Federal Court  Cour fédérale

**Date: 20221222**

**Dockets: Group 1: IMM-3099-20**
**IMM-3100-20**
**IMM-3092-20**
**Group 2: IMM-3097-20**
**IMM-3098-20**
**IMM-3093-20**

**Citation: 2022 FC 1787**

**Toronto, Ontario, December 22, 2022**

**PRESENT: Mr. Justice Diner**

**Docket: IMM-3099-20**

**BETWEEN:**

**GURPREET SINGH JANDU**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**Docket: IMM-3100-20**

**AND BETWEEN:**

**JAGMEET SINGH**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**Docket: IMM-3092-20**

**AND BETWEEN:**

**JASWINDER SINGH SANDHU**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**Docket: IMM-3097-20**

**AND BETWEEN:**

**RAJBIR SINGH**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**Docket: IMM-3098-20**

**AND BETWEEN:**

**MANJINDER SINGH**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**Docket: IMM-3093-20**

**AND BETWEEN:**

**SUKHWINDER SINGH SIDHU**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] Six Applicants challenge the refusal of their work permit applications. As an additional finding, those in Group 1 contest the findings of inadmissibility on account of misrepresentation.

I agree that all six decisions were unreasonable, and will accordingly be returned to the visa office for redetermination.

## II. Background

[2] The Applicants are citizens of India. They applied for work permits in Canada as temporary foreign workers. All the Applicants had a job offer from the same company, Daytona Freight Systems [Daytona] to work as long-haul truck drivers. Daytona had obtained positive Labour Market Impact Assessments [LMIA] from Employment and Social Development Canada/Service Canada [ESDC] to hire foreign nationals for these jobs.

[3] The Applicants were referred by Daytona to CANUS Immigration Consultancy Inc. [CANUS], for assistance with their work permit applications. CANUS submitted the Applicants' work permit applications through the Immigration Refugees and Citizenship Canada [IRCC] Authorized Paid Representative Portal between November 2019 and January 2020.

[4] IRCC sent two of the Group 1 Applicants (IMM-3099-20 and IMM-3100-20) procedural fairness letters [PFLs] requesting financial documents and business information about Daytona in December 2019 and January 2020. CANUS provided responses to the PFLs in January 2020. The third Group 1 Applicant (IMM-3092-20) did not receive a PFL. A copy of the two PFLs that were received is attached at Annex A to these Reasons.

[5] All the Applicants from Group 1 and Group 2 were asked for an interview with IRCC at the New Delhi Visa Office in March 2020. The interview invitation letters also included a

request for documents. A copy of the interview letter is attached at Annex B to these Reasons. During the interviews, IRCC asked the Applicants if they had visited Canada before, if they have any friends or family in Canada, if they have truck driving work experience, how they found the job in Canada, who they spoke to at Daytona, how they found CANUS and how much they paid CANUS.

[6] Ahead of the interviews, Daytona provided a document package to IRCC on March 10, 2020 [Document Package]. The Document Package included a letter from Peter Thorning of Brauti Thorning LLP [Thorning Letter]. The Thorning Letter detailed the basis upon which the work permits were being sought, and provided a summary of the business documentation that had been provided to ESDC for the LMIA applications. The Thorning Letter also included an explanation of the 80 foreign worker approvals that the five separate LMIAs comprised. Some of the truck drivers were to be destined to Ontario, while the others, to Nova Scotia, as Daytona has operations in both provinces. CANUS, which submitted the Document Package to IRCC on behalf of Daytona, included some but not all of the corporate documentation that the trucking company had filed with ESDC.

[7] In terms of what the Applicants brought to their interview, apart from the original personal documentation requested in support of their work permit applications, Daytona also provided them with a copy of the Thorning Letter, but not the corporate documentation. Rather, the six Applicants were instructed to inform IRCC at the interview that relevant documentation from Daytona was sent on their behalf to IRCC at the New Delhi High Commission of Canada. As will be explained later, Daytona did not want to share confidential information about its

finances and other related matters with prospective employees, on account of a request that the six work permit applicants share this corporate information with IRCC.

## III. Decision under Review

[8] The six Applicants' work permits were ultimately refused on account of a non-genuine offer of employment, based on IRCC's assessment of Daytona's financial and business documents. Each of the Group 1 Applicants' work permit applications had associated findings of misrepresentation pursuant to paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, because IRCC found that the Group 1 Applicants were aware of the non-genuine offers of employment that underpinned their work permit applications.

## IV. Preliminary Issues

[9] The parties raise a preliminary procedural issue. The Applicants request that this Court admit into evidence the affidavit of Inderpal (Andy) Singh Kahlon [Kahlon Affidavit], which contains documents that were before IRCC when it considered the work permit applications, and are missing from the Certified Tribunal Record [CTR].

[10] The Respondent agrees that for an unknown reason, the Certified Tribunal Record is incomplete, in that it does not include the Document Package of corporate information Daytona submitted to IRCC before the interviews of the Applicants. Accordingly, the Respondent does not oppose Exhibit "A" of the Kahlon Affidavit forming part of the record, as it is clear from the GCMS notes that the Exhibit "A" documents were before IRCC at the time of the Decisions.

[11] However, the Applicants also submit, for the purposes of this judicial review, documents that were not before IRCC at the time of the Decisions, Kahlon Exhibits “B” through “F”. The Applicants note that the Court should look to these documents in support of its arguments on procedural fairness. The Respondent opposes their admission on the basis that they are not subject to the limited exceptions to the rule that only material before the decision-maker is admissible on judicial review. It submits that judicial review does not provide an opportunity to file rebuttal evidence.

[12] I agree with the parties that the contents of Exhibit “A” of the Kahlon Affidavit, namely the letter from Peter Thorning and relevant business documents from Daytona dated March 10, 2020, were before IRCC when it considered the Applicants’ work permit applications, given that the notes clearly referenced them. Exhibit “A” is thus properly before this Court. That said, generally only material that was before the decision-maker is admissible on judicial review (*Namgis First Nation v Canada*, 2019 FCA 149 at para 7; *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 17-18).

[13] To look at the first of Exhibits “B” through “F” attachments as an example, the Truck Purchase Agreement at Exhibit “B” was referenced in the Thorning Letter, but IRCC specifically mentioned in the GCMS notes that the Agreement itself was not attached to the letter and was not part of the Document Package. I agree with the Respondent that Exhibits “B” through “F” that were not included with the IRCC applications are inadmissible in this case. They do not meet the exemptions outlined in the FCA case law above.

## V. Substantive Issues and Standard of Review

[14] The Applicants contend that IRCC erred first in breaching procedural fairness by failing to provide adequate notice of its concerns to the Applicants, as well as unreasonably refusing their work permits. I address the grounds raised as follows:

(i) Were the Applicants provided an adequate opportunity to respond?

(ii) Did IRCC err by unreasonably concluding the job offers were not genuine?

(iii) Did IRCC err by unreasonably finding misrepresentation?

[15] With respect to the first issue, questions of procedural fairness are to be reviewed by asking whether the process leading to the decision was fair in all the circumstances: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54-55; *Do v Canada (Citizenship and Immigration)*, 2022 FC 927 at para 4. The remaining two issues require a reasonableness analysis, meaning that the decision must be transparent, intelligible, and justified in the context of the law and facts (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 99).

## VI. Analysis

### 1. *There was not a breach of procedural fairness*

[16] The Applicants argue that IRCC breached procedural fairness by failing to provide them with adequate notice about its concerns relating to the genuineness of their job offers. The Applicants who did not receive a PFL submit that they did not know the case to meet and did not have a full and fair chance to respond, because no PFL was ever sent to them. The Applicants

who did receive a PFL argue that the PFL failed to convey IRCC's concerns in a way that would provide them with a meaningful opportunity to respond. The Applicants submit that the two PFLs sent provided a laundry list of documents, akin to a fishing expedition.

[17] I find that there was no breach of procedural fairness, regardless of whether the Applicant received a PFL or not, because the Applicants were sent an interview letter on March 2, 2020, outlining IRCC's concerns with the work permit applications. The interview letter stated "[t]his interview will include an assessment of your language ability, your previous work experience, your ability to perform the work sought, and the genuineness of the job offer." The genuineness of the job offer was the determinative factor in refusing the Applicants' work permit applications, and therefore, the Applicants were reasonably aware of the case to meet and did have a full and fair chance to respond, at the interview.

[18] The interview letter also provided the opportunity for the Applicants to submit additional documentation to address IRCC's concerns. I note that the list of documents to provide at the interview included documentation showing "the financial ability of your employer to hire you and pay our [*sic*] wages" (for the complete prototype interview letter sent to all six Applicants, see Annex B to these Reasons). Daytona's ability to pay the Applicants was the specific weakness IRCC highlighted in the GCMS notes to support its conclusion that the job offer was not genuine.

[19] The argument that the Applicants were unaware of IRCC's specific concerns is also contradicted by all the submissions they provided in support of their work permit applications,

including the Document Package sent to IRCC on March 10, 2020. The Document Package contains information that is specifically relevant to IRCC's concerns, including the very detailed submissions contained in the Thorning Letter.

[20] That being said, I do not find that the Decisions for either group of Applicants including non-genuineness and misrepresentation were reasonable, when read holistically and contextually (*Vavilov* at para 97).

2. *The refusal of the Applicants' work permit applications was unreasonable*

[21] The Applicants argue that IRCC acted unreasonably when it questioned the genuineness of the job offers despite the positive LMIA obtained by Daytona. The Applicants submit that under the legislative framework set by the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*] for work permit applications requiring an LMIA, IRCC officers are not tasked with determining whether a job offer meets the genuineness requirements of subsection 200(5), because this assessment is already conducted by ESDC in the LMIA application. Going forward, I will refer to the *Regulations* with the prefix R, such that subsection 200(5) is shortened to R200(5). This Court has consistently held that a positive LMIA is not determinative and that visa officers have the authority to assess the genuineness of job offers under R200(5). Recently, Justice Pallotta held in *Dhaliwal v Canada (Citizenship and Immigration)*, 2022 FC 1344 at para 7 [*Dhaliwal*]:

> The Officer was required to independently assess the genuineness of Mr. Dhaliwal's offer in light of the subsection 200(5) factors, including whether the offer is consistent with the employer's reasonable employment needs and whether its terms are ones the employer would be able to fulfill.

[22] See also *Musiker v Canada (Citizenship and Immigration)*, 2021 FC 1092 at para 33); *Patel v Canada (Citizenship and Immigration)*, 2021 FC 573 at para 18 and 2021 FC 483 at para 32; *Sharma v Canada (Citizenship and Immigration)*, 2020 FC 381 at para 19; and *Liu v Canada (Citizenship and Immigration)*, 2018 FC 527 at paras 10, 52-54.

[23] Therefore, IRCC cannot be faulted for considering the *bona fides* of the job offers made by Daytona to the Applicants. However, that inquiry is not without limits and nuances, particularly where an LMIA has already been obtained. In section (b) below, in assessing whether it was reasonable for IRCC not to consult with ESDC or Daytona, I will further explore the distinction between the scrutiny of an LMIA-exempt work permit application, and one where an LMIA has already been obtained.

[24] Suffice it to say at this point that here, I agree with the Applicants that the nature of the inquiries, and the basis upon which IRCC arrived at their conclusion was unreasonable. Specifically, the Applicants have persuaded me that the IRCC erred in (a) drawing speculative conclusions vis-à-vis Daytona's financial situation, (b) not consulting with ESDC or Daytona, and, (c) relying on extraneous information to conclude that the job offers were not genuine. I also find that the misrepresentation findings against the three Group 1 Applicants were unreasonable.

(a) *IRCC drew speculative conclusions re: Daytona*

[25] IRCC had concerns that Daytona would not be able to pay its prospective new truck drivers based on its current operations and financial information. The Applicants submit, however, that IRCC's assessment of Daytona's financial records is flawed, because it is based on

estimations, assumes that the current employees are full-time when many are part time and/or independent contractors, and inconsistently applies net and gross amounts for calculations. The Applicants also assert that IRCC mixed various financial documents that provide an incomplete and inaccurate view in arriving at unwarranted conclusions about the current scale and scope of Daytona's operations.

[26] The Respondent counters that the Applicants raise calculation issues that are minor: they are peripheral flaws, not sufficiently central or significant to render the overall Decisions unreasonable (*Vavilov* at para 100). The Respondent contends that even if IRCC's estimations when assessing Daytona's financial records were not perfect, they were reasonable enough to show that Daytona was not projected to have the financial capacity to pay the Applicants, and fulfill their employment contracts.

[27] I disagree. The Applicants have raised issues with IRCC's assessment of Daytona's financial records, which were not only flawed and speculative, but also central to the Decisions. IRCC cited several numbers from various sources in the documentation to justify its conclusion that Daytona did not provide a genuine job offer to the Applicants. Its analysis drew from several sources, including the projected annual salaries for the foreign workers in light of Daytona's 2018 tax return, as well as its 2016-2018 tax assessments. IRCC then compared these tax documents from previous years to an organizational chart delineating some 50 company employees (including 26 truck drivers), and 10 contract workers, sent to the visa office in the PFL Response. IRCC divided the worker figures for salary and wage expenses provided in the

T2 corporate tax return for 2018 amongst the 60 listed persons in the 2020 organizational chart, calculating an average of $7,488 per employee.

[28] These numbers do not add up, as IRCC was comparing disparate documents from various taxation years. Furthermore, IRCC did not take into account financial statements of the company or notes thereto, which offer an accounting-based explanation of the way that it operates its business. Any principled and reliable calculations determining average wages would have necessitated the same basis year, if such a calculation was to yield reliable results. Moreover, IRCC's simple division of the total number of workers – 60 – by a line item from the tax return, did not take any nuances into account, such as the distinction between contract workers and employees, in arriving at an average of $7,488 per worker. As set out above, IRCC used figures from different points in time to run its assessments.

[29] IRCC also concluded that "[i]t is noted that only two employees appear to have earned over 40,000CAD in 2019, so this earning potential appears to be the exception rather than the rule. The majority of employees appear to have earned between 6,000 – 20,000 CAD in 2019." Again, this does not appear to be an accurate analysis of the financial information provided. First, seven of twenty-eight employees made over that amount based on the pay stubs that were provided, if broken down over the year. But even that does not give an accurate picture: a large majority of the pay stubs indicated that the associated individuals had worked for more than 40 hours per week.

[30] In short, there is simply no evidence or indication that IRCC considered any of the nuances in the corporate financial information that it had been provided (such as how Daytona paid and reported salaries and wages).

(b) *It was unreasonable for IRCC not to consult with ESDC or Daytona*

[31] The evidence before IRCC indicated that Daytona representatives had met with ESDC and furnished it with detailed documentation in support of its LMIAs. And yet, IRCC did not consult the company, or ESDC, as to what documents were provided during the process of their more focused labour market assessment done in conjunction with the LMIA applications. This was unreasonable. While it is certainly open to IRCC to arrive at an opposite conclusion than its sister department ESDC, such a decision will lack transparency and justification without any reference to the financial information that underpinned ESDC's opinion. Further, the failure to do so will inevitably lead to the flawed and speculative reasoning described in greater detail below.

[32] IRCC drew a negative inference from Daytona failing to include certain documentation in the package sent to the New Delhi Visa Office. As just one demonstration of where IRCC fell short in its assessment, IRCC stated in its reasons that the "[Thorning] Letter states that a copy of the 40-truck purchase agreement plus the agreement for the remaining 13 trucks purchased last month is attached to the letter, however, said purchase agreement was not attached." I note two concerns with this conclusion.

[33] Daytona provided to IRCC the documentation requested in the PFLs (and/or interview letters), even though the Department never reached out to the company, but rather to the six Applicants through the PFLs and/or interview letters. However, neither the PFLs nor interview letters asked for the purchase agreements. Ultimately, IRCC only engaged the Applicants about the genuineness of the job offers. They asked questions and expected answers about the corporation's operations and business plans only to the prospective employees, who lived far away from Canada, had never visited the country, and knew little about the company, other than it operated in the trucking sector and had offered each of them a job.

[34] Consequently, the prospective employees – the six temporary foreign worker Applicants – could not have reasonably spoken to the more nuanced specifics on the genuineness of the job offers, having never been to Canada, or obtained any particular insight about the internal operations of Daytona, or been privy to any of the company's business plans or LMIA submissions.

[35] Indeed, the Applicants submitted at the judicial review – and understandably so – that the information requested in the PFLs and/ or interview letters was precisely the kind of information that job applicants would never have known, and which would have been entirely inappropriate to share with them. That is why CANUS and Daytona responded directly to the visa office without providing the sensitive corporate information to the Applicants who had been asked for it in the interview letters and/or PFLs. This information included the company's recruitment efforts in finding the workers, a description of the business, its size, operations and ownership

structure, the number of foreign workers employed, financial statements, and customer and supplier lists.

[36] Quite apart from IRCC's unreasonable analysis of the business information and numbers provided, the request of this information not from the Employer but rather from the prospective employees, and faulting them for lack of knowledge of the details, was unreasonable in and of itself. As Mr. Thorning explained in his letter:

> The IRCC officer required Daytona Freight Systems Inc. to obtain financial documents from prospective TFWs, documents which would never be shared by would-be employers for confidentiality reasons. The company had already submitted these openly available documents, Company Profile, Financial Statements, Employee data base details, CRA documents, to the government which had approved the good standing of the company, irrespective of how many potential employees needed to be processed to fill truck driver positions.

[37] Indeed, the operative IRCC policy guidance on assessing the genuineness of an employment offer [*Genuineness Guidance*] explicitly refers to the ability of an Officer, when in doubt, to communicate directly with an employer (as contained in the policy guidance at https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/foreign-workers/genuineness.html, dated 2019-11-19):

> If the officer has concerns regarding the employer or the genuineness of the offer of employment, the officer may request further information directly from the employer as per the contact information supplied in the offer of employment. Subparagraph R200(1)(c)(ii.1) provides officers the authority to request information from employers without having to use the foreign national applicant as a conduit for that request.

[38] I note that this passage is drawn from a section of the *Genuineness Guidance* that concerns LMIA-exempt work permits. That, of course, was not the type of work permit that the Applicants applied for in this case. Rather, LMIA exempt job offers do not benefit from the prior employer application and documentary support, along with the due diligence review, and approval by ESDC. The policy guidance shows that IRCC expressly contemplates scenarios in which employers would be better positioned than an applicant to provide certain kinds of information, rather than relying on the applicant as a "conduit" for information. In those LMIA-exempt cases reviewed under R200, the only verification of the *bona fides* of the job offer, and employer verification, is done by the visa officer.

[39] Having noted the distinction, the import of the *Genuineness Guidance* remains significant, perhaps even more so. It is a logical reflection of the fact that there may be scenarios in which employers are better positioned and certainly better informed than applicants, to provide more nuanced information to support the genuineness of the job offer. The need for that contact would only seem to be heightened in an LMIA context, where the employer has already undergone a complete labour market assessment from ESDC, the government department responsible for the labour market.

[40] The *Genuineness Guidance* reminds officers of their authority to seek out information from the employer, without having to rely on prospective employees "as a conduit". This is entirely logical given the imbalance in knowledge between the employer and prospective employee, whether the latter is being recruited from the local market or not, and whether they are a Canadian or foreign national. For how is an employee – let alone a prospective employee who

does not yet work for the company – expected to know any proprietary information about that company, its wages, the composition of its work force, or its ability to pay its future workers? These realities are even more present when the employer is a closely held or private enterprise, where financials are not publicly disclosed, such as in this case.

[41] I note that other operational instructions provided by IRCC also encourage the Department to contact ESDC where questions arise, namely "Temporary Foreign Worker Program: Overview of Labour Market Impact Assessments" dated (see https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/foreign-workers/exemption-codes/overview.html, dated 2019-11-14). In the section entitled "Cooperation between ESDC/SC and CIC and Canada Border Services Agency (CBSA)", this guideline clearly encourages IRCC to contact its sister departments, including ESDC, where warranted:

> The temporary foreign worker program is unique in that its delivery relies on the close cooperation of three different departments. Officers are encouraged to contact ESDC in cases where more detail regarding the job offer would assist the decision, and likewise are encouraged to respond to ESDC queries in a timely manner.
>
> There may be many situations where communication (separate from, or in addition to, issuance of an LMIA) between ESDC and CIC/CBSA can facilitate the decision-making process and improve client service.

[42] Further, the legislation makes clear that ESDC is responsible for the labour market component of the work permit application process (see, for instance, R203(1), R203(1.01), R203(1.1), R203(2.02) and R203(3), R203(4) and R203(5)). If ESDC's positive LMIA assessment – after all the efforts of the employer in making the application, including documents

laid, submissions made, and fees paid – is ignored and given no weight by its companion government department, employers might naturally query the time, effort and expense involved in obtaining LMIAs in the first place. This is particularly so if IRCC expects the foreign workers to be the conduit through whom sensitive corporate information is passed.

[43] Given the concerns IRCC had regarding the genuineness of the employer's job offer in this case, it was unreasonable for them not to contact Daytona or ESDC to better understand Daytona's financials. The Employer had gone through a complete process with the sister department, ESDC, when it applied for the LMIAs before recruiting the Applicants. Daytona had an in person meeting with ESDC, and satisfied it regarding its business fundamentals, growth projections, future business plans, and labour market shortages. Daytona also provided ESDC, according to the materials filed in this Application, a much more comprehensive set of corporate documents, and reasonably believed that the LMIA application process would evaluate and confirm the company's ability to pay any foreign workers applying to enter under the LMIA it had been issued.

[44] Here, I find that the left hand did not appreciate what the right had done, because of a lack of consultation. An employer should be able to place some reliance on a positive labour market assessment from ESDC, given the involved process of application, when its prospective employees apply to IRCC for work permits based on the positive assessment.

[45] While there is no question that both departments have a duty to satisfy themselves of job offer genuineness, it is unreasonable to do so without any coordination. The absence of

communication is akin to two ships passing in the night, which is particularly concerning where those ships belong to the same government fleet. And just as in this situation, where the second ship plans to chart a different course, one would expect a modicum of communication with the first. This could help to avoid navigational blind spots, on account of the failure to engage with either of the two parties who could have properly answered questions or responded to concerns (i.e. the employer, or ESDC).

[46] Questions related to the ability of the employer to pay prospective employees, or how its financials computed, how it planned to acquire trucks for the workers, what facilities they operated from, or how they would grow their business, could and should have been put to the employer, Daytona. Rather, IRCC put these questions to the Applicants, who were truck drivers from India, none of whom had ever visited Canada, and who also never consulted or received Daytona's financial records in the Document Package sent directly to IRCC.

[47] Questions related to why the LMIAs were approved by ESDC for truck drivers in the current labour market should have been put to ESDC. It was that body which made the decision to approve the LMIAs. The work permit applications included evidence that labour market shortages existed in the long-haul trucking industry. If IRCC was concerned that Daytona did not truly operate in the industry, or was not being genuine with respect to the information that was used in support of its LMIA applications, it is unreasonable to expect the Applicants in these circumstances to be able to adequately answer those concerns.

(c) *IRCC unreasonably relied on extraneous information*

[48] There were several indications, through the IRCC explanations provided in the GCMS notes, of IRCC relying on extraneous information in reaching its conclusion about the non-genuineness of the job offers. These unjustified conclusions also reflect a lack of intelligibility and transparency in the decision-making regarding the six work permit refusals under review.

[49] Starting with the refusal itself, IRCC concluded as follows: "I am not satisfied that this is a genuine job offer as per R200(1)(c)(ii.1)(A) as the potential employer does not appear to be reasonably capable of fulfilling the terms of the offer of employment." As already pointed out above in the section addressing the *Genuineness Guidance*, R200(1)(c)(ii.1)(A) relates to LMIA-exempt work permits. Rather, R203 applied here, because IRCC was presented with an LMIA for each of the six Applicants. Indeed, the reference to R200 rather than R203 may explain why IRCC felt compelled to redo the financial assessment and business plan analysis that had already been completed by ESDC.

[50] While there is no doubt that IRCC was aware and made reference to the LMIAs, at best, the Reasons display some confusion in the application of the legislation that is unreasonable in the circumstances. One cannot be sure that in citing the wrong statutory provision, that IRCC applied the correct considerations in refusing the applications.

[51] To further illustrate the distinction between the two sections of the *Regulations*, the operative policy guidance at the time of the assessments, IRCC's "*Steps to determine work and*

*assessment of work permit*" [WP Guidance] sets out a different path for its officers to take when considering LMIA-exempt work permits, as opposed to those which do not benefit from R204/205 labour market exemptions (see WP Guidance at the time of the assessment dated 2020-07-22 through the internet's "WayBack Machine" at https://web.archive.org/web/20220204175653/https:/ www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/foreign-workers/eligibility/steps-determine-work-assessment-work-permit-application.html).

[52] Step 3, titled "Is the employer genuine and eligible to employ foreign nationals?", suggests different paths that the officer should follow when the employer is (a) required to obtain an LMIA from ESDC, or (b) an LMIA-exempt offer. For LMIA-required work permits, the guidance instructs the officer to proceed to the foreign worker eligibility step (4), if the employer is exempt from the compliance regime. Here, there was nothing to suggest Daytona was subject to the compliance regime, or had been non-compliant with it in the past (per the list available at the time, located at https://web.archive.org/web/20220119215441/http://www.canada.ca/en/immigration-refugees-citizenship/services/work-canada/employers-non-compliant.html).

[53] However, if an LMIA was not required (i.e. LMIA-exempt work permits), then the relevant IRCC policy guidance instructed officers to undertake a complete review of the genuineness of the offer. The review of the genuineness of the offer included three steps indicating whether the employer will be able to meet the terms of employment: (i) "review the offer in the system to ensure it meets the genuineness requirements of R200(5) (e.g. business is

active, can pay wages, meets all provincial and federal laws related to employment)"; (ii) check the non-compliant list (see paragraph above); and (iii) check whether "the employer meet[s] the requirements of R200(1)(c)(ii.1)(B) in that in the last six years they have provided each foreign national employed by them with employment in the same occupation and wages and working conditions that were substantially the same as indicated in the offer of employment used as the basis of the previously issued work permits".

[54] Here, IRCC appears to adopt the analysis suggested under R200(1)(c)(ii.1)(A), which as explained above should entail the more rigorous employer verification for LMIA-exempt work permits, given the absence of any ESDC application or approval. Of course, in this case, the due diligence had already been done by ESDC during the LMIA stage. IRCC concluded that they were unsatisfied the employer had provided genuine job offers to the six Applicants because Daytona did not appear to be reasonably capable of fulfilling the terms of the offer of employment. Again, IRCC cited R200(1)(c)(ii.1)(A) in its conclusion, which corresponds to LMIA-exempt applications, rather than R203 to correspond to the respective LMIA contained in each of the six work permit applications packages before them.

[55] I note that this is not the only error reflected in IRCC's comments that suggests an unreasonable approach to the six assessments. Another lies in the comment at the outset of each of the six interviews (according to the GCMS notes) "I am the officer who will be making a decision on your application for a permanent resident visa for Canada." Again, while this could have been an innocent mistake made, it could also – given all the other comments above – have been reflective that the Officer was confused about the type of application being assessed and the

depth of due diligence required on the employer. The end result is that the reasonableness of the Decisions is undermined.

[56] Certain other findings were also not justifiable, such as the comments in the GCMS notes about the Applicants paying the immigration consultancy firm CANUS for the processing of their work permit applications. CANUS represented Daytona in successfully obtaining the LMIAs. They subsequently represented all six Applicants in their work permit applications before IRCC. While IRCC correctly observed that all Applicants were represented by the same representative, CANUS, IRCC noted "when asked the fee charged by CANUS Immigration, the common reply at interview was 3000CAD, however, there were some variations, including 3,500CAD and 5000CAD." The comment that the "common reply was 3,000CAD" is inconsistent with the different amounts given by the Applicants. Just to take Group 1 for an example, the Applicant in 3092 paid $3400, the Applicant in 3099 paid $3000, and 3100 paid $5000.

[57] Furthermore, there is no explanation as to why the amount of the fee payment, even if they were in the same general range of fees, was material or relevant to the Decisions. CANUS assisted in all work permit applications, serving as the third party representative. All six Applicants provided the requisite form (IMM-5476, Use of Representative Form), as well as a detailed cover letter from CANUS. CANUS also provided a response to the PFL on behalf of the employer.

[58] While CANUS was transparent with its involvement throughout, including through the various forms and letters that it submitted in support of the applications, the same cannot be said for IRCC's comments with respect to the firm in the Decisions. Quite apart from the unintelligible observation that the Applicants provided a common reply regarding the $3000 fee, the Decisions lack any transparent rationale in refusing the applications due to CANUS' involvement.

[59] Representing both the employer and prospective employees could certainly lead to issues (see, for instance, the Conflict of Interest provisions in the Code of Professional Conduct for College of Immigration and Citizenship Consultant Licensees, SOR/2022-128). However, the Code was not mentioned. Nor did IRCC mention any allegation of CANUS misconduct or breach of professional ethics. In this regard, the Decisions were not justified.

3. *The three misrepresentation findings were unreasonable*

[60] The Group 1 Applicants argue that the findings of misrepresentation against them are unreasonable, because IRCC did not sufficiently explain how the findings were made. The Respondent relies on this Court's comments in *Solopova v Canada (Citizenship and Immigration)*, 2016 FC 690 at para 32 to submit that this Court should defer to IRCC's weighing of the evidence and credibility determinations, even when the reasons are brief or poorly written. IRCC explained that each Group 1 Applicant was inadmissible because "based on the documents on file and responses to interview questions, I am of the opinion that the PA has submitted a non-genuine job offer and that the misrepresentation of this material fact could have induced errors in the administration of the Act."

[61] Findings of misrepresentation must be based on “clear and convincing” evidence, given the impact on the determinations to future admissibility to Canada (*Ibe-Ani v Canada (Citizenship and Immigration)*, 2020 FC 1112 at para 18 citing *Seraj v Canada (Citizenship and Immigration)*, 2016 FC 38 at para 1; *Lamsen v Canada (Citizenship and Immigration)*, 2016 FC 815 at para 31; *Chughtai v Canada (Citizenship and Immigration)*, 2016 FC 416 at paras 29-30). The three Group 1 Decisions fail to reveal the existence of clear and convincing evidence to support the findings of misrepresentation.

[62] Based on the GCMS notes, IRCC found that the Group 1 Applicants misrepresented by submitting non-genuine job offers, yet IRCC relied mostly on the information submitted by Daytona and its legal representatives to conclude that the job offers were non-genuine, rather than on information obtained at the interviews. I cannot agree with the Respondent’s proposition that the specific evidence from the Group 1 Applicants’ interviews justified the finding of misrepresentation against them, since the GCMS notes do not point to any clear or convincing evidence of misrepresentation by the Group 1 Applicants. Furthermore, there is nothing distinguishing these three applicants from the three in Group 2 that IRCC points to. On the contrary, the GCMS notes highlight how similar the responses were from all six Applicants.

[63] Thus, I agree with the Group 1 Applicants that the findings of misrepresentation against them are incoherent and unreasonable in light of the fact that there were no findings of misrepresentation against the Group 2 Applicants, and that all the Applicants’ work permit applications were refused on the basis of a non-genuine job offer. To find that an offer is non-genuine, particularly in the face of the opposite finding of another government department, is no

minor matter. This is akin to finding that the job offer made by the employer – and put forward by the applicant - was fraudulent. Given the serious nature of the finding, the explanation must be clear, and grounded in the evidence, and here the three findings of misrepresentation do not meet that mark (*Balyokwabwe v. Canada* (Citizenship and Immigration), 2020 FC 623 at para 45; *Oranye v Canada (Citizenship and Immigration)*, 2018 FC 390 at paras 23-24).

[64] The PFLs, sent to only two of the Applicants (IMM-3099-20 and IMM-3100-20), and not to the employer, provided a more specific list of requested documents than did the requested list of documents provided with the interview letters (as can be seen in Annex A versus Annex B of these Reasons). Specifically, the PFL list included a request for information about recruiters used, reasons for hiring the applicants, their ability to do the work, and steps taken to encourage visa compliance. The PFL also requested information about the business, including business registration, financial statements, notices of assessment, an organizational chart, employment insurance contributions, and customer and supplier information.

[65] Of course, the mere fact ESDC issued positive LMIAs to Daytona is no guarantee that an approval would ensue for some or all of the six work permit applicants. Indeed, as I previously noted, an LMIA is not determinative and there are many reasons for which individuals' work permits could be refused. Often in work permit cases, these reasons involve inadequacies personal to the applicant, in that they do not prove able to fulfill the job requirements. The bases for these refusals run the gamut from a lack of requisite education, work experience, language ability, to inadequacy of documentation or identity concerns. Indeed, these concerns are the focus of the bulleted list in the Applicants' job interview letters.

[66] Less commonly, work permit refusals result, in whole or in part, from inadmissibility findings. That could be for misrepresentation, as occurred for the three Applicants in Group 1. When making findings of inadmissibility, the stakes are higher than a denial of an application: the Court must be very clear about the basis for its finding that results in a five-year bar (*Toki v Canada (MCI),* 2017 FC 606 at paras 31, 38). Here, that Decision was anything but clear when read holistically. The refusal letters sent to the three Applicants state, as the sole basis for refusal, "I am not satisfied that you have truthfully answered all questions asked of you."

[67] To understand what lay behind that conclusion, the GCMS notes indicate that the Officer became concerned with the offer of employment submitted with the application. The Officer wrote on the date of the refusals: "Verifications were conducted by this office and it was confirmed that the applicant had provided a non-genuine offer of employment." The interview notes reflect sparse questioning on the issue of the company. The most in depth questioning regarding the company and its *bona fides* arose with Applicant in IMM-3092-20 (Group 1). In that interview, the exchange went as follows:

> Let me show you a picture of the stated address for your employment in Canada (showing google map image). The location appears to be a small office suite in a small mall. I don't see any trucks. A: They might have a separate yard. MO: Where is the yard? A: I don't know. MO: I have concerns that there do not appear to be any trucks at your employment address. A: They will have a separate yard with trucks. PROCEDURAL FAIRNESS - PROCEDURAL FAIRNESS MO: thank you for all information provided. I am coming to the end of this interview and I have some concerns with some of the information before me, from this interview and in your application. Your employment location is a small office space with no sign of trucks, I am concerned that this offer of employment is not genuine. A: I don't know, this is the offer they gave me. Maybe they have trucks in Brampton. MO: Do you know the distance between Brampton and Dartmouth? A:

> Maybe around 400 km. MO: Let's look at the map… it is approximately 1,900km way. A: That's what they told me.

[68] As in the analysis above regarding speculative conclusions, I have already pointed out why it was unreasonable to put these concerns to the Applicants, rather than the company. It is not surprising that expecting answers about internal corporate intelligence resulted in speculative findings from the decision-markers. For instance, IRCC did not take into account the $11 million in assets and $15 million in revenues reported in the tax returns that were provided by Daytona. Surely these numbers could have reflected some trucking activity, had the question been directed to the appropriate source.

[69] But this section of the analysis goes beyond the speculation that resulted from putting the concerns to the prospective employees who had never worked at the company, let alone set foot in Canada, and who had never seen any of the corporate tax returns or financial information provided by Daytona, due to confidentiality concerns. Rather, it goes to the reasonability of finding that they misrepresented, and another extract from the interview is enlightening. There, the GCMS notes provide the following comments regarding the interview in IMM-3092-20:

> When shown a google maps street view of the employment location address listed on the LMIA which is an office suite in a small office complex without evidence of long-haul trucks, PA stated that the company has a yard with trucks at a different location, but he is not sure of the exact location. Procedural Fairness was provided during interview, explaining concerns that job offer may not be genuine due to the size of the company and lack of evidence of sufficient trucking operations in Nova Scotia. At this point, PA stated that the potential employer had informed PA that the trucks were located in Brampton Ontario. When shown a map and the 1,900 km distance between Dartmouth Nova Scotia and Brampton ON, PA stated that the employer told him that the trucks were located in Brampton.

[70] This was the most in depth questioning of any of the three Group 1 Applicants regarding the alleged misrepresentation in putting forward a non-genuine job offer. I find it is unreasonable that this Applicant – similar to the other two Group 1 Applicants – is faulted for putting forward a non-genuine job offer, at least on the basis of IRCC's explanation. IRCC's rationale fails to provide transparent or intelligible reasons why these Applicants would have had any reason to believe that the job offer was not genuine. Certainly, the exchanges do not otherwise reflect any direct or indirect misrepresentation.

[71] In conclusion, there is no doubt that prospective employees must have a position they are coming to fill in Canada (*Dhaliwal* at para 6). However, if IRCC finds an employer has provided a non-genuine offer, this does not necessarily mean that the work permit applicant was aware that the offer they received was non-genuine and that the applicant is misrepresenting in their application. In certain circumstances, one could imagine that the misfeasance or malfeasance would extend to the applicant. However, given the "clear and convincing" evidentiary requirement explained above, more is required to meet the misrepresentation threshold than was present here: in this case, the evidence did not come close to crossing that line.

## VII. Conclusion

[72] The missing link from IRCC's chain of analysis is the complete absence of any consideration of the financial information available to it through its sister department who had issued positive LMIAs, or through the employer, both of whom were better positioned to provide a more fulsome financial picture than the Applicants alone. The analysis that was done regarding the genuineness of the six job offers was also fatally flawed, for the various reasons explained

above. Finally, IRCC failed to point to any clear and convincing evidence to establish that three of the six Applicants had misrepresented.

[73] Given the number and gravity of the errors made on these files, IRCC's decision to refuse each the six Applicants' work permit applications was clearly unreasonable. None of the Decisions provide a rational basis for the refusals, or any explanation that meets the mark of justifiability, intelligibility or transparency – as to why the employment offers were non-genuine based on what the Applicants said at the interview.

[74] Given the outcome, neither party asserts a question of general importance for certification, and in the circumstances, I agree that none arises.

**JUDGMENT in (Group 1) IMM-3099-20, IMM-3100-20, IMM-3092-20 and (Group 2) IMM-3097-20, IMM-3098-20, IMM-3093-20**

**THIS COURT'S JUDGMENT is that:**

1. The Applications are granted.

2. For clarity, the findings of misrepresentation in IMM-3099-20, IMM-3100-20, IMM-3092-20 are quashed.

3. All six Applications in Groups 1 and 2 will be returned to the visa office for redetermination by another officer.

4. No questions for certification were argued and I agree none arise.

5. There is no award as to costs.

"Alan S. Diner"

Judge

**Annex A**
**Sample Procedural Fairness Letter sent to two of the Applicants**

Government of Canada / Gouvernement du Canada
High Commission of Canada / Haut-commissariat du Canada

Date: December 27, 2019

Dear

This refers to your application for a Canadian work permit.

I have reviewed your application and documents you submitted in its support. Subsection 11(1) of the Immigration and Refugee Protection Act provides that a foreign national must, before entering Canada, apply to an officer for a visa or any other document required by the Regulations. The visa or document shall be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

I am not satisfied that you have fulfilled the requirement put upon you by section 16(1) of the Immigration and Refugee Protection Act, which states:

16(1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.

Specifically, I have concerns that your offer of employment may not be genuine as your potential employer is attempting to hire a large number of temporary foreign workers as truck drivers.

To assess this application you are required to provide the following documents pertaining to your potential employer within 15 days. Please provide the following from your potential employer:

1. Please identify the recruiters you have engaged in India to recruit the applicant(s) and provide a detailed description of the recruitment steps you have followed to identify the applicant(s) as suitable for the employment offered. Please also state your reasons for having been reasonably satisfied the applicant(s) is/are able to perform the job duties and is/are sincerely motivated to report for work and fulfill the terms of their employment contract. Also include any due diligence you have exercised to satisfy yourself the applicant(s) can be relied upon to fulfill the terms of their visa status as a temporary foreign worker and any precautionary steps followed by you to promote and encourage visa compliance.

2. Provide a description of your business, including but not limited to, the size of your current business and a brief history of operations, the address(es) where business operations

take place, the goods or services produced by your business, the type of business ownership with the names of the owners, and include the number of temporary foreign workers you have employed annually over the last three years in comparison to non-foreign workers for the same period.

3. Your business registration.

4. Your most recent unaudited financial statement.

5. Your business notices of assessment from Revenue Canada for the last 3 years.

6. An organizational chart of your business including job titles and the names of the individuals occupying each position. If you have employees who hold temporary resident status in Canada on staff provide full names, dates of birth and the social insurance number for each.

7. Evidence the employer contribution to the employment insurance (EI) plan has been made for each employee.

8. A list of your major customers including supporting materials such as sales contracts and accounts receivable.

9. A list of your major suppliers including supporting materials such as purchase contracts and accounts payable.

Please note that if it is found that you have engaged in misrepresentation in submitting your application for a work permit, you may be found to be inadmissible under Section 40(1)(a) of the ***Immigration and Refugee Protection Act.*** *A* finding of such inadmissibility would render you inadmissible to Canada for a period of five years according to section 40(2)(a):

40(1) A permanent resident or a foreign national is inadmissible for misrepresentation
(a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act

40(2) The following provisions govern subsection (1):

(a) the permanent resident or the foreign national continues to be inadmissible for misrepresentation for a period of five years following, in the case of a determination outside Canada, a final determination of inadmissibility under subsection (1) or, in the case of determination in Canada, the date the removal order is enforced.

I would like to give you an opportunity to respond to this information. I will afford you 15 days from the receipt of this letter to make any representations in this regard. Please upload your response to your IRCC My Account (My CIC) before the due date. If you do not respond to this request within the time outlined above, your application will be refused.

Sincerely,

Immigration Section

**Annex B**
**Sample interview letter sent to all Applicants**

Government of Canada
High Commission of Canada

Gouvernement du Canada
Haut-commissariat du Canada

Date: February 19, 2020

Dear

This refers to your application for a visa for Canada. In order to continue processing of your application you are required to attend an interview at the High Commission of Canada located at 7/8 Shantipath, Chanakyapuri, New Delhi, India 110021 on:

**Interview New Delhi 2020/03/18 14:00:00**
Date format is yyyy/mm/dd

You are being convoked for an interview to assess your eligibility under the Temporary Foreign Worker Program or the International Mobility Program. This interview will include an assessment of your language ability, your previous work experience, your ability to perform the work sought, and the genuineness of the job offer.

Note that interviews will normally not be rescheduled. If you do not attend your interview, your file will be assessed on the basis of the application as submitted and may be refused. You must be on time for your interview.

Bring the following documentation with you in paper format to your interview:

- **Current passport**
- **Prior passport**
- **Proof of current and past employment - reference letters, pay slips, ITR's.**
- **Evidence to demonstrate they you meet the LMIA stipulated requirements. The**
- **government-issued photo identification (e.g. passport);**
- **education documents;**
- **work experience documents;**
- **English language proficiency;**
- **the financial ability of your employer to hire you and pay our wages; and**
- **any other information you feel will address the issues raised above.**

Any documents not in English or French must be accompanied by a certified translation in addition to a photocopy of the original document. Do not submit originals unless specifically asked to do so.

**Sincerely,**

**Migration Section**

Government of Canada
High Commission of Canada

Gouvernement du Canada
Haut-commissariat du Canada

**Interpretation**

The Immigration Section of the Canadian High Commission in New Delhi DOES NOT provide interpretation services. Applicants who do not speak English or French fluently must engage the services of a qualified professional interpreter from the approved list of interpretation companies provided below. Should the applicant come to the interview without an approved interpreter, the interview will not proceed as scheduled, leading to processing delays. Interpreters from firms not on the approved list will not be accepted.

**Approved Interpretation Service Providers**

| | | |
|---|---|---|
| GMS Interpreters<br>14A/98 1st floor, W.E.A,<br>Karol Bagh, near Metro Pillar No. 117, New Delhi – 110005, India<br><br>Tel: 91 11 25721255,<br>91 11 47551990<br>Mobile:91 9873421990<br><br>Email:<br>jayshree.k.gms@gmail.com<br><br>Contact Person: Jayshree Khadkiwala<br><br>Business hrs : 9am to 7pm | Lingua Mart<br>RZ G-3 Opposite ICICI Bank<br>Mahavir Enclave, Palam Dabri Road, New Delhi – 110045 India<br><br>Tel.: 91 11 41345472<br>Mobile: 91 9818232356,<br>91 9999210917<br><br>Email:<br>linguamartdelhi@gmail.com<br><br>Website:<br>www.linguamart.com | Integrated Language Solutions Pvt Ltd (ils)<br>C-70 Raj Nagar Pitampura<br>New Delhi – 110034, India<br><br>Tel: 91 11 47021207,<br>91 9811093093<br><br>Email:<br>info@integratedlanguages.com<br><br>Website:<br>www.integratedlanuages.com |

**Please note:**

- Interpretation services fees are not negotiable.
- The above listed companies have no connection to the High Commission and cannot assist you in any way to improve your chances of obtaining a visa.
- Should you attempt to negotiate on either on these items, we have instructed the companies to refuse to take you as a client.
- The above listed companies should be contacted during business hours only. Should you call at any other time, the companies will refuse to take your calls.

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | IMM-3099-20 |
| **STYLE OF CAUSE:** | GURPREET SINGH JANDU v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **AND DOCKET:** | IMM-3100-20 |
| **STYLE OF CAUSE:** | JAGMEET SINGH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **AND DOCKET:** | IMM-3092-20 |
| **STYLE OF CAUSE:** | JASWINDER SINGH SANDHU v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **AND DOCKET:** | IMM-3097-20 |
| **STYLE OF CAUSE:** | RAJBIR SINGH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **AND DOCKET:** | IMM-3098-20 |
| **STYLE OF CAUSE:** | MANJINDER SINGH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **AND DOCKET:** | IMM-3093-20 |
| **STYLE OF CAUSE:** | SUKHWINDER SINGH SIDHU v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | NOVEMBER 10, 2022 |
| **JUDGMENT AND REASONS:** | DINER J. |
| **DATED:** | DECEMBER 22, 2022 |

**APPEARANCES:**

| | |
|---|---|
| Jelena Urosevic<br>Rafeena Rashid | FOR THE APPLICANT |
| Rachel Hepburn Craig | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
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| Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |