Doing Business North of the Border: What business attorneys need to know for clients doing business in Canada

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About the Author

Reis Pagtakhan is a Canadian corporate immigration lawyer with more than 21 years of experience in advising businesses and individuals on immigration matters. His focus is on:

1. Obtaining temporary entry and permanent residency for senior executives, managers, professionals and other company employees from all over the world;
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A partner with MLT Aikins and Senior Writer for CBC Manitoba, Reis has been invited to speak to Canadian and international audiences on immigration issues by CPHR Manitoba, the Association of Canadian Search, Employment and Staffing Services, World Trade Centre - Winnipeg, the Canadian Manufacturers & Exporters, the Canadian Corporate Counsel Association, the Law Society of Manitoba, the Manitoba Bar Association, and the Community Legal Education Association of Manitoba.

Reis has presented position papers before the Minister of Immigration, Refugees and Citizenship Canada, co-authored Manitoba Bar Association and CPHR responses to proposed immigration changes, and has appeared before both the House of Commons and Senate Standing Committees on immigration and citizenship legislation. He has written over 100 articles and papers on immigration law that have appeared in the Winnipeg Free Press as well as human resource, professional services, construction, legal and ethnic publications.

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I. Introduction

Canada is one of the United States’ largest trading partners and, as such, hundreds, if not thousands, of U.S. companies do business in Canada. For businesses that sell goods into Canada where there is no need for U.S. personnel to cross the border, the process of doing business in Canada is relatively painless – once custom and duties issues are sorted out.

However, when a U.S. company wins a bid or contract or wants to realize on a business opportunity in Canada that requires U.S. citizen employees or contractors to cross the border, these companies must deal with Canadian immigration issues in a timely fashion to meet the obligations of their customers or clients.

Canadian immigration lawyers often see situations where U.S. companies have entered into contractual relationships with Canadian customers or clients without considering the Canadian immigration issues that may arise for their personnel. I have often received calls from U.S. citizens who have been stopped at the border because they lack the qualifications to enter Canada or the correct documentation.

This paper will outline some of the common Canadian immigration solutions U.S. business attorneys should consider when advising clients who wish to do business in Canada. While this paper is not an exhaustive list of all possible Canadian immigration options, this paper will give U.S. business attorneys the ability to identify the necessary issues when faced with these situations.

Please note that the comments in this paper deal with entry of U.S. citizens to Canada. There are sometimes different immigration processes for U.S. permanent residents and foreign nationals who are in the U.S. on temporary visas.

II. Why is advanced planning needed before crossing the Canadian border?

Every entry to Canada involves some sort of immigration process.

In many cases, the immigration process is hard to discern. For instance, when an individual travels to Canada as a tourist, a border services officer must determine whether the individual is a bona fide visitor (i.e. Will the individual return to the U.S.? Will he or she engage in illegal work or study? Is he or she inadmissible to Canada?). In many cases, a few short questions generate the answers a border services officer needs to know to make the necessary determination as to whether an individual should be allowed into Canada or questioned further.

For individuals entering Canada for business, the type of Canadian immigration status a traveler requires will determine the steps that person needs to take to cross the border. For instance, for an individual allowed into Canada as a “business visitor”, the decision on admission will be made when the individual appears at a Canadian airport or border crossing. Processing times in these cases are often measured in minutes.
On the other hand, if a person needs a “work permit” to work in Canada, that person and his or her employer may need to file anywhere from 2 to 3 different applications with one or two levels of government. Depending on the work permit that is required, processing times can range from minutes to weeks or even months. Clearly, U.S. employers looking to get their people into Canada will want to determine well in advance what needs to be done.

III. How can you identify if your client has a Canadian immigration issue?

For U.S. business people entering Canada, border services officers are becoming more vigilant. When a U.S. citizen comes to Canada for business, the immediate thought that goes through a border services officer’s mind is whether the individual will be carrying out “work” in Canada. If so, the border services officer then needs to determine whether such “work” can be carried out by a “business visitor” or whether the traveler requires a document known as a “work permit”.

a. What is the immigration definition of “work”?

In the Canadian immigration context, “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”1.

As you can see, there are two distinct parts to this disjunctive test. First, any sort of paid activity is “work” for immigration purposes. In this connection, because the source of remuneration does not determine whether a person will be engaging in “work”, a U.S. citizen who remains on a U.S. payroll may be found to be engaging in “work” in Canada.

Second, “work” also encompasses unpaid activities. Unpaid activities in “direct competition” with activities of Canadians or Canadian permanent residents will be considered “work”.

b. When is “work” work?

In Ozawa v. Canada (Citizenship and Immigration), 2010 FC 444 CanLII, a shareholder of a hair salon sought to argue that his working as a hair stylist did not constitute “work” because he partially owned the business and was not an employee of the business.

The judge in this case accepted that Mr. Ozawa was a shareholder and director of the hair salon and found that the definition of “work” did not capture the normal activities of a shareholder or director.

However, with respect to working as a hair stylist, the judge found that when a director or shareholder provides service outside of the normal role of shareholder and director, these activities could constitute “work”. As Mr. Ozawa was observed by the investigating officer cutting hair for customers, this activity was considered “work”.

1 S.1 of the Immigration and Refugee Protection Regulation
IV. What is a “business visitor” and why this is the best immigration category for your client

Individuals who qualify as “business visitors” are allowed to work in Canada without obtaining a work permit. A “work permit” is a formal document issued to a non-Canadian that allows them to work in Canada for a finite period of time.

The business visitor category is the preferred category for any business person because entry is faster, easier and cheaper than any other immigration category. Unfortunately, this category is limited and typically excludes individuals who are coming to Canada to manage operations, do hands-on building and construction work, and to offer professional services.

a. What are the minimum criteria for business visitors?

Generally, to be business visitor, one must normally:

- Be primarily remunerated by a source outside of Canada;
- Have their principal place of business predominantly outside of Canada; and
- Show that the profits of their principal place of business accrue predominantly outside of Canada.

b. What are some examples of business visitors?

Examples of common business visitor categories found in the North American Free Trade Agreement (NAFTA) include:

- Technical, scientific and statistical researchers conducting independent research or research for an enterprise located in the U.S.
- Harvester owners supervising a harvesting crew authorized to enter Canada under applicable law.
- Purchasing and production management personnel conducting commercial transactions for an enterprise located in the U.S.
- Market researchers and analysts conducting independent research or analysis or research or analysis for an enterprise located in the U.S.
- Sales representatives and agents taking orders or negotiating contracts for goods or services for an enterprise located in the U.S. but not delivering goods or providing services.
- Buyers purchasing for an enterprise located in the U.S.
- Professionals engaging in a business activity at a professional level in a profession.
- Management and supervisory personnel engaging in a commercial transaction for an enterprise located in the U.S.
- Financial services personnel (insurers, bankers or investment brokers) engaging in commercial transactions for an enterprise located in the U.S.
- Public relations and advertising personnel consulting with business associates, or attending or participating in conventions.

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2 S.187(2) of the Immigration and Refugee Protection Regulations
c. The Business Visitor Category for After-Sales Service

A special business visitor category has been created for U.S. citizens entering Canada to provide after-sales service for goods sold to Canadian customers. In order to qualify, the following must be met:

1. The goods must be commercial or industrial equipment or machinery or computer software used in a commercial or industrial setting. (Products for household use are not covered.)
2. Generally, the goods must have been purchased from an enterprise located outside of Canada. U.S. personnel cannot enter Canada to provide after-sales service for Canadian manufactured products or software.
3. The work must be restricted to installing, repairing, or maintaining the equipment, machinery or software. For software, this type of work includes software upgrades. Individuals can also come to Canada to provide training on equipment or software.
4. When conducting installation, repair, maintenance or training, the person entering Canada cannot do work that is considered “hands-on building and construction work”. Generally, work normally done by tradespersons must be done by Canadians or Canadian permanent residents.
5. The individual traveling to Canada must possess specialized knowledge essential to the company’s obligation under the contract.
6. Entry will only be granted for the duration of the warranty or service agreement or any extension to these agreements. Work conducted outside of a warranty period, will not be covered. The service contract must have been negotiated as part of the original sales or lease/rental agreement (or be an extension of the original agreement).

i. Tips for business lawyers drafting contractual provisions for after-sales service and warranty agreements

For attorneys who draft sales or purchase agreements for cross-border customers, it is essential that the appropriate provisions be inserted in these agreements to ensure your client’s U.S. personnel can cross the border to properly service the equipment. If a third party will be providing this service, this should be mentioned in the contract.

In many cases, border services officers will ask to see these agreements to ensure that the appropriate provisions are in place. The failure to include these provisions can result in businesses having to go through a much more complicated immigration process to get their service personnel into Canada.

d. The Business Visitor status for salespeople

Another special category that allows U.S. citizens to work as business visitors is the category for cross-border salespeople. Individuals in this category can enter Canada to take orders or negotiate contracts for the sale of goods to Canadian customers. Unlike the after-sales service provisions, the goods or services need not be for commercial or industrial use.

While U.S. salespeople can enter Canada for the purpose of conducting sales, there are some important limitations. They include the following:

1. U.S. citizens cannot sell predominantly Canadian-made goods or Canadian-provided services. As a result, a U.S. company with manufacturing facilities in Canada cannot have their U.S.
salesperson sell the Canadian manufactured product in Canada without a work permit.

2. The goods or services that are the subject of a sale cannot be delivered during the same visit of the U.S. salesperson to Canada. While U.S. citizens can take orders or negotiate contracts for goods or services, the actual delivery of the goods and services must come later.

3. U.S. salespeople are prohibited from making sales to the general public as business visitors. So, while the U.S. salesperson can take an order for a thousand jars of jam that will be subsequently shipped to a Canadian retailer, that same U.S. salesperson would not be able to sell the thousand jars of jam to customers at a farmer’s market.

V. What is a “business visitor” and why this is the best immigration category for your client

If an individual does not qualify as a business visitor, he or she will need to obtain a work permit before being allowed to carry out their assigned duties in Canada.

The Canadian immigration system has a dizzying number of work permit categories. Factors that will be taken into consideration include:

1. The duties the individual will be carrying out in Canada,
2. Whether the individual is a professional;
3. The relationship between the individual’s U.S. employer and a Canadian-based company,
4. The length of employment an individual has with their U.S. employer, and
5. The citizenship or residency of the individual.

Canadian work permit options are generally divided up into two broad categories - work permits under the International Mobility Program and work permits under the Temporary Foreign Worker Program. The basic difference between these programs is that International Mobility Program work permits do not require U.S. employers to first go through a Canadian labour market test before being able to have their personnel work in Canada. Under the Temporary Foreign Worker Program, an employer generally must advertise extensively to fill the position in Canada before a U.S. citizen can be hired.

a. Work Permits under the International Mobility Program

The two most commonly used work permit categories for U.S. citizens are the NAFTA Professional category and the intra-company transfer category. Another often used category is for individuals providing after-sales service work (similar to the business visitor category above) where the warranty or after sales service agreement has expired.

i. NAFTA Professionals

Under the NAFTA professional category, certain individuals who meet the definition of “professional” under NAFTA are able to work in Canada without having to go through a labour market test to show there are no Canadians or Canadian permanent residents who are able or willing to fill the position.

For U.S. companies, the NAFTA professional category is one of the best and most effective immigration categories. The NAFTA professional category covers over 70 different professions ranging from
accountants, engineers, astronomers, dentists and university teachers. What this category does not cover are trades people and managers.

Under NAFTA, U.S. citizens are eligible to apply for work permits upon entry to Canada. The filing fee payable at the border is CAD$155. Prior to filing for a NAFTA work permit, an employer compliance filing (known as an LMIA-exempt Offer of Employment) needs to be filed at a cost of CAD$230.

In order to qualify as a NAFTA professional, the following criteria must be met:

1. The individual must be entering Canada to work in a profession listed under NAFTA;
2. The individual must meet the minimum educational and/or work experience requirements for the NAFTA professional category; and
3. The individual must be entering Canada through “prearranged employment” with a Canadian entity.

When is a “professional” a professional?

Just because an individual may be qualified as a professional under the NAFTA, this does not automatically mean that the individual would be eligible for a NAFTA work permit. Under NAFTA, an individual must not only have certain professional qualifications but must be entering Canada to work in that profession.

Two examples found on Immigration, Refugees and Citizenship Canada’s website illustrate this point.

In the first example, Immigration, Refugees and Citizenship Canada indicates that an accountant (which is a NAFTA profession) must be seeking to enter Canada as an accountant and not as a bookkeeper (which is not a NAFTA profession).

In the second example, Immigration, Refugees and Citizenship Canada indicates that a professional entering Canada to be a corporate executive must be coming to work in their field of qualification in order to qualify. In this example, the position of an engineer (also a NAFTA profession) is cited. If the corporate executive with an engineering designation is not carrying out the job duties of an engineer, he or she will not be eligible for a NAFTA work permit.

What is prearranged employment?

With respect to the requirement for prearranged employment, this does not mean that the individual traveling to Canada must enter into an employer-employee relationship with a Canadian company. The individual can still be employed by his or her U.S. employer or can be self-employed. What this requirement means is that an individual cannot simply hang out one’s own shingle in Canada. There must either be:

1. An employer-employee relationship with a Canadian enterprise,
2. A contract between the professional and a Canadian enterprise, or
3. A contract between the professional’s American employer and a Canadian enterprise.
ii. The intra-company transfer

The next most commonly used category under the International Mobility Program is for employees of U.S. companies who are being transferred to related companies in Canada. In order to qualify for this type of work permit, the individual traveling to Canada must be an executive, manager, or specialized knowledge employee of the U.S. enterprise and must be entering Canada to carry out duties in an executive, managerial or specialized knowledge capacity.

Some of the more important qualifications individuals needed to be intra-company transferees include the following:

1. The individual must have been continuously employed in a similar position outside of Canada for at least one year in the three years before applying for a work permit.
2. The U.S. employer and the Canadian company must be related in a specified way. While complicated corporate structures are allowable, it must be ultimately shown that the U.S. and Canadian company are related either in a parent-subsidiary relationship, are subsidiaries of a common owner or ownership group, or one entity is a branch office of the other.
3. It must be shown that the U.S. company will continue doing business in the U.S. for the duration of the individual’s transfer to Canada. While this is not normally a problem for long-established companies, smaller companies that have very few or no employees will sometimes have a difficulty in establishing this.
4. The definition of who is in an executive, manager or specialized knowledge employee is very specific and does not always correspond to the internal position descriptions in a company. As a result, it is important to carefully analyze the job duties to ensure that the immigration definition of executive, manager or specialized knowledge is met.

iii. Employer compliance filings – why they are problems for your clients

Before an individual can obtain a work permit under the International Mobility Program, that person’s “employer” must file an on-line employer compliance document known as an LMIA-exempt Offer of Employment.

The LMIA-exempt Offer of Employment is a document in which an employer sets out:

1. The wages and working conditions for the individual obtaining a work permit;
2. Other details of the individual’s remuneration,
3. The individual’s employee benefits, hours of work, location of work, and job duties;
4. The individual’s professional or other qualifications needed for the job; and
5. The specific immigration category that is being used.

Under the law, an employer may be audited for compliance up to 6 years after a U.S. citizen is employed in Canada. If the employer is unable to confirm that the U.S. citizen was employed in a manner consistent with what was set out in the LMIA-exempt Offer of Employment, the employer risks a finding of noncompliance which could result in the company being banned from hiring any non-Canadian/permanent residents for jobs in Canada.

Where this issue is particularly annoying is that “employers”, for the purpose of LMIA-exempt Offers of Employment, are usually the ultimate consumer of the goods or services. For instance, if a Canadian
project proponent in a construction project hires a U.S. engineering firm to work on a project in Canada, the "employer" will be the Canadian project proponent, not the actual U.S. employer of the engineers.

What can your client do if its Canadian customer refuses to be the “employer”?

Canadian customers will often resist being the “employer” on an LMIA-exempt Offer of Employment as this can result in them being audited for work done by U.S. contractors. In some cases, this has essentially eliminated U.S. firms from competing for this Canadian work.

Some time ago, we were approached by a U.S. consulting company whose Canadian client refused to complete employer compliance forms for U.S. employees.

In answer to this concern, we created a Canadian office through which the U.S. company transferred its employees to offer services to its Canadian clients. Because the U.S. company’s Canadian office was employing its U.S. employees, it was this company that had to complete the LMIA-exempt Offer of Employment thereby relieving their ultimate Canadian customer from having to file this documentation.

While this worked in this particular situation, for some International Mobility Program categories, the above approach is specifically prohibited.

What should you do for your Canadian client if they agree to be the “employer”?

In situations where a Canadian customer must file as the “employer” of a U.S. company’s employees, the only thing that a U.S. employer can do is assure their Canadian customer that they will provide them with all information needed to comply with any compliance audit.

Because these types of audits can occur any time within a six year period, when advising Canadian companies in this predicament, I recommended that they obtain from their U.S. contractors and consultants the information needed to answer questions set out in an audit request right after the project is completed.

In the current audit questionnaire sent by the government of Canada to “employers” of individuals who are employed by other companies, the following information is requested:

1. A letter or contract from the U.S. service provider stating that it is covering the individual’s wages and benefits and also confirms the job duties performed by the individual while in Canada;
2. An attestation signed by a person in authority at the company that confirms the wage paid to the individual for work performed in Canada, the benefits provided to the individual when he or she worked in Canada, and the job duties performed while in Canada; and
3. If there is a discrepancy between the wages, benefits, or job duties listed in the online compliance form and the actual wage paid to the individual, benefits provided to the individual, or services rendered by the individual, an explanation as to why there is a discrepancy.

U.S. companies that are willing to provide this information to Canadian customers immediately after the provision of services can go a long way in allaying concerns of their customers who need to put their names on the employer compliance forms and attest to the information that is provided in these forms.
b. Work Permits under the Temporary Foreign Worker Program

If a U.S. citizen does not qualify for entry to Canada as a business visitor or under the International Mobility Program, the last and least desirable option is a work permit through the Temporary Foreign Worker program.

With a few exceptions, Canada’s Temporary Foreign Worker program is a “Canada first” immigration program in which employers must prove that there are no Canadians or Canadian permanent residents willing and able to do the job before permission will be granted for a U.S. citizen to work in Canada.

Normally, this process requires the U.S. employer to advertise the vacant position in Canada to attempt to recruit Canadians and Canadian permanent residents. Ads must be run in a prescribed manner for at least one month before applying for permission to hire individuals from outside of Canada.

The recruitment process is intentionally frustrating. The rationale for this is to convince the government of Canada that there is no domestic labour that can fill this position.

When planning to do business in Canada, it is important to understand whether your client’s personnel need to go through this program. If this is the case, significant advanced planning must occur. It is not uncommon for this process to take in excess of three months from the date ads are first run to the dates approvals are issued.

VI. Canadian immigration solutions for companies setting up operations in Canada

a. How to create a “new office” for immigration purposes

For companies wishing to expand their operations in Canada, setting up an office in Canada can be a viable option.

When setting up a Canadian operation, U.S. companies will often analyze tax and employment laws to determining the viability of setting up in Canada. One thing that is often overlooked is whether the corporate structure provides easy immigration access to Canada.

While there are different immigration options for companies setting up in Canada, the easiest one is the intra-company transfer. This solution is especially useful for personnel who do not meet the qualifications of a business visitor or NAFTA professional.

As indicated above, the corporate structure needed for intra-company transfers requires there to be a parent-subsidiary relationship, an affiliate relationship, or a branch office relationship between an operation in the U.S. and Canada.

For there to be a parent-subsidiary relationship, an entity must own another entity. For the purposes of an intra-company transfer, it does not matter whether the parent company is located in the U.S. or Canada. It also does not matter if there be a direct relationship between the parent company and the subsidiary company. In other words, there can be a number of corporations interspersed between the ultimate
parent and subsidiary.

For an affiliate relationship, it must be shown that the two subsidiaries are owned and controlled by the same parent company or individual. If the common owner is a group of individuals, each individual within the group needs to own and control approximately the same share or proportion of each company.

A branch is considered an operating division of the same organization in a different location. It is not necessary for a separate corporate entity to be created for a branch relationship to occur.

For multinational companies doing business in Canada and the U.S. for more than a year, the test is relatively straightforward. However, if an entity is being set up for the first time (or has existed in Canada for under a year), it will be considered a “new office”. To qualify as a “new office” the following factors will be considered:

1. Whether physical premises for the Canadian operation has been secured.

   Generally speaking, a “new office” needs to secure physical premises. This is because Immigration, Refugees and Citizenship Canada wants to be assured that a shelf company has not been set up mainly to facilitate the entry of non-Canadians into the country. While there is room for some leniency, the general rule is that physical premises should be secured.

2. Whether the company has furnished realistic plans to staff new operation.

   In this connection, we typically submit a human resources plan that indicate the staffing levels projected over the period of the next 12 months. When putting together the human resources plan, it is important to not be overly optimistic as Immigration, Refugees and Citizenship Canada may look back at this plan at the end of one year.

3. Whether the company has the financial ability to commence business in Canada and compensate employees.

4. For transfers of executives or managers, whether the company will be large enough to support an executive or management function.

5. For transfers of specialize knowledge workers, whether the company can demonstrate that it is expected to do business and that the work in Canada will be guided and directed by management at the Canadian corporation.

For these last three items, we typically submit financial information and the business plan for the Canadian company. Like the human resources plan that is submitted in support of plans to staff the operation, it is often best for the business plan to be conservative.

b. Extending “new office” work permits

Work permits for intra-company transfers of “new offices” will initially be granted for only one year. (For established companies, intra-company work permits can initially be granted for 3 years.) For “new offices” to get extensions, it will be necessary for the companies to show:
1. The continuation of an intra-company relationship across borders;
2. That the Canadian office has been engaged in the continuous provisions of goods and services for the past year; and
3. That the Canadian office has been staffed.