Bringing German Workforce to Canada

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Insofar as this article adverts to provincial rules, it is usually the case that these rules refer specifically to the Province of Ontario where one-third of the population of Canada lives. These rules may vary from those of other provinces.

We strongly recommend that you seek professional legal advice from a qualified lawyer to resolve your particular legal problem.

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I. Introduction

Many German companies are internationally active and have their representative entities throughout the world. Not only large companies engage in global activity. Increasingly, mid-sized[1] corporations are taking advantage of business immigration opportunities and transferring all or part of their operations overseas and registering an affiliate or another form of subsidiary abroad.

This article is directed toward German companies which are interested in expanding their business to Canada or which have already established a presence in the Canadian business market[2]. The following analysis provides a short overview of the legal pre-conditions for getting a German workforce admitted to Canada, and focuses on the Canadian rules about work authorization (II.). Moreover, the article discusses further relevant legal issues arising in relation to transfer of employees from Germany to Canada (III.), which are useful to clear before employees enter Canada.

II. Work Authorization

There are two main types of individuals who can work in Canada without any restrictions: Canadian citizens and permanent residents. The Canadian *Immigration and Refugee Protection Act* provides that no person other than a Canadian citizen or a permanent resident may lawfully engage in employment in Canada[3]. Section 30 (1) of the Act states that a foreign national may not work or study in Canada unless authorized to do so under this Act.

For German corporations, the main issue is whether employees who are foreign nationals – non-Canadians or non-Canadian permanent residents – can work in Canada. The following aspects are important:

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[1] The definition of small and mid-sized business (SME) varies according to different sources. According to the German Commercial Code (§ 267 subsection 2 HGB) a German SME is an incorporated enterprise with less than 250 employees and less than Euro 38.5 million in revenue; according to the Institute of SME Research, SMEs are entities with fewer than 500 employees and less than Euro 50 million in revenue. The Canadian Council of Ministers of the Environment defines a SME according to the number of employees – up to 500 employees, and Statistics Canada counts companies as SMEs when they have less than $50 million in annual revenue.

[2] According to the Canadian German Chamber of Industry and Commerce there are more than 500 members in both Germany and Canada today, http://kanada.ahk.de/en/membership/membership-categories/why-become-a-member. (All cited websites were last retrieved on July 22, 2013).

[3] Canadian *Immigration and Refugee Protection Act,* S.C. 2001, c. 27 (the "IRP Act").

1. Employee's country of citizenship

Canada has different entry rules for citizens of different states. That is why an employee's citizenship will often determine the available entry options and the time it will take a foreign national to get permission to be admitted to Canada.

A foreign national can be authorized to enter Canada as a temporary resident (also known as a visitor). For its own reasons, Canada imposes visa requirements on nationals of various states. A foreign national who is a citizen of one of these countries[4] must apply for a temporary resident visa from the Canadian Embassy before entering Canada. German nationals are exempt from the visa requirement for visiting Canada, but some foreign nationals likely to be represented in the German workforce, for instance citizens of Turkey or of some Eastern European states, such as Serbia and Romania (although an European Union member state) are required to obtain visas. In addition to those of some European Union (EU) states, citizens of numerous other countries, such as, India, South Africa and Saudi Arabia, are required to obtain visas.

If a foreign national is a citizen of a country whose citizens do not need visas to enter Canada[5], the process of entering Canada becomes much easier. A visitor presents himself or herself at a Canadian point of entry (most often an international airport) with a passport and obtains a status of temporary resident within a few minutes.

2. Applications required: Work Permit and Labour Market Opinion

Generally, each foreign individual seeking entry to Canada not only for visiting purposes but also for performing any kind of work needs to apply for a Work Permit before entering Canada[6] and his or her Canadian employer usually needs to apply for a Labour Market Opinion (LMO)[7]. Without the LMO, Work Permits are usually not granted. However, the immigration rules provide several exemptions to this general rule. For a German company which intends to send its employees to Canada, the most relevant exemptions are those covering activities as (a.) a business visitor, (b.) an intra-company transferee or (c.) a professional.

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[4] The list of countries can be found at http://www.cic.gc.ca/english/visit/visas.asps.

[5] Section 190 of the *Immigration and Refugee Protection Regulations,* SOR/2002-227 (the "IRP Regulations").

[6] Section 197 IRP Regulations. The institution authorized to issue Work Permits is the Canadian government immigration department *Citizenship and Immigration Canada* (CIC), http://www.cic.gc.ca: accessible also through visa offices abroad.

[7] Section 203 IRP Regulations. The competent authority is *Human Resources and Social Development Canada* (HRSDC).

In order to determine to which category a foreign worker belongs, the first step is to establish whether his or her activity is considered "work" according to Canadian immigration provisions. For immigration purposes, "work" is defined as follows:

> "*an activity for which wages are paid or commission is earned, or that competes directly with activities of Canadian citizens or permanent residents in the Canadian labour market*"[8].

Wages or commissions include salary or wages paid by an employer to an employee, remuneration or commission received for fulfilling a service contract, or any other situation where a foreign national receives payment for performing a service[9]. There is no clear definition of "activities competing directly with activities in the Canadian labour market", but if a Canadian or permanent resident should really have an opportunity to perform the activity in question, or if the activity is one that is competitive within the marketplace, such activity would be classified as "work". There are even some examples of unpaid work that meet the immigration law definition of "work":

- a foreign technician coming to repair a machine, or otherwise fulfill a contract, even when he or she will not be paid directly by the Canadian company for whom this work is done;
- self-employment which could constitute competitive economic activity, such as opening a dry-cleaning shop or fast-food franchise;
- unpaid employment undertaken for the purpose of obtaining work experience, such as an internship or practicum normally done by a student[10].

Activities, outlined below, for which a person would not normally be remunerated or which would normally be part-time or incidental to the reason that the person is in Canada are not considered to be "work":

- unpaid volunteer work, such as sitting on the board of a charity or religious institution;

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[8] S. 2 IRP Regulations.

[9] Page 27 of CIC, *FW 1 Temporary Foreign Worker Guidelines*, 2013-01-20 ed. (the "FW Manual"), http://www.cic.gc.ca/english/resources/manuals/fw/fw01-eng.pdf

[10] Page 28 FW Manual.

- unremunerated help by a friend or family member during a visit, such as a mother assisting a daughter with children;
- long distance work done by telephone or internet by a foreign national whose employer is outside Canada and who is remunerated from outside Canada;
- self-employment where the work to be done would have no real impact on the labour market, that is, would not really deprive a Canadian of an opportunity, such as a farmer who resides in the United States of America but crosses the border to work on fields that he or she owns[11].

a. Business Visitors

Business visitors to Canada do not need a work permit or an LMO[12]. Section 187 (1) of IRP Regulations defines a business visitor as follows:

> *"a foreign national who is described in subsection (2) or who seeks to engage in international business activities in Canada without directly entering the Canadian labour market".*

Section 187 (2) of the IRP Regulations lists three types of activities that would typically make a foreign national a business visitor (and not a "worker"), as follows:

- purchasing Canadian goods or services for a foreign business or government, or receiving training or familiarisation in respect of such goods or services;

- receiving or giving training within a Canadian parent or subsidiary of the corporation that employs the foreign national outside Canada, provided any production of goods or services that results from the training is incidental;

- representing a foreign business or government for the purpose of selling goods for that business or government, if the foreign national is not engaged in making sales to the general public in Canada.

Generally, the employer's remuneration, principal place of employment and accrual of profits must remain outside Canada[13]. Additionally, business visitors must not have an intent to enter the

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[11] Page 28 FW Manual.

[12] Section 186 (a) IRP Regulations.

[13] Section 187 (3) IRP Regulations.

Canadian labour market, that is, not intend to obtain gainful employment in Canada, and his or her activities must be international in scope.

The most common types of business visitor activities (1) are after-sales/lease services and (2) board of directors meetings.

(1) After-Sales/Lease Service and Warranty Work

Non-Canadian companies that sell or lease equipment, machinery or software to Canadian businesses can take advantage of provisions that allow foreign nationals, on behalf of the vendor, to work in Canada to perform after-sales/lease service and warranty work without the need to obtain a Work Permit. In particular, a certain set of requirements must be fulfilled. The equipment, machinery or software purchased by a Canadian company must be commercial or industrial and not for household or personal use[14].

After-sales/lease services and warranty work permitted include:

- installing, setting-up, testing and repairing the equipment, machinery or software purchased;
- training and supervising Canadian workers on the equipment, machinery and software;
- upgrading previously purchased/leased software [15].

Some work, however, is not allowed under the after-sales/lease services:

- operating the equipment, machinery or software for production;
- performing hands-on building or construction work.

It is of no importance where the equipment, machinery or software was purchased or leased; the provisions governing business visitors also apply to persons seeking entry to Canada to repair or service specialized equipment purchased or leased outside Canada.

It must be stressed how essential precise wording of the warranty or service agreement is. Firstly, it is only if a warranty or service contract exists that the foreign service providers do not need a Work Permit and an LMO. Service contracts must have been negotiated as part of the original sales or lease/rental agreement, or must be an extension of the original agreement. However, service contracts negotiated with third parties after signing the original sales/lease agreement are

[14] Page 29 FW Manual.

[15] Page 29 FW Manual.

not covered by the exemption from a Work Permit or Labour Market Opinion. Only if the original sales/lease agreement indicates that a third company has been or will be contracted to service the equipment is neither a Work Permit nor LMO required[16].

(2) Board of Directors Meetings

A person seeking entry to Canada as a member of a board of directors may enter as a business visitor. Such a board meeting is typically of short duration and takes place no more than quarterly. There is no official definition of a "meeting" in immigration provisions, but examples of activities in a meeting include:

- selecting and appointing a chief executive officer;
- governing the organization by setting broad policies and objectives;
- accounting to shareholders for resources devoted to products, services and expenditures[17].

Even though board members are remunerated for participating in the directors' meeting, they are considered to be business visitors because their activity deals with the international mobility of business and does not compete with the Canadian labour market.

(3) Length of Time Granted as a Business Visitor

The business visitor provisions do not have any explicit restrictions on the amount of time a business visitor can spend in Canada. This does not mean that immigration officers would not consider the length of the visit in relation to the activity the visitor intends to perform in Canada. As a general rule, business meetings, sales trips, or provision of repairs or services last no more than one week. The timing and duration of the visit must however be consistent with the business activity; the visit can last longer if appropriate. A stay exceeding six months would normally be found to exceed the threshold specified by section 187 (3) (b) of the IRP Regulations, which requires that the principal place of business must remain outside of Canada[18].

b. Intra-Company Transferees

The least complicated way for German companies to bring their employees to Canada is usually by means of an intra-company transfer. This kind of work in Canada requires only a Work Permit and is LMO exempt under section 205 (a) of the IRP Regulations. A certain number of

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[16] Page 30 FW Manual.

[17] Page 31 FW Manual.

[18] Page 31 FW Manual; Global Mobility Handbook 2013, Baker & McKenzie, page 158, http://www.bakermckenzie.com/files/Uploads/Documents/Global%Employment/bk_globalmigration_globalmobility/handbook2013.pdf .

requirements must be strictly met. The following points address the most important (but not all) requirements:

(1) Intra-Company Relationship between the Canadian and Foreign Employers

For the purpose of working in Canada as an intra-company transferee, a qualifying relationship must exist between the foreign and Canadian employers. Both enterprises must be legal entities that are in a parent, subsidiary, branch or affiliate business relationship with each other[19]. It is necessary that the Canadian and foreign companies will continue "*doing business"*[20]. This requirement is intended to prevent abuse situations where a company exists in name only and is established for the sole purpose of facilitating the entry of intra-company transferees into Canada.

(2) Canadian company as a legitimate and continuing establishment

If the entity to which a foreign worker will be sent has been in existence for at least 18 months, it can be used as a reasonable minimum guideline for presuming that the company is a legitimate and continuing enterprise[21]. However, there are special provisions for start-up companies[22] and for companies which have recently undergone a merger or acquisition[23].

(3) Executive, Senior Managerial, or Specialized Knowledge Capacity

Intra-company transferees may only be transferred to executive or senior managerial positions or positions requiring specialized knowledge. In determining whether a worker will be allocated to one of these positions, the job-based duties of the foreign national, and not the designation of the position, will be decisive.

A position has an *executive* capacity if the transferee for the most part carries out responsibilities as follows:

- directs the management of the organization or a major component or function of the organization;
- establishes the goals and policies of the organization, component or function;
- exercises wide latitude in discretionary decision-making;
- receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization[24].

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[19] Page 62 FW Manual; Appendix G, No. 4.4, page 167 FW Manual.

[20] For the meaning of this term compare page 62 FW Manual.

[21] Page 61 FW Manual.

[22] Page 61 FW Manual.

[23] Page 63, 68 und Appendix I to FW Manual,

[24] Page 64 FW Manual.

Managerial capacity means that the employee primarily:

- manages the organisation, a department, subdivision, function, or component of the organization;
- supervises and controls the work of:
    - other managers or supervisors;
    - professional employees, or
    - manages an essential function within the organization, or a department or subdivision of the organization.
- has the authority to hire and fire, or recommend these and other personnel actions, such as promotion and authorization of leaves; if no other employee is directly supervised, functions at a *senior* level within the organizational hierarchy or with respect to the function managed; and,
- exercises discretion over the day-to-day operations of the activity or function for which the employee has the authority[25].

However, first line supervisors are not considered to be managers unless the employees who are being supervised are professionals.

Specialized knowledge for the purpose of immigration rules comprises:

- specialized knowledge of the company's product or service and its application in international markets, or
- an advanced level of knowledge or expertise in the organization's processes and procedures (product, process and service can include research, equipment, techniques, management, etc.)[26].

Recently, detailed provisions were enacted on the subject of specialized knowledge, making this category a bit more challenging. There are now precise minimum requirements regarding factors such as salary and wages for a specialized knowledge worker, and his or her level of education[27].

(4) A Similar Position Abroad for at least One Year

Not all employees of an internationally active German company qualify as an intra-company transferee. In order to qualify, an employee must have been employed by the foreign company in a similar position and on a full-time basis for at least one year during the three-year period immediately preceding the date of initial application[28]. However, employment on a part-time

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[25] Page 64 FW Manual.

[26] Page 65 FW Manual,

[27] Operational Bulletin 316 – July 4, 2011: Assessing Intra-Company Transferees under Specialized Knowledge, http://www.cic.gc.ca/english/resources/manuals/bulletins/2011/ob316.asp. See also page 66 FW Manual.

[28] Page 61 FW Manual.

basis is not an insuperable obstacle to intra-company transfers. The immigration officer handling the case is encouraged to consider other factors before refusing the application solely on this basis. The lack of full-time status can, for example, be offset by a significant number of years of work experience[29].

(5) Validity Period of Work Permit

In order to qualify as an intra-company transferee, the foreign national must apply to enter Canada for a temporary period only[30]. The initial work permit can be issued for a period of up to three years[31]. According to section 201 (1) of the IRP Regulations, a foreign national may apply for the renewal of his or her work permit. The application must be made before the work permit expires and while the permit holder still complies with all conditions imposed on his or her entry into Canada. The first renewal of a work permit can be issued for a maximum of two years. For further work permits, different total periods of stay are applicable to executive and managerial transferees as opposed to specialized knowledge transferees: Executive and managerial-level employees can obtain their work permit for a total period of not more than seven years. In contrast, specialized knowledge transferees are limited to five years[32].

Under section 201 of the IRP Regulations, compliance with which is essential for renewal of work permits, the immigration officer shall renew the foreign national's work permit if it is established that the foreign national continues to meet the requirements of section 200 of the IRP Regulations (see sec. 201 (2) IRP Regulations).

Since April 1, 2011, a new restriction with respect to the total period of work in Canada has been imposed. Section 200 (3) (g) of the IRP Regulations states that if a foreign national has worked in Canada for one or more periods for four years, he or she will not be eligible for another work permit. As was declared by Citizenship and Immigration Canada (CIC), the new provision was introduced to prevent foreign nationals who are working temporarily in Canada from losing ties with their country of origin due to prolonged stays in Canada, and to encourage workers and employers to explore appropriate pathways to permanent residence[33]. Generally, once a foreign worker has accumulated four years of work, he or she will be ineligible to work in Canada again until a further period of four years has elapsed, sec. 200 (3)(g)(i) of the IRP Regulations.

The four-year limit provision is not retroactive, but has started to have an impact on applicants

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[29] Page 61 FW Manual.

[30] Page 61 FW Manual.

[31] Page 99-100 FW Manual.

[32] Page 100 FW Manual.

[33] Operational Bulletin 523 – May 22, 2013 Temporary Foreign Worker Program –Four Year Maximum (Cumulative Duration), http://www.cic.gc.ca/english/resources/manuals/bulletins/2013/ob523.asp.

as of the spring of 2013[34].

However, it appears that this restriction would not have an impact on the total period of stay of *intra-company transferees,* for the following reasons:

The legal basis for issuing a work permit for an *intra-company transferee* is section 205 subsection (a) of the IRP Regulations[35], which reads:

> *"A work permit may be issued under section 200 to a foreign national who intends to perform a work that*
>
> *(a) would create or maintain significant social, cultural or economic benefits or opportunities for Canadian citizens and permanent residents;"*

The intra-company category was created to permit international companies to temporarily transfer qualified employees to Canada for the purpose of implementation of international trade agreements for citizens of signatory countries. Qualified intra-company transferees require work permits and are LMO exempt under section 205 (a) IRP Regulations as they provide significant benefit for Canada through the transfer of their expertise to Canadian business. This applies to foreign nationals from any country, including under the General Agreement on Trade in Services (GATS) [36]. Germany has been a member state of GATS since January 1, 1995[37].

Section 200 (3) (g) of the IRP Regulations, which states the new four-year restriction, also contains some exemptions, among them exemption (ii) in cases where

> *"(ii) the foreign national who intends to perform work that would create or maintain significant social, cultural or economic benefits or opportunities for Canadian citizens or permanent residents,…."*

Moreover, exemption (iii), covering foreign nationals who intend to perform work pursuant to an international agreement between Canada and other countries, may also be applicable to German intra-company transferees in some cases.

Although there is not yet any practical experience of the application of the four-year restriction, the aforementioned legal analysis suggests that intra-company transferees from Germany will continue to enjoy the total period of seven years (for executive and managerial employees) and five years (for specialized knowledge workers).

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[34] So as CIC has been stated in Operational Bulletin 523, s. footnote 33.

[35] See page 60 FW Manual.

[36] Page 61 FW Manual.

[37] All WTO member states are GATS member states too. On March 2, 2013 there were 159 economies in WTO and GATS, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm,

c. Professionals

The third category of workers enjoying some exemptions from requirements for entry into Canada is that of Professionals under the applicable international agreements[38]. The agreement between Germany and Canada most pertinent is the aforementioned GATS – General Agreement on Trade in Services[39]. For the temporary entry option as a Professional to be exercised, it is essential that the foreign worker be sent to the Canadian consumer of services, and furthermore, in certain cases,[40] that the German company not have a commercial presence in Canada.

A GATS Professional is a person who seeks to engage, as part of a services contract obtained by a company in another Member nation, in activity at a professional level in a profession, provided that the person possesses the necessary academic credentials and professional qualifications, which have been duly recognized by the relevant professional association in Canada[41].

The following nine occupations are covered by the rules for the entry of professionals: engineers, agrologists, architects, forestry professionals, geomatics professionals, land surveyors, legal consultants, urban planners and senior computer specialists.

The last three occupations are subject to additional requirements pertaining to the prospective work entity in Canada and the foreign service provider[42]. Among many detailed criteria which an applicant must meet it is important to stress that the educational requirements must be documented by copies of degrees, diplomas, professional licenses, accreditation and/or registration documents. The Professionals category is designed to facilitate short-term entry, so that the time limit imposed is a maximum three months, or 90 consecutive days, within a twelve-month period[43].

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[38] Section 204 IRP Regulations.

[39] It should be noted that there are other agreements between the two nations, e.g. Agreement between the Government of Canada and the Government of the Federal Republic of Germany on Scientific and Technical Cooperation, signed on April 16, 1971, http://www.treaty-accord.gc.ca/text-texte.aspx?id=102060

[40] For foreign legal consultants, urban planners and senior computer specialists, page 132, No. 2 FW Manual.

[41] Page 131 FW Manual.

[42] See page 133 FW Manual.

[43] Page 132 FW Manual.

The following table summarizes the requirements and conditions for different categories of foreign worker in Canada

	Labour Market Opinion	Work Permit	Time Limit
Business Visitor	not required	not required	up to 6 months
Intra-Company Transferee	not required	required	7 years for executive and managerial employees 5 years for specialized knowledge workers
Professionals under International Agree-ment	not required	required	90 days

3. Inadmissibility and Compliance Issues

Having determined that a foreign employee falls into one of the categories mentioned above, it is nonetheless essential to note that such a foreign worker may still be admissible to Canada under general immigration provisions. Canada also has a set of rules that makes applicants inadmissible to Canada based on past and present conduct or circumstances, for instance for past criminal activity (section 36, 37 IRP Act), for medical reasons (section 38 IRP Act) and for security reasons (section 34 IRP Act).

At the time of writing, namely July 2013, issues of compliance with the Temporary Foreign Worker Program are being considered very seriously. In light of recent perceived abuses of rules for temporary workers[44], the Canadian government has announced new regulations under the Immigration and Refugee Protection Act to enhance the government's power to investigate non-compliance by companies employing foreign workers. Under existing Canadian law, an employer who employs a foreign worker who has not been authorized for employment in Canada can face fines of up to $50,000 as well as a term of imprisonment of not more than two years (sections 124 (1) (c) and 125 of the IRP Act). A person who advises persons to misrepresent themselves, for example, a company employee who advises foreign nationals to lie or provide

[44] *Kathy Tomlinson*, RBC replaces Canadian staff with foreign workers, CBC News, posted April 6, 2013, http://www.cbc.ca/news/canada/british-columbia/story/2013/04/05/bc-rbc-foreign-workers.html,

misleading information to an immigration officer, can face fines of up to $100,000 and term of imprisonment of not more than five years (sections 126 and 128 of the IRP Act).

In one case, a person was fined $8,000 for telling a group of foreign nationals to state they were coming to Canada to visit when they were in fact coming for work[45].

III. Further Relevant Legal Issues

Among many relevant legal issues which must be taken into account before transferring an employee to a foreign host country, such as Canada, the following considerations are most important:

1. Employment Contract

It is important to keep in mind the laws of the jurisdictions involved when drafting the contract with the potential expatriate employee. There are several employment arrangements which German employer companies can use for the international transfer of their employees, including:

- termination of the original employment contract and signing of a new contract;
- agreement to cancel an old contract and replace it with a new contract; both agreements must be part of the same document;
- agreement to suspend the existing employment contract and to implement new employment conditions for the duration of the employment in the host country.

The employment agreement chosen must be appropriate to the foreign assignment and to the individual situation of the employee.

It appears that the "suspension" arrangement is the most commonly used by companies based in Germany. However, obtaining specialized advice on German employment law before opting for any one arrangement is highly recommended.

In drafting a "suspension" agreement, great care should be taken to clearly and expressly provide for a continued employment relationship to the company in the home country, so as to provide a contractual argument against the application of host country termination protections and entitlements. The employment contract must include an express choice of governing law. The Canadian general principle is that the parties are free to choose the applicable law; this principle is also applied to international contracts of employment[46]. The chosen law, (German law in this particu-

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[45] Canada Border Services Agency, Prosecutions and Seizures, News Release: Misrepresentation nets man $8,000 fine, http://www.cbsa-asfc.gc.ca/media/prosecutions-poursuites/pac/2011-10-07-eng.html.

[46] *Castel & Walker*, Canadian Conflict of Laws, Volume 2, § 31.8.d, 6th ed., LexisNexis, 2005.

lar case), will govern the contract provided the choice is *bona fide* and legal, and that there are no reasons for avoiding the choice on grounds of public policy. However, it is likely that an employee employed by a company in one jurisdiction who is working at a company in another jurisdiction will enjoy the benefits of employment law of both jurisdictions during his or her secondment[47].

2. Social Security

In matters of social insurance, no problem of double social taxation exists for German employees sent to Canada. According to the Agreements between Canada and Germany, and Quebec and Germany, respectively, on Social Security[48], German temporary workers are still subject to home jurisdiction for Pension Insurance for the duration of 60 months (article 7 of the Agreement). The German insurance contributions for Health, Injury and Unemployment Insurance remain imposed on both the employee and the employer due to a so-called radiation effect ("Ausstrahlung") of section 4 of the German Social Insurance Code IV. Even though this provision is applicable only to temporarily transferred employees, it states no exact time limit for the duration of work abroad.[49] For the purpose of avoiding the double social insurance contributions, a certificate specifying applicable provisions[50] must be requested by the employer or employee from the responsible health insurance institution to which the pension contributions are paid[51]. After arriving in Canada, the German employee has to make an application to Service Canada for a German Retirement and/or Disability Pension[52].

3. Taxation of Employee's Remuneration

Both German employers and their respective employees working abroad are interested in avoiding a permanent establishment issue, within the meaning of Art. 5 of the Canada-Germany Income Tax Agreement, resulting from the activities of the employees working abroad, which would cause such employers to be taxable in the host jurisdiction. This issue is regulated in the

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[47] For example, holidays and workplace protection provisions. Cf. Canada Labour Standards Regulations, C.R.C., c. 986; Ontario Employment Protection for Foreign Nationals Act, 2009, SO 2009. c. 32.

[48] Signed on November 14, 1985, http://www.treaty-accord.gc.ca/text-texte.aspx?lang=eng&id=102177

[49] More detailed information about the social insurance issues related to the transferring of employees to Canada can be found in the brochure "My Social Insurance during Work in Canada/Quebec" at http://www.lexsoft.de/share/pdf/b_kan.pdf

[50] Article 6 of Arrangement for the Implementation of the Agreement on Social Security between Canada and Gernany, BGBl. 1988 II-26.

[51] For Canada it is Form CAN 1, for Quebec – Q 101.

[52] Form C/D 1, available at http://www.servicecanada.gc.ca/cgi-bin/search/eforms/index.cgi?app=prfl&frm=dc1&ln=eng

Canada-Germany Income Tax Agreement[53]. Under Article 15 para. 2 of the Agreement,

> "[…] *remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first mentioned State if:*
>
> *(a) the recipient is present in the other State for a period not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the fiscal year concerned, and*
>
> *(b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and*
>
> *(c) the remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other State*."

Conferring closely with tax counsel is highly recommended to obtain understanding of and make arrangements for the potential application of these provisions to the facts of any particular assignment.

4. Good to Know…

To conclude this short overview, here are some useful practical tips for foreign workers coming to Canada.

Driving licence

The visitor to Canada who holds a foreign license may be able to drive using an international driver's permit. In Germany, the equivalent is the European Union (EU) driving licence. After a certain period of time has passed, in Ontario for instance 60 days after arriving in Canada, a visitor or foreign worker must apply for an Ontario driver's licence. For German citizens, two years of driving experience are sufficient to obtain full licence privileges without taking a knowledge-based or a practical driving test.

Social Insurance Number

This is a nine-digit number used to identify people who earn money through work, pay taxes and use government services. A Social Insurance Number should be applied for immediately after

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[53] Agreement between Canada and the Federal Republic of Germany for the Avoidance of Double Taxation with Respect to Taxes on Income and Certain other Taxes, the Prevention of Fiscal Evasion and Assistance in Tax Matters, signed on April 19, 2001, http://www.collectionscanada.gc.ca/webarchives/20071126010425/http://www.fin.gc.ca/news01/data/01-042_1e.html

obtaining a work permit. This can be done at any Service Canada Centre.

Spouse and Dependants

The spouse or common law partner and family members of a high-skilled foreign worker may apply for their own work permits without the need to have a job offer in Canada. Such work permits would be valid for the same duration as that of the high-skilled foreign worker. The work permit of the principal must be valid for a minimum 6 months and the principal must reside in Canada.

For legal advice on business immigration matters please contact Polten & Associates.

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