



Immigration Law News

Robert Young

Not Transparent. Not Predictable. Not Simple.

During 2007-2008 the Canadian Immigration system collapsed. The failure of the system is to be laid at the feet of the Ottawa mandarins who have alternately starved it or micromanaged it into a state of confusion. I can only feel pity for Immigration's front line workers.

Skilled Worker Program

On March 14, 2008 the Minister for Citizenship and Immigration proposed Bill C-50. This act (which was passed by the Senate at the end of June) gives the Minister the power to cherry pick from the class of skilled worker applications filed after February 27, 2008, those people whom the Minister thinks have the skill set needed to fill an occupational category that is currently in demand in Canada. It also allows her to cherry pick among applicants in the "entrepreneur" and "investor" categories. It also shuts down the right to file an application on humanitarian grounds from overseas. Because the discretion given to the Minister is so broad, I think that applicants have lost the right to use the writ of mandamus.

In March 2008 there were about 925,000 permanent resident applica-

tions sitting in Canadian embassies waiting to be processed. The majority of these were applications under the skilled worker category (over 600,000). In the last two years Canada has received about 174,000 skilled worker applications each year. The Minister has defended Bill C-50 by saying that something has to be done about the backlog.

What I find extremely frustrating is the fact that the senior bureaucrats in Ottawa don't know their Ministry's own history. Until June 2002, the skilled worker system was already designed around bringing to Canada people whose skills were seen to be in demand. We had an "occupations list" that gave high priority to such people as computer systems analysts and radio therapy technicians and low priority to eavestrough installers. Lawyers weren't even on the list! This system broke down because of underfunding. It became irrelevant because the list was never kept up-to-date.

Another reason why we have a backlog today was because of the ham-fisted way the Act was changed in 2002. In 2002 a previous Minister of Immigration rammed through the legislation in a rather secretive manner and made the changes retroactive. Because of the haste in which that legislation was pushed through, the

Ministry at that time too had not prepared its procedures or trained its staff. The resulting confusion and appeals to the Federal Court froze the system for about a year and a half. The backlog of skilled worker applications in 2000 was 374,000. It grew to 524,000 by the end of 2004.

We don't know what the new rules under Bill C-50 are going to look like. I expected that if the Minister proposed changes to the Act in March that her Ministry would have the new regulations and procedures already ready, or would have spent the summer working on them. At this point, the earliest we are going to see the new regulations will be the fall. It is impossible to advise anyone who is thinking about coming to Canada at this time whether or not there is any point in making an application. It is impossible to predict how quickly the application will be processed. No one has any idea what occupations will be deemed to be in demand. If an application is filed and the person's occupation does not fit into one of these proposed lists, the application will simply be thrown back.

If I am having trouble keeping up with the changes (I read the Canada Gazette every week), how can we expect someone in Berlin or Beijing to keep up?

Backlogs at the Immigration and Refugee Board

The backlogs at the IRB are now two years or more long. In 2007 the refugee side of the IRB finalized 13,826 refugee claims. They finalized 27,212 in 2005 and 40,408 in 2004. At the end of 2007, 37,513 cases were waiting to be heard. By the spring of 2008 the backlog on the refugee side

had grown to approximately 42,300 claims. On the Immigration Appeal Division side, approximately 5,800 appeals were finalized last year. The backlog grew to approximately 10,400 appeals.

Work Permits for Post-Graduation Students

I am over-simplifying a very positive change. Since April, foreigners who complete a degree or diploma program in Canada are now entitled upon the completion of their studies to a three-year open work permit.

New Category of Applicant: Canadian Experience Class

On August 9, 2008 the Minister floated a trial balloon. We don't know if or when this new category will open. The best estimate is the fall. We don't even know if the trial balloon will emerge in final form looking anything like the draft regulation published August 9, 2008. In this new category, though, someone who has

completed a degree or diploma in Canada and has twelve months of legal work experience within twenty-four months of applying for permanent residence, may become a Canadian permanent resident. Someone who has worked in Canada for at least two years out of the previous three years may also apply for Canadian permanent resident status. When you combine this change with the new work permits for foreign students, the Minister has proposed a very common sense, simple way for people who already have proven themselves in Canada to become Canadian permanent residents. When, though, will the program be put into place? How long will processing take? While we are waiting for the Minister to make up her mind, what are potential applicants supposed to do?

When is it Unreasonable to Say Something is "Unreasonable"?

I think Bobby Ewing was taking a shower when this one happened. The

Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (March 7, 2008) rolled back the clock on itself. The Court, which had itself created the distinction between "patent unreasonableness", "reasonableness simpliciter" and "correctness" decided that it has made a mistake and said that the distinction between "patent unreasonableness" and "reasonableness simpliciter" is gone. Of course, I am again over-simplifying. The only standards left to apply in a judicial review application are "correctness" and "reasonableness".

I am a tiny bit relieved by this decision. I could never figure out the difference between the two types of "reasonableness". ■

*Robert Young can be contacted at:
Sullivan Festeryga LLP
1 James Street South, 11th Floor
Hamilton, ON L8P 4R5
905-528-7963
ryoung@sullivanfesteryga.com*