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People Aspect of Entrepreneurs: Personal Service Contacts with Key Personnel including Non-Compete Clauses, Methods of Reimbursement for Company Success, Incentives (Profit-Sharing or other), and Effect of Immigration Restrictions on Entrance of Possible

John D.R. Craig

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So I will conclude my remarks now and just as I did not attempt to do throughout the presentation, I won't try to tie all those three topics together. But I wanted to highlight for you these are all people aspects of entrepreneurs.

MR. TORMA: Ben, thank you very much. You did a remarkable job of covering a myriad of topics in a short period of time. Thank you very much. John?

MR. CRAIG: If I can do this.

MR. TORMA: While he is doing that, I will comment briefly on non-competes and then later perhaps give a lay person's view of them perhaps from a different viewpoint; that it is just common sense – and it is not as difficult as it could be – when you understand it is not just in the interests of the company; it is really more in the interests, collective interests, of the employees than just the company, and we can cover that later at this time. Thank you.

John?

CANADIAN SPEAKER

*John D. R. Craig**

MR. CRAIG: Thanks. It is a great pleasure to be here. My colleague, Stan Friedman, who would otherwise be here but for a commitment that he could not get out of, suggested that this would be a great opportunity for me to share my thoughts on people issues to a joint Canadian-American audience, and it sounded fun and interesting.

By way of background, I am a partner at Heenan Blaikie, which is a Canadian law firm with a large management side employment practice. We have offices across the country in Vancouver, Calgary, Toronto, Montréal and smaller offices in Québec. We also act for North American and other multinational corporations and we are allied with firms across the globe. My practice includes both large and small American clients and I have a number of Canadian clients who are in the entrepreneurial category.

Charles Gonthier of the Supreme Court of Canada in 1994. He joined Heenan Blaikie in 2001 after several years with another prominent Toronto firm. Mr. Craig practises exclusively in the area of labour law at the University of Western Ontario, where he has been teaching since 1999. He is the author of *Privacy & Employment Law* (Hart Publishing, 1999), a book based on his doctoral thesis. He has also published articles related to labour and employment law in the *McGill Law Journal*, the *Comparative Labour Law & Policy Journal*, the *Industrial Law Journal*, the *Review of Constitutional Studies*, the *European Human Rights Law Review*, and the *Canadian Labour and Employment Law Journal*.

As Ben mentioned, this topic is somewhat of a grab bag, but I do want to touch upon a few issues, namely doing business in Canada, employment law, independent contractors, the importance of contracts, compensation, and issues that arise when crossing the frontier between our two countries.

So first, the good news, there have been a number of recent studies discussing issues of doing business and the cost of doing business. The KPMG survey, “Guide to International Business Costs, 2006” indicated that Canada has the second lowest business costs among the countries surveyed, and Canada ranks behind only Singapore on employment and labor costs.⁷⁰ There is more good news from a report entitled “Doing Business in 2006”: Canada ranked number four in ease of doing business and number one in flexibility and working time.⁷¹ This may be a surprise to those of us working in Canada, since every other country has less working hours than we do. What is notable, however, is that Canada ranks behind the United States in a number of important factors, including the difficulty of hiring employees, the difficulty of firing employees, and Canada ranks well below the United States in the flexibility of employment.⁷² Therefore, expectations that small American companies or entrepreneurs have based on their own systems will not necessarily stand in good stead once they cross the border.

Now, the bad news: In my experience, entrepreneurs tend to approach a lot of issues with a certain “Wild West” mentality, a “take no prisoners” mentality. They try to find new ways to do things and sometimes that can get them in trouble, particularly when they are dealing with a context they may not be entirely familiar with. Moreover, they often do not have counsel or consultants providing them with the advice that they require to be successful. This leads me to a few points I would like to make on the topic of employment law.

First, employment law in Canada is primarily a matter of provincial jurisdiction. There are ten provinces in Canada, each of them having different laws on employment issues.⁷³ As a result, there are different laws: employment standards, human rights, occupational health and safety,

⁷⁰ KPMG LLP, COMPETITIVE ALTERNATIVES: KPMG’S GUIDE TO INT’L BUS. COSTS i (2006), available at http://www.kpmg.ca/en/industries/cib/consumer/documents/Competitive_Alternatives.pdf.

⁷¹ See THE WORLD BANK GROUP, DOING BUS. IN 2006, at 3 tbl.1.2 (2006) (stating that Canada is number four in ease of doing business), and at 23 tbl.4.2. (stating that Canada has the least amount of rigidity regarding work hours).

⁷² See *id.* at 22 tbl.4.1 (listing the U.S. as the third easiest country to hire and fire from; Canada is not listed), and at 23 tbl.4.2. (listing the U.S. as having the third least rigid employment environment; Canada is not listed).

⁷³ See generally John-Paul Alexandrowicz, *A Comparative Analysis of the Law Regulating Employment Agreements in the United States and Canada*, 23 COMP. LAB. L. & POL’Y J. 1007, 1028 (2005) (stating that Canadian workers are protected by a variety of provincial employment discrimination laws).

workers' compensation, and pension laws. There is only a narrow category of employers who are regulated nationally, which include companies like Air Canada and communication companies.⁷⁴ Otherwise, the general rule is that companies and employment relationships are regulated provincially.⁷⁵ So, if a company or entrepreneur wishes to employ individuals in Vancouver and Toronto, they will be required to comply with two different sets of employment laws, in British Columbia and Ontario.⁷⁶

Second, there is no common law equivalent to the U.S. "at will" concept in Canada. I understand "at will" to be the ability of an employer to fire a person for any reason or no reason as long as it is done in compliance with human rights laws.⁷⁷ In Canada, it is true that you can be fired for any reason or no reason, but an employer has to provide working notice to employees.⁷⁸ This requires employers to give notice of a particular period of time or to pay the employee for the notice they would have otherwise received.⁷⁹ Typically, employment standards legislation in various provinces will set out notice periods.⁸⁰ In Ontario, which is probably the most relevant jurisdiction here, the general rule under the statute is one week to a maximum of eight weeks.⁸¹ So if you have an employee who has been working for you for two years, you are required to give him about two weeks of notice.⁸²

This is where it becomes more complicated. My third point is that, in addition to the statute, there is also a common law notice period.⁸³ My American clients refer to this as the "Canadian mystery notice period."⁸⁴ The

⁷⁴ See generally *Overview: Discrimination and Harassment: Federally Regulated Organizations*, CANADIAN HUMAN RIGHTS COMMISSION, http://www.chrc-cddp.ca/discrimination/federally_regulated-en.asp (last visited Oct. 14, 2007) (listing Canadian federally regulated industries covered by the Canadian Human Rights Act).

⁷⁵ See generally Alexandrowicz, *supra* note 73, at 1030 (stating that employees are protected against discrimination on various prohibited grounds by provincial human rights statutes).

⁷⁶ See generally *id.* (stating that individual Canadian employees have significant rights at common law).

⁷⁷ See Marc Cote, *Getting Dooced: Employee Blogs and Employer Blogging Policies Under the National Labor Relations Act*, 82 WASH. L. REV. 121, 124 (2007).

⁷⁸ Walter Stella & Patricia Forte, *Employers Find a Different World Up (or Down) There: Workers' Rights Vary Dramatically North and South of the Border*, THE NAT'L L.J., Apr. 18, 2007, available at <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1176800663236>.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Employment Standards Act, 2000 S.O., ch. 41 (Can.).

⁸² See *id.* (requiring at least two weeks of notice if the employee's period of employment is one year or more and fewer than three years).

⁸³ See Stella & Forte, *supra* note 78 (stating that there is no formula to calculate a "reasonable notice" period in common law).

⁸⁴ See generally *id.* (describing common law notice as "an art rather than a science").

rule of thumb is about one month per year of service.⁸⁵ So if an employee decides to see you in Court because you fired them, you may be required to pay them considerably more in damages than you would under the statute.⁸⁶ For example, the employee who would get two weeks of notice under the statute may be entitled up to two months or more of common law notice.⁸⁷ This may be confusing because it is not written down anywhere.⁸⁸ This is one good reason why you need counsel in this area.

Finally, there is extensive statutory regulation. I suspect this is one of the reasons why Canada ranks lower than the United States on flexibility of employment. We have more extensive regulation in a number of areas including occupational health and safety, in which we take a slightly different approach, pension legislation and workers' compensation.⁸⁹ Additionally, there are many pitfalls.

Employment standards legislation sets this floor of rights.⁹⁰ You can't go below the floor,⁹¹ you can't contract out of it,⁹² and generally speaking, there are no exceptions for small employers, including the entrepreneur class, who may only have a very limited payroll or only a few employees.⁹³ Generally speaking, there is no exception.⁹⁴

There are, however, a couple of areas where smaller employers are exempted. One important area in Ontario is the severance obligation. This is a separate obligation under Ontario legislation to pay employees for service when you fire them.⁹⁵ Generally speaking, it would be employees with five years or more of service, and the employer has to have a payroll of \$2.5

⁸⁵ See *id.* (stating that judges and lawyers apply an unofficial guideline to assess the notice period for employees who have a lengthy tenure of employment in the range of about one month per year of service, but this guideline does not apply for employees with a shorter tenure of employment).

⁸⁶ See *id.* (stating that common law is often invoked to increase the minimum notice period prescribed by statute).

⁸⁷ *Id.*

⁸⁸ See *generally id.* (determining common law notice on a case-by-case basis).

⁸⁹ See THE WORLD BANK, DOING BUSINESS IN 2006: OECD-HIGH INCOME REGION 13 (2005), available at <http://www.doingbusiness.org/documents/2006-OECD.pdf> (ranking countries in OCED-high income region category, including the United States and Canada, in Rigidity of Employment Index).

⁹⁰ See Ontario Ministry of Labor: Employment Standards, <http://www.labour.gov.on.ca/english/es/> (last visited Nov. 10, 2007) (explaining that the Employment Standards Act, 2000 sets out the "minimum standards" that employers and employees must follow).

⁹¹ *Id.*

⁹² Employment Standards Act, *supra* note 81.

⁹³ *Cf. id.* (omitting small employers from the Exceptions section to whom the Act does not apply).

⁹⁴ *Id.*

⁹⁵ Employment Standards Act, S.O. 2000 S.O., ch. 41 (Can.).

million or more. So this is an exception available to a smaller employer or entrepreneur just starting up in Ontario. Another example is emergency leave entitlements. We have fairly extensive leave provisions in our employment standards legislation⁹⁶ that provide for ten days leave without pay due to personal or family illness.⁹⁷ This applies to employers with 50 or more employees.⁹⁸ Therefore, small employers and entrepreneurs starting out in Ontario would not have to provide that benefit under the employment standards legislation.⁹⁹

I think the general rule is that employment standards are quite rigid. So how do companies, American companies, American entrepreneurs and small Canadian companies get around the rigidity? This brings me to my next topic: independent contractors. Companies will say, given all of the regulation that we are seeing across the country, "Why can't we just make everybody an independent contractor and avoid the whole spectrum of employment laws?" I get this request all the time. And there are certain advantages to doing this, including a higher degree of flexibility and often tax advantages.¹⁰⁰ Given these tax benefits, you may find people who would be very happy to be independent contractors, at least at the initial stages. This is a situation where everybody initially thinks this is a great idea, they call me and I have to tell them that it is, in fact, a bad idea.

First of all, sometimes I find that clients, particularly those who do not know a great deal about employment law in Canada, think they can avoid the entire gamut of employment regulation by creating an independent contractor situation. In fact, occupational health and safety legislation applies whether people are employees or independent contractors.¹⁰¹ Human rights laws also apply regardless.¹⁰² With respect to common law notice periods, there has

⁹⁶ See generally Employment Standards Act, 2000 S.O., ch. 41 (Can.) (listing all the different leave provisions, including pregnancy leave, parental leave, family medical leave, and emergency leave).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Cf. id.* (stating that an employee whose employer "regularly employs 50 or more employers" is entitled to emergency leave of 10 days).

¹⁰⁰ See Leanne E. Standryk, *Contracts and Self-Employment: A Workforce Perspective*, Lancaster, Brooks & Welch LLP, <http://www.lbwlawyers.com/publications/contractandselfemployment.php> (last visited Sept. 28, 2007) (describing the freedom of independent contractors to decide whom to work for, when to work and how to work, as well as their entitlement to business related tax deductions as advantages of being an independent contractor).

¹⁰¹ See generally Health and Safety, Ontario Ministry of Labour, <http://www.labour.gov.on.ca/english/hs/> (last visited October 5, 2007) (explaining that the Occupational Health and Safety Act sets out the rights and duties of "all parties in the workplace," including "every worker, supervisor, employer, constructor and workplace owner").

¹⁰² See generally Canadian Human Rights Act, R.S.C., ch. H-6 (1985) (stating that the Act

been recent case law that has confirmed that independent contractors may also be entitled to reasonable notice of termination.¹⁰³ So, if you fire an independent contractor and you think you avoided your month per year of obligation, you may be surprised to discover that, in fact, the independent contractor still has entitlement.

The other problem is that you need a true independent contractor relationship. What governs is substance rather than form. The fact that you paper it as an independent contractor relationship is not going to suffice if, in substance, what is really happening is a relationship of control where the person is truly an employee.¹⁰⁴ As a result, you may have an employment or tax authority taking a look at your relationship and declaring that you have not really created an independent contractor relationship. Penalties and problems may arise.¹⁰⁵

If you want to create independent contractor relationship in Ontario to avoid rigid employment regulations that we in some cases have, the first thing I tell my clients is that you have to create a non-exclusive relationship.¹⁰⁶ You cannot require an individual to work exclusively for you and declare that they are an independent contractor.¹⁰⁷ This is the essence of the independent contractor; they work for a number of employers. That usually stops the discussion. Most companies and most entrepreneurs want exclusive relationships. For example, they do not want to have people on their sales team who are able to go off and work for other employers. Some of the other factors that are present in an independent contractor relationship include limited control and supervision and ownership of tools (generally independent contractors own their cars, their vans, their vehicles). Employers cannot provide benefits to independent contractors.¹⁰⁸ If you want to provide extended healthcare benefits to your independent contractors, they are

extends to laws in Canada to give effect to the principle that “all individuals” should have equal opportunity and should not be prevented from doing so by discriminatory practices).

¹⁰³ *But cf.* JKC Enterprises Ltd. et al. v. Woolworth Canada Inc. et al., [2001] 300 A.R. 1 (Can.) (finding that notice is not required for independent contractors, but there are many cases of an “intermediate nature” that are neither one of employer-employee relationship nor employer-independent contractor relationship where a reasonable notice is implied).

¹⁰⁴ *See, e.g.*, Belton v. Liberty Ins. Co. of Canada, [2004] 72 O.R.3d 81 (Can.) (finding that an employer-employee relationship exists where the employer exerted much control over the agents, despite the explicit language of “independent contractor” in the employment agreement).

¹⁰⁵ *Id.*

¹⁰⁶ *See id.* (identifying the question of whether or not the agent was limited exclusively to the service of the principal as one of the four principles used to distinguish independent contractors from employees).

¹⁰⁷ *Id.*

¹⁰⁸ *See generally id.* (describing an independent contractor as having an investment or interest in “what are characterized as the ‘tools’ relating to his service”).

probably employees.¹⁰⁹ Independent contractors typically invoice a business, if you want to put them on payroll, they are probably not independent contractors. So, in theory, independent contractors are a great idea. But in practice, they are a bad idea.

Regardless of whether you are creating an employment relationship or independent contractor relationship, it is extremely important to have a well-drafted contract. It is remarkable how many employers or principals in Ontario do not have formal contracts. They have offer letters, very minimal documents. I suppose this is done with the hope that it will work out, that there will be no problems. However, the general recommendation that we make to companies starting out is that they ensure their contracts are well drafted and enforceable to avoid problems in the future.

What are some of the benefits of doing this? Well, the first benefit is that it is possible to contract out of common law obligations that an employer may have. The common law obligations in Ontario and other provinces are more onerous than American common law obligations. If you are trying to mirror more closely the American employment relationships, you need to contract out of our common law.¹¹⁰ The notice period that an employer has to pay upon termination is a very good example of an area where you will wish to contract out. You need to do this explicitly. Be very clear because the courts do not like you to contract out of common law, and they will try to ensure that the common law survives and resurfaces unless you are very clear.¹¹¹

You can also use a contract to protect against competition and loss of intellectual property. Often an entrepreneur is someone who has a new idea. Is it an innovative idea? Is it some process, some invention that is being brought across the border? The interest in protecting the intellectual property and preventing competition may be very high. This is one of the reasons why the contract, whether it is an employment contract or or a contract with an independent contractor, needs to be crystal clear.

There has been a very interesting recent 2006 decision from the Ontario Court of Appeals, *IT/Net Inc. v. Cameron*; it illustrates why you have to draft your restrictive covenants as clearly as possible.¹¹² What the employee did in this case was not a very nice thing to do,¹¹³ and if the contract had been

¹⁰⁹ Cf. Standryk, *supra* note 100 (stating that the independent contractor is not eligible for employment insurance benefits).

¹¹⁰ See, e.g., *McDonald v. ADGA Sys. Int'l Ltd.*, [1999] 117 O.A.C. 95 (Can.) (upholding a contractual clause that rebutted the common law presumption of reasonable notice).

¹¹¹ See, e.g., *IT/NET Inc. v. Cameron*, [2006] 207 O.A.C. 26 (Can.) (finding that the employee did not breach the restrictive covenant in an employment contract because the covenant goes beyond what is needed to protect the proprietary interest of the employer).

¹¹² *Id.*

¹¹³ *Id.*

drafted clearly, the court would have upheld it and would have awarded the employer damages for the employee's competition and solicitation.¹¹⁴ However, the clause that the employer had drafted was too broad, had no temporal limitations, no geographical limitations and a degree of ambiguity.¹¹⁵ The court concluded that the entire non-compete clause should be struck out.¹¹⁶ The employer tried as a fallback to argue that the employee was a common law fiduciary who owed duties that would survive even if the clause was struck out.¹¹⁷ The court did not agree.¹¹⁸ The employer had turned its mind to this issue and, therefore, the clause was unenforceable. The common law would not come to the employer's rescue in this situation.¹¹⁹ Even though the court was willing to concede what the employee had done was improper and could have been prevented by a contract, the court was not willing to award damages. So, the lesson is that the restrictive covenant must be drafted as clearly as possible in order to be enforceable.¹²⁰ Otherwise, it will be struck out, and the employer will be out of luck.

A few comments on compensation issues: The governing principles that tend to apply when companies are starting out are those of maximum flexibility and maximum discretion with respect to compensation. However, as Ben pointed out, attracting good workers and retaining them is very problematic in the current economy. So it is important for compensation to be competitive and to be consistent with the market.

I have had situations recently where I can honestly say that I felt my clients were being held hostage by employees who were so crucial to their operations that they could not afford to lose these employees. I will give you an example. One of my clients recently was in renegotiations with a CFO. This was a very small company, very entrepreneurial. The CFO wanted a golden parachute. She said, "If you fire me for any reason or no reason, I want \$100,000. If I decide to quit, I want \$100,000." My client called me and said they were thinking of agreeing to this because they hoped the clause would be unenforceable by a court due to unconscionability. First of all, I asked them why they would pay anybody \$100,000 for resigning. As soon as the employee signs the contract, she is going to quit and it is like winning the

¹¹⁴ See *id.* (holding that the restrictive covenant goes beyond what is needed to protect the proprietary interest of the employer, but it would have been entirely reasonable if it simply prohibited the employee from assisting employer's competitor to obtain a contract with a client of employer to fill the very position he had occupied with that client).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See *id.* (holding that a restrictive covenant was unenforceable because it was not reasonable).

¹²⁰ Cf. *id.* (holding an ambiguous restrictive covenant unenforceable).

lottery. Why would they agree to that? Second, they are the employer. I do not think that a court is going to come to their rescue and find that this is some kind of provision contrary to public policy. I told them to rethink their position. If you can believe it, this employee was so valuable to the company they agreed to the \$100,000. It is in the contract. I am waiting to see what's going to happen, whether the CFO will simply quit next week, take her money, and run. That is an example of being held hostage because an employer is so reliant on a particular employee that they cannot afford to lose her.

We always think of employment as being this imbalance of power, and 99% of the time it is. The employer has all the cards, imposes the working terms and conditions. However, in rare cases, it works in reverse and the law does not contemplate this.¹²¹ In fact, our Supreme Court of Canada has repeatedly said that it is a legal assumption that there is an inherent balance of power in every employment relationship.¹²² It is probably true in most cases, but I have seen examples where the assumption does not hold. I do find that some people or employers can be held hostage in certain cases.

One of the good things for employers is the availability of the public healthcare system across the country. This means that healthcare is not a benefit that needs to be provided and not a basis upon which to attract employees.¹²³ Many employers will provide extended healthcare benefits such as dental, vision, drugs, etc. However, small companies starting out do not usually offer these kinds of benefits because they are quite expensive. The message that I have given to my clients who are starting up in Ontario, is to hold off on significant benefits. However, it is worthwhile to discuss the issue with consultants to find out what's being offered in any particular industry.

There may also be a benefit to be gained from considering employer contributions to RRSP, which is our individual pension plan,¹²⁴ rather than providing an employer-sponsored pension plan. Consider providing some

¹²¹ See generally Janis Sarra, *Labour Arbitration: Recent Developments in Judicial Review of Arbitration Decisions, Dancing the Two-Step in British Columbia*, 36 U.B.C.L. REV. 311, 311-12 (2003) (describing collective bargaining as a means through which unions enhance the terms and working conditions of employees, where the labor relations law recognizes the "inherent imbalance in power" between employers and employees).

¹²² See, e.g., *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, 741 (Can.).

¹²³ See generally Canadian Health Care, <http://www.canadian-healthcare.org/> (last visited Nov. 10, 2007) (stating that Canada's public health care system is provided to all Canadian citizens); cf. Sherry A. Glied & Phyllis C. Borzi, *Devising Solutions: The Current State of Employment Based Health Coverage*, 32 J. L. MED. & ETHICS 404, 404 (2004) (explaining that during and after World War II, American employers sought to attract workers by offering health insurance in lieu of wage increases).

¹²⁴ RRSP - Glossary, Canada Revenue Agency, <http://www.cra-arc.gc.ca/tax/individuals/topics/rrsp/glossary-e.html> (last visited Nov. 10, 2007).

sort of flexible and efficient benefit that satisfies employees' pension needs. Employment lawyers can certainly help to create this. It is also important to consult with tax lawyers to determine the tax consequences of offering certain benefits rather than others.

I will now talk about crossing the border. It seems to me there are three scenarios that need to be considered. First is those individuals immigrating to Canada to become entrepreneurs. Second is Americans entering Canada to conduct business with the intention of returning to the U.S. after a short visit. Third is employers wishing to transfer employees to Canada.

Now, I would have thought that the idea of people immigrating to Canada as entrepreneurs from the U.S. would be a fairly rare occurrence, but last night as I drove in from the airport, my cab driver asked me where I was from. When I told him I was from Canada, he proceeded to tell me that he and his cousin in South Asia were thinking of establishing a PVC pipe business in British Columbia, and he would be moving there if this plan went ahead. He is an American citizen. I was convinced that the conference organizers set me up because it was just too much of a coincidence.

MR. JEFFERS: He needed investors.

MR. CRAIG: He had an idea that PVC would be great in the Vancouver climate, as it is similar to Seattle where a lot of PVC is needed. So there was an American entrepreneur who told me that he was thinking of moving to Vancouver. Naturally, I explained the requirements to him.

One of the things I thought was notable is that there is an entrepreneur class of immigrants. One has to commit to \$300,000 of investment in the country,¹²⁵ and it takes between 36 to 48 months, or three to four years before an entrepreneurial application will be processed.¹²⁶ I would have thought that an entrepreneur who wanted to come to Canada would lose interest quickly given the application time.¹²⁷ I wanted to investigate a little further because I find it hard to believe that we could have a system that is so inefficient. I have been told that only a thousand people have come in the last few years under this program.¹²⁸ Perhaps this is one of the reasons why.

¹²⁵ See generally *Entrepreneurs: Definitions, Citizenship and Immigration Canada* <http://www.cic.gc.ca/english/immigrate/business/entrepreneurs/definitions.asp> (last visited Nov. 10, 2007) (stating that an entrepreneur must have a legally obtained minimum net worth of \$300,000).

¹²⁶ See generally *Canada Business and Investment Immigration Overview*, <http://www.immigration.ca/permres-business-overview.asp> (last visited Nov. 10, 2007) (explaining that the federal entrepreneur program application processing delays regularly exceed 2.5 years).

¹²⁷ See *id.* (stating the years of application processing delay).

¹²⁸ See generally *CITIZENSHIP AND IMMIGRATION CAN., ANNUAL REPORT TO PARLIAMENT ON IMMIGRATION 2006 18 (2006)*, available at http://www.cic.gc.ca/english/pdf/pub/immigration2006_e.pdf (reporting that the number of permanent residents in the Entrepreneurs Class for 2005 was 2,848).

The more common scenario is Americans crossing the border to conduct business for a day or a week and then returning. Our system is relatively flexible on this front. There are visas that can be obtained, and many of you are probably aware of this process. Where this becomes complex, it is important to have immigration consultants to assist you. I recently had a client in the U.S., an American media company, who was sending two of their journalists across the border to Toronto. The complicating factor was that both of these employees were minors and their parents were not able to travel with them. We had to figure out how we can get two 16 year-olds across the border with only two days notice. Finding the answer quickly was quite difficult because we found the materials that the immigration authorities in Canada provided to be impenetrable. There was a form that required the parents to grant consent and transfer guardianship of these two teenagers to a representative of the company for a narrow period of time. If something happened and these two teenagers had to stay in Canada longer, another form was required. The process was very complicated. The bottom line is to consult with experts when necessary.

Thank you very much.

DISCUSSION FOLLOWING THE REMARKS OF BENJAMIN W.
JEFFERS AND JOHN D. R. CRAIG

MR. TORMA: John, thank you very much. It was an excellent presentation.

The closing comment is to remind us that we need to use the legal counsel that is available. We may ask ourselves, gee, isn't that rather expensive? Well, I use the analogy that education is expensive. The only thing more expensive than education is ignorance. So I think we would be penny wise and a pound foolish not to take that advice.

Are there any questions, a few comments? Let's see first from the audience if there are any questions.

Henry?

DR. KING: Yeah. I wanted to get the comments on the duration of non-compete clauses both in Canada and the United States. What is a reasonable point in time for a non-compete clause?

MR. JEFFERS: I won't give you the "depends" answer, but I will say if you are in a fast-moving industry where there is a lot of change, a lot of innovation, maybe six months in some jurisdictions would be considered reasonable.¹²⁹ That may be all that you really need in terms of trying to keep

¹²⁹ See, e.g., *DoubleClick, Inc. v. Henderson*, No. 116914/97, 1997 N.Y. Misc. LEXIS 577, at *23 (Sup. Ct. N.Y. Nov. 5, 1997) (enjoining defendants for six months because a one year restrictive covenant was too long given the dynamic nature of the internet industry).