Federal Skilled Worker Program and Canadian Experience Class (Summary and Jurisprudence Update)

Prepared for
The Canadian Bar Association

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Overview of the Two Programs

Issue	Canadian Experience Class	Federal Skilled Worker Class
Is there a cap in the number of applications?	No.	Yes, unless applying under the Arranged Employment category or the PhD stream.
Is a job offer required as part of the application?	No.	No, unless the applicant is applying under the Arranged Employment category.
If a job offer is required, and the applicant is in Canada, can the applicant change employers during processing?	N/A	Probably. The new IRPR s. 82(2)(a) provides that applicants have Arranged Employment if they hold a LMO based work permit at the time of application and visa issuance. Section 82(2)(a) no longer says that it must be the same work permit.[1]
If a job offer is required, does the employer have to do recruitment?	N/A	Unless the individual is working in Canada under r. 204(a), 205(a), 205(c)(ii) or r. 186, recruitment is the same as for a Labour Market Opinion.
How much work experience is required?	1 year of full-time work experience in a NOC 0/A/B occupation in Canada.	One year work in NOC 0/A/B during the past 10 years in a specific occupation.

[1] The previous version of s. 82(a)(iii) provided that one of the requirements for Arranged Employment was that the skilled worker be in Canada and hold a work permit that was valid at the time of the application and at the time the permanent resident visa was issued. The new Regulations state that an applicant is eligible for Arranged Employment if the applicant holds a work permit that is valid on the date of application, and, on the date on which the permanent resident visa is issued, the applicant holds a valid work permit (or is on implied status).

I initially had concerns that an applicant being issued a bridging open work permit would result in the applicant no longer meeting the requirements of Arranged Employment. Regulation 82 provides that Arranged Employment will result where (amongst other things) an applicant is working in Canada pursuant to a Labour Market Opinion supported work permit or pursuant to a work permit referred to in s. 204(a) or s. 204(c). Neither the TFW Manual nor OB 485 – Bridging Open Work Permits for Certain Federal Economic Class Applicants stipulates which regulatory authority bridging open work permits are provided under. Neither s. 204(a) nor (c) apply to open bridging work permits, nor do they require a determination by Service Canada. However, CIC has informed me through e-mail that a taking advantage of the bridging open work permit will have no impact on arranged employment.

Issue	Canadian Experience Class	Federal Skilled Worker Class
Does self-employment count to experience?	No, and CIC also defines "self-employment" as ownership in the employer.	Yes.
Can currently self-employed people apply?	Yes.	Yes. If it is supported by a Labour Market Opinion it may even qualify for Arranged Employment.
Processing time	13 months (often shorter)	Varies dramatically.
Is language testing required?	Applicants with experience in NOC 0/A currently require CLB 7 in all four language abilities. Applicants with experience in NOC B currently require CLB 5 in all four language abilities.[2]	Yes. As well, IRPR s. 79(2) provides points for language. Applicants can get points for capabilities in both English and French. Applicants are also expected to require a minimum CLB 7 in all abilities.[3]
Is there a minimum necessary income?	No. However, as per the *Qin* decision, a low wage may result in questions about whether applicant performed NOC duties.[4]	If the applicant is relying on Arranged Employment, and a LMO is involved, the rules for LMO will apply. If not relying on Arranged Employment, minimum funds are required.
Do applicants need their credentials assessed?	No.	Yes.
Can applicant maintain status during permanent residence application processing?	Eligible for bridging open work permit when CIO sends acknowledgement of receipt and work permit is expiring in 4 months.	Eligible for bridging open work permit when CIO sends acknowledgement of receipt and work permit expiring in 4 months. As noted in Footnote 1, this may affect validity of AEO.

[2] [3] – It is important to note that the Minister of Citizenship and Immigration Canada can change the language requirements of both the CEC and FSWC without advanced notice through Ministerial Instructions.

[4] This decision is discussed in more detail below.

2012-13 Jurisprudence on The Federal Skilled Worker Program

Beware the Cap

In *Agama v. Canada (Citizenship and Immigration)*, 2013 FC 135, Citizenship and Immigration Canada posted the following information on its website regarding how many NOC 0631 applications it had received:

> September 28, 2011 – 209 applications
> October 10, 2011 – 229 applications
> November 3, 2011 – 330 applications
> November 8, 2011 – 335 applications
> December 1, 2011 – 458 applications

The applicant filed her application on November 14, 2011. Considering that the CIC website on December 1 reported that the cap stood at 458, the applicant thought that she had made it.

Unfortunately, on January 13, 2012, CIC informed the applicant that her application was rejected because the cap of 500 applications for NOC 0631 had been reached on September 19, 2011. This contradicted what was on the CIC website.

Justice Phelan determined that the CIC website did not create a legitimate expectation that the applicant's application would be processed. He noted that there was nothing on the CIC website to suggest that the number of applications posted on the website was true, accurate and complete such as to create a legitimate expectation in the accuracy of the number.

The implication for practitioners is clear. It is important that they caution clients when submitting applications that just because the CIC website suggests that the quota is not filled does not mean that it in fact is.

An AEO Does not Exempt Someone from Meeting the Requirements of 75(2)

Subsection 75(2) of the *Immigration and Refugee Protection Regulations* provides that:

> (2) A foreign national is a skilled worker if
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> (a) within the 10 years before the date on which their application for a permanent resident visa is made, they have accumulated, over a continuous period, at least one year of full-time work experience, or the equivalent in part-time work, in the occupation identified by the foreign national in their application as their primary occupation, other than a restricted occupation, that is listed in Skill Type 0 Management Occupations or Skill Level A or B of the National Occupational Classification matrix;

(b) during that period of employment they performed the actions described in the lead statement for the occupation as set out in the occupational descriptions of the National Occupational Classification;

(c) during that period of employment they performed a substantial number of the main duties of the occupation as set out in the occupational descriptions of the National Occupational Classification, including all of the essential duties.

(d) they have submitted the results of an evaluation — by an organization or institution designated under subsection 74(3) and which must be less than two years old on the date on which their application is made — of their proficiency in either English or French indicating that they have met or exceeded the applicable language proficiency threshold fixed by the Minister under subsection 74(1) for each of the four language skill areas; and

(e) they have submitted one of the following:
(i) their Canadian educational credential, or

(ii) their foreign diploma, certificate or credential and the equivalency assessment, which assessment must be less than five years old on the date on which their application is made.

It appears that some practitioners, as well as Citizenship and Immigration Canada officers, have mistakenly assumed that applicants with Arranged Employment do not need to meet the above requirements. However, in *Senadheera v. Canada (Citizenship and Immigration Canada)*, 2012 FC 704, the Federal Court confirmed that CIC should refuse applications if they do not meet all of the above requirements in IRPR 75(2), even if applicants have Arranged Employment.

It is also important that applicants establish that their work experience was in fact full-time. In *Perez Enriquez v. Canada (Citizenship and Immigration)*, 2012 FC 1091, the Court found that the existence of work permits or reference letters which did not specify the number of hours worked per week (or at least state that employment was full-time) did not establish full-time work.

Ability to Perform the Duties of an AEO

In light of the recent revisions to the language requirements in the Federal Skilled Worker Class, it is unlikely that applicants will be rejected because of poor language ability, either through a declaration that they are unable to perform the duties of their AEO or a negative substituted evaluation.

For applications submitted under the previous program, applicants with Arranged Employment who also have a low IELTS score should not be surprised if an officer raises concerns about their ability to perform the terms of their employment offer. In *Singh v. Canada (Citizenship and Immigration)*, 2012 FC 814, CIC sent the applicant the following letter:

> In support of your application for permanent residence in Canada, you submitted a letter of employment offer from . . . . This job requires you to speak and write English at work. Your IELTS [language test] results show that you only have a basic command of the English language. Your overall band score indicates a result of 4.5 and I note your result for speaking is 5.5 and result for writing is 3.5. I have concerns regarding your ability to fulfill the responsibilities as required by your job offer.[5]

Fortunately for the applicant, the employer provided a letter in response to the Fairness Letter basically stating that the employer thought that the applicant's language abilities were sufficient. The Court allowed the appeal largely on the basis that the officer did not properly address the fact that the employer thought that the language abilities were sufficient.[6]

Sufficiency of Evidence

While applicants are advised to go beyond CIC's document checklist, it is important that they remember include everything in the checklist. In *Elisha v. Canada (Citizenship and Immigration)*, 2012 FC 520, the applicant's employer failed to include all of the required information in his reference letter. The applicant sought to address the missing information by writing her own letter, rather than providing contracts, work descriptions, and performance appraisals as specifically requested in the Buffalo Consulate's document checklist. The Federal Court ruled that the applicant thus did not provide sufficient evidence for an officer to determine whether she performed a substantial number of the main duties of NOC 3152 – Registered Nurse.

In *Singh v. Canada (Citizenship and Immigration)*, 2012 FC 855, meanwhile, the applicants, in order to prove that they had relatives in Canada, included an affidavit from their relatives, their relatives' permanent resident cards, and their relatives' passports. The visa officer awarded no points for Adaptability because the officer determined that there was insufficient evidence to show that the applicants had relatives living in Canada. In dismissing the judicial review application, the Court noted that the document checklist provided prior notice to the applicant's as to what documents were required to establish a relative living in Canada, and that the officer was not obligated to provide a Fairness Letter to address the deficiency. The Court also reiterated that affidavits from interested parties are of limited value, reiterating the following passage from *Ferguson v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067:

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[5] *Singh v. Canada (Citizenship and Immigration)*, 2012 FC 814, at para. 9
[6] For a similar decision see *Tan v. Canada (Citizenship and Immigration)*, 2012 FC 1079

> Evidence tendered by a witness with a personal interest in the matter may also be examined for its weight before considering its credibility because typically this sort of evidence requires corroboration if it is to have probative value. If there is no corroboration, then it may be unnecessary to assess its credibility as its weight will not meet the legal burden of proving the fact on the balance of probabilities. When the trier of fact assesses the evidence in this manner he or she is not making a determination based on the credibility of the person providing the evidence; rather, the trier of fact is simply saying the evidence that has been tendered does not have sufficient probative value, either on its own or coupled with the other tendered evidence, to establish on the balance of probability, the fact for which it has been tendered.[7]

When reviewing employer reference letters, it is also important that the job duties match the NOC that applicants are claiming experience in. As the Federal Court noted in *Afolabi v. Canada (Citizenship and Immigration Canada)*, 2012 FC 1364, simply relying on job titles is generally insufficient. An exception to this general rule may arise where the job duties of a position can be readily assumed by the position's title. An example of such a position that appears to have arisen in several cases is NOC 3111 – Specialist Physicians. In *Bazaid v. Canada (Citizenship and Immigration Canada)*, 2013 FC 17, the Court noted at paragraph 49 that:

> The distinction, however, between holding the job title of Psychiatrist and performing the functions of Psychiatrist or practicing as a Psychiatrist or providing in-patient care, is untenable. A person who holds the job title of Psychiatrist will obviously perform the functions of a Psychiatrist, practice as a Psychiatrist, and provide in-patient care.[8]

It is risky, however, to take this approach. The Federal Court has indicated that it was reasonable for visa officers to conclude that employer reference letters did not sufficiently describe the duties for financial Auditors[9] and Financial Managers.[10]

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[7] *Ferguson v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067, at para. 29. *Lohat v. Canada (Citizenship and Immigration)*, 2012 FC 1432, is another decision in which the Court reiterated that affidavits without documentary support are of limited value in assessing whether an applicant meets the requirements of s. 83(1)(d) and subparagraph 83(5)(a)(vi) of the Regulations.

[8] The Court cited *Taleb v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 384, where Justice Luc Martineau stated at paragraph 36 that: "I also agree with the applicant that the NOC contains no mention of any duties other than those which are usually performed by general practitioners or specialist physicians all over the world, that is, making diagnoses and treating their patients, ordering laboratory tests or other diagnostic procedures, prescribing medication, acting as a consultant for other physicians or occasionally conducting research. The duties described in NOC 3111 and 3112 are an inherent part of the work of any physician practicing modern medicine. To reach the opposite conclusion would amount to believing that fire does not burn both in Athens and in Persia, to draw on a maxim from the Nicomachean Ethics which the great philosopher Aristotle used to distinguish between natural law and "conventional" law.

[9] Chadha v. Canada (Citizenship and Immigration), 2013 FC 105

[10] *Afolabi v. Canada* (Citizenship and Immigration), 2012 FC 1364

Finally, in determining whether a potential client's work experience falls under a certain NOC, it is important to note where the applicant performed his duties, and whether these are consistent with the NOC website. In *Rashed v. Canada (Citizenship and Immigration)*, 2013 FC 175, the Court held that it was not unreasonable for an officer to determine that an applicant could not have performed the duties of NOC 0311 – Managers in Health Care because he worked for a pharmaceutical company, and the lead statement for NOC 0311 stated that:

> health care managers who work in institutions that provide health care services such as hospitals, medical clinics, nursing homes, and other health care establishments.

Substituted Evaluation

A positive or negative substituted evaluation requires the concurrence of a second officer. If the first officer conducts an interview, then procedural fairness does not require that the second officer also interview the applicant, even if the second officer disagrees with the first officer's assessment. In *El-Souri v. Canada (Citizenship and Immigration)*, 2012 FC 466, the Court noted that:

> With respect to the principle of "he who hears must decide", in fact the final decision maker, the 2nd Officer, did hear the matter through his review of the file, the documents and the notes. The process and procedures followed are consistent with the role a "concurring" officer is to play in this process.[11]

When making submissions as to why substituted evaluation would be appropriate, it is important to not simply reiterate factors which are formally assessed in the points factor. In *Ghazeleh v. Canada, Citizenship and Immigration)*, 2012 FC 1521, the Court reiterated that an applicant's age, education, relatives in Canada, etc. have already been assessed elsewhere in the Federal Skilled Worker Class analysis, and that they are not relevant to a substituted evaluation determination.

Procedural Fairness

The most cited case for procedural fairness in Federal Skilled Worker Class applicaitons continues to be *Hassani v. Canada (Minizter of Citizenship and Immigration)*, 2006 FC 1283, where Justice Mosely stated (emphasis added):

> Having reviewed the factual context of the cases cited above, it is clear that where a concern arises directly from the requirements of the legislation or related regulations, a visa officer will not be under a duty to provide an opportunity for the applicant to address his or her concerns. Where however the issue is not one that arises in this context, such a duty may arise. This is often the case where the credibility,

[11] *El-Souri v. Canada (Citizenship and Immigration)*, 2012 FC 466, at para. 14

> accuracy or genuine nature of information submitted by the applicant in support of their application is the basis of the visa officer's concern, as was the case in Rukmangathan [Rukmangathan v. Canada (Minister of Citizenship and Immigration) 2004 FC 284, (2004), 247 F.T.R. 147 (F.C.)], and in John [John v. Canada (Minister of Citizenship and Immigration) (2003), 26 Imm.L.R. (3d) 221 (F.C.T.D.)] and Cornea [Cornea v. Canada (Minister of Citizenship and Immigration) (2003), 30 Imm.L.R. (3d) 38 (F.C.)] cited by the Court in Rukmangathan, above.[12]

I have underlined the terms "may" and "often" in the above passage because in *Obeta v. Canada (Citizenship and Immigration)*, 2012 FC 1542, the Court has ruled that concerns over credibility, accuracy, or genuineness do not necessarily result in a duty to provide an opportunity for visa officers to provide applicants with opportunities to address their concern. In *Obeta*, Justice Bovin ruled that the credibility issues were so obvious that the Officer was under no duty to provide the applicant with an opportunity to address his concerns.

There does seem to be some division in the Court on this. In *Farooq v. Canada (Citizenship and Immigration Canada)*, 2013 FC 164, Justice Roy noted that:

> Here, the visa officer indicates clearly that the credibility of the applicant, or lack thereof, is the fundamental concern he has. Contrary to other cases where an opportunity is given to the applicant to address the concerns, there is nothing of the sort in this case. It would seem to me that both Patel and Rukmangathan are dispositive of the issue and that the matter should be remitted to a different visa officer for the purpose of a re-determination of the matter.[13]

[12] *Hassani v. Canada (Minizter of Citizenship and Immigration)*, 2006 FC 1283, at para. 24.
[13] *Farooq v. Canada*, Citizenship and Immigration Canada, 2013 FC 164.

2012-13 Jurisprudence on The Canadian Experience Class

Substantial Number of the Main Duties

Subsections 87.1(2)(b) and (c) of the *Immigration and Refugee Protection Regulations* set out the job duties that applicants must perform in order to meet the requirements of having experience in an eligible NOC.

Subsection 87.1(2)(b) provides that an applicant must have performed the "actions described in the lead statement for the occupation as set out [in the NOC]", while subsection 87.1(2)(c) provides that an applicant also must have performed a "substantial number of the main duties of the occupation as set out in the NOC, including all of the essential duties."

In *Benoit v. Canada (Citizenship and Immigration)*, 2013 FC 185, the Court allowed the appeal where an officer rejected an application because the applicant did not perform two of the eight main duties for NOC 6211. The Court stated:

> The officer was therefore required to determine if Ms. Benoit "performed a substantial number of the main duties." However, the officer's decision as disclosed by the CAIPS notes is merely the following: "Duties listed in job letter do not match duties in NOC description; ordering and scheduling is done by manager with PA's assistance." "Ordering" and "scheduling" are no more than mere components of the main duties listed in NOC 6211. Thus, it is not clear if the officer at any point turned his or her mind to the real question, which was whether – on the whole – the duties were a substantial match.[14]

Another case worth noting is *Ye v. Canada (Citizenship and Immigration Canada)*, 2012 FC 652. There, an officer refused an application under NOC 6221 because the officer felt that NOC 6421 was more appropriate. The officer did this not withstanding that NOC 6221 contained the following example titles "technical support specialist", "telecommunications sales representative", and "telecommunications salesperson." Accordingly, the court noted that the Officer erred by failing to address the evidence before her that the Applicant's responsibilities and work experience were described in terms of one of the example titles in the NOC 6221 category.[15]

Salary

In *Qin v. Canada (Citizenship and Immigration)*, 2013 FC 147, the Court reiterated that in evaluating whether or not an applicant's experience falls within a permissible NOC Code, an officer is required to understand the nature of the work performed and the degree of complexity of the tasks undertaken, to determine whether or not they fall within the appropriate NOC Code.

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[14] *Benoit v. Canada (Citizenship and Immigration)*, 2013 FC 185, at para. 3.
[15] *Ye v. Canada (Citizenship and Immigration Canada)*, 2012 FC 652, at para. 7.

Regarding the issue of salary, the Court noted that it was both permissible and reasonable for an officer to have considered the salary paid to the applicant in comparison to that paid in a geographic area for similar work as a fact relevant to the assessment of an applicant's job experience.[16]

The Court in Qin did state, however, that a salary below the market rate cannot in of itself disqualify someone from the CEC. The Court stated:

> Contrary to what the applicant asserts, the officer did not use salary as a preliminary disqualifying factor or to perform a "gatekeeper function" to disqualify the applicant's application. Had the officer done so – as the respondent conceded – he may well have engaged in an unreasonable and incorrect interpretation of the Regulations. In this regard, there is a significant difference between requiring a minimum salary as the starting point for consideration – and weeding out those who do not earn the minimum salary – as compared to examining the salary paid as but one of the data points relevant to determining if an applicant possesses the requisite experience to qualify as a member of the Canadian Experience Class.[17]

The Court did acknowledge some uncertainty on this issue by certifying the following question:

> Is it permissible for a visa officer to consider comparator salary data when assessing the nature of the work experience of an applicant who wishes to qualify as a member of the Canadian Experience Class, as described in section 87.1 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227?

The issue is likely to arise in cases where there is not a significant distinction between the duties in an NOC 0/A/B and NOC C/D occupation. For example, work in a purely clerical position (at Skill Level C in the NOC matrix) would not qualify but work as a legal assistant (Skill Level B) does.

One last thing to note on this case is that the Court also ruled that once the officer checked the Working in Canada website, then procedural fairness required him to put his concerns to the applicant.[18]

Employment Requirements

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[16] *Qin v. Canada (Citizenship and Immigration),* 2013 FC 147, at para. 30.
[17] *Qin v. Canada (Citizenship and Immigration),* 2013 FC 147, at para. 33.
[18] *Qin v. Canada (Citizenship and Immigration),* 2013 FC 147, at para. 40.

In *Anabtawi v. Canada (Citizenship and Immigration)*, 2012 FC 856, the Court ruled that an immigration officer applied the correct test by incorporating the language of s. 80(3) of the Regulations to interpret what was then s. 87.1(2) of the Regulations.

Regulation 80(3) provides that (emphasis added):

> (3) For the purposes of subsection (1), a skilled worker is considered to have experience in an occupation, regardless of whether they meet the employment requirements of the occupation as set out in the occupational descriptions of the National Occupational Classification, if they performed
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> (a) the actions described in the lead statement for the occupation as set out in the occupational descriptions of the National Occupational Classification; and
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> (b) at least a substantial number of the main duties of the occupation as set out in the occupational descriptions of the National Occupational Classification, including all the essential duties.

Although *Anabtawi v. Canada* occurred before the changes to the Regulations, there is nothing in the regulations to imply that officers will consider employment experience. However, as outlined below, as a result of the *Qin* decision, it is likely that it will now be possible to treat this as a factor which may be considered in determining whether someone performs duties.

The Document Checklist

While it is obviously important to enclose all documents as requested in the CIC document checklist, it is important to remember that the onus is on applicants to show that they meet the requirements of the program, and not just the checklist.

In *Arachchige v. Canada (Citizenship and Immigration)*, 2012 FC 1068, the applicant followed the CIC CEC checklist, which simply requested that applicants provide their most recent Notice of Assessment. The applicant accordingly filed his 2010 notice of Assessment. The Officer then refused the application because he had no evidence regarding the 2009 and 2011 periods of employment beyond the reference letters required in the checklist.

In determining that the officer did not breach procedural fairness, the Court noted that:

> Additionally, Section 10.1 of CIC's Overseas Processing Manual lays out the options available to an Officer in situations in which he or she is unable to make a decision, due to lack of information or documentation, or where there are serious doubts as to the legitimacy of the document submitted:

- request, in writing, specific information or documentation to clarify; or
- refuse the application; or
- consider a personal interview (Section 10.2) (Overseas Processing Manual OP 25 - Canadian Experience Class at 20).

The Officer's decision to refuse the application without requesting further information or convoking the Applicant for an interview is an outcome foreseen by the Processing Manual, which was available to the Applicant. I am thus of the opinion that there was no breach of procedural fairness in this case.[19]

[19] *Arachchige v. Canada (Citizenship and Immigration)*, 2012 FC 1068, at paras. 15-16