canada have been refusing LMIA’s for more than a decade based on dubious labour shortage statistics (if any).

Other methodologies were used by Citizenship and Immigration Canada (CIC) to develop Occupation Lists (in the Federal Skilled Worker Class) in the past 20 years. These methodologies were shrouded in secrecy for several decades. Although Occupation Lists have finally been abolished, reference will be made to these methodologies as it can provide some understanding of the policy chaos within the Federal Government. It is also provided because immigration practitioners can use it as resources, when LMIA submissions are being prepared.

The different methodologies will be explained chronologically from 9 September 2010 to 21 April 2015. Although the methodologies of CIC will be mentioned, the focus of the discussion will be on the methodologies used by ESDC and Service Canada.

2. ESDC states there is no Methodology (dated 9 September 2010)

ESDC has stated in paragraph 2.5.2.3 of Temporary Foreign Worker Manual (dated 9 September 2010) that ESDC does not have a definition of labour shortage at all. ¹

3. Service Canada’s Methodology in Western Canada (dated April 2011)

In this national policy vacuum, of ESDC’s definition of a labour market shortage, Service Canada’s Western Territories developed a policy to define labour market shortage during April 2011. This policy was apparently used by officers when they made decisions for LMO (now LMIA) requests in BC, AB, SK and MB. It is **not** a national policy and it is not included in Service Canada’s National Temporary

¹ Access to Information Act Request at Employment and Social Development, File number A-2012-00360/SS dated 8 January 2013

Foreign Worker Program Manual (according to the latest version that has been obtained). The content of this policy was released under the Access to Information Act.² According to discussions held with Service Canada staff in Western Canada on 11 December 2014 this formula was not used by Service Canada in Vancouver and Edmonton in 2014. However as we will see later this information might not be accurate.

Here is a summary of the Service Canada in Western Canada formula:

Factor 1: Employment growth

Percentage 1: % Annual change of full time employment in a province for a specific NOC

Compared with

Percentage 2: % Annual change of full time employment in a province for all Occupations

If Percentage 1 is larger than Percentage 2 it is an indication of a labour shortage

Factor 2: Wage growth

Comparison of two percentages

Percentage 1: % Change in annual full time average wage in a province for specific NOC

Compared with

Percentage 2: % Annual change of full time average wages in a province for all Occupations

If both are positive and Percentage 1 is greater the Percentage 2, then it is an indication of a shortage.

² Access to Information Act Request at Employment and Social Development File A-2013-00629/HJK dated 6 February 2014

Factor 3: Ratio of EI claimants to Employment

Comparison of two ratios

Ratio 1 (NOC): Average number of work ready EI claimants in a specific NOC over the past 2 years in a province

Divided by

Average number of people employed in a specific NOC over the past 2 years in a province

Ratio 2 (All Occupations): Average number of work ready EI claimants over the past 2 years in a province

Divided by

Average number employed over the past 2 years in a province

If Ratio 1 is below Ratio 2, then it is a positive indicator of a shortage

Factor 4: Change in number of EI claimants

Comparison between two percentages

Percentage 1: Average annual percentage change in number of work ready EI claimants in a specific NOC over the past 2 years

Compared with

Percentage 2: Average annual percentage change of work ready EI claimants over the past 2 years

If the Number of EI claims in a NOC falls and is lower than then the general number of claims their may be a shortage.

Factor 5: Job Vacancies

Annual percentage change in number of jobbank vacancies.

If vacancies increase between 2 years it is considered as a positive indicator of a shortage.

The sources are:

AB, MB = jobbank.gc.ca

BC = workBC.ca

SK= Saskjobs.ca

Factor 6: Number of Foreign Workers Requested

It is a comparison between 2 percentages:

Percentage 1: % change of number of foreign workers annually per NOC in a province between two years (2012 compared with 2013)

Compared with

Percentage 2: % change of number of foreign workers annually per province between two years (2012 compared with 2013)

Therefore if the first percentage is larger than the second percentage it is considered as a positive indicator of a shortage.

Factor 7 Future Demands

Comparison between two percentages

Average number of forecasted job openings over the next 6 years (2014-2020) in a province per NOC

Divided by

Average number employed in 2014 in province per NOC

Average number of forecasted job openings over the next 6 years (2014-2020) in a province

Divided by

Average number employed in 2014 in a province

If the first percentage is greater than second percentage it is considered as a positive indicator of a shortage.

Comment:

This tool (that has sadly remained hidden to employers for years) has excellent potential. Although it is a great tool attempting to address the concept of labour shortage, it has a massive shortcoming, because it completely ignores regional differences in the labour market. They use the same formula for small towns e.g. Hudson Bay or Oxbow (both in SK) as for a city like Saskatoon, and the Achilles Heel of the methodology. Obviously this is wrong and this mythology cannot be used accurately to determine whether a shortage exist in a specific area of a specific province as it distorts the figures about regional shortages within provinces.

The concern is that the Federal Government does not have a single national definition of labour market shortage but they:

- a. defined Occupation Lists (or list of Occupations-in-Demand) for decades for the Federal Skilled Worker Class; and
- b. have been refusing and approving thousands of LMO and LMIA requests without defining the concept.

Amidst this policy vacuum, the Western Territories of Service Canada developed it's own definition (with flaws) in an effort to guide officers.

4. ESDC Methodology (dated 26 November 2012)

Two authors, Erwin Gomez and Marc Gendron from ESDC published an article named "*Indicators for Monitoring Labour Market Pressures in Canada*³". In this 54-page document (excluding Appendices), summaries of the methodologies to determine shortages used by some provincial governments as well as Human Resources and Skills Development (before the name changed to Employment and Social Development Canada) are provided. This is a summary of the most important findings of Gomez and Gendron:

- (i) Approach of HRSDC: HRSDC uses the Occupational Tightness Model (OT) and the Canadian Occupational Projection System (COPS). The OT model uses historical employment and wage growth data; changes in the unemployment rate; as well as the amount of overtime worked. The COPS model uses employment growth; relative wage growth and unemployment rate changes of the past 3 years.
- (ii) Approach of Service Canada in the Atlantic Provinces: Service Canada in the Atlantic provinces uses the following indicators: Employment Insurance (EI) Claims in a specific area; estimated job openings; projections from COPS; analyses of temporary foreign worker information; analyses of the supply side of information from colleges and

³ Access to Information Request at Employment and Social Development Canada, file number AI-2014-00009/EM

universities; and analyses of data including tourism statistics, and building permits. Then the predicted shortage is monitored through intelligence gathering in consultation with key labour market analysts.

- (iii) Approach by the Province of Newfoundland: Newfoundland classifies occupations as good, fair, or with limited opportunities. Their conclusions are based on traditional employment statistics from the Labour Force Survey (also known as LFS) as well as the provincial Work Activity Survey (WAS) where unemployment numbers and impacts of seasonal employment plays and important role.
- (iv) Approach of The Province of Nova Scotia: It uses COPS demand projections of occupations in demand (provided by ESDC and the Conference Board of Canada). In the supply side it uses EI claims as well as regional labour market pressures as provided by Service Canada analysts.
- (v) Approach of Service Canada in Quebec: Service Canada in Quebec completed an analyses for 520 NOC codes based on 4 factors
 - i. Forecast of employment growth
 - ii. COPS attrition rates
 - iii. EI claims
 - iv. Projected employment over the following 2 years
- (vi) Approach by the Province of Quebec: The following factors are used by the Province of Quebec: labour demand (based on projected economic growth); unemployment levels of the next 5 years; investment in major projects which are labour intensive; recent mass layoffs; labour market integration of recent graduates; creation and opening of businesses (as obtained from newspapers); number of new housing permits; sectorial reports; job vacancies according to websites and newspapers; as well as subjective “departmental perspectives”. The Province of Quebec also has a list of occupations that is used for immigration, based on three factors: it must be in the list of occupations in demand; it must have a low turnover rate; and the unemployment rate must be below a certain threshold.
- (vii) Approach by the province of Ontario: Ontario relies on a model that uses past employment growth; earnings growth; average unemployment rate; LFS data; 2006 Census figures; future employment growth; average retirement rate; and private sector reports.
- (viii) Approach by the province of Saskatchewan: Saskatchewan uses COPS demand projections and projections by the Provincial Ministry of Finance.

- (ix) Approach of Alberta: Alberta's projected labour shortages are based on 7 factors: employment growth rate; unemployment rate; the ratio of the number of EI claims compared with number of employed workers; participation rate based on the census; projected employment growth rate over the next 4 years as well as a qualitative input through different sources (such as industry environmental scan, vacancy rates, Alberta wage and salary Survey, number of Jobbank vacancies and the number of nominations by the Alberta Immigrant Nominee Program). For each of the 7 factors there is a threshold and if 6 of these thresholds are met then there is a significant likelihood that a specific occupation is in demand.
- (x) Approach by the Province of British Columbia: Their approach is based on the labour market tightness index that uses the following information: 2 years historical EI/Employment ratio; Census data; 2 years historical unemployment rate; 5 year projections of employment growth; average unemployment rate; ratio of job openings and employment growth as qualitative (subjective) information obtained from stakeholder consultation. This analyses is then used to determine a "High Opportunity Occupation List".

5. **Citizenship and Immigration Canada (CIC) methodology (Sept 2013)**

On 1 February 2014, Ms. Christine Pescarus from ESDC published a research précis. The title was as follows: "***Does Having the Training Required to Work in eligible Occupations of the Ministerial Instructions Guarantee Success on Canada Labour Market ?***"⁴ In Annex A (page 46) of the research the methodology of determining the eligible occupation list for 2013 is described:

- i. CIC used the COPS system to determine for which occupations shortages exist.
- ii. Provinces and Territories were asked to provide their own lists of occupations in demand. Emphasis was placed on provinces that received more skilled workers.
- iii. Inventory of current applicants was also taken into consideration. Therefore if a large number of applicants in a specific occupation requested permanent residence, that occupation/s would be removed from the list.
- iv. Opinions from Health Canada, Industry Canada and Agriculture Canada.
- v. The perspectives of representatives at the Standing Committee on Human Resources Skills and Social Development and the Status of persons with Disabilities, on skills gaps in Canada.

⁴ Ibid

- vi. The 2010 and 2011 target occupations in the Pan Canadian Framework for Assessment and Recognition of Foreign Qualifications, which identifies the priority occupations for the development of clear and transparent pathways for licensure for internationally educated individuals.
- vii. Once a draft list was established the Minister of CIC made some changes. Changes made by the Minister of CIC and the research used to make these changes is unknown.

Comment: According to the report it seems as if ESDC and CIC did not exchange notes and information before the occupation list was finalized.

6. **Methodology of ESDC Technical Working Group (September 2013)**

A briefing note⁵ was prepared for the Minister ESDC in September 2013 for a meeting with the Canadian Labour Congress on 1 October 2013. The briefing note was named "***Labour shortages in Canada Internal File number 2013 HR NHQ 027563 folder 610535***". In this briefing note reference was made to the following:

- (i) a plan to provide better and more consistent advice and projected labour/skills shortages;
- (ii) a methodology for providing labour market conditions to a large number of occupational groupings at a national level; and
- (iii) an assessment methodology that use several labour market indicators. Such as wage growth and unemployment statistics.

The factors that are being considered to determine the list of occupations in short supply are as follows: rate of unemployment; wage growth; employment growth; hours worked/overtime; job vacancies or job postings and the number of EI Claims.

In June 2014 the TWG identified a list of occupations for which there are shortages for each province. These assessments were based on an examination of data from 2010 to 2012⁶.

The following is quoted from the TWG publication named "**Recent Labour Market Conditions at Provincial and National Levels**" dated 7 July 2014⁷:

⁵ Access to Information Act Request at Employment and Social Development, File number AI-2014-00018/EM a

⁶ The list can be found here: www.matrixvisa.com Navigate to "Our Efforts" and scroll to point number 22 named "Hidden List of Shortages"

“This list were created as part of a broader departmental plan requested by the ESDC Deputy Minister to provide better and more consistent advice concerning current and projected occupational shortages at the national, provincial, and local levels. This plan is being implemented by an intradepartmental technical working group (TWG) with representation from all branches involved in assessing high demand occupations, including Strategic Policy and Research (SPR), Skills and Employment Branch (SEB), Service Canada (SC), and Learning Branch (LB).

One component of this plan is the annual preparation of lists of occupational labour market conditions at the national and provincial levels. This work has been done by Policy Research Directorate (PRO), and reviewed by the TWG. The following list pertains to this component of the broader plan.

Assessments of recent occupational labour market conditions were based on the analysis of relevant, available labour market indicators, including: rate of unemployment; wage growth; employment growth; hours worked/overtime; job vacancies or job postings; and EI claims. The results of this analysis, for both the national and provincial-level assessments, were then reviewed by the TGW and provincial officials (via the Forum of Labour Market Ministers Labour Market Information Working Group). Several provincial-level assessments were revised as a result of the comments provided by provincial officials.

The methodology used in these assessments was peer reviewed by three experienced economists: Professor Tony Fang of York University who has done research on labour shortages, and Professor Jennifer Stewart of Carleton University and Mr. Ernie Stokes of Stokes Economic Consulting, who are familiar with or have experience assessing occupational labour market conditions. The reviewers found the methodology to be sound.

A Director General-level Learning and Labour Market Information (LLMI) steering committee with representation from the same branches has been briefed on the methodology and has approved the release of this information.

It is important to understand that these results are best estimates of recent labour market conditions at the geographic level in which they are analyzed. So for example, while there may not be evidence of a shortage of stationary engineers and power station and system operators in Alberta, this does not mean that there are not shortages of workers for these occupations in Wood Buffalo, Alberta.

⁷ Access to Information Act Request: JL A-2014-00466/JL

Also, the assessment results obtained for the occupational groupings that could be analyzed may not hold for finer groupings. For example, while the analysis shows no signs evidence of labour shortages among teachers in Ontario, that does not mean there are not shortages of French or Math teachers.

Furthermore, these methods do not measure whether there are skills deficits among available workers. So for example, the analysis may find no signs of shortages of auto mechanics, but this does not mean that there is not a shortage of auto mechanics with knowledge of the latest diagnostic tools or with good interpersonal skills.

Finally, when employers and others speak of occupations in shortage they are sometimes referring to occupations that they forecast will be in shortage in the future due to various factors such as anticipated economic growth or retirements. The attached list is about recent labour market conditions, not about future conditions.”

Comments:

The last three paragraphs above are crucial as it again indicates that the Occupation List is based on shortages on a provincial level and does not recognize regional shortages within a province. It suffers from the same shortcomings as the labour shortage methodology developed by Service Canada in Western Canada (as mention in paragraph 2 b above).

The TWG has 34 members of whom 5 are from Service Canada in Eastern Canada, 14 are from ESDC, and 1 from Aboriginal Affairs and the balance of the participants could not be associated with a specific department⁸. It seems as if there are no members from CIC on the TWG.

7. ESCD is Writing a Policy (6 June 2014)

On 6 June 2014 the Director responsible for LMIA policy, Mr. Collin Spencer, wrote an e-mail to different federal employees at ESDC headquarters as well as the regions and attached a draft policy about labour shortage. On 5 December 2014 it has not yet been released.

The concern is that the policy is only one page in length. A complex concept such as labour shortage cannot be summarized in one page. The result would be that officers will make decisions without clear guidelines.

⁸ Access to Information Requests: A-2014-00464/JL and A-2014-00465 and JL A-2014-00466/JL

8. Service Canada in Western Territories (Nov 2014)

According to a telephone conference with SC's management in the WT, officers in Vancouver and Edmonton use several sources: Jobbank outlook section; Unemployment Insurance claims; information obtained in discussions with the employer; the employer's recruitment report; newspaper reports; etc.

9. Service Canada in Ontario (10 Dec 2014)

The Service Canada office in Ontario (Toronto) refuses applications if there is not a shortage in a specific NOC as listed on 2 websites: the "outlook" tab of the jobbank.gc.ca and on Ontario Job futures.

(<http://www.tcu.gov.on.ca/eng/labourmarket/ojf/>)

A letter was sent to the manager in ON in which the errors in their methodology was identified⁹. Two examples were quoted to demonstrate the lack of accuracy of this methodology:

- a. These two sources of Service Canada indicate that there is not a shortage of Dentists in Ontario. However the TWG of ESDC (their own head office) indicates that there is a shortage of Dentists in Ontario.
- b. These two sources of Service Canada indicate that there is not a shortage of CNC Machinists in Ontario. However recent research by the Ontario Manufacturing Learning Consortium (the founding organizations include the Ontario Aerospace Council, the Canadian Tooling & Machining Association, the Organization of Canadian Nuclear Industries and Canadian Manufacturers & Exporter) has demonstrated that there is a shortage of 700 CNC machinists in Ontario¹⁰.

The response by the manager of Service Canada was as follows: *"Thank you for your feedback below and your further feedback dated December 10, 2014. It has been shared with the appropriate policy group at national headquarters"*

The concern is that officers are still using this flawed methodology to refuse LMIA's.

10. Fat Burger Case (8 January 2015)

⁹ Navigate to Matrixvisa.com. Click on "Our Efforts" and scroll to Point Number 22 to download the letter.

¹⁰ See <http://www.plant.ca/general/ontario-manufacturing-industries-team-address-critical-skills-shortage-140217/>

In the judgment in Frankies's Burger Lougheed Inc (DBA Fatburger Lougheed) Fat Burger VS The Minister of ESDC¹¹ references were made to a Service Canada officer that referred to two of the seven factors mentioned above in paragraph 3 (Service Canada's Methodology in Western Canada).

It now seems as if this formula is actually being used by at least one Service Canada officer in Vancouver.

11. **Euro Railings Limited (21 April 2015)**

During 2014 an officer of Service Canada in Ontario refused a Labour Market Opinion (LMO) for a welder. The LMO refusal letter was based on:

- “the absence of a demonstrable labour shortage in this occupation”; and
- “Service Canada labour market information and analysis for the Ontario region indicates there is no demonstrable shortage of workers in this occupation in Ontario”.

This “reason” was a typical response that has been the hallmark for Service Canada for more than 12 years. Actual reasons for claiming no labour shortage is never mentioned in refusal letters when LMIA's are refused. Actually the officer only provided a “conclusion” instead of a reason. It also seems as if the concept of procedural fairness is not well understood within ESDC and Service Canada.

The court essentially confirmed the erroneous labour shortage methodology of Service Canada in Ontario that was brought under the attention of the Manager of Service Canada in Ontario in December 2014.

In the judgment¹² the following was mentioned:

[2] To say that outlining the facts in this case is a challenge is to downplay the word “challenge”. The Certified Tribunal Record can only be described as a mess. Its inadequacy was compounded by its incompleteness remedied only recently when the Officer found documents behind a cabinet.

[3] The record in this case was sufficiently deficient that the Respondent, without leave of the Court, filed both an affidavit from the

¹¹ Paragraph 50 on page 50 of Frankies's Burger Lougheed Inc (DBA Fatburger Lougheed) Fat Burger v The Minister of ESDC, IMM2996-14 and IMM2977-14, 205 FC 27 dated 8 Jan 2015

¹² Euro Railings Ltd v. Canada (Employment and Social Development), 2015 FC 507 (CanLII)

Officer purporting to explain the reasons for her decision and an affidavit from the Officer's supervisor [Director] in part explaining the program as she saw it and the duties of an officer assessing labour markets. Both affidavits are submitted to buttress the Officer's decision – to make up for the obvious deficiencies in it.

[4] The Applicant was rightly concerned that the Respondent was trying to manipulate the process of judicial review. At the hearing I ordered the Director's affidavit struck from the record as improper evidence in a judicial review. I neglected to similarly strike the Officer's affidavit for the same reason. The final judgment will do so.

[6] The Applicant is a specialty custom railing company. It began advertising for a welder in October 2013, requesting someone with five years' experience. Although the Applicant received numerous applications for the welding position, 90% were from individuals who did not meet the requirements.

[7] The Officer informed the Applicant on April 9, 2014, of the negative LMO. The LMO letter was not sent that day so as to permit the Applicant's representative to make submissions. The submissions, made the next day, were to the effect that there was a labour shortage for welders and this occupation was listed as an occupation on the Federal Skills Trade Program [FSTP] indicating a need for such skills in Canada.

[8] The LMO refusal letter was based on:

- the absence of a demonstrable labour shortage in this occupation; and
- Service Canada labour market information and analysis for the Ontario region indicates there is no demonstrable shortage of workers in this occupation in Ontario.

[9] The Applicant has raised a breach of procedural fairness in this decision; firstly, because the decision had been made on April 9 despite accepting submissions on April 10; and, secondly, the reasons were either non-existent or inadequate. The first issue is a form of bias, the second is either part of a challenge to the reasonableness of the decision or a challenge to the procedural right to reasons itself – inadequacy of reasons is no longer a standalone grounds for review.

[10] The overarching challenge is to the procedural fairness of the decision. As such, the standard of review is correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 (CanLII), [2009] 1 SCR 339).

[11] The Applicant, particularly in oral argument, made a number of submissions suggesting that the record of decision had been manipulated. That allegation was not established in my view. The Respondent did attempt to manipulate the judicial review with improper evidence. That has been dealt with. The Applicant should be reminded of the saying “Do not attribute to malice that which can be explained by incompetence”.

[12] More importantly, turning to the substantive challenge, this Court in *Frankie’s Burgers Lougheed Inc v Canada (Employment and Social Development)*, 2015 FC 27 (CanLII), while holding that the procedural rights on a LMO application are minimal, held that an applicant has a right to reasons that are intelligible.

[13] This means more than the grammar and syntax produce coherent sentences. It means that the reasons are intelligible against the background of the material before the Officer.

[14] In this case, the reasons are not intelligible against the background of the material before the Officer. An applicant is at least entitled to an explanation – short, sharp and crisp – for the rejection of key evidence.

[15] The Officer had before her the NOC list indicating that welders were in demand in Canada. The Officer also had before her evidence from the Applicant showing the efforts to secure sufficiently skilled welders and the inability to find such persons.

[16] The Respondent’s counsel has suggested that the reason for such an inability is because the Applicant was offering too low a wage. Not only does the Officer not say this but notes that the hourly rate criteria is “Met”. The Applicant was entitled to at minimal an explanation of why its concrete evidence was rejected.

[17] The Officer, in her post-decision affidavit, attempts to explain why the NOC evidence – a basis upon which people seek work visas and on which they are granted – was rejected. Such evidence is too convenient and improper.”

12. **Conclusion**

In September 2010, ten years after the current Immigration and Refugee Protection Regulations came into effect, ESDC acknowledged that they do not have a formal definition of the concept of “Labour Shortage.”

A TWG that was formed by ESDC head office used their own definition of labour shortage. Service Canada in the Western part of Canada developed their own policy of what a labour shortage is. In 2014 Service Canada indicated that Service

Canada's Methodology in Western Canada is not being used. However in the Fat Burger Case reference was made to at least one officer that used this methodology.

Service Canada in the Atlantic provinces, Newfoundland, Quebec and Ontario each use their own methodologies of the concept of Labour Shortage.

Ontario relies on the information of two websites (outlook tab of the website www.jobbbank.gc.ca) and Ontario Job Futures. Research was provided to the regional manager of Service Canada in Ontario that clearly demonstrated that there are serious errors with their methodology.

The case of Euro Railings is the final proof that the policy chaos, with specific reference to the concept of Labour Shortage, has not yet been resolved within ESDC and Service Canada. It is hoped that ESDC will now take a hint from Federal Court and resolve it's problems with regards to it's Labour Shortage methodology.