

# ImmQuest

“Qui bene interrogat bene docet” “He who questions well teaches well”

Editors-in-chief: Cecil L. Rotenberg Q.C. and Mario D. Bellissimo C.S.; Associate Editor: Edward C. Corrigan

## Unions and Disputes in LMOs

Cobus Kriek

(Part Two of Two – Please see the March Issue of *ImmQuest* (6-3) for the beginning portion of this article).

...

### What Should Immigration Practitioners Do?

Immigration practitioners should consider implementing some of the following actions:

- Be aware that Immigration and Refugee Protection Regulation 203 (3) (f) is sometimes interpreted incorrectly by some Service Canada foreign worker officers.
- Be aware that some rules are in conflict with each other and some questions are interpreted as rules.
- Be aware that some rules and questions are *ultra vires* and could point toward a bias attitude.
- Be aware that some officers believe that questions in Form EMP 5239 hold authority and are guided by this in their decision making.
- Prevent an error by providing copies of the sources of authority – especially a copy of National Policy Directive

Full Story on page 2

## INSIDE

### Focus— Work Permits – Part II

- **Unions and Disputes in LMOs (Part Two of Two) . . . . . 1**  
— Cobus Kriek
- **Case Tracker: Cases You Should Know! . . . . . 4**  
— Mario D. Bellissimo, C.S.

Please send your questions to *ImmQuest* care of Mario D. Bellissimo at [mdb@obr-immigration.com](mailto: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.

# Unions and Disputes in LMOs

## continued from page 1

No. 13. Highlight the relevant sections and refer to it in the submission.

- Obtain a copy of the collective agreement and provide this to Service Canada as an enclosure to the submission.
- Determine which provincial or federal law governs the dispute (as mentioned above) and obtain a copy of the relevant legislation. Provide a copy of the relevant provincial or national legislation to the Service Canada foreign worker officer.
- If there is a dispute, arbitration, mediation, strike or lockout as defined in the provincial or national legislation or labour contract/collective agreement, provide copies of the relevant statutes, regulations or agreements that describe the appropriate type of “dispute”. In the submission, describe how this applies to current labour action (if any).
- Determine if there are special procedures for the registration of a dispute at the workplace and obtain copies of documents describing this process. Provide copies to Service Canada and verify if any dispute was registered, whether a dispute is imminent and how far the dispute process has escalated in this process.
- Determine whether there is special industry legislation in addition to national or provincial legislation that is relevant and provide copies in the submission. For example, in Ontario there is the *Hospital Labour Disputes Arbitration Act*, and in Alberta there is the *Horizon Oil Sands Project Designation Regulation*. Determine the impact of this legislation (being an Act or a Regulation) on the submission and provide copies to the Service Canada foreign worker section.
- Determine what the role is of any relevant national or provincial labour board (such as the Labour Relations Board, or in the case of Alberta, the Dispute Resolution Board of Alberta) and determine whether these organizations can provide additional information to assist the Service Canada foreign worker officer to make an appropriate decision.

Provide all of the research and a summary of the discussions held with officials including their names, appointment and contact details to the Service Canada foreign worker section in the submission.

- As the immigration practitioner represents the employer, do not communicate to the union directly without the blessing/approval of the employer.
- Determine whether there were any recent lay-offs/terminations (in a unionized and non-unionized environment), what the reasons were for these lay-offs/terminations and whether any disputes are expected from these lay-offs/terminations. Provide as much of this information to the Service Canada foreign worker section as possible: names, occupations, reasons and dates. It is very important to request these details from the employer even if there is no union agreement or organized labour present at the workplace.
- Attempt to prevent phone calls and request officers to make their request in writing. Verbal conversations with officers should be captured with a reply letter to the officer detailing the questions and answers. This will create an accurate record of the discussion which will be very important in case a review is requested within Service Canada or through the courts.
- Make careful notes of these verbal statements in the above-mentioned manner and ensure that it is captured on the file notes of HRSDC. An Access to Information Request will reveal that in many cases officers do not keep good records and motivation of decisions on file. Errors should be corrected in writing to the relevant Service Canada’s office in each province.
- Practitioners should be aware that in some collective agreements there are moratoriums on strikes or lockouts. In some cases, investors will only make major investments if the investors have insurance that there will not be any labour disruptions. This requirement could result in the employers and employees agreeing that all disputes will result in arbitration or mediation. In such a case, the appointment of a foreign worker could not have a negative effect on the settlement of dispute or have a negative effect on the labour market as a dispute must be settled with mediation. When cases like this exist, explain this in the submission. Even if

there is a dispute that could lead to a decision before an arbitrator, the Union members' jobs cannot be at risk as any strike and lockouts would be prohibited under such an agreement. Therefore, the appointment of a foreign worker could not have an adverse effect on the settlement of a "dispute".

- Request the employer for a description of the actions that were taken to obtain qualified workers from the union or employee organization, if this was required, in terms of the union agreement or if the employer volunteered to take this action. In this detailed description of the actions taken, mention the dates, contact names (at the employer and the Union) and the method of communication (e-mail, meetings, etc.) to the HRSDC foreign worker officer as part of the submission. For example, copies of advertisements placed on employer (in-house) display boards could also be provided.
- Practitioners should work with the relevant immigration lobbying organizations such as CAPIC, CMI or the CBA and ensure that (with a well-organized effort) HRSDC foreign workers in Ottawa are informed of practical problems in the field, such as the problems with the interpretation of *Immigration and Refugee Protection Regulation* 203 (3) (f). Ottawa cannot improve their long-awaited policy if they are not being informed of the challenges that different industries are experiencing.
- Practitioners are reminded that the HRSDC foreign worker section in Ottawa only develops policies and that these policies are implemented by provincial offices of Service Canada over which HRSDC foreign workers in Ottawa has no jurisdiction. This is a very unhealthy situation and it also contributes to the divide between the policy maker and the organization responsible for its implementation. This is evident in the discrepancies in policy interpretation between the different policies of different provinces.
- Lobby for change: Industry organizations should question HRSDC foreign worker section and the relevant Ministry about why policies on Labour Market Opinion and Arranged Employment Opinions could not have been made public in more than 4 years. HRSDC foreign worker section was informed about the lack of policy and

the need for publicly available policy in May 2005 during the CICIP meeting held in Banff Alberta and in several other forums. The lack of well-publicized, numbered and detailed policies on all issues (not brief guidelines in html format on the Internet) result in incorrect decisions, disputes between Service Canada foreign worker officers and employers. As a result, limited "man" hours are being absorbed on either side by unnecessary squabbling which results in even slower processing times.

- Lobby for change: Working in a transparent way, which we all expect in a first world country, should become the norm as emphasized by the Montgomery Report on the Sponsorship Scandal in Chapter 10. Justice Montgomery mentioned the following:

The Commission wishes to emphasize a key concept that may be learned from the private sector: greater transparency promotes accountability and better management. The best managers are those whose administrative practices are transparent and who accept that they are accountable not only to their superiors but also to the shareholders of the corporation... By contrast, it is uncommon for the public, who are, in a sense, the shareholders of the various enterprises, agencies and corporations operated by the federal government, to be made aware of... with money that comes indirectly from taxpayers. This chapter explores the means of achieving greater transparency in several areas and suggests an explicit link between increased transparency and the achievement of better management and accountability throughout the public sector. Critics, both inside and outside government, talk of "shifting the paradigm" or a "change in culture." By seeking and attaining greater transparency in the various areas discussed below, the federal government will be better managed because it will be more accountable. That will help to create the cultural change being sought.

When senior members of HRSDC and or Service Canada question the necessity of having publically available rules about the interpretation of regulations, it possibly demonstrates the lack of understanding of transparent government.

- HRSDC foreign workers work for Canadian employers and the Foreign Worker Program is an “employer” program. Practitioners should advise and educate Canadian employer organizations about the challenges and opportunities within the Foreign Worker Program. This will empower these organizations to lobby the federal government for changes in this federal program.
- Detailed reasons should always be requested in the case of negative decisions or for not providing a LMO for a specific period. Any negative decisions based without accompanying detailed reasons, decisions that are *ultra vires* or based on irrelevant factors can be reviewed in federal court. The importance of requesting detailed reasons have been mentioned in the following cases:
  - In *Liang v. Canada (Minister of Citizenship & Immigration)*, [1999] F.C.J. 1301,<sup>1</sup> the judge mentioned the following: “However, in my opinion, the duty of fairness normally only requires reasons to be given on the request of the person to whom the duty is owed and, in the absence of such a request, there will be no breach of the duty of fairness.”
  - *Gaoat v. Canada (Minister of Citizenship & Immigration)*, [2007] F.C. 440, it was mentioned that “the fact that the applicant in the present case failed to ask for further reasons bars him from claiming on judicial review that the duty of fairness owed to him was breached because the reasons provided were inadequate.”
  - In *Hayama v. Canada (Minister of Citizenship & Immigration)*, [2003] F.C. 1305, the following was mentioned: “ Before seeking judicial review of a tribunal order on the grounds of failure to provide reasons, there is an obligation on parties to request reasons from the tribunal.”

*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@matrix-visa.com](mailto:cobus@matrix-visa.com).*

## Case Tracker: Cases You Should Know!

Mario D. Bellissimo, C.S.

### Refugee (China)

**Case:** *Zhou v. Canada (Minister of Citizenship & Immigration)*

**Decider:** Mr. Justice de Montigny

**Court:** FC

**Citation:** 2009 FC 1210

**Judgment:** November 25, 2009

**Docket:** IMM-1674-09

[28] It was inappropriate for the Board to question the genuineness of the applicant’s faith on the ground that he had no previous religious background, and that he did not investigate the conflict between Christianity and its practice in official churches. The applicant was found credible, he continued his practice of Christianity in Canada, and the authenticity of his beliefs were not a matter for the Board absent evidence that his conversion to Christianity and his preference for his unregistered church were somehow dictated by untruthful motives. As I said in *Chen v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 677, [2009] F.C.J. No. 1391:

28. The only thing the Board purported to say on the subject was that if the applicant wishes to practice his religion in China, he could do so freely in a registered church “as vast and increasing numbers of Chinese citizens now do without fear of persecution”. Not only is this finding inappropriate, but it is also inaccurate. It is not for the Board to dictate how the applicant should practise his faith. As can be seen from the documentary evidence (and, in particular, from a Response to Information Request dated 27 April 2007), some religious groups in China choose to remain unregistered because registration involves being monitored by the government and government sometimes interfere in doctrinal decisions of registered religious groups. It is perfectly legitimate for the applicant to choose not to join these official churches, if he considers that this is the only way to remain true to his faith. Various reports indicate that the government of China does not allow the official Catholic Church to recognize the authority of the Vatican, and denies many central dogmas of the Catholic

<sup>1</sup> 1999 CarswellNat 1592