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ImmQuest

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

INSIDE

Focus—Work Permits

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.

CARSWELL®

Unions and Disputes in LMOs

(Part One of Two)

Cobus Kriek

When an officer of Service Canada is requested to provide a labour market opinion (LMO) about the effect the employment of a foreign worker has on the economy, six factors must be considered. One of these factors is identified in *Immigration and Refugee Protection Regulation* 203 (3) (f): "whether the employment of the foreign national is likely to adversely affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute."

HRSDC Rules and Guidelines

Human Resources Skills Development Canada (HRSDC) has interpreted the above-mentioned regulation, and published that interpretation in the form of online rules and guidelines to employers and Service Canada officers. However, many remain hidden as internal rules unavailable to the employers that Service Canada serves.

a.) In an online publication, "Temporary Foreign Worker Program Labour Market Opinion Assessment Criteria", HRSDC mention the following:[1]

> Union Consultation: If the position being filled by the foreign worker is part of a bargaining unit, the following information will support a positive or neutral labour market opinion and will reduce delays in the recruitment of the foreign worker:
>
> - An explanation of the union's position on hiring a foreign worker for your job. If you have not contacted the union, explain why you have not done so.
> - An indication of whether you actively work with union officials to identify unemployed Canadians.

1 Human Resources and Skills Development Canada, "Temporary Foreign Worker Program Labour Market Opinion Assessment Criteria", online: http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/temp_assessment.shtml (accessed 14 Feb 2010).

- Confirmation that the conditions of the collective agreement (e.g. wages, working conditions) will apply to the foreign worker.

HRSDC/Service Canada may contact the union for additional information when reviewing your application.

b.) In the same publication[2], HRSDC also mention the following:

Labour Disputes: If you are making an offer to a foreign worker for a position that affects current or foreseeable labour disputes at your workplace, or affects the employment of any Canadian worker involved in such disputes, HRSDC/Service Canada and CIC will not confirm the hiring or issue a work permit to the foreign worker.

c.) In the HRSDC National Policy Directive No. 13 dated 28 June 2002 (Reference UC 020628)[3], the following interpretation is mentioned:

- Employers have the right to choose whom they hire, except where there is something written into a collective agreement which limits this capacity.
- Officers may not force employers to obtain union concurrence.
- Officers "should" not provide a positive LMO (confirmation) where there is evidence of a labour dispute.

This is clearly an *ultra vires* requirement as the regulation does not require union concurrence or agreement. It is also possibly an indication of a bias against employers or a serious misunderstanding of the Immigration and Refugee Protection Regulation 203(3)(f).

d.) HRSDC also mention the following on its website[4] ("Directives Assessing Labour Market Opinions", dated January 2010):

Part II - Labour Market Opinion Analysis

13. Labour Dispute

A variety of situations may constitute a labour dispute. These situations, which often arise during collective agreement/contract negotiations between an employer and a union, may include: work stoppage, strikes, refusal to work, picketing, refusal to serve customers, a slowdown of work, demonstrations, withdrawal of services, strategic shutdown of premises, and lockouts.

The existence of a grievance between a union and an employer does not necessarily constitute a labour dispute, since many collective agreements contain provisions that allow their members to submit grievances against their employer to the union, and to have them dealt with in arbitration.

Employers are prohibited from using foreign workers to circumvent a legal work stoppage or to influence the outcome of a labour dispute. Therefore, if the entry of a foreign worker could reasonably be expected to affect the course or the outcome of a labour dispute, a negative labour market opinion must be issued. In this case, the employer would be encouraged to apply again once the dispute is resolved.

When assessing a labour market opinion application, TFWP officers consider whether:

- The foreign worker would be doing work that would normally be done by a striking employee.
- The foreign worker would be hired to replace a worker who is on strike.
- The entry of the foreign worker would have an adverse affect on the settlement of the labour dispute.

Although this latest policy is an improvement on the other online criteria, this directive is partially in conflict with the directives mentioned in sub-paragraph (a) and sub-paragraph (c) above.

e.) In a letter[5] dated 9 June 2006, the Director of Foreign Workers unit of HRSDC clearly stated the policy that union concurrence is not always needed.

f.) In paragraph or question 49 in HRSDC Form EMP 5239 E (a form used to request a LMO)[6], the employer is required to answer the following questions:

Is the position part of a union? If yes, what is the name of the union?

2 *Ibid.*
3 HRSDC National Policy Directive 13, Reference UC 020628, dated 28 June 2002 and updated on 13 May 2005.
4 Human Resources and Skills Development Canada, "Directives for Assessing Labour Market Opinions January 2010", online: http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/lmodir/lmodirtoc.shtml (Accessed 14 February 2010).
5 Letter from J. Sutherland, Director of HRSDC Foreign Workers (9 June 2006) [unpublished].
6 Human Resources and Skills Development Canada, "Foreign Worker Application - Application for a Labour Market Opinion", see Form EMP 5239 2010-01-007 E, online: http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/forms/emp5239e.pdf (Accessed 14 February 2010).

Has the union been consulted about the hiring of a foreign worker? If yes, what is the position of the union? Provide details. Attach documentation, if available.

Although question 49 in the form EMP 5239 is not a source of authority, history has shown that officers attach an immense weight to the answers – as if it is a source of authority itself.

Challenges

Although the interpretation of IRPR 203 (3) (f) by HRSDC on its website in the above mentioned national directive, as well as question 49 in Form EMP5239, does not require the Union's "written approval", some Service Canada Foreign Worker Officers have demanded approval from a union/bargaining unit in writing before providing a positive labour market opinion. In this scenario two errors might occur:

- The first error is to require the union's "position" (or comment or input) when there is not a dispute or even where there is dispute.
- The second error is to demand "written approval".

Some Service Canada Foreign Worker Officers might not understand the difference between the regulations, rules (interpretation of regulations in the form of HRSDC Directives) and questions mentioned in Form EMP 5239. It seems as though some of these officers believe question 49 in Form EMP 5239 about the Union's "position" to be a source of authority, allowing themselves to be guided by the question instead of an actual source of authority.

Union concurrence/input/comment/position is probably never a requirement - except if requiring the union's "input" or "comment" is a requirement of a collective agreement. In theory this could happen, but in reality this would probably never be the the case. The rhetorical question is, why is concurrence/input/comment/position required? In some cases (depending on the collective agreement), the employer might have to consult the Union if it needs workers – that is all. If it is required in terms of the collective agreement, the employer is responsible to ask only: "*Do you have any suitable local workers?*", not "*What is your opinion if a German or Australian or South African foreign worker is appointed?*" There is a big difference. However, some officers are being guided by the question in form EMP 5239.

If there is a union strike of 2000 workers, will the appointment of a single foreign worker be able to have an effect on the settlement of the dispute? No, it will probably not have a detrimental effect.

These errors could result in a negative opinion based on this incorrect interpretation of the regulation and it could be considered an error in law and could be reason enough to request a judicial review.

A Service Canada officer once mentioned that the appointment of a foreign worker could result in a labour dispute in future, which could upset the workplace and could result in a strike. In theory, the appointment of a foreign worker could result in a strike or have a negative effect on the labour market, but such a consideration would be an *ultra vires* consideration. This shows either a serious lack of basic knowledge about this regulation or a serious anti-employer bias or both.

What is also concerning is that some Service Canada Foreign Worker officers in different provinces have a different interpretation of IRR 203 (3) (f) than the HRSDC Foreign Worker National Office in Ottawa. The possible reasons are:

- It seems as if the guidance/direction from a national level does not reach the lower/provincial levels.
- The perception or excuse that provincial labour markets are so different that national policy cannot be implemented across the provinces; This notion will result in continued problems until strong leadership resolves the issue. It allows a "window-of-opportunity" for provincial interpretations (sometimes incorrect interpretations) to become the norm.
- Confusing internal guidelines or rules of national legislation could also contribute to the differences in opinion.
- Some rules about the interpretation of IRPR 203 (3) (f) are in conflict as explained above.
- The existence of a chaotic group of haphazard internal rules being published by Human Resources Skills Development Canada.
- There is no formal system of numbering policies or rules or guidelines. There is also no system of withdrawing or updating outdated rules.

Suggestions to HRSDC

HRSDC Foreign Worker Section should consider taking the following actions on a national level:

1. Make improvements in the above National Policy Directive No. 13 dated 28 June 2002 by removing guidelines suggesting that officers must provide negative opinions if there are disputes;
2. Remove rules, directives or guidelines that are in conflict;
3. Provide the one group of detailed national rules on the formulation of Labour Market Opinions, especially Immigration and Refugee Protection Regulation 203 (3) (f) by publishing it on the Internet.

In 2006, there were fourteen National Policy Directives and forty-seven Provincial Policy Directives – none available without Access to Information requests. Canadian employers and immigration practitioners want to work with HRSDC Foreign Workers, but we need to know the rules of the game in order to play. If these directives are shared with the industry, the HRSDC Foreign Worker officers can expect more detailed and complete submissions. More comprehensive submissions will result in less questions and faster processing times. Action to improve the lack of detailed rules of the interpretation of Immigration and Refugee Protection Regulation 203 (3) was

- promised by the National Director of HRSDC Foreign Workers in the CICIP meeting held in Banff in 2005,
- promised in a letter from the National Director of Foreign Workers in July 2006, and
- even mentioned in a judicial review about an Arranged Employment Opinion in 2008.

CIC has close to 100 chapters in the Immigration Manual to explain the implementation of the Immigration and Refugee Protection Regulations. Each Chapter has

- a name and number;
- paragraph numbers;
- date of publication, etc.

At present, certain HRSDC rules are published on the Internet as html code and reference cannot be made to some specific paragraphs as sources of authority as many rules are not numbered and dated. Other rules are only published internally which make reference even more difficult as employers do not have access to these rules and guidelines. If changes take place in internal rules, there can be no indication of what changed and when it changed. Why can HRSDC and Service Canada not have the same clear and well-published rules in the form of one document? Many of the existing rules have no numbers, no date of publication and are only accessible through Access to Information requests.

4. Remove the following bias question from the HRSDC website, "An indication of whether you actively work with union officials to identify unemployed Canadians".

   Why must this be removed? The requirement to work with a union to find suitable Canadians is only a requirement in some collective agreements.

5. Remove the following bias question from the HRSDC website, "An explanation of the union's position on hiring a foreign worker for your job. If you have not contacted the union, explain why you have not done so".

   Why must this opinion from the union be removed? Unless it is a requirement in a union agreement (which is unthinkable), employers do not have to obtain the union's opinion/input/position. Only if the collective agreement requires the union to be contacted for workers or employees are the employers required to contact the union to determine if the union or bargaining unit can provide for employees. To obtain an opinion about the "union's position" is

   - an *ultra vires* requirement;
   - will not shed light on the question whether the appointment of a foreign worker will have an adverse effect on the settlement of the dispute;
   - a non sequitur;
   - an indication about a possible bias attitude against employers and lead Service Canada officers down the wrong path.

We have worked with employers across Canada (as many as 1500 employees or more) and management were perplexed (some shocked) by the audacity and the motivation behind this question

as well as the insistence by some officers requiring written concurrence from a union.

6. Rewrite Question 49 in Form EMP 5239. The suggested question is as follows:

If there is a union, what is the name of the union?

Is it a requirement of the union agreement to consult with the union in the employment of workers? (Please provide a copy of the collective agreement).

If the union had to be contacted as required by the Collective agreement to find employees/workers, when and how was this done and what was their response?

7. Train officers to interpret the relevant legislation in their decision-making process.

8. Explain on which date a labour dispute will be taken into consideration: when the submission is made to Service Canada, when the officer makes the decision; or when the work permit has been requested at a CIC office.

Some would argue that the decision date of the officer should be the appropriate date. However, since Service Canada sometimes has such long processing times, it would only be fair to lock it in at the date of submission plus one week from that date. If HRSDC is incapable (for whatever reasons) of providing a decision within a reasonable timeframe (2 weeks), they should not be allowed to have the benefit of using unforeseen labour occurrences to prevent the appointment of a foreign worker. It would only be procedurally fair if HRSDC has a time limit to perform their duty. What would happen if a submission is made to HRSDC and 10 weeks after the submission, a decision has not been made and a "dispute" is noted/registered during the tenth week?

9. Explain in policy whether the definition of a "dispute", "arbitration" or "mediation" mentioned in the national and provincial labour legislation is considered a "dispute" under Immigration and Refugee Protection Regulation 203(f). Some examples of national and provincial labour legislation that could be addressed in HRSDC policy are discussed below.

In the case of some employers, the *Canada Labour Code* (federal/national legislation) is the relevant legislation for labour issues, not provincial labour law. Section 2 of the *Canada Labour Code* defines the words "dispute", "lockout to strike" as well as the actual time when a dispute officially exists.

> "dispute" means a dispute arising in connection with the entering into, renewing or revising of a collective agreement, in respect of which notice may be given to the Minister under section 71.
>
> "lockout" includes the closing of a place of employment, a suspension of work by an employer or a refusal by an employer to continue to employ a number of their employees, done to compel their employees, or to aid another employer to compel that other employer's employees, to agree to terms or conditions of employment.
>
> "strike" includes a cessation of work or a refusal to work or to continue to work by employees, in combination, in concert or in accordance with a common understanding, and a slowdown of work or other concerted activity on the part of employees in relation to their work that is designed to restrict or limit output.
>
> The Labour Code of Canada indicates that a "dispute" must be registered under Sec 71 of the Code:
>
> 71. (1) Where a notice to commence collective bargaining has been given under this Part, either party may inform the Minister, by sending a notice of dispute, of their failure to enter into, renew or revise a collective agreement where (a) collective bargaining has not commenced within the time fixed by this Part; or (b) the parties have bargained collectively for the purpose of entering into or revising a collective agreement but have been unable to reach agreement. Copy to other party (2) The party who sends a notice of dispute under subsection (1) must immediately send a copy of it to the other party.

The HRSDC website mentioned that the national Labour Code applies to the following employers:

- Works or undertakings connecting a province with another province or country, such as railways, bus operations, trucking, pipelines, ferries, tunnels, bridges, canals, telephone and cable systems;
- All extra-provincial shipping and services connected with such shipping, such as longshoring;

- Air transport, aircraft and airports;
- Radio and television broadcasting;
- Banks;
- Defined operations of specific works that have been declared by Parliament to be for the general advantage of Canada or of two or more provinces, such as flour, feed and seed cleaning mills, feed warehouses, grain elevators and uranium mining and processing; and
- Federal Crown corporations where they are engaged in works or undertakings that fall within section 91 of the Constitution Act, 1867, or where they are an agency of the Crown, for example the Canadian Broadcasting Corporation and the St. Lawrence Seaway Authority.

Employers with premises that are located on provincial borders could also follow the national Labour Code (not mentioned on the HRSDC website).

In the case of Manitoba, the *Labour Relations Act* of Manitoba defines the term "dispute":

> "dispute" means any dispute or difference, or apprehended dispute or difference, between an employer and one or more of his employees or a bargaining agent acting on behalf of his employees, as to matters or things affecting, or relating to, terms or conditions of employment or work done or to be done by him or by the employee or employees, or as to privileges, rights, and duties, of the employer or employee or employees.

In Ontario, the *Labour Relations Act* of 1995 defines the term "strike" and not "dispute":

> "strike" includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slowdown or other concerted activity on the part of employees designed to restrict or limit output; ("grève").

In Alberta, the *Labour Relations Code* of 2000 specifies the following:

> 1. (j) "dispute" means a difference or apprehended difference arising in connection with the entering into, renewing or revising of a collective agreement;

In Saskatchewan, the *Trade Union Act* of 1978 specifies the following:

> (i) "labour-management dispute" means any dispute or difference between an employer and one or more of his employees or a trade union with respect to: (i) matters or things affecting or relating to work done or to be done by the employee or employees or trade union; or (ii) the privileges, rights, duties, terms and conditions, or tenure of, employment or working conditions of the employee or employees or trade union;

10. Make it a requirement to provide a copy of the collective agreement in a LMO submission and highlight the relevant section.
11. Notify all immigration industry organizations such as CMI, CAPIC and the CBA about policy changes.
12. Notify industry organizations ahead of time when forms or other requirements will change. Making abrupt changes without prior notification is procedurally unfair.

Part Two of this article resumes in the next issue of ImmQuest with a discussion on actions that immigration practitioners should be taking.

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Case Tracker: Cases You Should Know!

Mario D. Bellissimo, C.S.

Detention Review – Minister's Application

Case: *Canada (Minister of Public Safety & Emergency Preparedness) v. Sankar*
Decider: Mr. Justice Boivin
Court: FC
Citation: 2009 FC 934
Judgment: September 18, 2009
Docket: IMM-4589-09

[13] The Respondent's sister said that she has an influence on her brother because he listens to her and respects her. However,