

CHAPTER 1: HUMAN RIGHTS LEGISLATION AND THE RECOGNITION OF FOREIGN CREDENTIALS

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Recognition of foreign credentials has been a topic of discussion in Canada for some time. Many immigrants who have obtained their education, training or work experience abroad face challenges in having their credentials properly recognized in Canada. One method of recourse for these professional immigrants has been through human rights legislation. Several human rights decisions have directly considered whether place of education, training, and work/vocational experience can be considered a prohibited ground of discrimination.

In *Bitonti v British Columbia (Minister of Health)*, the British Columbia Council of Human Rights determined that place of training was highly correlated to place of origin, which is an enumerated ground. Because of this correlation, a distinction based on place of training was found to be discrimination based on place of origin. In the *Meiorin Grievance*, the Supreme Court of Canada provided a procedure to determine whether a prima facie discriminatory employment standard is justifiable. This procedure was subsequently applied in several decisions including *Bitonti*.

Because of existing barriers, achieving full accreditation to work in a regulated occupation in Canada can be a slow, expensive and demoralizing process for those educated abroad. It can result in self-doubt, insecurity and frustration for those holding foreign credentials, and it can also adversely impact Canada's economic and social well-being. This paper recommends that there be:

- ***Inclusion of “place of education, training, and work/vocational experience” as a prohibited ground of discrimination in human rights codes;***
- ***Improvements made to fair access legislation to allow government administrators to make legally binding orders; and***
- ***A multi-dimensional approach to reform whereby changes made to human rights legislation and improvements to fair access legislation would provide professional immigrants with several routes to binding dispute resolution.***

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I. INTRODUCTION

Professional immigrants face many barriers when first arriving in Canada; attempting to practise within their fields of training remains one of the more exhausting and challenging hurdles to obtaining economic and social success and well-being. Many immigrants who spent years achieving professional success in their home countries are often forced to start over in Canada, even when they are already adequately qualified to work in a given occupation. The process of obtaining accreditation for training received elsewhere may require a significant amount of time, money and effort, forcing some immigrants to simply give up and find alternate employment which is often below their levels of education, training and experience. The result is a significant waste of human capital. One of the major issues regarding foreign credentials remains the inability of regulators to properly assess the qualifications of foreign-trained persons. Many times indicators of competence are often unduly onerous and result in additional expense to emotionally and financially stressed newcomers.

One method of recourse for these newcomers has been through human rights laws. Human rights legislation exists in Canada at the federal level and in each province and territory. Which laws are relevant in given circumstances depends on the division of powers in the *Constitution Act, 1867*.¹ Regulation of employment, professions and trades generally falls within provincial jurisdiction, and is thus subject to the provincial human rights statutes.² The federal *Canadian Human Rights Act* applies to the activities of the federal government and the federally regulated private sector, which includes industries such as airlines and telecommunications.³ Human rights codes have been recognized by the Supreme Court of Canada (SCC) as having a “special nature and purpose [which is] not quite constitutional but certainly more than ordinary”.⁴

The prohibition of discrimination is the central tenet of human rights codes in Canada. In fact “[s]trictly speaking it would make more sense to speak of ... anti-discrimination legislation than of human rights legislation.”⁵ The Supreme Court of Canada provided a general definition of discrimination in *Law Society of British Columbia v Andrews*:

Discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not

¹ “Human Rights Law Basics”, online: Canadian Human Rights Reporter <<http://www.cdn-hr-reporter.ca>> [Human Rights Law Basics].

² *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92 reprinted in RSC 1985, App II, No 5.

³ *Ibid* at s 91.

⁴ *Ontario (Human Rights Commission) v Simpsons Sears Ltd*, [1985] 2 SCR 536 at para 12, 23 DLR (4th) 321 [*Simpsons Sears*, cited to SCR].

⁵ Stanley Corbett, *Canadian Human Rights Law & Commentary*, (Markham, Ont: LexisNexis Canada, 2007) at 24.

imposed on others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.⁶

There may be subtle variations in how human rights statutes in the various provinces, territories and at the federal level define “discrimination” as well as which enumerated grounds are included, directly or implicitly, under the various statutes. All of Canada’s human rights statutes include provisions which exempt certain kinds of discrimination from their scope, or justify those acts. Again, there can be variations in the details of the statutes, but the general approach to justification has been set out by the Supreme Court of Canada in *Meiorin*.⁷ There are three requirements articulated in *Meiorin* that are required to justify a discriminatory employment standard. The standard must (i) be adopted “for a purpose rationally connected to the performance of the job,” (ii) have been implemented with “an honest and good faith belief that it was necessary to ... that legitimate work-related purpose,” and (iii) be “reasonably necessary to the accomplishment of that legitimate work-related purpose.”⁸

Early cases found that discrimination can be established either “direct[ly],” or based on “adverse effect[s].”⁹ “[D]irect discrimination” is “where an employer adopts a practice or rule which on its face discriminates on a prohibited ground,”¹⁰ whereas

adverse effect discrimination ... arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral ... but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.¹¹

More recently, in *Meiorin*, the Supreme Court of Canada found that it is not always easy to place a case completely within one category or the other, and so the same justification test and remedial approach should be taken in all cases.¹² Although *Meiorin* was a case dealing with employment standards

⁶ [1989] 1 SCR 143, para 37, [1989] SCJ No 6 [*Andrews*, cited to SCR].

⁷ See *British Columbia (Public Services Employee Relations Comm) v British Columbia Government and Service Employees' Union (BCGSEU) (Meiorin Grievance)* [1999] 3 SCR 3, 176 DLR (4th) 1 [*Meiorin*, cited to SCR].

⁸ *Ibid* at para 54.

⁹ *Simpsons Sears*, *supra* note 4 at para 18.

¹⁰ *Ibid*.

¹¹ *Ibid*.

¹² *Meiorin*, *supra* note 7 at paras 28-31, 50-53; *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* [1999] 3 SCR 868, at paras 16-17, 181 DLR (4th) 385 [*Grismer*, cited to SCR].

outside of the regulated occupations, this new “unified approach” has also been applied to standards established by regulatory bodies.¹³

II. PLACE OF EDUCATION, TRAINING OR WORK/VOCATIONAL EXPERIENCE

Both human rights tribunals and courts have had to grapple with the question of whether discrimination against individuals with foreign training or work experience falls within the scope of an expressly enumerated ground, such as place or origin or birth. In a number of cases, complainants have been able to convince human rights tribunals that a human rights statute has been breached by the manner in which a regulatory authority has treated individuals with foreign training or work experience.

The British Columbia Council of Human Rights’ decision in *Bitonti* suggests that a distinction based on place of education or training may be based on an expressly prohibited ground of discrimination in some circumstances.¹⁴ In *Bitonti*, legislation in British Columbia distinguished medical graduates based on the country where their medical credentials were earned. “Category I” medical graduates included those who obtained their credentials “in Canada, the United States, Great Britain, Ireland, Australia, New Zealand or South Africa; ‘Category II’ included graduates of medical schools anywhere else in the world.”¹⁵ Graduates of medical schools in “Category II” countries had more onerous requirements to obtain licensure with respect to “post-graduate training.” These graduates had to complete two years of such training “in a Category I country,” and at least one year had to be in Canada. “Category I”

¹³ *Bitonti v British Columbia (Minister of Health)* (1999), 36 CHRR D/263 (BCCHR) at paras 193-194 [*Bitonti*].

¹⁴ *Ibid* at para 190; see also *Neznanski v University of Toronto and John Provan* (1995), 24 CHRR D/187 (Ont Bd Inq) (“[o]stensibly, they are discriminated against on the basis of their foreign credentials. However, the effect often is to exclude groups linked to their place of origin, race, colour, or ethnic origin” at para 51); see also *Grover v Alberta (Human Rights Comm)* (1996), 28 CHRR D/318 (Alta QB) (the court implies that a distinction based on place of training could be considered discrimination based on place of origin, but only where “there [is] a link between the facts and ‘place of origin.’” In the factual circumstances in this case “place of origin of a person ... cannot be stretched to include the place where the person received their PhD degree” at para 42); contra *Fletcher Challenge Ltd v British Columbia (Council of Human Rights) and Grewal* (1992), 18 CHRR D/422 (BCSC) (in considering whether language requirements are discriminatory, the court said “language is directly related to ... place of origin. But it cannot be said to be necessarily related. Apart from its capacity to convey culture, language is also a communication skill that may be learned, and the ability to learn any language is not dependent on race, colour or ancestry” at para 32).

¹⁵ *Bitonti*, *supra* note 13 at para 1.

graduates only had to obtain one year of this training “in an approved hospital.”¹⁶

The Council explicitly stated that “‘place of origin’ does not include place of medical training *per se*,” but rather that the distinction based on whether one was trained in a “Category I” or “Category II” country had the *effect* of discriminating based on place of origin.¹⁷ The Council essentially determined that “place of birth in a defined set of countries constitutes a place of origin within the meaning of the *Act*.”¹⁸ Because “the correlation between place of origin and place of graduation is high,”¹⁹ the distinction had the effect of “plac[ing] an obstacle to membership in the College for persons with a Category II medical education, almost all of whom have a Category II place of origin.”²⁰

The nature of the decision in *Bitonti*, while illuminating a possible route to bring a human rights complaint based on place of training, also highlights why it would be advantageous to amend human rights codes to include place of education, training, or work/vocational experience as an enumerated ground of discrimination. With such a ground clearly enumerated, it would be significantly easier for complainants to establish direct *prima facie* discrimination. Instead of having to prove, as in *Bitonti*, that there is a high correlation between place of origin and place of education, training or work/vocational experience, one would simply have to show that a distinction is being made based on this ground, and it denies her or him some benefit or advantage that is available to other members of society, or that it imposes some burden or disadvantage that is not faced by other members of society. Adverse effects discrimination would also be easier to establish for the same reason – correlation or analogy to another ground would not need to be proven.

The concept of adverse effects discrimination makes it clear that even if there is formal equality present, a provision can still be discriminatory. In *Siadat v Ontario College of Teachers* for example, “to teach in Ontario’s publicly funded” schools, one had to have a “Certificate of Qualification” from the Ontario College of Teachers.²¹ The College had a uniform policy requiring official documents regarding a person’s teacher education program to be sent directly from the educational institution where the credential was obtained.²² Ms. Siadat was a teacher for sixteen years in Iran, before encountering political persecution and being accepted as a “Convention refugee in Canada.”²³ Ms.

¹⁶ *Ibid* at para 32.

¹⁷ *Ibid* at paras 158 & 176.

¹⁸ *Ibid* at para 161.

¹⁹ *Ibid* at para 147.

²⁰ *Ibid* at para 180.

²¹ *Siadat v Ontario College of Teachers* (2007) 83 OR (3d) 401 (Div Ct) at para 3, [2007] OJ No 65.

²² *Ibid* at para 7.

²³ *Ibid* at para 9.

Siadat's main difficulty was that, because of her persecution in Iran, she was unable to have the relevant documents sent from the granting institution, given that they "[were] all held by the Ministry of Education there, which [was], in effect her prosecutor as a political dissident."²⁴

Ms. Siadat did possess an identification card from Iran identifying her as a teacher, as well as "a handwritten copy of what purports to be her transcript," obtained illegally from a friend in Iran, and "photocopies of her Bachelor's Degree in teaching."²⁵ As a result of these circumstances, Ms. Siadat sought the provision of "alternate ways of further showing her qualifications."²⁶ She made various suggestions to establish her qualifications, including conducting a hearing at which she could be examined and cross-examined about her educational background, reviewing the documents she submitted, and hearing evidence from other teachers who were trained in Iran, or conducting a test aimed at verifying her substantive proficiency.

The court asserted that "Ms. Siadat's problems with her application to the College directly relate[d] to her place of origin."²⁷ Ms. Siadat sought, in addition to the provision of what evidence she had of her qualifications, "accommodation from the usual requirements" which she could not meet because of her origins in Iran.²⁸ The court determined that the Committee did not adequately address the issue of accommodation, and their decision was "rescinded, and the application ... referred back to the Committee for re-hearing."²⁹ Even though Ms. Siadat was only being subjected to the same requirements as everyone else, in her circumstances this amounted to discrimination. There was no overt distinction being made of course, but in effect the measure distinguished based on a prohibited ground and resulted in a disadvantage to her, and limited her access to opportunities that others in society were afforded.

In *Keith v Newfoundland Dental Board*, the Newfoundland and Labrador Supreme Court considered whether the requirements that had to be met for foreign-trained dentists to move from provisional to full licences were discriminatory.³⁰ The court agreed with a board of inquiry decision that the requirements were contrary to the provisions of the provincial human rights statute. All of these foreign-trained dentists practised in Newfoundland for between eighteen and twenty-seven years with provisional licences, and "[p]reviously they had all been licensed ... in the United Kingdom."³¹ The

²⁴ *Ibid* at para 11.

²⁵ *Ibid* at paras 12-14.

²⁶ *Ibid* at para 16.

²⁷ *Ibid* at para 46.

²⁸ *Ibid* at para 47.

²⁹ *Ibid* at para 65.

³⁰ *Keith v Newfoundland Dental Board*, 2005 NLTD 125, at para 1, 37 Admin LR (4th) 106.

³¹ *Ibid* at para 3.

provisions of their Newfoundland licences had no “clinical restrictions,” but they were “geographically restricted to areas of the Province deemed...to be underserved.”³² Holding provisional licences would keep them from enjoying the benefits of interprovincial labour mobility provisions in the *Agreement on Internal Trade*.³³ Although these dentists were licensed without requiring the “National Dental Examining Board of Canada (CDAD) certificate” as their Canadian-trained counterparts required,³⁴ in order to obtain full licensure they were required to finish “an eligibility examination, self-study and assessment by examination administered by Dalhousie University,” at a cost of \$15,000. None of this was required for domestically-trained dentists.³⁵ Although these requirements were considered less stringent than the CDAD, they still amounted to discrimination.³⁶ The court noted that the competence of this group of foreign-trained dentists was not contested. It agreed that the Dental Board’s rules “disproportionately, negatively and adversely impacted” these foreign-dentists and it “was based upon their national origin because of the significance placed upon their foreign training.”³⁷ The court concluded that the requirements were discriminatory because they “impos[ed] a burden ... and den[ie]d a benefit (national mobility),” to dentists who the Dental Board clearly thought were well-qualified, because of their lack of clinical restrictions.³⁸

In addition to the case law, Quebec’s Commission des Droits de la Personne et des Droits de la Jeunesse (the Commission) considered whether there was discrimination present in that province’s process for selecting candidates for medical residency.³⁹ The commission determined that certain influencing factors such as the time elapsed since a candidate’s studies and familiarity with medical practice in Quebec, amongst others, “constitute[d] obstacles that [had] a disproportionate exclusionary effect on [international medical graduates].”⁴⁰ The commission then determined that this distinction was based on “ethnic or national origin.” This determination was made because “data collected ... establishes a clear relationship between the ethnic origin of the candidate and his or her choice of place of training, considering that in almost every case, the candidates undertake medical training within the geographical areas of their

³² *Ibid.*

³³ *Ibid* at paras 6-8.

³⁴ *Ibid* at para 4.

³⁵ *Ibid* at para 9.

³⁶ *Ibid* at para 28.

³⁷ *Ibid* at para 32.

³⁸ *Ibid* at para 35

³⁹ *Investigation on its own Initiative of the Commission des Droits de la Personne et des Droits de la Jeunesse*, (Commission des Droits de la Personne et des Droits de la Jeunesse, 2010), online:

<http://www2.cdpcj.qc.ca/en/img/Documents/traduction_resolution_anglais_medecins_etran_gers.pdf>.

⁴⁰ *Ibid* at 7.

birth.”⁴¹ This correlation between place of birth and place of training corresponds closely to the findings in *Bitonti*.

These decisions in Canadian courts and tribunals have clearly shown that distinctions based on place of education, training, or work/vocational experience can be discriminatory. One of the most important roles of occupational regulatory bodies is to protect the public by establishing licensing requirements which ensure the safe and competent delivery of services. It is a legitimate concern that if additional requirements cannot be placed on those educated in other countries, it could lead to licensed practitioners who are not fully competent delivering services to Canadians, which would be unacceptable. However, providing an avenue through which *prima facie* discrimination can be more easily established would not have this effect; the relevant discriminatory standards can be justified if they can satisfy the “bona fide occupational requirement” test in *Meiorin*.⁴²

III. JUSTIFICATION FOR DISCRIMINATION

In *Meiorin*, the SCC “revised [the] approach to what an employer must show to justify a *prima facie* case of discrimination.”⁴³ The Court articulated a “three-step test for determining whether a *prima facie* discriminatory standard is a” Bona Fide Occupational Requirement (BFOR).⁴⁴ A *prima facie* discriminatory occupational standard can be justified by an employer by satisfying each of the three aspects of the test “on a balance of probabilities.”⁴⁵

The first step requires one to determine what the “standard is generally designed to achieve.” This purpose must then be shown to be rationally connected to “the objective requirements of the job.”⁴⁶ The second step of the test requires demonstration of the fact that the adoption of the standard was “thought to be reasonably necessary,” and “was [not] motivated by discriminatory animus.”⁴⁷ The requirement in the third step that the standard be reasonably necessary requires it to “be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant

⁴¹ *Ibid.*

⁴² See *Meiorin*, *supra* note 7.

⁴³ *Ibid* at para 3; see also *The Human Rights Code*, CCSM c H175, of Manitoba at s 14(6) (“[n]o trade union, employer, employers’ organization, occupational association, professional association or trade association” can “discriminate in respect of the right of membership or any other aspect of membership in the union, organization or association,” unless there is a bona fide and reasonable cause ... for the discrimination”); See also *Grismer*, *supra* note 12.

⁴⁴ *Meiorin*, *supra* note 7 at para 54.

⁴⁵ *Ibid* at para 54.

⁴⁶ *Ibid* at paras 57-58.

⁴⁷ *Ibid* at para 60.

without imposing undue hardship upon the employer.”⁴⁸ The SCC clarified that the word “undue” was used because of the reality that “some hardship is acceptable.”⁴⁹ The many different ways that “capabilities may be accommodated” must be taken into account. This includes not only “individual testing,” but also looking at a person’s “skills, capabilities and potential contributions ... [which] must be respected as much as possible.”⁵⁰

The decision in *Meiroin* puts a positive obligation on employers to “build conceptions of equality into workplace standards.”⁵¹ This obligation seems to imply that employers and regulators have a lawful obligation, where discrimination would otherwise exist against individuals with foreign training or experience, to establish mechanisms to accurately recognize foreign credentials or assess the substantive competencies of an individual, or both. The precise nature of the required mechanisms would depend on all the factual circumstances. As a result, a discriminatory standard with respect to foreign credentials established by an employer or regulatory body would not be justifiable if the employer or regulatory body has not actively attempted to accommodate the relevant person or group by establishing appropriate facilitative mechanisms.⁵²

IV. ALTERNATIVE AVENUES: THE CHARTER OF RIGHTS AND FREEDOMS

Another possible method of recourse for newcomers having difficulty attaining proper recognition of their credentials is through the *Charter*.⁵³ In *Eldridge v British Columbia (Attorney General)*, the SCC asserted that an entity can be subject to the *Charter* in one of two ways. First, if “the entity is itself ‘government’ for the purposes of s. 32,” the *Charter* will apply. Whether or not the entity is considered “government” depends on whether it can be characterized as such “either by its very nature or [by] virtue of the degree of governmental control exercised over it.”⁵⁴ If it is found that a body is itself “government,” then all of its actions must be guided by the *Charter*.⁵⁵ Second, it

⁴⁸ *Ibid* at para 54.

⁴⁹ *Ibid* at para 62.

⁵⁰ *Ibid* at para 64.

⁵¹ *Ibid* at para 68.

⁵² See e.g. Chapter 7: Facilitating Credentials Recognition at Frontline Agencies.

⁵³ *Canadian Charter of Rights and Freedoms*, s 15(1), Part I of the *Constitution Act*, 1982, being schedule B to the *Canada Act 1982* [UK], 1982, c 11 [*Charter*].

⁵⁴ *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 44, [1997] SCJ No 86 [*Eldridge*, cited to SCR].

⁵⁵ *Ibid*.

is possible for an actor that is not “government” *per se* to subject to the *Charter* in certain circumstances.⁵⁶

The government is able to give authority to entities that will not be subject to the *Charter* at all, such as private corporations, for example.⁵⁷ While private corporations are clearly not subject to the *Charter*, “... other statutory entities ... are not as clearly autonomous from government,” such as the many “public or quasi-public institutions that may be independent from government in some respects, but in other respects may exercise delegated governmental powers or be otherwise responsible for the implementation of government policy.”⁵⁸ In these circumstances, “one must scrutinize the quality of the act at issue, rather than the quality of the actor. If the act is truly ‘governmental’ in nature ... the entity performing it will be subject to ... the Charter only in respect of that act.”⁵⁹

Because legislation and regulations do not generally set specific entry requirements to regulated occupations, it is the regulatory bodies and their actions which would have to be subject to the *Charter* for a successful challenge to be possible. Regulatory bodies have been found to be subject to *Charter* scrutiny in a number of cases.⁶⁰ Whether or not a given body can be considered government *per se*, the erection of barriers to regulated occupations in order to ensure the safe delivery of services to Canadians is surely “implementing a specific government policy or program.”⁶¹ The government would not be able to implement its policy of requiring certain barriers to qualification in a discriminatory way by simply delegating the authority to erect those barriers to another entity. From this, we are able to draw the conclusion that regulatory bodies’ establishment of barriers to certification would be bound by the *Charter*.⁶²

⁵⁶ *Ibid.*

⁵⁷ *Ibid* at para 35.

⁵⁸ *Ibid* at para 36.

⁵⁹ *Ibid* at para 44.

⁶⁰ See e.g. *Black v Law Society of Alberta* [1989] 1 SCR 591, 58 DLR (4th) 317 [*Black*]; see e.g. *Histed v Law Society of Manitoba*, 2007 MBCA 150, 287 DLR (4th) 577 [*Histed*]; see e.g. *Rocket v Royal College of Dental Surgeons of Ontario* [1990] 2 SCR 232, 71 DLR (4th) 68; see e.g. *Andrews*, *supra* note 6.

⁶¹ See *Eldridge*, *supra* note 54 (“[i]n order for the Charter to apply to a private entity, it must be found to be implementing a specific governmental policy or program” at para 43).

⁶² See Peter W Hogg, *2009 Student Edition Constitutional Law of Canada* (Toronto: Carswell, 2009) (“[s]ince neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter. Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to ... all other action ... which depends for its validity on statutory authority” at 787); see also *Histed*, *supra* note 60 (“[t]he *Charter* applies to the exercise of statutory authority regardless of whether the actor is part of the government or is controlled by the government”. The Charter was found to apply to the Law Society of Manitoba because their “mandate under the *Act* is part of a regulatory scheme established by

Section 15 of the *Charter* protects individuals from discrimination on the basis of “race, national or ethnic origin, colour, religion, sex, age or mental or physical disability” or other analogous grounds.⁶³ Compared with the cases related to human rights codes, there has been a relatively small amount of litigation in this area related to the *Charter*. This is not surprising given the fact that a *Charter* challenge would involve a significant amount of litigation, and would be far more expensive for the complainant than a human rights complaint. Despite the relative dearth of precedents specifically relating to the *Charter*, some of the concepts established in the human rights cases may transfer to a *Charter* challenge. The most important potentially transferrable concept would be that a distinction based on place of training can be discriminatory based on place of origin in some circumstances.⁶⁴ This is significant because “national or ethnic origin” is an enumerated ground in the *Charter*.⁶⁵

In *Jamorski*, a 1988 Ontario Court of Appeal case, several graduates of Polish medical schools launched a s. 15 argument, asserting that certain rules in place regarding “admission to ... medical internships” were discriminatory.⁶⁶ These internships were required in order to gain entry to the practice of medicine in Ontario.⁶⁷ The legislation at issue distinguished between “accredited” medical schools, which included all Canadian and most American schools, and “unaccredited acceptable medical schools” which were ones “listed in the World Health Organization Directory,” and “this distinction ha[d] an important effect on securing an internship.”⁶⁸

The court provided two reasons why this distinction was not considered discriminatory in *Jamorski*. First, the graduates in this case were “not similarly situated to those who have graduated from accredited medical schools,” and it is not reasonable to expect Ontario regulators to treat graduates of an “unknown” system in the same way as graduates from a school that has “been carefully assessed and accredited.”⁶⁹ Second, the court determined that “there is nothing invidious or pejorative in the system of classification of medical schools.” If the

the Manitoba legislature to govern the affairs and activities of the legal profession” at para 43); see also Mary Cornish, Elizabeth McIntyre & Amanda Pask, “Strategies for Challenging Discriminatory Barriers to Foreign Credential Recognition” (Paper delivered at the National Conference – Shaping the Future: Qualification Recognition in the 21st Century, Toronto, 12-15 October 1999), online: Cavalluzzo, Hayes, Shilton, McIntyre & Cornish <<http://www.cavalluzzo.com>>.

⁶³ *Charter*, *supra* note 53, s 15.

⁶⁴ See e.g. *Bitonti*, *supra* note 13.

⁶⁵ *Charter*, *supra* note 53, s 15(1).

⁶⁶ *Jamorski v Ontario (Attorney General)* 5 Imm LR (2d) 312 at paras 1-2, 49 DLR (4th) 426 [*Jamorski*].

⁶⁷ *Ibid*.

⁶⁸ *Ibid* at paras 8-9, 18.

⁶⁹ *Ibid* at para 20.

distinction was based on a prohibited ground in section 15 there may be “an inference ... of an invidious or pejorative nature,” but a distinction based on “different educational qualifications” will not lead to that inference.⁷⁰ Additionally, the court stated that “even if it could be said that in some manner which has escaped me that s. 15 applies ... I would have no difficulty in [justifying the *Charter* breach under section 1].”⁷¹

It is possible that *Jamorski* would be decided differently today. The similarly situated argument used in *Jamorski* was rejected as bad law by the SCC in *Andrews*,⁷² and the court in *Jamorski* only considered that distinctions based on “different educational qualifications” are not discriminatory.⁷³ It was not considered that a high correlation between place of education and place of origin may result in distinction based on the former resulting in discrimination based on the latter, as was found in *Bitonti*. As the court in *Jamorski* was clearly aware, even if a standard is discriminatory, it could be justified under section 1 of the *Charter*, eliminating the worry that regulatory bodies would be unable to erect reasonable barriers to licensure to ensure the safe and competent delivery of services to Canadians. Only time will tell if the *Charter* route can be successfully taken in relation to barriers to entry to regulated occupations and the recognition of foreign credentials.

V. FLEXIBILITY IN ASSESSING COMPETENCY

The decision in *Meiorin* and the provisions in human rights codes requiring positive accommodative action up to the point where the employer (or regulator) suffers undue hardship raises questions regarding what can be done to properly assess credentials and competencies in a way that is not discriminatory. Where there is simply a requirement for the accurate assessment of an academic credential, facilitative mechanisms that are already being developed could be utilized to determine the Canadian value of a person’s credential.⁷⁴ In this case, the only accommodation that may be required would be the regulatory body’s recognition of a credential assessment performed by an independent body. There are numerous circumstances however, where the simple recognition of an academic credential will not be enough, and different mechanisms will be required to properly accommodate a person or group being discriminated against.

The issue is more complex when dealing with experienced practitioners. Typical barriers to entry to professions, such as required examinations, are not

⁷⁰ *Ibid* at para 21.

⁷¹ *Ibid* at para 22.

⁷² *Andrews*, *supra* note 6 at para 30.

⁷³ *Jamorski*, *supra* note 66 at para 21.

⁷⁴ See Chapter 7, Facilitating Credentials Recognition at Frontline Agencies.

appropriate because these practitioners are likely to have been away from some of the material covered by the examination for a significant period of time. This would also be the case if a Canadian-trained and experienced practitioner were required to write the entry examination. The issue is not that these people *could* not pass the examinations, the issue is that such a barrier is unnecessary and would require significant, unneeded periods of study.

Instead of establishing formal equality by requiring every member of a regulated occupation to pass the same test to be allowed to practise, the requirement of these bodies to accommodate should include the establishment of substantive equality through the construction and maintenance of mechanisms to assess and recognize clinical skills and competencies that are necessary for safe practice in the given occupation. Although such mechanisms could be expensive, they would also have numerous benefits. More competent practitioners in these occupations would lead to increased access to these services for Canadians, an increase in competition and a corresponding drop in prices. There would additionally be financial benefits in terms of income tax remittance from these skilled practitioners, and a better life for those holding foreign credentials in Canada.

Such accommodation would only be required if the relevant standard is determined to be discriminatory. As a result, the addition of place of education, training, and work/vocational experience as an enumerated ground would be a very clear and effective way to convey to regulatory bodies that the development of these mechanisms is not optional, but a requirement. It would provide a significant incentive for regulatory bodies to proactively establish appropriate mechanisms, and in circumstances where the required mechanisms would be difficult and expensive to establish and maintain, it may also encourage different jurisdictions to pool financial resources and expertise to develop pan-provincial solutions to problems related to foreign credentials and discriminatory barriers.

VI. RECOMMENDATIONS

Human rights regimes have contributed to a more enlightened approach to the admittance of foreign-trained individuals to regulated occupations in some provinces. In several cases, they have provided a forum for definitively resolving situations. They have helped to indicate the direction that should be followed as a matter of general policy. This includes the need for professional bodies to establish a variety of routes to test professional competence, including clinical assessment, rather than relying on methods that have the practical effect of excluding able foreign-trained applicants.

The human rights route however, has serious limitations. From the point of view of the complainant, the process can be slow, expensive, and demoralizing.

Prolonged delays are often experienced in bringing cases to resolution. In *Blencoe v British Columbia (Human Rights Commission)*, the Supreme Court of Canada held that thirty months was not an abuse of process in human rights cases where there is an attempt at protecting the claimant's rights.⁷⁵

There tends to be a severe imbalance in the power of the contestants when an official body denies recognition to a foreign-trained or experienced applicant. Pursuing a formal complaint exacts a material cost on the applicant who may already be in a state of diminished prosperity, or even poverty, as a result of recognition being denied. Pursuing the complaint costs the applicant time that could be spent earning income and the out of pocket costs that can include hiring legal counsel. It is true that under many human rights systems, such as that in Manitoba, the Human Rights Commission will investigate cases and pursue them on behalf of the complainant, including before tribunals and courts, if it finds the complainant's position to be sufficiently meritorious. In practice, however, in an area as complicated as recognition of the credentials and competencies of foreign-trained professionals, a complainant may have difficulty explaining his case to the commission without the assistance of legal counsel.⁷⁶ The entity denying recognition may have "deep pockets;" the money it obtains from membership dues may be very substantial. Furthermore, there is a severe asymmetry in emotional resources. The entity denying recognition will be acting through leaders and bureaucrats who have no great personal investment in a particular outcome in a single case. By contrast, the newcomer to Canada may find it humiliating and demoralizing to have her professional credentials or competency rejected. An individual may come from a society in which he is highly respected by professional peers and members of the public, and find himself rejected and excluded. The grounds for doing so often appear to the applicant – and justifiably so – as unfair, both to the applicant and the public. Compounding the stress can be the usual difficulties of adapting to a new society, and the shock of discovering that a society that is supposed to be advanced, free and enlightened can adopt practices that appear – and often are – based in economic self-interest, stereotypes or ignorance about other societies and the caliber of their training and testing systems. The entity denying registration often prevails in the war of material and emotional attrition long before a matter can ever be brought to adjudication. The newcomers may find the financial and emotional cost to be unsustainable, and either switch to a

⁷⁵ *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307 at paras 11 and 134.

⁷⁶ But see "Guide to a Human Rights Hearing", online: The Manitoba Human Rights Commission <<http://www.gov.mb.ca/hrc/publications/guidelines/guide-to-a-human-rights-hearing.pdf>> (in Manitoba, the complainant is not required to hire counsel (though he or she can), because the Manitoba Human Rights Commission's "[c]ounsel is responsible for presenting the case", while the respondent can either "represent him or her self or be represented by his/her own lawyer").

different occupation or move to another jurisdiction in which they will be fairly valued.

The human rights system has other inherent limitations as well. Human rights commissions and adjudicators may not be familiar with the issues involved in professional accreditation, and their jurisdiction is limited by the need to tie a case of professional exclusion to an enumerated ground of discrimination. Additionally, the system as a whole is driven by individual complaints in reaction to exclusion, rather than encouraging professional bodies to be proactive about producing across-the-board improvements in their credentialing processes that can benefit all applicants, whether foreign- or domestically-trained.

Under all human rights systems, there is jurisdiction for the commission to pursue a remedy, and for an independent tribunal to grant it, only if the complainant can demonstrate that his case satisfies the legal requirements for the existence of “discrimination” under the relevant statute. In each of the cases surveyed, there was extensive dispute between the parties over whether this requirement was met. The issue of whether differential and burdensome treatment is on the “basis” of some personal characteristic, and whether that characteristic is within the catalogue covered by a particular provincial statute, can be the subject of prolonged disputation. Technical subtleties arise pursuant to a simple and overriding limitation on the scope of human rights regimes: they can only remedy situations where a foreign-trained professional can demonstrate that the source of unfair treatment is discriminatory, but not “merely” because it creates an unnecessary and unfair barrier to the entry into the profession by a competent, even extraordinarily competent, foreign-trained professional.

Some provinces have now established regimes that require fair access to the regulated professions.⁷⁷ These statutes address the issue of fair access to the professions generally, and are not confined to addressing only injustices that can be fit without the scope of anti-discrimination statutes. Fair access laws tend to be severely limited by the fact that government administrators have no authority to make legally binding orders, whether on a complaint-driven basis or pursuant to ongoing oversight of a body’s practices. Unless and until there is substantial improvement in the enforceability of these fair access laws, the human rights route will remain one of few that offers even the theoretical possibility of providing an applicant access to binding dispute resolution.

We recommend that human rights codes be amended to include place of education, training and work/vocational experience as an expressly prohibited ground of discrimination. Doing so would send a clear message to all

⁷⁷ See *Fair Access to Regulated Occupations Act*, SO 2006, c 31; see *The Fair Registration Practices in Regulated Professions Act*, SM 2007, c 21; see also Chapter 2, *Effective Foreign Credential Recognition Legislation: Recommendations for Success*.

concerned—applicants, occupational regulatory bodies, human rights investigators and adjudicators as well as the general public—that foreign credential recognition is within the scope of human rights regimes.⁷⁸

Even if legally-binding fair access regimes are finally established at the provincial level, the proposed amendment to human rights law would still be warranted. The unreasonably restrictive treatment of foreign-trained professionals in Canada is a longstanding problem that has proved resistant to change. A multi-dimensional approach to reform is the most desirable way to address this issue. The inclusion of place of education, training and work/vocational experience as an enumerated ground in human rights legislation would confirm that the issue is not just one of fairness in administering licensing regimes, but of eliminating discrimination based on factors such as place of origin. The existence of multiple routes to binding dispute resolution is appropriate for several practical reasons. Even if fair access legislation provided for legally-binding dispute resolution, it would take many years before we would know whether the system works in practice. It would make more sense to offer several possible methods; this way, the more effective route will be organically chosen by those seeking redress. Lessons learned from one remedial track may be useful in improving the other. The human rights track might, in some cases, be more appropriate and effective—for example, in cases where bias and stereotyping of applicants from other countries is a major dimension of the problem.

⁷⁸ The provisions of *The Human Rights Code* in Manitoba are unusual in that a ground of discrimination can be the basis for a complaint even if it is not on the expressly enumerated list of prohibited grounds, such as race, ethnicity or gender (s 9(1)(a)). “Failure to make reasonable accommodation” (s 9(1)(b)), however, is only considered discrimination in relation to the grounds enumerated in s 9(2), and not to the “analogous” grounds contemplated by s 9(1)(a). Even if grounds such as place of education, training and work experience could be inferred as included under s. 9(1)(a), therefore, the protection afforded to individuals with respect to such discrimination would be relatively limited. In Manitoba as in other provinces, therefore, the best approach would be to make it clear that place of education, training and work experience is an expressly prohibited ground of discrimination. Doing so would remove any uncertainty about whether such a ground of discrimination is to be read into the less protective s 9(1)(a) or are “proxies” for grounds in s 9(1)(b).