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BULLETIN

Is Silicon Valley moving north?

While the United States curtails its immigration, Canada introduces a pilot program aimed at highly skilled workers

By Naumaan Hameed, Partner, KPMG Law

Canada and the United States are adopting diametrically opposed views on immigration policy, based partly on differing views of the impact of temporary foreign workers when it comes to domestic economic growth, job creation and skill transfer.

While recent U.S. policy has generally sought to curtail immigration, a new Canadian immigration pilot program — which enables the expedited entry of high-skilled foreign workers holding unique or in-demand skills — has been introduced to assist employers to scale up and compete in the global marketplace.

And a number of businesses, particularly in the technology industry, are identifying Canada's progressive immigration program as a differentiating factor in securing critically needed foreign talent, so they are either establishing or expanding operations north of the border.

Protecting U.S. jobs, wages

Protectionism is a recurring theme of President Donald Trump's administration and is premised on the assumption that restricting the entry of certain foreign workers will result in more job opportunities for Americans. A clear priority is to protect U.S. jobs and wage levels by increasing enforcement on immigration fraud and abuse, and changing the eligibility and procedural requirements of the most popular work visa categories.

The H-1B ''specialty occupations'' visa program is a favoured path for U.S. companies to bring in highly skilled, professional foreign talent. While the H-1B program has been the subject of debate for many years, the present political leadership in the U.S. has dramatically ramped up scrutiny and criticisms of the program.

Most notably, Trump's ''Buy American, Hire American'' executive order unveiled last April directs immigration and labour regulatory agencies to focus on strict enforcement and total transformation of the program.

Specifically, the administration, in tandem with congressional leaders, is promoting significant reforms to the H-1B program from a lottery to a merit-based system, which may result in visas being awarded primarily (or even exclusively) to those with advanced degrees or receiving the highest wages.

Many U.S. companies, particularly those dependent on high-skilled foreign workers, are increasingly concerned about the ability to compete internationally, given the anticipated challenges and significant increases in wages, costs and compliance obligations associated with the proposed H-1B reforms.

Strategic immigration policies to support Canadian innovation

In contrast to the U.S., the Canadian government has created a new, innovative immigration pilot program that assists both high-growth and tech companies to scale up by accessing high-skilled foreign talent on an expedited basis, while stimulating economic growth, job creation and skills development for Canadians.

Employment and Social Development Canada (ESDC) introduced the Global Talent Stream (GTS) on June 12 as part of Canada's Global Skills Strategy, and it provides two new streams for employers seeking high-skilled global talent in Canada.

The GTS facilitates the entry of highly skilled foreign workers possessing unique talent for high-growth companies (category A) or holding in-demand skills most notably in technology-related occupations (category B). Participation in the pilot program is conditional on an employer submitting a Labour Market Benefits Plan, which is a written commitment to create new jobs or training opportunities for Canadians.

A Labour Market Impact Assessment (LMIA) processed under the GTS is not subject to ESDC's minimum advertising requirements and transition plan. In addition, the LMIA and work permit processing standard under the GTS is two weeks - a substantial improvement from regular processing times.

The Global Skills Strategy also supports faster processing for LMIA-exempt work permit applications under the International

Mobility Program (IMP) for executive, managerial and high-skilled occupations – reducing processing times from 12 to 16 weeks at certain visa posts to two weeks.

Furthermore, eligible foreign workers are also able to obtain a work permit exemption enabling them to work without a work permit for up to 30 days within a calendar year.

Considering the factors when attracting tech companies

Given the various parallels between Canada and the U.S. — such as geographic proximity, language, legal systems and cultures — the additional advantages from Canada's new immigration pilot is becoming a key factor in attracting tech companies to Canada.

A comparison of the two programs clearly highlights the strategic advantages of GTS Category B vis-a-vis the H-1B as a mechanism for tech companies to quickly and predictably acquire global talent in order to scale up and compete internationally.

It is worth noting that the minister of immigration recently announced that the startup visa pilot — which was intended to help immigrants launch businesses in Canada – will become a regular part of the federal immigration program. This announcement was made shortly after the U.S. government announced it may delay or eliminate its version of the startup visa — the international entrepreneur rule — altogether. The startup visa was intended to allow foreign-born entrepreneurs to remain in the United States.

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The haunting insult of being a 'taxpayer cost'

By Ron Poulton, Poulton Law

When Angela Chesters learned she could not reunite with her husband in Canada as a landed immigrant because she was likely to create an excessive demand on our health and social services, she felt insulted. Chesters was, and is, an independent woman who obtained a Masters degree in Science and Information Technology and who had engaged in full-time work averaging some 70 hours per week. She is bright, hardworking and had much to offer Canada in 1994.

She also had multiple sclerosis and was in a wheelchair, and so she was deemed a risk of costing Canada too much; too much in medical care, too much in occupational therapy, too much of too much. What Chesters offered by way of her hard work, bright and active mind and being a loving wife to a Canadian citizen was not factored in to the equation. She was disabled, and her value to Canada was simply never considered.

Chesters sued the government of Canada. However, in 2002, a Federal Court judge decided that Chesters was not being discriminated against because she was disabled, she was refused landing because of cost — a cost applied to everyone.

What the judge never referenced in her decision was actuarial evidence submitted on behalf of the plaintiff that foreign nationals who smoke or engage in risky behaviour, such as fast driving, cost even more to our health and social service system, yet they are never labelled an excessive demand. The judge also did not refer to evidence that very bright children who enter gifted programs and cost the school board more than average kids also cost a lot to our social service system, yet they are never ''screened out'' as applicants for permanent residency.

What this and other evidence revealed was that the assessment of excessive demand was not just about cost, it was and is about where that cost comes from and who is generating it. If you are disabled and may cost the system more than an average Canadian costs, then it is irrelevant whether you are Angela Chesters and work 70 hours a week or Stephen Hawking, a brilliant physicist. You will be refused. If you are a heavy smoker, however, and likely to end up with lung cancer in a Canadian hospital, you are fine.

When asked under cross-examination in *Chesters* how he could explain how a heavy smoker who would likely cost the taxpayers significant health-care costs could be allowed into Canada without an issue, the director of Canada Immigration's Medical Services refused to offer a direct answer and instead said that she personally encouraged all smokers to quit! A Trumpian retort if there ever was one.

The focus on disability on a medical assessment has again come to light after Parkdale Community Legal Services began representing a live-in caregiver who faced having her permanent residency application refused as she has a son in the Philippines who is disabled. Although the law was amended after 2002 to exempt spouses, dependent children and a few others from the excessive demand assessment in recognition of its discriminatory and unfair quality, it remains a barrier to other foreign nationals and their children — those like Parkdale's client, a nanny who had worked long hours, days and years caring for Canadians and now was denied landing in Canada because her son was disabled.

Although the Supreme Court of Canada softened the excessive demand bar in 2005 by infusing a requirement that medical officers consider a family's willingness and ability to not access publicly funded services, it never softened the insult that a disabled child has no other value beyond health and social

service costs, like any able-bodied person, and that that value must be part of the equation.

Chester's anger at Canada for failing to consider her personal characteristics and the contribution she could make that went beyond the image of the restrictions of her wheelchair and the cost of services was justified then and remains pertinent now. Canada's recent response to United Nations concerns over the discriminatory conduct of Canada Immigration against people with disabilities was to say that the excessive demand regime was under review. Let's hope so.

The issue of taxpayer cost is the Trumpian justification, but it remains largely a red herring. A reply of half-truths and false news to the real issue of discrimination is disappointing. The failure of an immigration regime to understand that a child who may not be able to walk or who may need additional help in school may still contribute to Canada in ways that far exceed an accountant's short-term assessment of cost is unacceptable.

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This article by Ron Poulton ''The haunting insult of being a 'taxpayer cost' originally appeared on the Canadian Lawyer website and may be found at http://www.canadianlawyermag.com/author/ron-poulton/the-haunting-insult-of-being-a-taxpayer-cost-3660/

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No NAFTA? No problem - for temporary business travel, that is

By Sarah McInnes and Meghan Felt, McInnes Cooper

Canada's most important trading relationship is — in all likelihood — about to change: The current United States administration has put the future of the North American Free Trade Agreement at risk. One of NAFTA's key benefits is its role in facilitating cross-border mobility between Canada and the U.S. But while NAFTA remains vital to immigration, the demise or drastic redrafting of NAFTA does not necessarily mean the end of fast and stress-free business travel from the U.S. to Canada.

Business Visitors. Canada's ''business visitor'' visa was designed to grant people from the U.S. (and elsewhere) entry to Canada without the usual requirement for a work permit. This work permit exemption is valuable because obtaining one can be a complex process: There is a fee and, unless the individual meets one of the narrow exemptions for a labour market impact assessment, it's very difficult to get a work permit without one. A person coming to Canada for business may require a work permit to enter and carry out their intended activities, even if only in Canada for a few days. However, a person who does qualify as a ''business visitor'' for Canadian immigration law purposes is exempt from this work permit requirement and granted temporary entry to Canada for a stay of up to six months. Currently, NAFTA permits the nationals of member countries (the U.S. and Mexico) to travel to Canada as such a ''business visitor'' if they are engaging in qualifying activities, which include participating in business meetings, conventions, conferences, consultations and negotiations respecting them. Still, even if the NAFTA negotiations affect this work permit-exempt path into Canada from the U.S. for temporary business travel, there are two other options.

Immigration and Refugee Protection Regulations (IRPA). U.S. (and Mexican) nationals can still effectively enter Canada as business visitors under Immigration and Refugee Protection Regulations with little practical distinction vis-à-vis NAFTA. Under IRPA, any foreign national (including Americans) can enter Canada without a work permit as a ''business visitor.'' Defined broadly, for the purposes of IRPA, a business visitor is a foreign national who seeks to ''engage in international business activities in Canada without directly entering the Canadian labour market,'' and whose principal place of business, primary source of remuneration and the place of accrual of profits remain outside Canada. Immigration, Refugees and Citizenship Canada developed and posted guidelines on its website for immigration officers on its interpretation and application of both NAFTA and IRPA, and the qualifying activities under each are largely parallel. The guidelines provide illustrative examples of permitted activities, including: after-sales service/warranty work, purchasing Canadian goods or services for a foreign business or receiving training in respect of such goods or services; receiving or giving training within a Canadian affiliate of the corporation that employs them outside of Canada, if production resulting from the training is incidental; and representing a foreign business for the purpose of selling goods but not making sales to the general public.

Global Skills Strategy. In June 2017, shortly after the U.S. introduced ''hire American'' immigration policies, Canada created its Global Skills Strategy. Intended to facilitate the ability of Canadian businesses to attract international talent (from the U.S. and beyond) to Canada, the strategy does not employ the ''business visitor'' visa, but its practical effect is similar. The strategy introduced two work permit exemptions. The first exemption is for highly skilled workers to enter Canada for short-term work assignments and short-term research. Individuals will qualify if their occupation is National Occupation Classification skill type 0 (executive, managerial) or skill level A (professional) and they are coming to Canada for a short-term work assignment of 15 days (once every six months) or 30 days (once every 12 months). The second exemption is for researchers coming to Canada for a 120-day stay in a period of 12 months where they are working on a research project at a publicly

funded post-secondary institution or affiliated research institution.

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This article by Sarah McInnes and Meghan Felt: ''No NAFTA? No problem - for temporary business travel, that is'' originally appeared on McInnes Cooper's website at http://www.mcinnescooper.com/publications/no-nafta-no-problem-for-temporary-business-travel-that-is/.

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