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Expert Witnesses: A Lesson in What Not to Do *

By Adam Hirsh, Osler Hoskin & Harcourt LLP

Expert evidence often plays a critical role in complex litigation, and can frequently determine the outcome of the case. The recent decision of the Ontario Court of Appeal in *Alfano v. Piersanti*[1] provides a welcome reminder of some of the key principles regarding expert evidence and a helpful illustration of the type of conduct by an expert that will cross the line into inappropriate advocacy. Of particular interest is the fact that the Court reviewed the emails between the expert and his client, which demonstrated that the expert had crafted his evidence to meet his client's goals in the litigation, asked the client for substantive input into issues on which the expert was retained to provide an independent opinion, and generally failed to maintain the degree of impartiality that is required of an expert witness.

The dispute in *Alfano* involved allegations of fraud and the expert evidence at issue related to the issues of forensic accounting and damages. After a mid-trial motion, the trial judge ordered the production of email correspondence that had been referred to in the expert's time dockets, which included a large number of emails between the expert and his client, the defendant. The trial judge conducted a lengthy *voir dire* to determine whether the evidence should be admitted and in a written ruling, held that the evidence should be excluded as the expert "based his analysis of the defense position on the theories advanced by [the Defendant]" and "was committed to advancing the theory of the case of his client, thereby assuming the role of advocate."[2]

The Court of Appeal upheld the trial judge's ruling to exclude the expert evidence, finding that it lacked independence and objectivity. The Court's decision was based in large part on an

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examination of the emails, which showed the expert attempting to tailor his evidence to achieve his client's objectives. Some examples of the emails that the Court highlighted included a statement by the expert that he was trying to "to bolster [the defendant's] position... [and] make [the plaintiffs] look bad," a request by the expert to "tell me succinctly why [the plaintiffs] are wrong," and a request for the defendant to identify "the three to five points which destroy or invalidate the [plaintiffs' damages expert's] loss of cash flow estimate." The Court was also troubled by the fact that each draft of the expert's two reports were delivered to the defendant for his review, revision and approval, and that the reports appeared to be biased, as they were repetitive and argumentative, went beyond the areas in which the expert was qualified to give evidence, addressed factual issues that fell within the purview of the trial judge, and opined on matters of law.

In upholding the trial judge's ruling, the Court of Appeal confirmed a number of important principles that experts and counsel should bear in mind when preparing expert reports.

First, the Court reiterated the well-established principle that expert opinion should always be the result of the expert's *independent* analysis and conclusion; it "should not be influenced as to form or content by the exigencies of the litigation or by pressure from the client." Although expert evidence may support a party's position, the expert cannot simply parrot the client's position or provide a platform from which to argue the client's case. Notwithstanding that the expert is retained by one party to the litigation, his or her ultimate duty is to court.

Second, the Court confirmed that a lack of independence may affect the *admissibility* of the expert's evidence, not simply its weight. While a concern about an expert's independence or objectivity will normally be addressed by attributing less weight to that evidence, the Court confirmed that the trial judge retains the discretion to exclude the evidence altogether where he or she is satisfied that the evidence is "so tainted by bias or partiality as to render it of minimal or no assistance."

Third, the Court agreed that it was appropriate for the trial judge to consider the email exchanges between the expert and the defendant in assessing whether the evidence was sufficiently independent. The Court held that:

> in considering whether to admit expert evidence in the face of concerns about independence, a trial judge may conduct a *voir dire* and have regard to *any relevant matters that bear on the expert's independence.* These may include the expert's report, the nature of the expert's retainer, as well as

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> materials *and communications that form part of the process by which the expert formed the opinions that will be the basis for the proposed testimony*.[3]

One of the interesting questions that is raised by the decision is whether the outcome would have been any different if the emails had passed between the expert and the defendant's counsel, rather than the defendant directly.

It can be anticipated that parties seeking production of an expert's brief will argue that regardless of whether the emails had been sent to the defendant or to his counsel, they would retain their character as "communications that form part of the process by which the expert formed his opinion," and accordingly would appear to be producible. Although a challenge might be raised on the basis of litigation privilege, the same challenge could have been raised by the defendant in *Alfano*, and yet there appears to have been no suggestion in this case that the emails in question might be privileged, as the issue was not addressed by either the trial judge or the Court of Appeal. Ontario courts have previously shown a willingness to order the production of information that is provided by counsel to an expert for the purposes of assisting the expert to prepare his or her report, finding that litigation privilege is waived through the production of the report.[4] Relying on rule 31.06(3), which requires a party to disclose on discovery the findings, opinions and conclusions of any expert that it intends to call at trial, the courts have ordered the production of notes, data, information, research and documents reviewed by the expert,[5]as well as drafts of the expert report.[6] Email communications between the expert and counsel are no different in principle.

Accordingly, the decision in *Alfano* provides an important reminder to counsel and their clients of the need to exercise caution when providing instructions and comments to an expert, and of the expert's obligation to render an opinion that is his or her own. Counsel who are providing instructions to an expert must remind the expert that they have a duty to act independently and to provide an opinion that is fair and impartial.[7] As the *Alfano* case demonstrates, the strategy of treating an expert witness as a hired gun is not only inappropriate, it can easily backfire.

[1] 2012 ONCA 297 ("*Alfano*")

[2] [2009] O.J. No. 1224 (S.C.J.)

[3] Emphasis added.

[4] See for example *Enterprise Excellence v. Royal Bank* (2000), 9 C.P.C. (5th) 362 (Ont. S.C.J.).

[5] See for example *Allen. v. Oulahen* (1992), 10 O.R. (3d) 613 (Gen. Div.); *Ontario (Attorney General) v. Ballard Estate* (1994), 20 O.R. (3d) 189 (Gen. Div.); *Lecocq Logging*

Inc. v. Hood Logging Equipment Canada Inc,. [2005] O.J. No. 2338 (S.C.J.).

[6] See *Aviaco Internatioanl Leasing Inc. v. Boeing Canada Inc.* (2002), 117 A.C.W.S. (3d) 51, [2002] O.J. No. 3799 (QL) (S.C.J.); *Ramer Building Supplies (Toronto) Ltd. v. Leva* (2009), 174 A.C.W.S. (3d) 998, [2009] O.J. No. 592 (QL) (S.C.J.); *Hrodynsky Farms Inc. v. Zeneca Corp*. (2006), 272 D.L.R. (4th) 532;

[7] Indeed, this duty is now codified in the *Rules of Civil Procedure* through the amendments to the Rules that came into force on January 1, 2010 and the introduction of Rule 4.1, which provides:

(1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,

(a) to provide opinion evidence that is fair, objective and non-partisan;

(b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and

(c)to provide such additional assistance as the court may reasonably require to determine a matter in issue.

(2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.

Under the amended Rule 53.03, experts must also now provide a written acknowledgement of their duty, in the form of Form 53.

* This article has been submitted for publication to the Canadian Bar Association

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Ontario Court Dismisses Billion Dollar Damages Claim Relating to Moratorium on Offshore Wind Farms

By Jack Coop, Dan Kirby, Jennifer Fairfax, Patrick Welsh

On October 5, 2012, the Ontario Superior Court of Justice struck out an action brought by Trillium Power Wind Corporation ("Trillium") against the Ontario government seeking $2.5 billion in damages occasioned by Ontario's February 2011 moratorium of offshore wind farms.

In *Trillium Power Wind Corporation v. Ontario*,[1] on a motion to strike out the action, brought by Ontario, the court ruled that Trillium's statement of claim (which alleged breach of

contract, unjust enrichment, expropriation, negligent misrepresentation, negligence, misfeasance in public office, and intentional infliction of economic harm) failed to disclose a reasonable cause of action and should be struck out, without leave to amend. The decision raises important questions about the risks assumed by contractors who choose to participate in discretionary government programs, such as Ontario's renewable energy program.

Brief Background

The facts pleaded in the Statement of Claim were accepted by the court as true for the purposes of the motion.[2] To encourage the development of wind power, the Ontario Ministry of Natural Resources ("MNR") announced a two-stage process that would allow prospective wind energy developers to identify, and eventually use, Crown land for wind power generation. This wind-power policy was announced in January 2004.

Trillium found a potential location for an offshore wind farm near Main Duck Island on Lake Ontario. In May 2004, Trillium applied to lease the Crown land, specifically the bedrock off of Main Duck Island, under the wind-power policy. MNR acknowledged Trillium's application, but explicitly noted in its correspondence that there was no further obligation to entertain the application.

In October 2004, Trillium paid fees related to its application. The MNR"s letter of receipt for this payment also explicitly stated that the fees paid conferred no guarantee of approval. In December 2005, the MNR notified Trillium that it was the Applicant of Record for Main Duck Island.

In November 2006, Ontario announced the first moratorium on offshore wind power development, pending further environmental and social studies. This moratorium was lifted in January 2008. Trillium re-applied for, and in December 2008 was granted, Applicant of Record status for Main Duck Island. MNR informed Trillium that the Applicant of Record status consisted of two phases: (1) a three-year test phase allowing Trillium to conduct wind-power testing; and, (2) an approvals phase where Trillium would be given the opportunity to conduct an environmental assessment and obtain other necessary approvals. MNR's correspondence again explicitly noted that no rights or tenure accrued with Applicant of Record status, and that approval of the application was not guaranteed, nor was there any right to alter or improve Crown land.

In February 2011, Ontario announced that offshore wind power development would be subject to a second moratorium, citing the need for further scientific studies. By then, Trillium had expended over $5,000,000.00 in testing and development.

In September 2011, Trillium brought a civil action against the Ontario government seeking $2.25 billion in damages based on allegations of breach of contract, unjust enrichment,

expropriation, negligent misrepresentation, negligence, misfeasance in public office, and intentional infliction of economic harm. The statement of claim further alleged that Ontario acted unlawfully in that it breached a variety of statutes, including the *Green Energy Act*, the *Electricity Act*, and the *Ontario Water Resources Act*. Ontario moved to strike, arguing that the statement of claim disclosed no reasonable cause of action.

The Superior Court Dismisses Trillium's Arguments

Ministerial Discretion Existed Throughout the Regulatory Scheme

The court first made a legal determination that only three statutes govern offshore wind power development: the *Electricity Act*, the *Environmental Protection Act* ("EPA"), and the *Public Lands Act*. The *Green Energy Act* and the *Ontario Water Resources Act* were ruled to be legally irrelevant. Moreover, the three relevant statutes all confer broad ministerial discretion to set or alter government policy with regard to the development of wind power. They also confer broad statutory discretions to issue a variety of project approvals, including a Renewable Energy Approval under the EPA, all of which must be obtained by a proponent before a proposed offshore wind farm project may proceed. The court held that the Ontario government's actions of altering offshore wind farm policy (the moratorium) were not illegal because they were made in accordance with the discretion conferred by the statutes. Further, the court held that Trillium had not obtained the requisite approvals for constructing and operating a wind farm at the time of the moratorium. Rather, Trillium had just begun the approvals process.

No Breach of Contract

Although Trillium argued that its status as Applicant of Record demonstrated a contractual relationship with Ontario, based upon documents expressly referenced in the Statement of Claim, the court ruled that there was clearly no contract in place.

> ...Applicant of Record Status confers no rights, obligations, tenure, or approval. At most, Applicant of Record status granted Trillium the right to continue with the regulatory process to the next level of approvals.

The court stated that this was a "complex regulatory process that might have led to approvals", but they were by no means guaranteed.

In short, Trillium was attempting to obtain compensation for the exercise of regulatory authority while incorrectly characterizing it as a breach of contract. Because there was no contract in place, no reasonable cause of action for breach of contract could be sustained.

No Unjust Enrichment

Trillium alleged in its claim that it had been deprived of the opportunity to construct a wind farm. Although the court had difficulty in accepting that Trillium had been deprived of anything, it disposed of this cause of action by reasoning that Ontario had in no way been correspondingly enriched.

No Expropriation

Although Trillium did not explicitly plead expropriation, it did allege, using the language of expropriation, that its "property" and "asset" had been confiscated by government action. In its particulars, Trillium identified its property and asset as its Applicant of Record status. The court dismissed this allegation, holding that the Applicant of Record status was not property, but was merely a right to enter into a regulatory process that might result in approval to construct a wind farm. Moreover, Trillium could not establish that the government had taken the alleged "property" for its own use or for the purposes of destruction, an essential element of a compensable expropriation.

No Negligence or Negligent Misrepresentation

The court ruled that both the torts of negligence and negligent misrepresentation required, as a matter of law, the existence of a private law duty of care owed by Ontario to the plaintiff. To establish a private law duty of care, the plaintiff must establish a relationship of proximity. Proximity can be established in one of two ways: it can either be created by the statutory scheme(s) or by a specific series of interactions between the plaintiff and government actors which give rise to a special relationship.

Here, it was clear that the statutory schemes in question created no relationship of proximity and no private law duty of care.

> There is nothing that I can find in the regulatory scheme to suggest that there is a private law duty of care owed to Trillium by statute. Indeed, it is clear to me that the overall thrust of the regulatory scheme established by the various statutes, regulations and policies is the promotion of renewable energy in the public interest.

The plaintiff also attempted to plead that a special relationship of proximity existed between the plaintiff and Ontario by reason of their interactions. The court accepted that "there is a scintilla or germ of fact pleaded that could give rise to a special relationship". However, the court went on to rule under the second arm of the *Anns* test (which examines whether there are any policy reasons why the duty of care should not be recognized) that this *prima facie* duty of care must be negated. The moratorium was clearly a "core policy decision" of the government "based on public policy considerations, such as economic, social and political factors",

which is "exactly the type of policy decision that is protected from suit".

No Misfeasance in Public Office

The court ruled that it is an essential element of the tort of misfeasance of public office that the public officer engaged in unlawful conduct. Since the moratorium was not unlawful, this was sufficient to dismiss this aspect of the claim. Although Trillium also pleaded "targeted malice" - an intent by public officials to injure Trillium - it failed to provide any particulars of this malice as required under the *Rules of Civil Procedure*, despite Ontario's demand for same. As a result, the court ruled that these allegations of malice were effectively bald pleadings based on speculation and assumptions about the underlying motivations of government officials. Therefore, it was plain and obvious this allegation had no chance of success.

No Intentional Infliction of Economic Harm

Because illegality and malicious intent are also essential elements of the tort of intentional infliction of economic harm, for the same reasons as previously given for misfeasance of public office, this alleged tort could not be sustained.

In sum, the court rejected all of Trillium's alleged causes of action, as failing to disclose a reasonable cause of action, and dismissed the action without leave to amend.

Application of the Decision

This decision, especially in light of the Ontario Divisional Court's decision in *Skypower v. Minister of Energy*,[3] if not overturned on appeal,[4] suggests that proponents who choose to participate in discretionary government programs, such as Ontario's renewable energy program, may do so at their own risk. Governments may alter the policies which underlie a program, and may even alter or cancel such programs, in a manner which may be lawful and immune from civil suit. Much will depend upon the particular facts of a case.

Even if the plaintiff can plead a special relationship with government actors which arguably gives rise to a private law duty of care, the duty of care may be negated by the court for reasons of public policy.

Unless participation in the government program has resulted in a legally binding contract, the granting of legally binding approvals to proceed with the project, or clearly unlawful conduct on the part of government (i.e., violation of a statute, or clear malicious intent to harm the plaintiff), courts may be unsympathetic to a plaintiff who wishes to sue the government simply on the basis of money spent attempting to meet program criteria which have been changed.

Courts will tend to recognize the legitimacy of ministerial discretion to cancel a program or change a program policy midstream, provided the discretion is statutorily authorized

and is exercised in good faith. Despite Trillium's allegation that the moratoria on offshore wind farm development in this case were made for "purely political" reasons, this decision emphasizes that political factors, such as strong public opposition, are legitimate public policy considerations. As here, the court may conclude that "the remedy for a political decision that a party does not agree with is found in ballot box, not the courtroom."

[1] *Trillium Power Wind Corp. v. Ontario (Ministry of Natural Resources)*, 2012 CarswellOnt 12408, 2012 ONSC 5619 (Ont. Sup. Ct).

[2] The court also relied on documents expressly referenced in the Statement of Claim, and particulars provided by the plaintiff in response to a Demand for Particulars, as permitted under the *Rules of Civil Procedure.*

[3] *Skypower CL 1 LP v. Ontario (Minister of Energy)*, 2012 CarswellOnt 11834, 2012 ONSC 4979 (Div. Ct.). See Jack Coop et. al, *Challenge to Changes in the Feed-in Tariff Program Dismissed by Divisional Court*, Osler Update - Sept 12, 2012.

[4] The author has been advised that Trillium intends to appeal.

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THE LABOUR MARKET- SKILLED WORKER "FIT" - PART 2

"Just in time" Immigration ~ Is Canada Getting It Right?

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"Canada's immigration system will be transformed from one that was plagued by backlogs into one that is fast, flexible and responsive to the labour market" announced Minister of Citizenship, Immigration and Multi-Culturalism, Jason Kenny on November 2, 2012[1]. In May 2012 I wrote of the many changes to Canada's economic immigration program since Mr. Kenny took on the portfolio; I speculated on what Canadians might expect next and what was needed to fix Canada's broken immigration system. Six months later, there are now clear signs of what is to come, namely: 'just in time" immigration.

In Operational Bulletin 438 issued June 29, 2012, Canadians received the first indication of what was in store. By way of a

fifth set of Ministerial Instructions, entitled "Temporary Pause on Certain Federal Skilled Worker and on Federal Immigrant Investor Applications", the government announced that effective July 1, 2012, there would be a moratorium on new applications under the Federal Skilled Worker Program (FSWP)[2]. The government also placed a 'temporary pause' on the Federal Immigrant Investor Program (IIP) effectively shutting down both programs, without notice, indefinitely[3].

This heavy-handed approach is not without precedent. Four years earlier, on June 18, 2008, the *Immigration and Refugee Protection Act* was amended to giving the Minister of Citizenship & Immigration wide ranging authority to issue instructions as to application criteria and processing without engaging in the regulatory process[4]. The conservative government has flexed its discretionary powers before ~ instructions that came into force on July 1, 2011, allowed for a 'temporary pause' on new applications in the Federal Entrepreneur Class; this 'temporary pause' remains in place today[5]. Similarly, there is a 'temporary pause' in place for all new Sponsorship applications for parents and grandparents in the Family Class as per instructions that came into force on November 5, 2011[6].

In the absence of active skilled worker, investor and entrepreneur programs relatively few professionals, skilled (high and low) workers, entrepreneurs and investors can presently immigrate to Canada. Much of Canada's permanent economic immigration is closed for business. The country's immigration door is held ajar, primarily by those who have studied or worked in Canada and qualify under the Canada Experience Class.

What is next? A three tiered approach which includes a revamped Federal Skilled Worker Class, a new Federal Skilled Trades Class and a tweaked Canada Experience Class.

1. Revamped Federal Skilled Worker Program

On August 18, 2012, Citizenship and Immigration Canada ("CIC") proposed regulatory changes to the Federal Skilled Worker Program (FSWP) signaling that it will revamp this program on a priority basis[7]. The proposed changes will significantly alter the program for CIC intends to rebalance the number of 'points' allowed among the existing criteria and to impose additional requirements before points will be awarded in others[8]. Below is a summary of the proposed changes:

> *Language Ability* ~ The new scheme will require *minimum* language abilities. An applicant will no longer be able to meet the requirements of the program with weak language skills by compensating with strength in other criteria. It will also significantly increase the maximum points awarded for fluency in *one* official language[9]. However, the maximum number of points allotted for the applicant's second official language will be reduced thus decreasing the importance placed on an applicant's ability to speak both official languages[10].

Age ~ The Regulations favour younger immigrants by awarding a maximum of 12 points for applicants from 18 to 35 years of age as compared to applicants from 21 to 49 years of age who received maximum points under the old criteria[11]. Applicants between 36 and 46 years of age will receive diminishing points and those 47 years of age or older will receive no points[12].

Foreign Work Experience ~ The Regulations reduce the total number of points awarded for work experience and increase the years of experience required to achieve the maximum number of points[13]. This change reflects the view that Canadian employers discount foreign work experience and that it is a poor predictor of economic success in Canada.

Education ~ The Regulations will authorize the approval of organizations and professional bodies as designated credential evaluators[14]. Evaluators will authenticate individual foreign credentials and determine their Canadian equivalent. Where an applicant has applied under a regulated occupation, he or she will be required to submit a relevant designated professional body's foreign credential evaluation, establishing that his or her foreign credential is equivalent to the Canadian educational credential required to practice in that occupation[15]. Applicants in non-regulated occupations must submit a foreign educational assessment provided by a designed organization to demonstrate that their educational credentials are equivalent to a Canadian educational credential[16].

Reliable credential evaluation is a necessary and long awaited step toward ensuring that immigrants have the education for which they have been selected. However, without the established professional infrastructure required to provide evaluations, this new requirement is likely to delay applications at the onset.Moreover, applicants whose credentials do not exist in Canada, or who do not have a credential equivalent to the Canadian version, may not be eligible and this could have the adverse effect of disqualifying promising applicants due to credential equivalency discrepancies.

Adaptability ~ The total number of adaptability 'points' will remain the same but the maximum number of points (10, up from 5) will be awarded if the principal applicant has qualifying prior work experience in Canada (a minimum of 1 year at NOC skills level O, A, or B)[17]. Additionally, if an accompanying spouse or common-law partner has sufficient language ability in either official language 5 points will now be awarded[18]. However, adaptability points for the accompanying spouse or common-law partner's

education, previously rewarded 3-5 points, will no longer be awarded[19].

Arranged Employment ~ The proposed regulations require employers to apply for an Labour Market Opinion ("LMO") from Service Canada on behalf of an applicant under the FSWP, in the same manner as many temporary foreign workers[20]. The Arranged Employment Opinion ("AEO") currently being used will be eliminated. FSWP applicants who obtain an approved LMO will continue to receive, in effect, 15 points for Arranged Employment[21].

The existing Arranged Employment framework has been riddled with abuse; few doubt that it necessitates a more rigorous assessment of the employer and the job offer. However, under the proposed Regulations, the definition of Arranged Employment will also be restricted to certain classes of Work Permit holders and as such, eligibility will be curtailed[22].

2. Brand New Federal Skilled Trades Class

Perhaps most promising, are the regulatory changes that will create a new Federal Skilled Trades Class ("FSTC" or 'Skilled Trades' program). Eligible occupation areas will include NOC "B" level Industrial, Electrical and Construction trades; Maintenance and Equipment Operation Trades; Supervisors and Technical Occupations in Natural Resources, Agriculture, and Related Production; Processing, Manufacturing, and Utilities Supervisors and Central Control Operators; Chefs; Cooks; Bakers; and Butchers[23].

Many tradespeople will no longer struggle to meet the requirements of the Skilled Worker program but rather will be required to satisfy four (4) minimum requirements applicable to this new immigration class[24].

First, the applicant must have a qualifying offer of employment (from up to two employers in Canada) having a collective duration of at least one year, OR a certificate of qualification from a provincial or territorial Apprenticeship Authority. Where an offer of employment is used, the employer will be required to obtain a positive LMO[25].

Second, the applicant must possess language proficiency, as evidenced by a test from a designated language testing organization, establishing his or her ability[26].

Third, the applicant must possess at least 24 months of work experience (after qualification or certification in the country where the work was performed, where applicable) in the same skilled trade within the last five (5) years[27].

Finally, the applicant must possess qualifications that

satisfy the employment requirements as described in the National Occupation Classifications "NOC", except for certification and licensing requirements, which are difficult to obtain outside Canada[28].

In the past, tradespeople were part of the Skilled Worker program but tended to be squeezed out as language and educational requirements, not necessarily reflective of their occupational requirements, precluded them for meeting the base line criteria. The new program is poised to allow skilled tradespersons with experience in specific occupational areas access to Canadian permanent residence. However, the LMO based protocol is potentially problematic as the LMO requirement has, in recent times, caused prolonged delay in other immigration process.

Moreover, the program does not address the evidence of increased demand for skill level "C' and "D" occupations. For instance, several of the skilled trades in the construction sector have a relatively high share of older workers likely to lead to shortages in the upcoming years. The average age, of 43, is relatively high among contractors and supervisors in the construction sector[29]. According to the 2001 census, 18 percent of pipe fitters and 16 percent of carpenters are aged 55 and over[30]. There is also evidence that young people are not entering these vocations. Bricklayers are among the oldest construction workers with 17.5 percent aged 55 or older followed by plumbers at 14.5 percent; the number of young workers in these occupations has also decreased[31]. Hopefully the limited scope of the new program will be examined and revised should it be necessary.

3. Tweaked Canada Experience Class

The regulations will also impact the Canadian Experience Class ("CEC"); the main change will reduce the existing work experience requirement for temporary foreign workers, already in Canada, from 24 months of full-time employment (or equivalent) to 12 months of full-time employment (or equivalent), within the preceding 36 months[32]. This change is designed to alleviate the current transition difficulties that many work permit holders face when their temporary status expires while they await CEC eligibility or processing.

Conclusion

Emerging is a picture of Canada's economic immigration program of the future. Above all, there will be a heightened emphasize on alignment between Canadian immigration programs and the labour market. The ideology of fitting the applicant's skill set with those skills currently in demand in Canada is reflected in the changes time and time again. However, with the emphasis on present labour market demand, and a new "just in time" delivery model, there will be added pressure on decision makers to make timely decisions. The changes to the Arranged Employment scheme and the introduction of the Skilled Trades Class, which will require Labour Market Opinions, mean that Service Canada will have increased responsibilities regarding immigration processing. Given the backlogs that have characterized Canadian

immigration and the potential for disconnect between Service Canada and Citizenship & Immigration Canada, significant increases in resourcing and improvements to institutional co-ordination will be a pre-requisite to Mr. Kenney's ambitious plans[33].

With increasingly complicated, multi-step and multi-departmental processing protocols, the onus on the applicant to navigate the system, its various interfaces and the resulting logistics, will also increase. Conversely, unless government resourcing and technical advances mitigate the increased workload the proposed changes will contribute to ongoing user frustration resulting from a lack of institutional accessibility. On the positive side however, the proposed Regulations do enable Officers to provide for substituted evaluation under the Skilled Trades program where they believe that the applicant's inability (or ability) to meet the minimum requirements of the class is not a sufficient indicator of whether he or she may become economically established in Canada[34]. As such, there will be a non-litigious mechanism of address for at least *some* applications that might otherwise fall between the cracks.

The proposed regulations are slated to come into force on January 1, 2013[35]. Many anticipate that soon after CIC will once again begin accepting permanent residence applications, up to 55,000 in 2013, under a revamped Skilled Worker program and as well under the new Skilled Trade program and the tweaked Canada Experience Class[36]. Given the Minister's proclivity for announcing changes the day they come into effect, we should anticipate a challenging transition period as lawyers, applicants and Officers a like struggle to manage a barrage of new requirements and protocols. However, given the current closed door status of much of Canada's permanent economic immigration, this is nonetheless a positive development.

Finally, it is important to remember that the Regulations themselves make no mention of the number of applications to be permitted under the Skilled Worker program and its respective occupational classes. Nor do they set out targets or caps for the other programs. In the last few years Citizenship & Immigration Canada has identified an inclusive list of eligible occupations for which it accepted Skilled Worker applications; it has also set a yearly cap on the number of applications it accepted in each occupation. Until such numbers are released for the programs it will not be possible to evaluate their true impact. Finally, lest we forget, there is still no word as to the fate of the Entrepreneur program or the status of the Federal Investor Program.

[1]*See:* Citizenship & Immigration Canada, *News Release*, *An Immigration System that Works For Canada's Economy.* November 2, 2012.
[2]*See:* "Citizenship & Immigration Canada, Operational Bulletin 438 - June 29, 2012. The moratorium does not apply to applications received under a PhD eligibility stream or those with a qualifying offer of Arranged Employment (AE). As well,

applications from skilled workers selected by the province of Quebec and investors selected under the Quebec Investor Program are **not affected**.

[3]*Ibid.*

[4]*See generally:* Citizenship & Immigration Canada, Backgrounder: Action Plan for Faster Immigration: Ministerial Instructions-How the ministerial instructions fit within the Action Plan for Faster Immigration

[5]*See*: "Citizenship & Immigration Canada, Operational Bulletin 319 - June 27, 2011.

[6]*See*: "Citizenship & Immigration Canada, Operational Bulletin 350 - November 4, 2011.

[7]*See*: Canada Gazette, Vol. 146, No. 33 - August 18, 2012 Regulations Amending the *Immigration and Refugee Protection Regulations*.

[8]*Ibid.* at p.14.

[9]*Ibid*.at p.8.

[10]*Ibid*.

[11]*Ibid*. at p.9.

[12]*Ibid*.

[13]*Ibid*.

[14]*Ibid.* at p.6.

[15]*Ibid*.

[16]*Ibid*.

[17]*Ibid*. at p.11. CIC uses the National Occupation Classification (NOC) system to classify occupations within fourskill level categories. "A", "B" "C" and "D" based on education and training characteristics. Skill Level "A" encompasses occupations that usually require university education; skill level "B" encompasses occupations that usually require a college education or apprentice training; skill level "C" encompasses occupations requiring secondary school or occupation-specific training and skill level "D" encompasses occupations that usually require on the job training. Skill Level "O" is for managerial level occupations. Found at: http://www5.hrsdc.gc.ca/NOC/English/NOC/2011/Welcome.aspx.

[18]*Ibid*.

[19]*Ibid*.

[20]*Ibid*.at p.10.

[21]*Ibid*.at p.10-11. Applicants will receive 10 points for Arranged Employment and an additional 5 points in the Adaptability category for Arranged Employment.

[22]*Ibid.* It appears that Arranged Employment will be limited to skilled workers who hold an approved LMO or hold an LMO-exempt work permit under R204(a) of the IRPA relating to international agreements. I could find no explanation for the elimination of other LMO-exempt work permits holders from Arranged Employment eligibility.

[23]*Ibid*. at p.12

[24]*Ibid*.at p.12.

[25]*Ibid.*

[26]*Ibid.* The level of proficiency (in speaking, reading, writing and oral comprehension) required is to be set by the Minister.

[27]*Ibid*.

[28]*Ibid*.

[29] Shaping the Nation's Workforce: Immigrants, Demand for Skills and an Ageing Population, Statistics Canada 2001 Census

at p.5.
[30]*Ibid*. at p.5.
[31] *Ibid*. at p.6.
[32]Ibid at p.13.
[33]In recent times obtaining an LMO from Service Canada for a temporary worker has taken between 3 and 5 months. This contrasts with Service Canada's self-determining service standard (objective) of 28 days. Because CIC would not wait more than 2 months for the prerequisite LMO, many temporary workers' implied status and temporary status lapsed through no fault of their own. As a result, Canadian employers, who had complied with every aspect of the Work Permit Extension a process, had no choice but to have their employee sit idle. As insult to injury, the employer or applicant was required to pay additional fees to have the employee's temporary status restored. As of the date of writing neither CIC nor Service Canada have taken responsibility for, or indicated willingness to resolve, this Catch22 situation.
[34]*Supra,* Gazette Note 7 at p.7.
[35]*Ibid.* at p.41.
[36]*Supra,* News Release, Note 1 at p.1. Note that this figure includes accompanying family members so by comparison with figures for years that pre date the backlogs and moratorium is modest.

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