Chapter Six

Conditions of Landing

General

Permanent residents may be removed from Canada for failure to comply with the conditions imposed upon them when they became permanent residents.

Paragraph 27(2) of IRPA states:

> (2) A permanent resident must comply with any conditions imposed under the regulations.

Paragraph 41 of IRPA states:

> s. 41. A person is inadmissible for failing to comply with this Act
>
> (b) in the case of a permanent resident through failing to comply with subsection 27(2) or section 28.

Paragraph 44 (1) and (2) set out that an officer who is of the opinion that a permanent resident is inadmissible may prepare a report and if the Minister is of the opinion that the report is well-founded the Minister may make a removal order.

Entrepreneurs

The Regulations impose specific, time sensitive conditions upon entrepreneurs who become permanent residents. Section 98 of the Regulations sets out the conditions that an entrepreneur must fulfill.

s. 98. (1) An entrepreneur who becomes a permanent resident must meet the following conditions:

> (a) the entrepreneur must control a percentage of the equity of a qualifying Canadian business equal to or greater than 33⅓ per cent;
>
> (b) the entrepreneur must provide active and ongoing management of the qualifying Canadian business; and
>
> (c) the entrepreneur must create at least one incremental full-time job equivalent for Canadian citizens or permanent residents, other than the entrepreneur and their family members.

(2) The entrepreneur must meet the conditions for a period of at least one year within a period of three years after the day the entrepreneur becomes a permanent resident.

(3) An entrepreneur who becomes a permanent resident must provide to an officer evidence of compliance with the conditions within the period of three years after the day the entrepreneur becomes a permanent resident.

(4) An entrepreneur must provide to an officer

(a) not later than six months after the day the entrepreneur becomes a permanent resident, their residential address and telephone number; and

(b) during the period beginning 18 months after and ending 24 months after the day the entrepreneur becomes a permanent resident, evidence of their efforts to comply with the conditions.

(5) The family members of an entrepreneur are subject to the condition that the entrepreneur meets the conditions.

Entrepreneurs are expected to make a significant economic contribution to Canada. This is to be achieved through the control of at least 33⅓ percent of the equity in a Canadian business that will create employment opportunities for one or more persons other than the entrepreneur and the entrepreneur's family. The entrepreneur is also expected to participate actively in the management of the business. These conditions must be met for a period of at least one year within three years of the entrepreneur becoming a permanent resident.

The Regulations also specify that family members of an entrepreneur are themselves subject to the fulfillment of the conditions by the entrepreneur. Therefore, family members are always removable if the entrepreneur fails to meet the conditions of landing. **The IAD must appoint a designated representative for any family members who are minors at the time of the hearing.**[1]

Entrepreneurs are expected to furnish immigration officers with evidence of their efforts to comply with the conditions set out in the Regulations.[2]

In a constitutional challenge to the old Regulations (s.23.1 (1) (a) to (d)), it was argued that the Regulations were overly broad and compelled a person to perform personal service to the state.[3] The IAD followed the test set out by the Supreme Court of Canada in *R. v. Heywood*[4] that legislation is overly broad and thus unconstitutional when its means are broader than necessary to achieve its objectives so that individual rights have been limited without good reason. Given that the objective stated in s.3 (h) of the old Act is to foster the development of a strong and viable economy and the prosperity of all regions in Canada, the breadth of the Regulations governing entrepreneurs was not overly broad and therefore not unconstitutional.

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1 *Vashee, Gautam Bapushai v. M.C.I.* Kelen, August 15, 2005; 2005 FC 1104.

2 Citizenship and Immigration Canada, OP 8; Entrepreneur and Self-Employed http://www.cic.gc.ca/english/resources/manuals/op/op08-eng.pdf.

3 *Mak v. Canada* (Minister of Citizenship and Immigration) [2003] I.A.D.D. No.467, (IAD VA1-03363), Clark, May 8, 2003.

4 [1994] 3 S.C.R. 761.

Right of appeal

Under section 63(3), a permanent resident may appeal a removal order to the IAD. Under section 67(1), there are three grounds of appeal;

(a) the decision appealed is wrong in law or fact or mixed law and fact;

(b) a principle of natural justice has not been observed; or

(c) sufficient humanitarian and compassionate considerations warrant special relief.

On the issue of legal validity, the only question is whether the entrepreneur clearly understood the conditions imposed upon becoming a permanent resident and did not fulfill them. At the time of making an application for permanent residence, entrepreneurs must sign a declaration stating that they intend and will be able to meet the conditions in s.98 (1)-(4) of the Regulations[5]. Therefore, it is unlikely that any entrepreneur will be able to assert lack of knowledge of the conditions.

Under the old Act an entrepreneur could be removed if he or she "knowingly contravened a term or condition"[6] and under *IRPA* the entrepreneur becomes inadmissible for "failing to comply" with the conditions imposed under the Regulations. The case law established that "knowingly contravened," as used in paragraph 27(1)(b) of the old Act, referred to simple knowledge of the contravention and did not require *mens rea* or wilful non-compliance.[7] The change in wording to "failing to comply" has not produced any change in the case law with respect to the test for legal validity. The IAD has to be satisfied that the entrepreneur understood the conditions and did not comply with them. Once it is clear that the entrepreneur understood the conditions that had to be met, it is irrelevant that the entrepreneur fully intended to comply with the condition and that the condition became impossible to fulfill.[8]

The old Act provisions were subject to a Charter challenge on the basis that paragraph 27(1) (b) of that Act violated section 7 of the Charter because of its similarity to an absolute liability offence. It was argued that an appellant has no opportunity to explain lack of compliance with the terms and conditions of landing with respect to legal validity and this is a denial of fundamental justice. The Appeal Division followed the reasoning of the Federal Court in *Mohammed*[9] that it is not a principle of fundamental justice that someone who does not satisfy the requirements of a statutory regime is

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5 Citizenship and Immigration Canada, OP 8; Entrepreneur and Self-Employed, s.6.5.

6 Section 27(1)(b) of the *Immigration Act.*

7 See *Baker* v. *M.C.I.* (IAD T93-10044), Townshend, January 28, 1994, where in referring to paragraph 27(1)(b) the Appeal Division stated: "This is a very harsh section, in that the term "knowingly" has been interpreted by the Federal Court of Appeal as meaning merely having knowledge of the contravention of the condition entered into. There is no requirement for *mens rea*, [intent], control of the circumstances, or responsibility for the contravention. Mere knowledge is sufficient."

8 *Kim, Mann* v. *M.C.I.* (IAD T98-02335), D'Ignazio, October 7, 1998; *Gabriel* v. *Canada (Minister of Employment and Immigration)* (1984), 60 N.R. 108 (F.C.A.).

9 *Mohammed, Abu Tayub v. M.C.I.* (F.C.T.D., IMM-3601-95), MacKay, May 12, 1997.

entitled to special concessions. The Appeal Division found that paragraph 27(1) (b) does not engage section 7 of the Charter.[10]

Discretionary Jurisdiction

If the Appeal Division determines that the entrepreneur failed to comply with the conditions in the Regulations the removal order is valid in law as against the entrepreneur and any family members who immigrated with the entrepreneur[11]. However, the appeal may also be considered based on whether there are sufficient humanitarian and compassionate considerations to warrant special relief.[12] Each family member can advance his or her particular circumstances which may warrant special relief.[13]

In considering special relief for an entrepreneur, the panel may consider the extent to which the entrepreneur made serious efforts to comply with the conditions. For example, the panel may find that despite the entrepreneur's conscientiousness and diligence, circumstances outside of the entrepreneur's control hindered compliance with the conditions.[14] Evidence of continuing efforts of a substantial nature to meet the investment and business requirements may be considered.[15] A stay of removal may be granted in order to allow the entrepreneur more time to fulfill the conditions.[16]

The best interests of any child directly affected by the decision must also be a factor considered.[17]

.....The Appeal Division may also consider a breach of procedural fairness by the immigration officer as a factor in the exercise of its discretionary jurisdiction.[18]

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10 *Ateeq, Shaista v. M.E.I.* (IAD No. T97-01063), Marziarz, October 1, 1999.

11 *Zidour, Abdelkader v. M.C.I.*, Pinard, December 20, 2006;, 2006 FC 1518.

12 Please see Chapter 9 for general discussion of factors to be considered for special relief.

13 The Federal Court in *Chang, Chun Mu v. M.C.I.*, Shore, February 14, 2006; 2006 FC 157, upheld an IAD decision that departed from the usual methodology of considering each family member's H&C situation separately. In that appeal the IAD refused to consider the children's appeals separately from their parents even though the children had positive factors in their favour. The parents' had participated in a sham arrangement in trying to meet the entrepreneur conditions and the IAD felt that to grant the children special relief would ultimately benefit the parents.

14 *Liu, Kui Kwan v.M.E.I. v.* (IAD V90-01549), Wlodyka, August 20, 1991. The Appeal Division examined how conscientious the appellant had been in his attempt to comply with the terms and conditions and considered all the factors which hindered compliance.

15 In *De Kock* v. *M.C.I.* (IAD V96-00823), Clark, December 17, 1996, the appellant was granted a two-year stay in order to try and fulfill the conditions. He submitted evidence to show a guaranteed $100,000 investment, the acquisition of a business licence, and the proven track record of his proposed business in other locations. In *Luthria* v. *M.C.I.* (IAD T93-03725), Aterman, September 9, 1994, the appellant had made some effort to establish a business, but was unsuccessful. The panel acknowledged the uphill struggle because of the recession, but found the appellant's efforts were not strenuous enough to warrant equitable relief. In *Maotassem, Salim Khalid* v. *M.C.I.* (IAD T97-00307), Maziarz, December 17, 1997, the appellant had twice tried to comply with the conditions and the businesses failed for reasons beyond his control. The evidence failed to establish that the appellant was then on the road to becoming able to meet the terms and conditions and therefore no special relief was granted.

16 *Vashee, supra*, footnote 1.

17 *Elias, Touchan Said v. M.C.I.*, Pinard, September 30, 2005;2005 FC 1329.

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[18] *Lin,Ying Kor et al v. M.C.I.* (F.C.T.D., no. IMM-4245-00), Kelen, December 12, 2001.