Provincial immigration role increasing

RANDOLPH HAHN

Who decides who gets to immigrate to Canada? Historically, it's been the federal government's decision. Increasingly, though, the provinces are having a say.

In 2010, more than a quarter of a million people immigrated to Canada. More than 60 per cent of them were in one of the "economic classes" (including skilled workers and those with a business background) and about 20 per cent of those came through a provincial nominee program. Just five years ago, only about five per cent of newcomers who arrived through one of the economic classes of immigrants were nominated by a province. The growth has been huge, and there are both significant legal and practical consequences.

Not surprisingly, Quebec was the first province to exercise its constitutional right to have a say in the selection of immigrants. Canada and Quebec have had immigration agreements since 1971, the most recent one dating from 1991. Those agreements have given Quebec full authority over the selection of immigrants, with the exception of those immigrating through family class sponsorships or in-Canada refugees (although the federal government retains responsibility for ensuring that prospective immigrants are not inadmissible for reasons such as medical or security concerns). Quebec has enacted its own laws and regulations governing the selection of immigrants.

Until recently, none of the other provinces was actively involved in the selection of immigrants. However, in recent years the federal government has entered into a series of agreements with all provinces and territories (except Nunavut) allowing them to nominate immigrants each year. Unlike Quebec, the other provinces do not have comprehensive regulations outlining the criteria for the selection of immigrants — it is effectively policy that determines who the provinces will nominate, and policy can change abruptly and without forewarning.

Anyone advising prospective immigrants to Canada need not only understand the applicable federal legislation, regulations and policies, but must also now understand what might be possible through the various provincial nominee programs. Ontario may be giving preference to those who have completed a PhD in the province, while Alberta is looking for hotel workers and New Brunswick is willing to nominate those who already have family in the province. All of that can change without any notice.

In addition to the increased and frequently changing ways of immigrating to Canada, there are a number of new legal issues that result from the growth of these programs. Should an applicant wish to challenge a decision, he or she can apply for leave and judicial review at the Federal Court. The federal *Immigration and Refugee Protection Act* sets out the procedural framework for such a challenge. A large proportion of cases heard by the Federal Court involve immigration and that court has a certain expertise in interpreting and applying the law.

If one wants to challenge the decision made by a province in connection with an application to that province's program then one would apply for judicial review in the province's court. However, as noted above, it is usually a policy rather than legislation that would be challenged (though the policy results from an underlying agreement with the federal government) and the provincial courts do not have particular expertise in applying immigration law.

There is also the issue of whether immigrants to Canada are obliged to remain in the provinces that nominate them. One of the reasons for having such programs is so that immigrants will be encouraged to settle throughout the country rather than only in the large metropolitan areas where they have traditionally settled. On the face of it, immigrants cannot be compelled to remain in a province. Freedom of mobility within Canada is guaranteed by the *Charter of Rights*.

In theory, the federal government could assert that if an immigrant came to Canada through a provincial nominee program knowing full well upon arrival that he or she had no intention to settle in that province, then the immigrant could be considered to have misrepresented himself or herself and could lose permanent resident status. There are some who criticize the increased role of the provinces in the selection of immigrants to Canada. Many of the provinces focus on those that have job offers. In the view of some, the provincial programs are effectively giving employers too much of a say in immigration policy.

As well, there have been problems in the administration of some of the programs. Nova Scotia signed an exclusive agreement with a private partner to help administer its program, which led to a variety of difficulties. In Prince Edward Island, many took advantage of a program allowing for passive investment in provincial businesses, which led to a change to the applicable regulations.

Notwithstanding the growing pains, the government appears committed to the increasing role of the provinces in selecting immigrants.

"As I've said in the past we are excited about this program," said Minister of Citizenship and Immigration Jason Kenney. However, he went on to add that the government realizes "it needs improvement in key areas." ■

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Fee refunds up to $130 million

Proposal

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waiting up to seven years to have their applications processed. In February 2008, Citizenship and Immigration Canada introduced an action plan that reduced a backlog of 640,000 applications by imposing restrictions on the types of applications received, such that the applicant either had to have a valid offer of employment, had lived in Canada for one year as a temporary worker or student, or belonged to a profession on the designated occupations list.

Despite a significant reduction in the backlog by more than 50 per cent, the government appears to be considering a further means to eliminate the current backlog — by returning the 300,000 applications and provide a refund of the government fees paid.

Is this an efficient, fair and legal strategy to deal with the current backlog?

Each FSW application is a long and arduous process. Not only must an applicant spend time and money gathering extensive documents (and translations) and completing forms, they must pay for police checks, language exams, medical exams, and perhaps legal fees, costing much more than just the fee paid with the application. Beyond the fairness, there is the legal issue of whether the government can retroactively legislate away the backlog.

In June, 2002, changes to the *Immigration and Refugee Protection Act* came into force altering the approval process of FSW applications by increasing the pass mark on the points system to 75 from 70. In the Federal Court case *Dragan v. Canada (Minister of Citizenship and Immigration)* (2003), 102 individuals who had applied for the FSW program prior to January, 2002, were successful in requiring the government to either process their applications before the deadline or assess them on the previous 70-point system. The court held that the rights acquired under the Act prior to 2002 survived according to s. 43 of the *Interpretation Act*, which preserves in force the rights and duties accrued under repealed legislation.

The manner in which the current government intends to draft the legislation dealing with returning the FSW applications is yet to be announced. However, many FSW applicants are already preparing new applications and considering all options to ensure they can hold on to the dream of immigrating to Canada and reuniting with family members.

One has to ask, if the government can afford to refund $130-million to applicants, why can it not simply put more resources toward the processing of these same applications? ■

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