

# **Corporate Immigration and Cross Border Issues ... or How to Avoid the “Immigration Blacklist”**

*Corporate (in-house) Counsel Section of the  
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## **I. Immigration Issues for In-House Counsel**

Corporations that deal with the movement of people across borders face unique immigration issues that intersect with other areas of the law such as taxation and labour and employment. The speed of business typically requires that personnel be able to move across borders quickly and with as little hassle as possible. This article will focus on some of the more common immigration issues faced by in-house counsel as well as issues resulting from the coming into force of new immigration regulations on April 1, 2011.

### **A. Foreign Contractors and Workers - What is “Work”?**

A Foreign National (a person who is neither a Canadian citizen nor a Canadian permanent resident) cannot work in Canada unless authorized under the *Immigration and Refugee Protection Act* (the “Act”). Under the *Immigration and Refugee Protection Regulations* (the “Regulations.”), “work” means:

*“an activity for which wages are paid or commission is earned, or that is in direct competition with the activities of Canadian citizens or permanent residents in the Canadian labour market.”<sup>1</sup>*

It is important to note that a Foreign National may be engaging in “work” even if no remuneration is received. If a Foreign National will be engaging in “work”, it is likely that he/she will need written authorization to work in Canada in the form of a Work Permit<sup>2</sup>.

### **B. When is a Work Permit Needed?**

While most Foreign Nationals working in Canada require a Work Permit, there is a list of occupations which are exempt from this requirement. This list includes over 20 occupations<sup>3</sup>. Some of the more common occupations are set out below.

#### **1. Business visitors**

Business visitors are Foreign Nationals entering Canada to engage in business or trade activities:

- Who have no intent to enter the Canadian labour market – are not gainfully employed;
- Whose activities are international in scope – cross-border commercial activity;
- Whose primary source of remuneration remains outside Canada; and
- Whose principal place of employment is outside Canada and the accrual of profits of the principal place of employment is outside Canada.

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<sup>1</sup> s. 2 of the Regulations

<sup>2</sup> s. 196 of the Regulations

<sup>3</sup> ss. 186 and 187 of the Regulations

A Foreign National is NOT a business visitor simply because they are not directly receiving remuneration from a Canadian source. If there is a contract between a Canadian company and the Foreign National's employer, there is a labour market entry.

## **2. Commercial speakers**

Commercial speakers conducting seminars of five days or less do not need Work Permits. However, commercial speakers hired by Canadian companies to provide training may need Work Permits.

## **3. Expert Witnesses**

Experts conducting surveys or analyses to be used as evidence or persons who will be expert witnesses before a regulatory body, tribunal or court of law do not need Work Permits.

## **4. Supervisors of installers**

Supervisors of individuals installing specialized machinery purchased or leased outside Canada or supervisors of individuals dismantling of equipment or machinery for relocation outside Canada can work without a Work Permit. Generally, a ratio of one supervisor to 5-10 installers/other workers is acceptable.

## **5. Intra-company trainers and trainees**

Trainers providing training for a branch or subsidiary and trainees coming to Canada for training in a branch or subsidiary do not need Work Permits. This being said, these individuals cannot perform hands-on building or construction work. The Foreign National should maintain his/her position in their home branch and should not be paid by the Canadian branch above expenses.

## **6. Members of Boards of Directors**

A corporate director does not need a Work Permit to attend director meetings. However, directors who are also full-time employees of the corporation - such as corporate executives - may need Work Permits if they will be performing their employment duties in Canada.

## **7. Employees of Foreign Companies Contracting Canadian Companies**

Foreign companies contracting Canadian companies to provide services in a foreign jurisdiction may send employees to Canada to ensure that the Canadian company is doing what they are contracted to do. The Foreign National will be a business visitor as long as:

- The employee remains an employee of the foreign company;
- The employee remains on the payroll of the foreign company;
- The foreign company remains the beneficiary of the employee's efforts; and
- The foreign company's principal place of business remains outside Canada.

## **8. After Sales Service**

Persons repairing, servicing, setting up and/or testing commercial or industrial equipment (including computer software) can work without a Work Permit as long as they do not perform hands-on installation generally performed by construction or building trades. The service must be part of an original or extended sales, lease/rental, warranty, or service contract. After-sales service also includes software upgrades to operate previously sold equipment.

### **C. Work Permits and Labour Market Opinions (“LMOs”)**

If a Work Permit is needed, chances are that the employer will need to obtain a LMO prior to the Foreign National applying for a Work Permit. A LMO is an opinion issued by Human Resources and Skills Development Canada through their service delivery arm, Service Canada, which allows an employer to hire a Foreign National.

#### **1. How to obtain a positive LMO?**

To obtain a positive LMO, it is necessary to establish that the employment of the Foreign National will have a neutral or positive effect on the Canadian labour market<sup>4</sup>. In making the assessment Service Canada must consider the following<sup>5</sup>:

1. Whether the employment of the foreign worker is likely to result in direct job creation or job retention for Canadian citizens/permanent residents.
2. Whether the employment of the foreign worker is likely to result in the creation or transfer of skills and knowledge for the benefit of Canadian citizens/permanent residents.
3. Whether the employment of the foreign worker is likely to fill a labour shortage.
4. Whether the wages offered to the foreign worker are consistent with the prevailing wage rate for the occupation and region(s) where the worker will be employed and the working conditions meet generally accepted Canadian standards.
5. Whether the employer has made, or has agreed to make, reasonable efforts to hire or train Canadian citizens or permanent residents.
6. Whether the employment of the foreign worker is likely to adversely affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute.

The two key elements in virtually all LMO applications is whether a “prevailing wage” is being offered and the employer’s attempt to recruit for the vacant position in Canada.

The “prevailing wage” is defined by Service Canada as the “average hourly wage for the requested occupation in the specified geographical area”. On the issue of recruiting, Service

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<sup>4</sup> s. 203(1) of the Regulations

<sup>5</sup> s. 203(3) of the Regulations

Canada defines what is needed according to “minimum advertising requirements”. The requirements that apply depends on the skill level of the occupation<sup>6</sup>.

There are some occupations that are exempt from Service Canada’s “minimum advertising requirements”, these include (but are not limited to) the following<sup>7</sup>:

**i. Employees subject to a Collective Bargaining Agreement (CBA) that Stipulates Internal Recruitment .**

A union member for which the CBA contains provisions for internal hiring/promoting may need a LMO and Work Permit but there will be no requirement for external recruitment. This usually occurs when the Foreign National already has a Work Permit and is being promoted. In these cases, posting the position in a manner consistent with the CBA will suffice.

**ii. Specialized Service Technicians/Specialized Service Providers**

A specialist coming to Canada for a limited period of time with proprietary knowledge and/or experience related to the work to be performed can obtain a LMO without any advertising if there is no opportunity for Canadians to be trained. Examples include:

- Service required for equipment manufactured outside of Canada and the original equipment manufacturer (“OEM”) does not have Canadian licensees that can do the work (equipment is generally no longer under warranty).
- Work requiring someone currently unavailable in Canada, with proprietary knowledge, experience and/or tools from the OEM (or an approved OEM licensee) to perform the work or to oversee and direct Canadians doing the work.
- Service required for equipment that is so old (no longer in production) that customized parts have to be manufactured, or new parts reconfigured, by an OEM approved technician/representative.

**2. The Worker Recruitment and Protection Act (“WRAPA”)**

In Manitoba, before an employer can apply for an LMO, the employer must obtain approval to recruit a Foreign National from Employment Standards under WRAPA. Amongst other things, the employer undertakes to ensure the following:

1. That the employer will not, directly or indirectly, recover from the Foreign National any costs it incurred in recruiting the Foreign National<sup>8</sup>.

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<sup>6</sup> Government of Canada. *Temporary Foreign Worker Program Minimum Advertising Requirements*, online: Human Resources and Skills Development Canada  
[www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/communications/advertrecruitment.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/communications/advertrecruitment.shtml)

<sup>7</sup> Government of Canada. *Temporary Foreign Worker Program Variations to Minimum Advertising Requirements*, online: Human Resources and Skills Development Canada  
[http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/lmodir/variation.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/lmodir/variation.shtml)



2. That it will provide Employment Standards with information set out in the legislation<sup>9</sup>.
3. That the Foreign National will not be charged a fee, either directly or indirectly, for finding employment with the employer. This includes any and all charges a third party (such as a recruiter) may charge to the Foreign Worker<sup>10</sup>.
4. That it will not reduce the Foreign National's wages, or reduce or eliminate any other benefit or term or condition of employment that the employer undertakes to provide as a result of participating in the recruitment of a foreign worker<sup>11</sup>.

Once approval is received from Employment Standards, an application for an LMO can be filed.

#### **D. Work Permits not requiring LMOs**

Not all Work Permits require LMOs. The list of LMO exempt occupations includes professionals under trade treaties (NAFTA, the Canada-Chile Free Trade Agreement, the Canada-Peru Free Trade Agreement, the General Agreement on Trade and Services)<sup>12</sup>, emergency repair personnel<sup>13</sup> and intra-company transferees<sup>14</sup>.

##### **1. Emergency repair personnel**

Foreign Nationals carrying out emergency repairs to industrial or commercial equipment in order to prevent disruption of employment require Work Permits but are exempt from LMOs.

##### **2. Intra-Company Transferees**

Intra-Company transferees are employees of a parent, branch, subsidiary or affiliate company outside of Canada. These employees can qualify as intra-company transferees to Canada if:

- They will be employed in an “executive”, “managerial”, or “specialized knowledge” capacity in Canada. These terms are defined by Citizenship and Immigration Canada;
- The related company in Canada and abroad will continue doing business in Canada and abroad for the duration of the employee's transfer to Canada;
- The company in Canada is legitimate and continuing;

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<sup>8</sup> s. 16(1) of the WRAPA

<sup>9</sup> Worker Recruitment and Protection Regulation s.14(1)

<sup>10</sup> s. 15(4) of the WRAPA

<sup>11</sup> s. 17 of the WRAPA

<sup>12</sup> s.204 of the Regulations

<sup>13</sup> s. 205(a) of the Regulations

<sup>14</sup> s. 205(a) of the Regulations

- The employee has been employed in an executive, managerial or specialized knowledge capacity on a full-time basis for one year in the three-year period previous to the date of application. (The only exception is for Peruvian citizens and permanent residents who need only show 6 months of full-time employment within the 3-year period.)

Intra-Company transferees (except those entering Canada to set up a new office) are eligible for initial Work Permits of 3 years. Specialized knowledge workers are eligible for an additional 2-year extension (total 5 years) while executives and managers are eligible for two 2-year extensions (total 7 years).

#### **E. Entry under the North American Free Trade Agreement (“NAFTA”)**

Under the NAFTA, preferential immigration treatment is given to U.S. and Mexican citizens. Canadians have reciprocal treatment when entering the U.S. and Mexico.

Since NAFTA, Canada has entered into free trade agreements with Chile and Peru. Most of the provisions in all three agreements are similar. While there are some exceptions, for the purpose of this paper, we will review NAFTA only.

##### **1. Business Visitors under the NAFTA<sup>15</sup>**

NAFTA provides U.S. and Mexican citizens additional business visitor categories. Much like the general business visitor category, the activities of the U.S. or Mexican citizen must be international in scope, have no intent to enter the Canadian labour market, the primary source of foreign worker’s remuneration and the principal place of business must be outside Canada. The list of NAFTA Business Visitor includes:

##### **i. Research and Design Personnel**

Technical, scientific and statistical researchers conducting independent research or research for an enterprise located in the U.S. or Mexico.

##### **ii. Growth, Manufacture and Production Personnel**

Owners of machines used for gathering agricultural crops who are supervising a harvesting crew. The crew members must have work permits to work in Canada.

Purchasing and production management personnel conducting commercial transactions for an enterprise located in the U.S. or Mexico.

##### **iii. Marketing Personnel**

Market researchers and analysts conducting research or analysis either independently or for an enterprise located in the U.S. or Mexico.

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<sup>15</sup> North American Free Trade Agreement, Appendix 1603.A.

Trade fair and promotional personnel attending a trade convention who are not involved in sales.

**iv. Sales Representatives**

Sales representatives and agents taking orders or negotiating contracts for goods or services for an enterprise located in the U.S. or Mexico. These representatives and agents cannot deliver goods or provide services. In addition, the goods or services cannot be Canadian-made goods or provided by a Canadian. Sales can only be made to the general public if the goods or services are not delivered or available to the buyer at the time of sale (on the same business trip).

Buyers purchasing for an enterprise located in the U.S. or Mexico.

**v. General Service**

This category includes management and supervisory personnel engaging in commercial transactions for enterprises in the U.S. or Mexico, financial services personnel (insurers, bankers or investment brokers) engaging in commercial transactions for an enterprise in the U.S. or Mexico, and public relations and advertising personnel consulting with business associates or attending or participating in conventions.

**2. NAFTA Professionals<sup>16</sup>**

Canada, Mexico and the U.S. developed a list of professionals allowed to work in each country. These professionals must obtain Work Permits but are LMO exempt. NAFTA professionals must present the following to be granted a Work Permit to work in Canada:

1. proof of American or Mexican citizenship;
2. confirmation of pre-arranged employment in Canada;
3. documentation which indicates: the proposed employer in Canada, the profession for which entry is sought, details of the position (title, duties, duration of employment, arrangements as to payment), and that the person meets the qualifications for the profession as defined in NAFTA.

A list of NAFTA professionals is attached as Schedule "A".

**3. NAFTA Traders and Investors<sup>17</sup>**

The Trader and Investor categories allows for U.S. and Mexican citizens to invest in businesses in Canada and obtain Work Permits for the trader, investor and their employees.

Unlike other Work Permits, applications for Trader or Investor status must be made at a Canadian Visa office. In order to qualify, the Trader and Investor must show:

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<sup>16</sup> North American Free Trade Agreement, Appendix 1603.D.

<sup>17</sup> North American Free Trade Agreement, Appendix 1603.B.

1. that they have American or Mexican citizenship;
2. the employing enterprise has American or Mexican nationality (majority owned by Americans or Mexicans); and
3. their position or the position sought for their employees is supervisory, executive, or involves essential skills;

Traders must demonstrate activities that involve substantial trade in goods or services principally between either the United States or Mexico, and Canada.

Investors, on the other hand, must show that a substantial investment has been made or is actively being made. As well, investors must show that the applicant is seeking entry solely to develop or direct the enterprise.

#### **F. Arriving at the Border. What to Say and What Documents to Carry**

Most Foreign Nationals entering Canada must first obtain a visa. The process of obtaining a visa requires the Foreign National to apply at a designated Canadian Embassy, High Commission or Consulate abroad in advance of travel to Canada. This process can take days, months, weeks or even years depending on the Foreign National's country of citizenship, country of residence, or proposed Canadian occupation.

##### **1. Who does not need a visa to enter Canada<sup>18</sup>**

The major exceptions to the visa requirement are U.S. citizens and permanent residents, citizens of most E.U. countries, citizens of Japan, Australia, New Zealand, South Korea and citizens of many Caribbean countries. These individuals do not need visas to come to Canada and are usually able to apply for Work Permits when entering Canada at an airport or land border. (If LMOs are needed, these must first be obtained before a Work Permit can be applied for.)

##### **2. Entry for Work Permit Exempt Applicants who are also visa exempt**

If a Foreign National does not need a Work Permit, he/she must establish that what he/she will be doing is Work Permit exempt. In some cases, a simple verbal declaration is all that is needed. However, it is usually advisable for the Foreign National to carry documents that establish why the work being carried out in Canada is Work Permit exempt. In many cases, a letter will suffice. However, some cases (most notably after-sales service personnel) require further documentation to establish eligibility.

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<sup>18</sup> s. 190 of the Regulations

**3. Entry for Work Permit Applicants who are LMO exempt and visa exempt**

Work Permit applicants who are LMO exempt must bring all of the documents necessary to establish their eligibility for a Work Permit. The documents required depend on the category of entry.

One of the more complicated categories is the intra-company transferee category. While many border officers have generally been relaxed about this category, the coming into force of new regulations on April 1, 2011 (discussed below) will likely result in increased scrutiny of applications.

**4. Work Permit Applicants who require LMOs but are visa exempt**

Work Permit applicants who require LMOs should bring with them a copy of the approved LMO as well as documentation that shows that they are eligible for the job. Since Service Canada only assesses the employer and not the employee, Citizenship and Immigration Canada/Canada Border Services Agency has the responsibility to determine whether the employee has the qualifications to carry out the job.

In every LMO application, the employer will indicate the experience, education and licensing required for the job. It is necessary for the Foreign National to establish that he or she meets these qualifications in order for a Work Permit to be issued. As well, it is advisable to bring a copy of the original LMO application out of an abundance of caution.

**G. Can anything be done before arrival ... or how to give the port of entry a head's up?**

One of the major advantages of port of entry processing is that decisions can be made on Work Permit exempt or LMO exempt entries to Canada on the spot.

However, in some cases, this is not desirable. Because decisions at port of entry cannot be made in advance, there is always a level of uncertainty as to what an officer will do when the Foreign National appears.

In cases where LMOs are necessary, the level of uncertainty is low because the LMO is effectively a pre-approval. However, LMOs cannot be issued for occupations that do not require LMOs. There are two solutions for this situation.

**1. Applying for a LMO exempt opinion from a Temporary Foreign Worker Unit ("TFWU")**

Employers of Foreign Nationals who do not need LMOs can apply for a LMO exempt opinion from one of Citizenship and Immigration Canada's TFWUs.

TFWUs are offices that will assess whether an LMO is needed for a particular Foreign National to work in Canada and will provide an opinion on this issue. If the TFWU agrees that a Foreign National is LMO exempt, it will issue a written opinion that can be brought to a port of entry by

the Foreign National (along with the originally filed TFWU application) to obtain a Work Permit.

A positive opinion by the TFWU does not guarantee entry to Canada nor does a negative opinion mean that a Work Permit cannot be obtained. This is because the law requires decisions be made when the Foreign National presents at the port of entry. However, these opinions are extremely persuasive and will rarely, if ever, be overruled by an officer at a port of entry.

## **2. Submitting applications to a Manitoba port of entry in advance of entry**

A better option for Foreign Nationals entering at a Manitoba port of entry is to send a submission in advance to that port of entry.

Unlike most ports of entry, the Canada Border Services Agency in Manitoba will take submissions in advance. While final decisions cannot be made until the Foreign National actually arrives at a port of entry, the Canada Border Services Agency will put submissions in a “go forward” binder to coincide with the arrival of the Foreign National in Canada. If problems are identified, the Canada Border Services Agency is usually good about providing feedback in advance.

This option is not available at all ports of entry in Canada. As a result, if the Foreign National destined to Manitoba will be first arriving in, say, Toronto, this process cannot be used. On the other hand, if the Foreign National is destined to another jurisdiction in Canada but will be entering in Manitoba, this process can be used.

## **H. Mergers, Acquisitions and Immigration Law<sup>19</sup>**

Corporate mergers and acquisitions may trigger Work Permit related issues for Foreign Workers employed at Canadian company that is the target of the merger or acquisition.

### **1. The impact on holders of LMO Work Permits**

For workers who require a LMO, the main question is whether the merged company is a “successor in interest” or if the acquired employer is the same employer.

A “successor in interest” is a company that has substantially assumed the interests, obligations, assets and liabilities of the original owner and continues to operate the same type of business as the original owner.

Changes in ownership structure do not, in and of itself, require a new LMO if the new entity continues to be the Foreign National’s employer. However, if some assets or liabilities are not assumed by the successor entity after the restructuring, a “successor-in-interest” may not exist. If this is the case, the new entity will have to apply for a new LMO and the worker will need new Work Permit.

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<sup>19</sup> Citizenship and Immigration Canada. FW 1 Foreign Worker Manual pp.180-185.

## **2. The impact on holders of Intra-Company Work Permits**

The main consideration for intra-company transferees is whether a qualifying relationship continues to exist between a foreign entity and the Canadian entity.

An intra-company transferee must be able to establish that an intra-company relationship exists between the Canadian employer and a foreign employer. Intra-company transfers must be able to show that they can be transferred outside of the country at the end of their Canadian assignment. If an intra-company relationship no longer exists, the Foreign National may no longer be eligible to work in Canada.

## **3. Corporate Name Changes**

In situations where a new corporate or business name arises out of a merger or acquisition, it is advisable to apply for a new Work Permit to reflect the name of the new owner to avoid confusion as to who the employer of the Foreign Worker is.

### **I. Immigration Problems - Criminal Offences**

Just because an individual is qualified to enter Canada does not mean that they will be admitted. Foreign Nationals cannot be “inadmissible” to Canada. Grounds of inadmissibility include being a security threat to Canada, having a serious medical condition, or making misrepresentations.

One of the most common reasons for “inadmissibility” is a past criminal record. If a person has committed an offense outside of Canada, it may make him/her inadmissible.

#### **1. Is the Foreign National criminally inadmissible?**

A Foreign National will only be criminally inadmissible if he or she was found guilty of an offence “equivalent” to an offence under an Act of Parliament.

Canadian immigration law only makes people criminally inadmissible for violating laws passed by Parliament – in another words - federal laws. If the individual is guilty of an “equivalent” provincial or municipal offence, he/she will not be inadmissible. An “equivalency” analysis is necessary as not all offences under an Act of Parliament create inadmissibility.

#### **2. If the Foreign National is criminally inadmissible, is he or she eligible for “rehabilitation”?**

Foreign Nationals who are inadmissible may be eligible for “rehabilitation”. If granted “rehabilitation”, the Foreign National is no longer inadmissible to Canada. In order to determine this, one must determine when the Foreign National’s sentence ended.

If a Foreign National’s sentence ended 10 or more years ago, he/she may be eligible for “Deemed Rehabilitation” depending on the crime. If the Foreign National’s sentence ended 5 to 10 years ago, he/she may be eligible to apply for “Individual Rehabilitation”.

If the Foreign National's sentence ended less than 5 years ago, rehabilitation is not available. In order for these individuals to be allowed into Canada on a temporary basis, they would have to request a Temporary Resident Permit

When applying for Individual Rehabilitation or a Temporary Resident Permit, documents must be submitted that show that the individual has been "rehabilitated". Amongst other things, items that should be included are: letters of reference, employer letters, documents to show a stable lifestyle, and if substance abuse was part of the criminal activity, information to show that this is no longer an issue.

#### **J. Compliance Issues with the New Immigration Regulations<sup>20</sup>**

On April 1, 2011, new immigration regulations came into force that dramatically change the factors assessed in granting Work Permits. In addition to the criteria set out earlier in this paper, all new Work Permit applications are now assessed under the following 4 tests:

**1. Is the employer on the Employer Ineligibility website (the "Immigration Blacklist")?**

A list of employers who have violated certain immigration regulations came into force on April 1, 2011. This Immigration Blacklist will be made public. Employers on this list will be prohibited from hiring foreign workers for two years.

**2. Does the employee pass the "cumulative duration" test?**

The regulations now impose a limit on the amount of time a foreign national can work in Canada. In general, once a Foreign National reaches four years of work in Canada, he or she will not be eligible for another Work Permit for a further four years.

While the four year limit is calculated cumulatively, gaps in employment (such as periods of unemployment, extended unpaid leave, maternity/parental leave, and medical leave that is not covered by employment contracts or agreements) will not count toward the cumulative duration.

The four year limit does not apply to all foreign workers. Some of the major exempt categories include executives, managers, professionals, and persons employed pursuant to international agreements (such as NAFTA).

These regulations are not retroactive. The four year calculation period begins on April 1, 2011 which means that the earliest date a foreign worker can reach the limit is April 1, 2015.

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<sup>20</sup> Government of Canada. *Operational Bulletin 275-C*, online: Citizenship and Immigration Canada <http://www.cic.gc.ca/english/resources/manuals/bulletins/2011/ob275C.asp>



**3. Does the employer pass the “genuineness” test?**

The regulations now require employers prove their job offers are genuine. In assessing “genuineness”, the following will be considered:

1. Whether the employer is actively engaged in the business;
2. Whether the job being offered is consistent with the employer’s employment needs;
3. Whether the employer can fulfill the terms and conditions of the job offer; and
4. Whether the employer, or any representative acting on behalf of the employer, is compliant with relevant federal-provincial/territorial employment and recruitment legislation.

The genuineness test will require employers to provide additional evidence on their business and business activities. Amongst the documents Citizenship and Immigration Canada will consider are Canada Revenue Agency filings.

**4. Does the employer pass the “substantially the same” test?**

In cases where an employer hired a foreign worker in the two years prior to a new application being filed, an assessment will be made as to whether the employer provided “substantially the same” wages, working conditions and employment to their past or existing foreign workers as set out in the offers of employment to these foreign workers.

If it does not appear that the employer can pass the “substantially the same” test, employers can provide a “reasonable justification”. If a “reasonable justification” is accepted, this test will be passed. Examples of “reasonable justification” include:

1. Changes to federal or provincial laws;
2. Changes to a collective agreement;
3. A dramatic change in economic conditions;
4. Good faith employer error; and
5. An administrative accounting error.

Employers who do not pass the “substantially the same” test may be entered onto the Immigration Blacklist.

**K. The New Immigration Regulations - The Impact on Due Diligence in Merger and Acquisition transactions**

The new immigration regulations may require an adjustment in due diligence required in select merger and acquisition transactions.

Purchasers of target companies will want to be assured that target companies that employ or have employed Foreign Workers will not be on the Immigration Blacklist and will be able to retain key Foreign Nationals employed by the target company.

In these types of transactions, all contracts with foreign workers, work permits, labour market opinions, agreements with recruiters and, in Manitoba, all applications filed under WRAPA, may need to be reviewed.

**L. Work Permits for Spouses and Manitoba Health coverage**

When a Foreign National comes to Canada, the immigration status of that person's children and/or spouse may be an issue. If the ability of a spouse to work in Canada is key to the recruitment of a Foreign National, you should also deal with these issues.

**1. Spousal Work Permit**

The spouse of a Foreign National who is authorized to work in Canada for six months or longer and is performing a job that is highly skilled (management, professional or trade) is eligible for an open Work Permit that will allow the spouse to accept any job in Canada.

This open Work Permit is valid for the same amount of time as the Work Permit of the highly skilled spouse.

An open Work Permit allows an individual to work in any job which that individual is qualified. However, there may be a restriction on the open Work Permit in certain circumstances. Typically, for a Work Permit to be totally "open" an individual must take a medical exam. If that individual does not take a medical exam, that person would not be able to work in certain occupations such as teaching small children or in the health care field.

It should be noted that a "spouse" includes a husband, wife, common-law partner or same sex partner.

**2. Manitoba Health Care**

Foreign Nationals are eligible for Manitoba Health care coverage if they are legally entitled to work in Manitoba and hold a valid work permit for a period of 12 months or more. If a Foreign National is eligible for Manitoba Health care coverage, the Foreign National's spouse and minor children are also available for coverage.

The 12-month period is essential to note. If a Work Permit is issued for less than that period of time, the employee will not be eligible for Manitoba Health care coverage and neither will his or her spouse or minor children. In this case, the employer and employee may want to discuss other health insurance options.

**M. Permanent Residency for Temporary Residents**

On occasion, an employee who is on a Work Permit will want to move to Canada permanently and become a Canadian Permanent Resident. It should be noted that just because an individual is eligible for a Work Permit does not mean that that individual will be eligible for permanent

residency. A separate and distinct analysis must be done with respect to permanent residency to determine whether the foreign worker will be eligible for permanent residency.

## **II. Select Tax Issues**

**By Robert G. Sly**

### **A. Establishment of a Permanent Establishment**

The exposure of foreign corporations to Canadian taxation is twofold. First, if such a corporation earns passive income from a Canadian source such income will be subject to Canadian withholding tax pursuant to the *Income Tax Act* (Canada) (the "ITA"). Second, if foreign corporations carry on business in Canada then they can be subject to regular Canadian income tax on the profits they earn here.

If a particular country has a tax treaty with Canada, the exposure of corporations resident in that country to Canadian income tax on the profits they might earn from their operations in Canada is, usually, limited to a situation whereby the particular corporation has a "permanent establishment" in Canada. This term is typically defined in the particular tax treaty. However, the presence in Canada of executives of a foreign corporation on a regular basis and the ability of such individuals to bind their corporate employer can result in the corporation in question being considered, under the particular income tax treaty, to have a permanent establishment. If such is the case the corporation becomes subject to Canadian income tax and is obliged to file a Canadian income tax return.

### **B. Employee Exposure to Foreign Taxes**

Employees who travel to foreign countries on behalf of their employer can be subject to tax in such foreign jurisdictions based on the proportion of their salaries which relate to their service in the particular foreign country. If the country in which the individual in question is resident and the country to which they have travelled have a tax treaty then there may be certain exemptions which will allow the individual to remain free of foreign tax entanglements.

However, if there is no tax treaty or if the exceptions in that treaty do not apply then the employee in question may be obliged to file a tax return and pay tax to the foreign jurisdiction and then attempt to claim a foreign tax credit on the return they file in their home jurisdiction.

Often an employer will loan the employee the amount to pay the foreign jurisdiction tax and will then pay for accounting fees to prepare the foreign tax return and the tax return in the country of residence.

**C. Income Tax Withholdings for Employees**

For employees who are exposed to foreign taxes only once usually the need to withhold tax and remit it to a foreign tax authority will not arise. However, for executives who travel year over year to a foreign destination and will yearly be exposed to taxation in that foreign jurisdiction then the need to withhold and remit tax to the foreign tax authority will arise. There is, of course an overlapping obligation to remit tax to the tax authority of the employee's country of residence.

This can be dealt with by obtaining a remission from the tax authority in the country of residence so that the tax withholdings can be reduced and the difference forwarded to tax authority of the foreign jurisdiction. If such a remission is not forthcoming then the loan procedure described in the answer to B above will have to be used.

**III. Select Labour and Employment Issues**

**By Shandra N. Czarnecki**

**A. Terms and Conditions of Employment**

Foreign workers who are employed by provincially regulated Manitoba employers are governed by *The Employment Standards Code* (Manitoba) (the "ESC"). As a result, the terms and conditions of their employment and the termination thereof must be no less than that required by the ESC.

Foreign workers who are employed by an employer who falls under federal jurisdiction are governed by the *Canada Labour Code* (the "CLC"), such that the terms and conditions of their employment and the termination thereof must be no less than that required by the CLC.

If the employment contract or the Labour Market Opinion in respect of the worker provides terms and conditions that are greater than the minimums provided for in the relevant statute, those contractual terms and conditions will be enforced as the minimum standards for the worker.

Section 88 of the ESC provides that wages must be paid in one of three ways:

- in Canadian currency;
- by cheque or bill of exchange drawn upon an Approved Institution; or
- by deposit in the employee's account in an Approved Institution.

Approved Institutions for the purposes of paying wages are banks, credit unions, trust companies or other companies insured under the *Canada Deposit Insurance Corporation Act*. The CLC does not contain a similar provision regulating the manner in which a worker may be paid.

## **B. Potential Contract Provisions**

Section 16(1) of the WRAPA limits the recovery from foreign workers of money paid by employers in the recruitment process.

However, an employer may recover amounts in respect of the monetary value of a good, service or benefit that the employer provided to the worker where the good, service or benefit was to the direct benefit or advantage of the worker and was not a condition of being employed (or, if obtaining the good, service or benefit was a condition of being employed, the worker was not required to obtain the good, service or benefit from the employer). Amounts that may be recovered by an employer pursuant to this section include reimbursements to the worker for relocation expenses incurred by the worker that the employer was not otherwise obligated to pay.

If an employer is considering reimbursing the worker for some or all of the worker's out-of-pocket relocation expenses, the employer should consider drafting a contractual provision pursuant to which the worker would be required to repay those expenses or a portion thereof if the worker resigns or is terminated for cause within a stipulated period of time. In the event that such a provision is agreed to between the employer and the worker, the employer should have the worker sign an authorization confirming that the employer can deduct an amount from the worker's final pay in order to cover the repayment obligations.

## **C. Labour Relations**

In *Mayfair Farms (Portage) Ltd. (Re)*, [2007] M.L.B.D. No. 6, the Manitoba Labour Board found that foreign workers are "employees" for the purposes of *The Labour Relations Act* (the "LRA"). Therefore, foreign workers have the same rights, protections and responsibilities under the LRA as all other workers in Manitoba. Similarly, foreign workers will be "employees" for the purposes of the CLC and will be subject to the labour relations provisions of that legislation.

As a result, foreign workers have the right to participate in the organization and activities of a union and foreign workers who are hired into positions that fall within the scope of a bargaining unit will become a part of the unit unless the union agrees otherwise.

## **D. Workers' Compensation**

Foreign workers are "workers" for the purposes of *The Workers' Compensation Act* (the "WCA"). If the employer is covered by the WCA, the foreign worker will be entitled to Workers' Compensation coverage in the same manner as all other similarly placed employees.

## **E. Employer Obligations Regarding Employment Related Records**

In addition to the records which a provincially regulated Manitoba employer is required to maintain under the ESC, section 14(1) of the Worker Recruitment and Protection Regulation provides that provincially regulated Manitoba employers must maintain for a period of at least three years the following records in respect of a foreign worker's employment:

- any expenses incurred, directly or indirectly, by the employer in recruiting the foreign worker;
- any expenses incurred, directly or indirectly, by an employee of the employer who, on behalf of the employer, engaged in activities to find the foreign worker for the employer;
- any contract or agreement under which the employer retained or directed an individual licensed to engage in foreign worker recruitment; and
- any contract or agreement that the employer has entered into with the foreign worker.

## Schedule A

### 3.8 Appendix 1603.D.1 - Professionals (Amended)

Amended to include interpretive notes - the official text of Appendix 1603.D.1 is available at: <http://www.dfait-maeci.gc.ca/nafta-alena/agree-e.asp>

**Note:** A business person seeking temporary entry under this Appendix may also perform training functions relating to the profession, including conducting seminars. It is to be noted that the subject of the workshop or seminar must be in the field for which professional qualification is held. The workshop or seminar must be for professional training or development purposes related to the occupation or to the job duties of the participants.

Profession	Minimum education requirements and alternative credentials
<b>General</b>	
Accountant	Baccalaureate or Licenciatura Degree; or C.P.A., C.A., C.G.A. or C.M.A.
Architect	Baccalaureate or Licenciatura Degree; or state/provincial licence. ("State/provincial licence" and "state/provincial/federal licence" mean any document issued by a state, provincial or federal government, as the case may be, or under its authority, but not by a local government, that permits a person to engage in a regulated activity or profession.)
Computer Systems Analyst	Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years' experience.  <b>Note:</b> "Post-Secondary Diploma" means a credential issued, on completion of two or more years of post-secondary education, by an accredited academic institution in Canada or the United States.  <b>Note:</b> "Post-Secondary Certificate" means a certificate issued, on completion of two or more years of post-secondary education at an academic institution, by the federal government of Mexico or a state government in Mexico, an academic institution recognized by the federal government or a state government, or an academic institution created by federal or state law.
Disaster Relief Insurance Claims Adjuster (claims adjuster employed by an insurance company located in the territory of a Party, or an independent claims adjuster)	Baccalaureate or Licenciatura Degree, and successful completion of training in the appropriate areas of insurance adjustment pertaining to disaster relief claims; or three years experience in claims adjustment and successful completion of training in the appropriate areas of insurance adjustment pertaining to disaster relief claims
<b>Note:</b> For the purposes of this provision, a disaster shall be an event so declared by the Insurance Bureau of Canada or sub-committee thereof through activating the <i>Insurance Emergency Response Plan</i> .	
Economist	Baccalaureate or Licenciatura Degree
Engineer	Baccalaureate or Licenciatura Degree; or state/provincial licence
Forester	Baccalaureate or Licenciatura Degree; or state/provincial licence
Graphic Designer	Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years

	experience
Hotel Manager (See note below for further details.)	Baccalaureate or Licenciatura Degree in hotel/restaurant management; or Post-Secondary Diploma or Post-Secondary Certificate in hotel/restaurant management, and three years experience in hotel/restaurant management
<p><b>Note:</b> This provision refers to a management position to which other managers report, e.g., general manager, director. It also refers to specialty managers, e.g., food and beverage managers, convention services managers within a hotel.</p>	
Industrial Designer	Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience
Interior Designer	Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience
Land Surveyor	Baccalaureate or Licenciatura Degree; or state/provincial/federal licence
Landscape Architect	Baccalaureate or Licenciatura Degree
Lawyer (including Notary in the Province of Quebec)	LL.B., J.D., LL.L, B.C.L. or Licenciatura Degree (five years); or membership in a state/provincial bar
Librarian (See note below for the requirements of a librarian.)	M.L.S. or B.L.S. (for which another Baccalaureate or Licenciatura Degree was a prerequisite)
<p><b>Note:</b> A librarian must have either:</p> <ol style="list-style-type: none"> <li>1. a Master of Library Science degree; or</li> <li>2. a Bachelor of Library Science and another baccalaureate degree which was necessary to enter the B.L.S. program.</li> </ol>	
Management Consultant (See notes below for further details.)	Baccalaureate or Licenciatura Degree; or equivalent professional experience as established by statement or professional credential attesting to five years experience as a management consultant, or five years experience in a field of specialty related to the consulting agreement
<p><b>Notes:</b></p> <ol style="list-style-type: none"> <li>1. A management consultant provides services which are directed toward improving the managerial, operating, and economic performance of public and private entities by analyzing and resolving strategic and operating problems. The management consultant does not take part in the company's production but seeks to improve the client's goals, objectives, policies, strategies, administration, organization, and operation. Generally a management consultant is hired on contract to do project work to deal with specific issues or problems.</li> <li>2. A management consultant may provide the following range of services: <ul style="list-style-type: none"> <li>• conduct a comprehensive examination of the client's business to isolate and define problems;</li> <li>• prepare a presentation and report all findings to the client;</li> <li>• work with the client to design and implement in-depth working solutions.</li> </ul> </li> <li>3. Management consultants assist and advise in implementing recommendations but do not perform functional/operational work for clients or take part in the company's production.</li> <li>4. Any training or familiarization that is provided to management and personnel on an individual or group basis: <ul style="list-style-type: none"> <li>• must be incidental to the implementation of new systems and procedures which were</li> </ul> </li> </ol>	



<p>recommended in the management consulting report;</p> <ul style="list-style-type: none"> <li>• must be performed by permanent (indeterminate) employees of the recommending American or Mexican management consulting firm.</li> </ul> <p>5. Typically, a management consultant is an independent contractor or an employee of a consulting firm under contract to a Canadian client. A management consultant can also occupy a permanent position on a temporary basis with a Canadian management consulting firm.</p>	
Mathematician (including Statistician and Actuary)	Baccalaureate or Licenciatura Degree An Actuary must satisfy the necessary requirements to be recognized as an actuary by a professional actuarial association or society operating the territory of at least one of the Parties
Range Manager/Range Conservationalist	Baccalaureate or Licenciatura Degree
Research Assistant (working in a post-secondary educational institution)	Baccalaureate or Licenciatura Degree
Scientific Technician/Technologist (See below for further details.)	Possession of (a) theoretical knowledge of any of the following disciplines: agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology or physics; and (b) the ability to solve practical problems in any of those disciplines, or the ability to apply principles of any of those disciplines to basic or applied research
<p>A business person in this category must be seeking temporary entry to work in direct support of professionals in agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology or physics.</p> <p><b>Notes:</b></p> <ol style="list-style-type: none"> <li>1. A baccalaureate degree is not normally held by a scientific technician/technologist; therefore, an applicant must possess the skills noted above.</li> <li>2. Basic research is theoretical or conceptual and is not conducted with a specific purpose or result in mind. Applied research is conducted with a practical or problem solving purpose in mind.</li> </ol> <p><b>Additional guidance (as agreed to by all parties of the Working Group, Dec. 2001):</b></p> <p>Individuals for whom ST/Ts wish to provide direct support <i>must qualify as a professional in their own right</i> in one of the following fields: agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology, or physics.</p> <p>A general offer of employment by such a professional is not sufficient, by itself, to qualify for admission as a Scientific Technician of Technologist. The offer must demonstrate that the work of the ST/T will be <i>interrelated with</i> that of the supervisory professional. That is, the work of the ST/T must be managed, coordinated and reviewed by the professional supervisor, and must also provide input to the supervisory professional's own work.</p> <p>The ST/T's theoretical knowledge should generally have been acquired through the <i>successful completion of at least two years of training</i> in a relevant educational program. Such training may be documented by presentation of a diploma, a certificate, or a transcript accompanied by evidence of relevant work experience.</p> <p>Use the National Occupational Classification (NOC) in order to establish whether proposed job functions are consistent with those of a scientific or engineering technician or technologist.</p> <p>Not admissible as ST/Ts are persons intending to do work that is normally done by the construction trades (welders, boiler makers, carpenters, electricians, etc.), even where these trades are specialized to a particular industry (e.g., aircraft, power distribution).</p>	

Social Worker	Baccalaureate or Licenciatura Degree
Sylviculturist (including Forestry Specialist)	Baccalaureate or Licenciatura Degree
Technical Publications Writer	Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience
Urban Planner (including Geographer)	Baccalaureate or Licenciatura Degree
Vocational Counsellor	Baccalaureate or Licenciatura Degree
<b>Medical/Allied Professional</b>	
Dentist	D.D.S., D.M.D., Doctor en Odontologia or Doctor en Cirugia Dental; or state/provincial license
Dietitian	Baccalaureate or Licenciatura Degree; or state/provincial license
Medical Laboratory Technologist (Canada)/ Medical Technologist (Mexico and the United States) (See note below for further details.)	Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience
<b>Note:</b> A business person in this category must be seeking temporary entry to perform in a laboratory chemical, biological, hematological, immunologic, microscopic or bacteriological tests and analyses for diagnosis, treatment or prevention of disease.	
Nutritionist	Baccalaureate or Licenciatura Degree
Occupational Therapist	Baccalaureate or Licenciatura Degree; or state/provincial license
Pharmacist	Baccalaureate or Licenciatura Degree; or state/provincial license
Physician (teaching or research only) (See note below for further details.)	M.D. or Doctor en Medicina; or state/provincial license
<b>Note:</b> Physicians may not enter for the purpose of providing direct patient care. Patient care incidental to teaching and/or research is permissible.	
Physiotherapist/Physical Therapist	Baccalaureate or Licenciatura Degree; or state/provincial license
Psychologist	State/provincial license; or Licenciatura Degree
Recreational Therapist	Baccalaureate or Licenciatura Degree
Registered Nurse (See note below for further details.)	State/provincial license; or Licenciatura Degree
<b>Note:</b> To be authorized to enter Canada as a registered nurse, a licence issued by the province of destination is necessary.	
Veterinarian	D.V.M., D.M.V. or Doctor en Veterinaria; or state/provincial license
<b>Scientist</b>	
Agriculturist (including Agronomist)	Baccalaureate or Licenciatura Degree
Animal Breeder	Baccalaureate or Licenciatura Degree
Animal Scientist	Baccalaureate or Licenciatura Degree
Apiculturist	Baccalaureate or Licenciatura Degree
Astronomer	Baccalaureate or Licenciatura Degree
Biochemist	Baccalaureate or Licenciatura Degree
Biologist (including Plant Pathologist)	Baccalaureate or Licenciatura Degree
Chemist	Baccalaureate or Licenciatura Degree

Dairy Scientist	Baccalaureate or Licenciatura Degree
Entomologist	Baccalaureate or Licenciatura Degree
Epidemiologist	Baccalaureate or Licenciatura Degree
Geneticist	Baccalaureate or Licenciatura Degree
Geologist	Baccalaureate or Licenciatura Degree
Geochemist	Baccalaureate or Licenciatura Degree
Geophysicist (including Oceanographer in Mexico and the United States)	Baccalaureate or Licenciatura Degree
Horticulturist	Baccalaureate or Licenciatura Degree
Meteorologist	Baccalaureate or Licenciatura Degree
Pharmacologist	Baccalaureate or Licenciatura Degree
Physicist (including Oceanographer in Canada)	Baccalaureate or Licenciatura Degree
Plant Breeder	Baccalaureate or Licenciatura Degree
Poultry Scientist	Baccalaureate or Licenciatura Degree
Soil Scientist	Baccalaureate or Licenciatura Degree
Zoologist	Baccalaureate or Licenciatura Degree
<b>Teacher</b>	
College	Baccalaureate or Licenciatura Degree
Seminary	Baccalaureate or Licenciatura Degree
University	Baccalaureate or Licenciatura Degree

#### 4 INTRA-COMPANY TRANSFEREES

##### 4.1. What requirements apply to intra-company transferees?

The following requirements apply:

- citizenship of the United States or Mexico;
- employment in an executive or managerial capacity or one involving "specialized knowledge";
- enterprises in the United States or Mexico and in Canada have a parent, branch, subsidiary or affiliate relationship;
- continuous employment, in a similar position outside Canada, for one year (full-time) in the previous three-year period from the date of application; and
- compliance with existing immigration requirements for temporary entry.

##### 4.2. Where can an intra-company transferee apply for a work permit?

Facilitated entry under the NAFTA allows an intra-company transferee to make an application at the POE. An application can also be made at a visa office before departing for Canada.

United States and Mexican citizens can also apply for intra-company transferee status in Canada, having been authorized to enter Canada as visitors (R199).

##### 4.3. What documentation must an intra-company transferee present to support an application?

An intra-company transferee must present:

- proof of American or Mexican citizenship;
- confirmation that the person has been employed continuously outside of Canada by the enterprise for one year (full-time) within the three-year period immediately preceding the date of application (see TIP);
- outline of the applicant's current position in an executive, or managerial capacity or one involving specialized knowledge, i.e., position, title, place in the organization, job description;
- in the case of "specialized knowledge", evidence that the person has such knowledge and that the position in Canada requires such knowledge;
- outline of the position in Canada, i.e., position, title, place in the organization, job description;
- indication of intended duration of stay; and

**About the Authors**

**R. Reis Pagtakhan**

Reis Pagtakhan practices primarily in the area of immigration law. His extensive experience includes assisting businesses obtain temporary entry to Canada and permanent residency for their executives, employees and contractors from all over the world.

Reis has lectured on and written papers on immigration law for the Law Society of Manitoba, the Manitoba Bar Association and the Community Legal Education Association of Manitoba. He has presented position papers before the Minister of Citizenship and Immigration and Immigration Department officials and has written articles on the law and legal issues for trade and industry publications as well as local ethnic newspapers in Winnipeg, Edmonton and Vancouver. He is currently a director of the Immigrant Centre Manitoba. Reis received his Bachelor of Laws and Bachelor of Arts (Hons.) from the University of Manitoba.

**Shandra N. Czarnecki**

Shandra Czarnecki practices in the areas of labour and employment law representing management of public and private sector organizations engaged in a variety of industries. Shandra provides practical advice and assistance to clients on all matters relating to labour and employment law, including the negotiation, drafting, interpretation and application of collective agreements and employment agreements; the drafting, implementation and enforcement of workplace policies; disciplinary matters and terminations; compensation and benefit matters; labour and employment matters relating to corporate restructuring, downsizing and acquisitions; human rights matters, including discrimination, accommodation and harassment; employment standards matters; and workplace safety and health and workers compensation matters

Shandra represents employers before arbitration boards, human rights commissions and tribunals, labour boards, workers compensation tribunals and Manitoba courts. She received her Bachelor of Laws from the University of Manitoba and her Bachelor of Arts from the University of Winnipeg.

**Robert G. Sly**

Bob Sly practices in the area of taxation and advises corporate clients in taxation matters including corporate reorganizations, cross border and general tax planning and estate planning including estate freezes. Prior to joining Aikins, Bob was a Chartered Accountant with Deloitte & Touche.

Bob has lectured on tax law for the Bar Admission Course and has presented papers to various CLE sessions, the Prairie Tax Conference and the Annual Tax Conference of the Canadian Tax Foundation. He received his Bachelor of Laws from the University of Manitoba and his Bachelor of Arts from the University of Winnipeg. He became a Chartered Accountant in 1983.