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# Is it, or isn't it, work?

## *Federal Court ruling involving foreign worker at Edmonton auto dealer underlines importance of work permits*

The Immigration and Refugee Protection Act (IRPA) and its regulations have been in effect since 2002 and provide more flexibility to hire foreign workers than previous immigration legislation.

However, employers should plan carefully when considering international relocations to avoid the pitfalls that plague the system, including misunderstandings about who can work in Canada and for how long, delays at visa processing posts overseas and compliance with Service Canada requirements for obtaining labour market opinions (LMOs).

### Definition of 'work'

A foreign worker may be authorized to work in Canada without a permit or may be required to obtain one. The first step in determining whether a work permit is needed is to consider the nature of the activities to be performed by the foreign worker. "Work" is defined in the regulations as an activity for which wages or commission are earned or that competes directly with Canadian citizens or permanent residents in the labour market.

If a foreign worker performs an activity that will result in receiving remuneration, she will be engaging in work. This includes salary or wages, commissions, receipts for fulfilling a service contract or any other situation where foreign nationals receive payment for the performance of services.

**GUEST COMMENTARY**

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Even if the foreign worker does not receive remuneration, the activities performed may still constitute work if there appears to be an element of competition with the local labour force.

To determine which activities could be considered work, ask yourself the following questions:

- Will the foreign worker be doing something a Canadian or permanent resident should really have the opportunity to do?
- Will the foreign worker be engaging in a business activity that is competitive in the marketplace?

The answers to these questions are not always obvious. Some examples of work include:

- Technical personnel coming to Canada to repair machinery or equipment, even if they are paid outside of Canada by a third-party contractor.
- A foreigner who intends to engage in self-employment, either directly or by receiving commissions or payment for services.

On the other hand, the following activities are not considered to be work:

- Volunteer work for which a person would not normally be paid, such as activities for charitable or religious institutions.
- Helping a friend or family member with housework or child care in the home.
- Attending meetings on behalf of a foreign employer to discuss products and services or take orders and specifications for a manufacturer abroad.

### Car dealer employee had study permit

Earlier this year, the Federal Court had to decide what is the scope of the term "work" as defined in the IRPA regulations. In *Juneja v. Canada*, the court was faced with an interesting situation. Siddharth Juneja entered Canada with a study permit, which prohibited his employment unless authorized by Citizenship and Immigration Canada, a standard requirement.

During the course of an investigation, Juneja was observed to be working at an automobile dealership in Edmonton. He was arrested for working without authorization. An admissibility hearing

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was held and Juneja was declared to be inadmissible to Canada and ordered to leave the country. Juneja did not dispute the fact he was not in possession of a work permit. However, he contended his activity did not constitute work as defined in the IRPA regulations.

### Worker had expectation of payment

Juneja argued he was not being paid and he was only keeping track of his time in case he received the authorization to work in Canada. Although there was some dispute about the factual context, it was clear from the evidence the employer had agreed to pay him $8 an hour retroactively for the time he had spent performing his services at the dealership, should he receive his work permit.

At the admissibility hearing, it was determined the arrangement between Juneja and the dealership owner was an agreement to bank Juneja's hours and to pay him a wage, albeit conditionally, and, therefore it was either an activity for which wages are paid or reasonably expected, or which is otherwise in direct competition with the employment activities of Canadians or permanent residents. Therefore, the tribunal concluded, despite the fact Juneja was not being paid immediately, his activities constituted work as defined in the IRPA regulations.

Upon judicial review, the Federal Court entertained the question of whether a contingent arrangement to pay a wage for work performed meets the legal definition of work. The court held Juneja had an expectation of future payment and the dealership had at least a conditional, and perhaps an absolute, legal obligation to pay for the work he performed. This activity was of a character for which wages are paid or anticipated.

### Work could have been done by a Canadian

The court further held that even if Juneja was correct in arguing the definition of work sets an absolute standard not fulfilled by a conditional arrangement for payment, his conduct was still caught by the second part of the definition — the performance of an activity in direct competition with the activities of Canadians and permanent residents in the Canadian labour market.

His employment directly competed with others who were legally entitled to work in Canada and this was so whether a wage was paid or not. The court rejected the contention the second part of the definition of work only applied to self-employed persons and held that the definition contains no such qualification.

Further, the court also referred to the regulatory impact analysis statement published with the regulations in the Citizenship and Immigration department guidelines, indicating the definition of work includes unpaid employment undertaken for the purposes of obtaining work experience, such as an internship or practicum normally done by a student. This could have serious implications for small businesses that are not familiar with work permit requirements.

### Precedents support ruling

Last, the court referred to pre-2002 litigation on the matter and noted the definition of work had changed. The previous provision spoke of "an activity for which a person received or might reasonably be expected to receive valuable consideration." That provision made no reference to competing for work that should otherwise be available to Canadians.

The Federal Court had already found in the 1978 case of *Georges v. Canada* that the essential concern of that definition was to protect employment opportunities for Canadians, whether wages were paid or not. The court reasoned neither *Georges* nor the 1995 ruling in *Bernardez v. Canada* on the same subject could support a finding that Juneja was not working, whether under the prior or current definition of work.

It is important individuals not be engaged to perform any services, either paid or where a reasonable expectation of earnings exists, without first obtaining a work permit for a specific employer and activity, in accordance with the IRPA regulations.

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