

Effective Foreign Credential Recognition Legislation: Give It Some Teeth

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I. INTRODUCTION

In recent history, when recruiting abroad, Canada's immigration policies have focused on highly educated and financially established populations.¹ Applicants assume that because their education almost guarantees them Canadian entry, the job market needs their skills, and therefore, their credentials, earned outside Canada, will be recognized. Sadly, there is a disconnect between the federal government's recruitment criteria, the labour needs of the different provinces and territories, and the standards set by the self-regulated professions. In the last few years the federal government has been working with provincial governments to successfully target and recruit immigrants to fill provincial labour gaps.² Unfortunately, even though the various levels of government are working in concert for the common good, the bodies that set the criterion for entry into professional fields can unilaterally block governmental initiatives.

The issue of foreign credential recognition has been a hot topic in political circles for the last few years. In their 2006 election platform, Harper's Conservatives promised to ease and expedite process for the recognition of immigrants' foreign credentials.³ Ontario introduced legislation meant to

¹ See Canada, Citizenship and Immigration Canada, *Skilled workers and professionals: Who can apply*, online: Citizenship and Immigration Canada <<http://www.cic.gc.ca/english/immigrate/skilled/apply-who.asp>>.

² See Canada, Human Resources and Social Development Canada, *Temporary Foreign Worker Program*, online: Human Resources and Social Development Canada <http://www.hrsdc.gc.ca/en/workplaceskills/foreign_workers/index.shtml>.

³ See *Stephen Harper pledges action on immigrant credentials*, online: Stand Up for Canada: Conservative Party of Canada 2006 Election Campaign <<http://epe.lac-bac.gc.ca/100/205/300/conservative-ef/06-01-06/www.conservative.ca/EN/1738/37785>>. See

promote fairness and transparency in the registration practices of specific self-regulated professions.⁴ Other provinces, suffering from labour shortage, began assessing their options and implementing programs for dealing with the recognition of foreign credentials.⁵

This paper will discuss Manitoba's main attempt to solve the foreign credential dilemma: *The Fair Registration Practices in Regulated Professions Act*.⁶ To understand how Manitoba ended up with this legislation and to understand its vulnerabilities, this paper will touch on the development and the strengths and weaknesses of Ontario's *Fair Access to Regulated Professions Act*.⁷ Finally, the paper will suggest tactics and strategies for making the Manitoba legislation effective in accomplishing its stated goal.

II. MANITOBA'S BILL 19: THE FAIR REGISTRATION PRACTICES IN REGULATED PROFESSIONS ACT

On 26 September 2007, Bill 19, *The Fair Registration Practices in Regulated Professions Act* was introduced in the Manitoba legislature.⁸ The drafters' intent

also *Foreign credentials recognized in a Conservative Canada*, online: CanadaVisa.com Canada Immigration Lawyers <<http://www.canadavisa.com/foreign-credentials-recognized-in-a-conservative-canada.html>>.

⁴ *Fair Access to Regulated Professions Act*, Schedule 1, *infra* note 7. The Act applies to: The Association of Professional Engineers of Ontario, The Association of Professional Geoscientists of Ontario, The Association of Ontario land Surveyors, The Certified General Accountants Association of Ontario, The College of Early Childhood Educators, The College of Veterinarians on Ontario, The Institute of Chartered Accountants of Ontario, The Law Society of Upper Canada, The Ontario Association of Architects, The Ontario Association of Certified Engineering Technicians and Technologists, The Ontario College of Social Workers and Social Service Workers, The Ontario College of Teachers, The Ontario College of Teachers, The Ontario Professional Foresters Association, and The Society of Management Accountants of Ontario. .

⁵ Initiatives like the Provincial Nominee Program were implemented in Alberta, Manitoba, Newfoundland and Labrador, Ontario, Saskatchewan, British Columbia, New Brunswick, Nova Scotia, Prince Edward Island, and the Yukon. See Canada, Citizenship and Immigration Canada, *Provincial Nominees: Who can apply*, online: Citizenship and Immigration Canada <<http://www.cic.gc.ca/English/immigrate/provincial/apply-who.asp>>.

⁶ *The Fair Registration Practices in Regulated Professions Act*, S.M. 2007, c. 21, online: Manitoba Laws <http://web2.gov.mb.ca/laws/statutes/2007/c02107e.php#>. This Act is to come into force on a date to be fixed by proclamation.

⁷ *Fair Access to Regulated Professions Act*, 2006, S.O. 2006, c. 31.

⁸ *Supra* note 6. Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, Vol. LIX, No. 10 (26 September 2007) at 333 (Hon. Nancy Allan), online: Manitoba Legislative Assembly <<http://www.gov.mb.ca/legislature/hansard/1st-39th/hansardpdf/10.pdf>>.

was to create legislation that would encourage transparent, objective, impartial and fair registration practices.⁹ The bill passed through its first and second readings, the discussions at the Standing Committee on Justice, the third reading, and received Royal Assent.¹⁰ It is set to come into force on a date fixed by proclamation.¹¹

It became apparent during the second reading of the proposed legislation and the committee discussions that the regulated professions felt that the bill was drafted in haste.¹² Nineteen presenters gave the Standing Committee on Justice their opinions on the new piece of legislation.¹³ Concerns of additional bureaucratic red tape,¹⁴ the loss of independence,¹⁵ the excessively wide scope of the legislation,¹⁶ unclear and unduly burdensome provisions,¹⁷ the fact that the commissioner would report to the minister as opposed to the entire house,¹⁸ to name a few, were raised by the regulatory bodies. Of these, few were integrated into the bill; only three amendments were made.¹⁹

A. Canadian Jurisdictions with Similar Legislation or Initiatives

Manitoba's The Fair Registration Practices in Regulated Professions Act was largely modeled on Ontario's Fair Access to Regulated Professions Act, 2006.²⁰ At the time it was introduced, Fair Access to Regulated Professions Act, 2006

⁹ Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, Vol. LIX, No. 24B (23 October 2007) at 1586 (Mavis Taillieu), online: Manitoba Legislative Assembly <<http://www.gov.mb.ca/legislature/hansard/1st-39th/hansardpdf/24b.pdf>>.

¹⁰ For first reading see *supra* note 8; for second reading see *ibid*; for minutes of the Standing Committee on Justice see Legislative Assembly, Standing Committee on Justice, Vol. LIX, No. 2 (29 October 2007) at 10-47, online: Manitoba Legislative Assembly <<http://www.gov.mb.ca/legislature/hansard/1st-39th/hansardpdf/ju2.pdf>>; for third reading see Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, Vol. LIX, No. 33 (7 November 2007) at 2019-2023, online: Manitoba Legislative Assembly <<http://www.gov.mb.ca/legislature/hansard/1st-39th/hansardpdf/33.pdf>>.

¹¹ See *The Fair Registration Practices in Regulated Professions Act*, *supra* note 6.

¹² See *supra* note 9 at 1586-1595.

¹³ Standing Committee on Justice, *supra* note 10.

¹⁴ *Ibid.* at 10-13 (Sharon Eadie).

¹⁵ *Ibid.* at 14-15 (Douglas Bedford).

¹⁶ *Ibid.* at 18-19 (William D.B. Pope).

¹⁷ *Ibid.*

¹⁸ *Ibid.* at 14-15 (Douglas Bedford).

¹⁹ See Manitoba, Legislative Assembly of Manitoba, *Amendments adopted at Committee Stage*, online: Legislative Assembly of Manitoba <<http://web2.gov.mb.ca/bills/39-1/b019cs.pdf>>.

²⁰ *Supra* note 7. See also *supra* note 10.

was hailed as an innovative piece of legislation that would play a major role in Ontario's comprehensive plan to break down the barriers that prevent newcomers from integrating into Canadian society.²¹

1. Ontario's Fair Access to Regulated Professions Act, 2006

On 8 June 2006, *Fair Access to Regulated Professions Act, 2006*,²² known also as Bill 124, was introduced to the Legislative Assembly of Ontario.²³ By requiring that regulatory body registration procedures be quick, fair and open, Bill 124 aimed to remove bureaucratic hurdles and help newly landed immigrants find jobs in their chosen fields quickly.²⁴

The drafters of Bill 124 relied heavily upon Justice Thomson's *Review of Appeal Processes from Registration Decisions in Ontario's Regulated Professions*.²⁵ The report sought to develop a framework on which an independent appeal process could be based. According to the report, an independent appeal should be guided by principles of fairness, accountability, objectivity, transparency, and collaboration.²⁶ The process would include a panel—autonomous of the original assessing authority—that would review the authority's decisions.²⁷ Since the regulatory body's decision determines the applicant's ability to practice his or her chosen the "access to independent appeal

²¹ Ontario, Ministry of Citizenship and Immigration, "Breaking Down Barriers for Skilled Newcomers: What you need to know about Bill 124 The Proposed *Fair Access to Regulated Professions Act, 2006*", online: Ministry of Citizenship and Immigration Ontario <<http://www.citizenship.gov.on.ca/english/working/farpa/docs/Bill124.Brochure.English.pdf>>.

²² *Supra* note 7.

²³ Bill 124, *An Act to Provide for Fair Registration Practices in Ontario's Regulated Professions*, 2nd Sess., 38th Leg., Ontario, 2006, online: Legislative Assembly of Ontario <http://www.ontla.on.ca/bills/bills-files/38_Parliament/Session2/b124ra.pdf>.

²⁴ Ontario, Ministry of Citizenship and Immigration, *Results-based Plan Briefing Book 2007-2008*, online: Ministry of Citizenship and Immigration Ontario <<http://www.citizenship.gov.on.ca/english/publications/rbp/2007-2008/>>.

²⁵ In September 2004 the Ontario government appointed former Ontario Justice George Thomson to review existing appeal processes within different regulatory bodies. George M. Thomson, *Review of Appeal Processes from Registration Decisions in Ontario's Regulated Professions, Report to the Ontario Minister of Citizenship and Immigration*, November 2005, online: Legislative Assembly of Ontario <<http://www.ontla.on.ca/library/repository/mon/13000/257188.pdf>> [*Review of Appeal Processes Report*]. See also, Ontario, Ministry of Training, Colleges and Universities, Press Release, "Government Moves to Reduce Barriers to Employment for the Internationally Trained", *CNW Group* (29 September 2004), online: Ontario Newswire <http://ogov.newswire.ca/ontario/GPOE/2004/09/29/c5055.html?lmatch=&lang=_e.html>.

²⁶ *Review of Appeal Processes Report, ibid.* at viii.

²⁷ *Ibid.* at viii & xii. The report stressed the importance for internationally trained professionals to have an opportunity for an independent appeal and review process.

is vital.²⁸ That said—if fair registration practices successfully increase the effectiveness, fairness and clarity of internal registration procedures and review processes within regulatory bodies—then the need for an independent appeal will be reduced. In other words, as put by Mr. George Thomson: "The best independent appeal process is one that does not need to be used often. We should therefore promote good internal processes within regulatory bodies that reduce the demand for independent appeals and that lay the foundation for effective appeals when they are needed."²⁹

Using Justice Thomson's report as a launching pad, the drafters of Bill 124 incorporated various creative strategies into the legislation to improve recognition practices.

One innovative step was the creation of the Office of the Fair Registration Practices Commissioner (the Fairness Commissioner) to ensure regulatory bodies' compliance with the bill.³⁰ The Commissioner's functions include assessing the registration practices of regulatory bodies, determining their audit standards, deciding the time when the registration practices are to be reviewed, providing advisory functions to the bodies and applicants, and, most importantly, reporting to the ministers on the registration practices of the regulated professions.³¹ Manitoba adopted the idea of a fairness commissioner in Bill 19.

The role of the Commissioner is limited. According to the Act, the Commissioner is appointed by the Lieutenant Governor in Council, and reports to the Minister of Citizenship and Immigration.³² The legislation does not indicate that the Commissioner is intended to be independent, or that she must in fact be independent; she could be a member of the minister's staff. This brings into question the legitimacy of the role and of the work that she does. Also, the Fairness Commissioner does not have the authority to intervene in procedures,

²⁸ *Ibid.* at ix & xviii. The report recommended enabling appeal processes for the following decisions: denial of registration; the granting or denial of provisional, limited or conditional registration; imposition of conditions; failure to decide within a reasonable time; and a refusal to accept or process an application. *Ibid.* at 66.

²⁹ *Ibid.* at ix.

³⁰ Bill 124, *supra* note 23, cls. 13(1)-(2). For more information about the Office of the Fairness Commissioner, and of the role of the Commissioner see *The Office of the Fairness Commissioner*, online: <<http://www.fairnesscommissioner.ca>>.

³¹ The Commissioner may also advise regulatory bodies, government agencies, community associations as well as ministers on the broad scope of matters. See Bill 124, *supra* note 23, cl. 13(3). See also Ontario, Citizenship and Immigration, "Accessing and Recognizing Credentials in Canada: Ontario's New Fair Access to Regulated Professions Act, 2006" (Public Policy Forum Seminar, Regina, SK, 19 April 2007), online: Public Policy Forum <http://www.pforum.ca/common/assets/fcr/nuzhat_jafri.pdf> at 7-8.

³² *Fair Access to Regulated Professions Act*, *supra* note 7, ss. 13(1), (3).

question the decisions of the regulatory bodies, or represent the interests of an applicant to a body. Instead the Commissioner composes a series of reports and audits on the practices of the regulated professions.³³ These include an annual report to the minister, who may choose when to submit the report to the Lieutenant Governor in Council.³⁴

When the legislation was first introduced, critics warned that the principles of fairness would be replaced by political correctness.³⁵ Moreover, instead of promoting open or expedient regulatory procedures, critics pointed out that the Fairness Commissioner's office would only create additional delays.³⁶ Some argued that the power granted to the Commissioner to conduct audits was a threat to self-regulation.³⁷ There was concern that audits would reduce the flexibility of the registration process, add new costs to it, and generally replace the process of assessing professional competency with a purely bureaucratic assessment of credentials.³⁸

It has now been more than a year since the Office of the Fairness Commissioner was created, and the product of the office, the first set of audits

³³ *Ibid.*, ss. 13(3), 15.

³⁴ See *ibid.* s. 15(6). The Minister must submit a copy of the report to the Lieutenant Governor in Council who will cause it to be laid before the Assembly if it is in session or, if not, at the next session. However, it does not specify within what timeframe the Minister must submit the report. See *The Office of the Fairness Commissioner, 2007-2008 Annual Report* (Toronto: Queen's Printer for Ontario, 2008), online: Office of the Fairness Commissioner <http://www.fairnesscommissioner.ca/pdfs/ofc_annual_report_2007-2008_english_online.pdf> [*Annual Report*].

³⁵ George Jonas, "Keep the Fairness Fairy Out of It", *National Post* (15 July 2006). The concern is that "[f]airness' will be interpreted as if it were a synonym for 'equality,' and 'equality' as if it were a synonym for 'parity.' If professional associations were inclined to expedite matters for exceptional practitioners, the [Commissioner] would either stop them or make sure that matters were also expedited for unexceptional ones. If an association decided to view diplomas from first-rate institutions in the developed parts of the world at par with Canadian diplomas, the FC's office would make every effort to stop it from 'discriminating' against diplomas issued by second-rate institutions in undeveloped regions."

³⁶ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 101A (3 October 2006) at 5168 (Elizabeth Witmer), online: Legislative Assembly of Ontario <http://www.ontla.on.ca/house-proceedings/transcripts/files_pdf/2006-10-03_pdfL101A.pdf>. [*Bill 124: Second Reading (3 October 2006)*].

³⁷ *Ibid.*

³⁸ The College of Physicians and Surgeons of Ontario, News Release, "More Bureaucracy Equals More Barriers: The *Fair Access to Regulated Professions Act, 2006* will do little to improve access for international medical graduates (IMGs) in Ontario" (8 June 2006), online: The College of Physicians and Surgeons of Ontario <<http://www.cpso.on.ca/whatsnew/news/default.aspx?id=1564>> cited in *ibid.*

and reports, were made public in July of 2008.³⁹ The office reviewed the registration practices of the professional regulatory bodies and declared that it had “[developed] a solid foundation by gathering vital information and establishing consultative relationships with stakeholders.”⁴⁰ In its initial analysis the office found that most of the regulated professions are striving towards transparent, objective, impartial and fair registration practices.⁴¹ It did note, however, that “[n]ot all of the regulated professions are moving at the same pace, and some deeply rooted systemic registration issues will take time to resolve... .”⁴²

The investigatory efforts of the office relied mainly on self-reporting by the professional bodies by using previous surveys; reports and legislation on the registration practices of the regulated professions; interviews with staff of regulatory bodies; the websites of professional bodies; and statistical information provided by the professional bodies.⁴³ The data is one-sided and may not reflect the diverse interests at stake.

In order to avoid the possibility of bias, in conducting their research, the Office of the Fairness Commissioner should seek statistical information from sources independent of the professional bodies, interview all the relevant stakeholders (current members of the profession, foreign professionals, representatives from the Foreign Credential Referral office, etc.), review a sample of the bodies’ decisions (including their reasons) and compare the information with the legislation, regulations and any further codes the professional bodies may have. The research is only valuable if it identifies the real issues in each profession and attempts to develop viable solutions.

It can be argued that in the year following the establishment of the position, the Commissioner did not achieve substantial change. She merely reported the status quo and declared her intentions for future compliance.⁴⁴ Future

³⁹ The Fairness Commissioner was appointed in April 2007, and the Office of the Fairness Commissioner was established within the month. For full access to the audits, the report on the audits, and the first annual report see The Office of the Fairness Commissioner <<http://www.fairnesscommissioner.ca/en/publications.asp>>.

⁴⁰ *Annual Report*, *supra* note 34 at 24.

⁴¹ See Ontario, Office of the Fairness Commissioner, *Ontario's Regulated Professions: Report on the 2007 Study of Registration Practices*, (Toronto: Queen's Printer for Ontario, 2008) at 8, online: Office of the Fairness Commissioner <http://www.fairnesscommissioner.ca/en/downloads/PDF/ontario%27s_regulated_professions_report_on_the_2007_study_of_registration_practices_english_pdf.pdf> [*Report on the Study of Registration Practices*].

⁴² *Ibid.*

⁴³ *Report on the Study of Registration Practices*, *supra* note 41 at 7.

⁴⁴ See *Annual Report*, *supra* note 34 at 25.

compliance may be difficult. The consequences for non-compliance, a fine of \$100 000, may not be sufficient motivation for a professional body focused on their own self-interests to abandon practices deemed by the Commissioner to be unfair.⁴⁵

A related criticism of the *Fair Access to Regulated Professions Act, 2006* is that fairness simply does not exist substantively in the legislation. As set out in the legislation, the Fairness Commissioner does not provide any practical assistance for individual applicants. Neither does she have the power to prevent discrimination by the assessors against the applicants on grounds such as race or culture. Fairness in the *Fair Access to Regulated Professions Act* has little to do with the protection of foreign-trained professionals' human rights, correcting systemic bias faced by immigrants from certain countries, or facilitating recognition for individual applicants. Instead, it appears that for the architects of Bill 124, fairness was purely a procedural term.

Another feature of Ontario's bill was the establishment of the Access Center for Internationally Trained Individuals (Access Center).⁴⁶ The role of the Access Center is to provide information regarding requirements for and assistance with registration, conduct research and analysis on the problems related to the registration of foreign-trained professionals, and advise and assist various government and community agencies, ministries, institutions, professional associations, employers, and regulated professions on the training and registration of internationally trained professionals.⁴⁷

A significant shortcoming of the Access Center is that it strictly does orientation and referrals, and does not do more to assist or support newcomers in having their credentials recognized. The Access Center's functions are limited to referring foreign professionals to the regulatory bodies without providing any legal or professional assistance;⁴⁸ it is up to the applicant to defend his or her cause before an internal review or appeal panel. The sole responsibility of the Access Center is to provide information regarding the process.⁴⁹

⁴⁵ *Fair Access to Regulated Professions Act, supra* note 7, at s.30(3)(b).

⁴⁶ Bill 124, *supra* note 23, cl. 17(1).

⁴⁷ *Ibid.*, cl. 17(2)(a)-(d).

⁴⁸ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 110 (19 October 2006) at 5648 (Rosario Marchese), online: Legislative Assembly of Ontario <http://www.ontla.on.ca/house-proceedings/transcripts/files_pdf/2006-10-19_pdfL110.pdf > [Bill 124: Second Reading (19 October 2006)].

⁴⁹ Ontario, Legislative Assembly, *Standing Committee on Regulations and Private Bills, Fair Access to Regulated Professions Act, 2006*, No. T-20 (7 December 2006) at 311 (Riet Verheggen) online: Legislative Assembly of Ontario <http://www.ontla.on.ca/committee-proceedings/transcripts/files_pdf/2006-12-07_pdfT020.pdf>.

During the Standing Committee on Regulations and Private Bills (“Standing Committee”) debates, presenters argued numerous points and recommended related amendments.⁵⁰ The challenge was for Bill 124 to strike the right balance between, on the one hand, removing barriers in the recognition process, and, on the other hand, avoiding replacing self-regulation with state-regulation. The latter was crucial as one of the goals of the legislation was to preserve the independence of the professions and their regulatory authorities.⁵¹ However, in the attempt to realize this balance, the bill lost a great deal of the potential power it had to facilitate the process of recognition.

The main criticism of Bill 124 is that it did not incorporate Justice Thomson’s recommendation for the establishment of an independent appeal body.⁵² During the Standing Committee debates, most presenters stated that without an independent appeal tribunal it would be difficult to achieve objectivity and fairness⁵³—especially in the case of appeals of regulatory body decisions that were to be heard by the same regulatory body that originally rejected the application.⁵⁴ In the absence of an independent appeal body, the only way an applicant can have his case heard by a third party would be through the court, either by statutory appeal or judicial review. However, this can be

⁵⁰ See Ontario, Legislative Assembly, *Standing Committee on Regulations and Private Bills, Fair Access to Regulated Professions Act, 2006*, online: Legislative Assembly of Ontario <http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=421&detailPage=bills_detail_debates>.

⁵¹ *Bill 124: Second Reading (3 October 2006)*, supra note 36 at 5165, 5169 (Norm Miller, Lisa Macleod).

⁵² *Review of Appeal Processes Report*, supra note 25.

⁵³ An independent appeal tribunal exists under the *Regulated Health Professions Act, 1991*, R.S.O. 1991, c. 18. Decisions of health care professional regulatory bodies may be appealed to the Health Profession Appeal and Review Board. However, there are no such tribunals for many other professional regulatory bodies. See Ontario, Legislative Assembly, *Standing Committee on Regulations and Bills, Fair Access to Regulated Professions Act, 2006*, No. T-15 (15 November 2006) at 199 (Anne Coghlan), online: Legislative Assembly of Ontario <http://www.ontla.on.ca/committee-proceedings/transcripts/files_pdf/2006-11-15_pdfT015.pdf> [*Standing Committee Meeting 15 November 2006*].

⁵⁴ *Bill 124: Second Reading (3 October 2006)*, supra note 36 at 5173 (Peter Tabuns). The need for an independent appeal tribunal was emphasized by the College of Medical Laboratory Technologists of Ontario; the Policy Roundtable Mobilizing Professions and Trade; MP Olivia Chow; the Institute of Chartered Accountants of Bangladesh, North American Chapter; the Chinese Professionals Association of Canada; the Thorncliff Neighbourhood Office; and others. See *Standing Committee Meeting 15 November 2006*, *ibid*. See also Ontario, Legislative Assembly, *Standing Committee on Regulations and Private Bills, Fair Access to Regulated Professions Act, 2006*, (21 November 2006), online: Legislative Assembly of Ontario <http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=421&detailPage=bills_detail_debates> [*Standing Committee Meeting 21/November 2006*].

both expensive and risky for new immigrants who are, for the most part, already struggling financially.⁵⁵

An independent appeal body would provide more transparency, accountability and the "appearance of fairness to the public."⁵⁶ As it is, the only provision ensuring objectivity in the internal review requires that a decision maker involved in the original decision will not act as a decision maker in the review or appeal.⁵⁷

While the legislation was well-intentioned, the *Fair Access to Regulated Professions Act, 2006* is ineffective. Some argue that since the legislation does not accomplish what it sets out to do for foreign-trained professionals, it is no more than a symbolic gesture.⁵⁸ The difference between the Bill's intent to ensure fair and transparent registration procedures, and what the Bill actually delivers, is significant.⁵⁹

Consequently, one question should be at the forefront of any discussion of the *Fair Access to Regulated Professions Act, 2006*:⁶⁰ why did the Ontario Legislative Assembly pass legislation that lacks teeth?

In the debates and public hearings of Bill 124, numerous flaws in the legislation were identified and amendments to it were suggested; however, none of these recommendations were adopted.⁶¹ The *Fair Access to Regulated Professions Act, 2006* that received royal assent is identical to the bill at its first reading. The legislation's power to facilitate registration processes and help foreign-trained professionals integrate into the Canadian labour market is weakened by rhetorical language, unclear explanations of "transparent,

⁵⁵ *Bill 124: Second Reading (3 October 2006)*, *ibid.*

⁵⁶ Ontario, Legislative Assembly, *Standing Committee on Regulations and Private Bills, Fair Access to Regulated Professions Act, 2006*, No. T-17 (22 November 2006) at 231-232 (Chinniah Ramanathan), online: Legislative Assembly of Ontario <http://www.ontla.on.ca/committee-proceedings/transcripts/files_pdf/2006-11-22_pdfT017.pdf> [*Standing Committee Meeting 22/November 2006*].

⁵⁷ *Fair Access to Regulated Professions Act*, *supra* note 7, cl. 9(5). See also *Bill 124: Second Reading (3 October 2006)*, *supra* note 54 (Peter Tabuns).

⁵⁸ *Bill 124: Second Reading (3 October 2006)*, *ibid.* at 5173.

⁵⁹ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 104A (10 October 2006) at 5324 (Frank Klees), online: Legislative Assembly of Ontario <http://www.ontla.on.ca/house-proceedings/transcripts/files_pdf/2006-10-10_pdfL104A.pdf> [*Bill 124: Second Reading (10 October 2006)*].

⁶⁰ *Fair Access to Regulated Professions Act*, *supra* note 7.

⁶¹ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 135 (12 December 2006) at 6891-6896 (Frank Klees), online: Legislative Assembly of Ontario <http://www.ontla.on.ca/house-proceedings/transcripts/files_pdf/2006-12-12_pdfL135A.pdf> [*Bill 124: Third Reading (12 December 2006)*].

objective, impartial and fair" registration practices,⁶² and the limitation of fairness to administrative procedures. Not only is the administrative regime created by Bill 124 not effective in influencing regulatory body registration practices, it does little to ease the difficulties faced by foreign-trained professionals.

The role of the Fairness Commissioner is merely to be an observer of the practices of professional bodies; composing reports for the Minister of Citizenship and Immigration detailing the processes and procedures of all the self-regulated professions. The position is not independent from the ministry that implemented the legislation, which raises questions of effectiveness and legitimacy. In addition, the role does not come with the authority to fulfill a practical purpose such as intervening on behalf of a foreign educated professional in a dispute with a professional body, or demanding that an applicant's case be re-considered.

Similarly, the Access Center provides applicants with information about where they can get their credentials recognized, but does not assist them in the practical process.

The most notable failing of the legislation is the absence of an independent appeal body—the main recommendation of Justice Thomson's report.⁶³ This absence was strongly supported by the professional regulatory bodies.⁶⁴ While Ontario's legislation does not seem to ease the plight of foreign-trained professionals, it does present a threat to the regulated professions. The professional bodies found the language of the bill overly restrictive and confusing. They raised the following concerns:

- 1) The bill erodes self-regulation and there is the potential it will be replaced by state-regulation.⁶⁵ Because the Fairness Commissioner has the authority to influence entry requirements, there is the possibility that the office will begin supervising professional bodies; which conflicts with the principle of independence self-regulated professions.⁶⁶ This, in turn, may interfere with the ability of regulatory bodies to ensure that applicants meet professional standards.⁶⁷

⁶² *Fair Access to Regulated Professions Act*, *supra* note 7, cl. 6.

⁶³ *Review of Appeal Processes Report*, *supra* note 25 at viii, xii.

⁶⁴ *Standing Committee Meeting (22 November 2006)* *supra* note 56 at 245-46 (Kim Allen).

⁶⁵ *Standing Committee Meeting (15 November 2006)* *supra* note 53 at 181 (Don Cattani).

⁶⁶ This was also the reason the Law Society of Upper Canada supported the government's decision not to create an independent appeal body. See also *Standing Committee Meeting (22 November 2006)*, *supra* note 56 at 235-36 (Glenda McDonald).

⁶⁷ The Fairness Commissioner may impose different requirements or restrictions in respect to any class of regulated professions. *Fair Access to Regulated Professions Act, 2006*, *supra* note 22, cl.

- 2) The sole contribution of the legislation is another layer of bureaucracy.⁶⁸
- 3) Audits and numerous reporting requirements are costly procedures that reduce flexibility. There is the risk that standardization will replace the individualized registration process. Also, audits may be limited to measuring technical credentials instead of actual competence.⁶⁹ Moreover, the additional reporting and auditing costs will eventually be transferred to the applicants.⁷⁰
- 4) The audit standards are unclear: the terms "transparent," "fair," and "objective" must be defined if regulatory body practices are to be assessed against them.⁷¹
- 5) There is the potential for duplication of reporting duties: conflicts between the obligations under the bill and those under the professional body's authorizing legislation may exist.⁷²

It was more than likely the above concerns—coupled with the vigourousness with which the professional bodies acted in protecting their turf and the government's own enthusiasm for delivering a solution—that persuaded the provincial government not to amend the legislation to include the recommended changes.

Nova Scotia's Fair Access to Regulated Professions Act

Recently Nova Scotia followed Ontario's lead and introduced Bill 126, the *Fair Access to Regulated Professions Act*.⁷³ The draft does not vary substantially from either Manitoba's Bill 19 or Ontario's *Fair Access to Regulated Professions Act*,

14(c). See also *Standing Committee Meeting (15 November 2006)*, *supra* note 53 at 198-99 (Anne Coghlan).

⁶⁸ *Standing Committee Meeting (22 November 2006)*, *supra* note 56 at 235-36 (Glenda McDonald).

⁶⁹ *Ibid.* At 235, 258 (Rocco Gerace, Sharon Saberton).

⁷⁰ *Bill 124: Second Reading (3 October 2006)*, *supra* note 36 at 5167 (Elizabeth Witmer). Regarding additional costs of the audits see also *Standing Committee Meeting (15 November 2006)*, *supra* note 53 at 183 (Norm Williams). Also see *Standing Committee Meeting (22 November 2006)*, *supra* note 56 at 235-36 (Glenda McDonald).

⁷¹ *Standing Committee Meeting (15 November 2006)*, *ibid.* At 181, 183 (Don Cattani, Norm Williams).

⁷² For example, under the *Regulated Health Professions Act* (*supra* note 53), health professions have a duty to report annually to the Ministry of Health. *Ibid.* at 176 (Tina Langlois). For other professions, see *ibid.* at 181 (Don Cattani). See also *Standing Committee Meeting (22 November 2006)*, *supra* note 56 at 236, 239 (Glenda McDonald & Louis Cooke).

⁷³ Nova Scotia, House of Assembly, *Debates and Proceedings*, No. 08-17 (24 April, 2008) at 1905 (Hon. Mark Parent).

2006. Like its counterparts, it includes a commissioner-type role, called the Review Officer, but does not incorporate an independent appeal body. The bill has entered into its second reading, but at the time of writing no further progress had been made.⁷⁴

B. Summary of the Current Legislation

While an excellent idea in theory, Ontario's *Fair Access to Regulated Professions Act* does not accomplish what it purports to. Failing to incorporate Justice Thomson's recommendation of an independent panel, and instead creating the Access Center and reporting mechanisms like the Fairness Commissioner, detracts from the goal of the legislation. Neither reporting instrument serves the practical purpose of getting more foreign trained professionals working within the province in their respective professions.

Manitoba's Bill 19 is essentially a copy of Ontario's act. Instead of taking heed of the criticism of the *Fair Access to Regulated Professions Act*, reviewing its strengths and weaknesses, and spending the time to make Bill 19 effective, the Manitoba Legislature pushed through the duplicate legislation with few amendments.

C. Professional Self-Regulated Bodies

If there is an obvious demand in the marketplace for more skilled professionals, and the federal and the provincial governments are developing programs and legislation to support immigrant professionals in having their credentials recognized, it begs the question: why do there continue to be barriers for those professionals to enter the workforce? One answer is that certifying more professionals is not in the interests of the professional self-regulating bodies.

Through legislation, professional bodies have been delegated the power to determine the entrance requirements for their profession. While it makes sense to have those in the profession evaluate the training and credentials of those seeking to join the profession, it also raises the issue of conflicts of interest. It can be assumed that the occupational regulatory body is not only obligated to protect public interests *per se* but also to act in the best interests of the members of the profession.⁷⁵ The Competition Bureau points out that "self-regulating professions

⁷⁴ Nova Scotia, House of Assembly, *Debates and Proceedings*, No. 20 (29 April 2008) at 2300-2303; Nova Scotia, House of Assembly, *Debates and Proceedings*, No. 38 (27 May 2008) at 4073-4076.

⁷⁵ Todd-Jeffrey Weiler, "Professional Self-Regulation and Federal Competition Policy: The Calarco Case" (January 1997) 7 W.R.L.S.I. 119 at 126.

must acknowledge that the private interest of its members will inevitably be at odds with the common good at some times.”⁷⁶

By restricting the labour supply through training and educational requirements and caps on licences, the self-regulatory bodies hold monopolies over their respective industries, ensuring large workloads and high wages for their members. It is assumed that preventing unskilled and unqualified professionals from harming clients will preserve the quality of service. Instead, with no competition the cost of services in the industry is increased—not necessarily based on the value of the service—but because a limited number of professionals are permitted to perform the service.

If the impact of the decisions made by the professional self-regulating bodies is felt by those making them, it is understandable for the decision-makers to make decisions that are favourable to their interests. All decisions start and end with the professional self-regulating bodies. This is in contrast to the principles enunciated by the Competition Bureau to assist regulators develop and maintain effective and efficient regulations that maximize the interests of the consumer.⁷⁷

Obstacles to entrance faced by foreign-trained professionals indicate that self-regulation has not worked. To ensure impartial decisions and a healthy, competitive market there must be a check and balance to the system.

D. Recommendation: Legislation with Teeth

To be effective, fair recognition legislation must have teeth. Manitoba should learn from Ontario’s mistakes. *The Fair Registration Practices in Regulated Professions Act*, as it currently stands, is more a declaration of a desire to have professions within the province use fair practices than a guarantee that they will do so.⁷⁸ During the second reading of Bill 19, Mr. David Fauschou, the member from Portage la Prairie, stated:

[W]e need to have some type of mechanism by which to oversee the entry into professional organizations and also to safeguard those individuals that are wanting to join professional bodies here in the province of Manitoba, thereby providing a fair and equitable assessment of their skills and abilities to the benefit of not only the professional organization but to the benefit of all Manitobans.⁷⁹

⁷⁶ Competition Bureau Canada, *Self-regulated professions: Balancing competition and regulation* (Gatineau: Competition Bureau, 2007), online: Competition Bureau Canada <[http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/vwapj/Professions%20study%20final%20E.pdf/\\$FILE/Professions%20study%20final%20E.pdf](http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/vwapj/Professions%20study%20final%20E.pdf/$FILE/Professions%20study%20final%20E.pdf)>.

⁷⁷ *Ibid.* at 37-39.

⁷⁸ *Supra* note 6.

⁷⁹ See *supra* note 9 at 1591 (David Fauschou).

To achieve the goals that the legislation purports to support, certain steps must be taken. First, the term “fairness” must be defined. It should mean no unfair barriers to entry, and no unnecessary obstacles. This clearly sets out the intention and the scope of the legislation.

Second, it is essential that the legislation have a fairness body or panel. The panel would consider appeals of decisions of the regulatory bodies governed by the legislation. Such a panel must be independent of the profession and its regulatory body. This would serve two functions. First, for the immigrant it would confirm the fairness of the process by providing an autonomous party that could assess the case. Second, the regulatory body would be less likely to make unfair rulings because their decisions could be reviewed.

The right to an independent appeal adds a human rights aspect to the recognition problem. Review of a decision by an independent panel ensures that no discriminatory practices are administered in such a decision. Without an independent appeal, an applicant relies on a review by the same organization that issued the original unfavourable decision, hoping that any discrimination present in the first decision will be put aside in the second.

Moreover, an independent review might ensure that, on a case-by-case basis, the regulatory body administers no unwarranted discriminatory practices.⁸⁰ The act of discriminating with respect to the right to membership in a professional association with no *bona fide* or reasonable cause for the discrimination is one of the practices explicitly prohibited by (Manitoba’s) *The Human Rights Code* (“The Code”).⁸¹ *The Code* allows professional bodies to make discriminatory decisions provided there is *bona fide* or reasonable cause to support such decisions. An independent review of decisions on a case-by-case basis would strengthen the system by providing a safeguard against unnecessary and unwarranted discrimination.⁸² An independent appeal process indicates that, if fair registration practices do not exist within regulatory bodies, action can be taken.⁸³

Third, the legislation should not be solely procedural in nature. While it does cover the procedural steps taken by professional bodies in order to reduce the number of unfair decisions, the legislation should also have substantive

⁸⁰ *The Human Rights Code*, S.M. 1987-88, c. 45, s. 9(1), 9(2). , But see s. 12. See ss. 14(1), 14(2), 14(6)(a).

⁸¹ *Ibid.* s. 14(6)(a).

⁸² *Ibid.*

⁸³ Such fair registration practices include the issuance of written decisions, the provision of sufficient reasons to support the decision, and clear and transparent criteria for the decision-making process. See *Review of Appeal Processes Report*, *supra* note 25 at xviii.

effects. The independent body should be able to intervene when it feels that a bad decision has been made. Two options should be available to the panel: they could either opt to have the decision sent back to the professional body for reconsideration, or, they could substitute their own decision for that of the professional body. Most importantly, in either case, the decisions of the fairness panel should be binding on both the professional body and the applicant. This suggests that the administrative standard of review should be one of correctness, rather than reasonableness, granting less deference to the self-regulating professional bodies.

This is not a new idea: having an independent, administrative body has been done before. Under *The Code*, an Adjudication Panel has the power to review the decisions of other bodies that involve discrimination complaints.⁸⁴ Similar to those of courts and regulatory tribunals, the decisions of the Human Rights Commission (“HRC”) are based on the testimonial, documentary and real evidence before it. Like the independent panel suggested here would be, the HRC is an administrative body, and there is no evidence that the scope of the power bestowed on it is beyond what is required. Additionally, it is not argued that the HRC’s function does not justify the loss of power suffered by the bodies whose decisions it reviews. As such, the suggested panel should be modeled after the HRC.

E. Arguments Against Having a Panel

The idea of an independent appeal body—while attractive to legislators, employers struggling to find qualified professionals, and immigrants who face barriers to practicing their profession—will likely be opposed by many of the self-regulated professions. They may raise a few obvious arguments in support of maintaining their control over professional entrance standards without involvement from third parties. The first is that the power to set standards and determine whether applicants satisfy requirements was bestowed on them by the government. It simply makes sense that those who understand the demands and expectations of the profession should set and regulate the standards.

While it is true that each profession has an overarching piece of legislation that empowers them to make such decisions, the legislation does not grant complete authority over everything related to a specific profession. For example, the Lieutenant Governor in Council (practically speaking, the provincial

⁸⁴ *The Human Rights Code*, *supra* note 80, s. 8(1), 37, 43(2).

cabinet) must approve any regulation made under an act.⁸⁵ This means that the final authority still lies with the government and not with the self-regulating bodies. Historically the government has not acted contrary to the recommendations of professional bodies. However, this is not necessarily in the best interests of the public. Due to their position as the elected representatives of the majority, Cabinet has the power to not approve regulations. Their responsibilities to the public should not be dismissed out of respect for the expertise of professionals.

The second argument is that an independent appeal panel will not have the expertise necessary to either insist that a regulatory body's decision be reconsidered, or to replace it with their own. The self-regulated professional body selects each member of their panel for their individual expertise and experience, which brings a breadth of knowledge about the profession to the table. When it comes to panel rulings in a particular profession, who but the members of that profession are able to make the best decisions? Additionally, who is an independent panel to second-guess the findings of a professional body?

The response is simple. As mentioned above, the independent appeal body should be set up like the HRC. The decisions of the commission are not based on the individual knowledge or expertise of its members, but rather on the use of evidence. Expert evidence removes the need for a panel of experts; an expert in a given area can explain why the entry standards and tests are (or are not) appropriate and necessary. Other forms of evidence, such as studies, could be used to evaluate the standards.

Due process should also be incorporated into the legislation. This would provide the professional self-regulatory body the opportunity to defend its decisions. It would have the same opportunity as the applicant and the panel to use evidence in support of its findings.

III. CONCLUSION

The intent of *The Fair Registration Practices in Regulated Professions Act* is to ensure that transparent, objective, impartial and fair registration practices are used in the assessment of a professional's qualifications.⁸⁶ To achieve that laudable goal, changes must be made to the legislation.

The independent review panel recommended by Justice Thomson should be part of the proposed legislation. It ensures fairness. And although the argument

⁸⁵ See e.g. *The Health Service Act*, R.S.M. 1987, c. H30, s. 6(1); *The Dental Health Services Act*, R.S.M. 1987, c. D33, s. 9(1); *The Podiatrist Act*, S.M. 2001, c. 36, s. 48(2).

⁸⁶ *Supra* note 6.

exists that to prevent the abuse of self-regulation it is being replaced by state-regulation, most pieces of legislation that delegate powers to the professional bodies require amendments to first be approved by the Lieutenant Governor in Council. In such cases, professional bodies have not been handed a *carte blanche* to self-govern, but rather are given limited authority subject to the approval of those in power. The concept of an independent panel that would review the decisions of self-regulating bodies is not a new idea; it is the mandate of the Human Rights Commission to review decisions where there are discrimination complaints. The use of due process and expert evidence ensures fairness to both the regulatory bodies and the applicants. If necessary, the legislation could be phased-in over a two-year period to give the regulatory bodies the time to amend their codes and policies to comply with the requirements of the legislation.

As Manitoba's immigrant and foreign-trained population increases, the issue of credential recognition is becoming more and more pressing. Newcomers come to the province not only to start a new life for themselves and their families, but also to become contributing members of Canadian society. It is in the best interests of the public to enact effective legislation that guarantees fairness in access to the regulated professions.