

Policy on removing the “Canadian experience” barrier



Engineers Canada Board Meeting
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Ontario
Human Rights Commission
Commission ontarienne des
droits de la personne

Background

- Academic and legal research
- Public survey
- Consultation with affected communities, employers, regulatory bodies and government found:
 - Recent immigrants more likely to be under employed and unemployed
 - Canadian experience and other requirements barrier to professional membership, licensing and employment
 - May also face discrimination in accessing internships



Ontario Human Rights Code

- s.5 prohibits discrimination in employment
- s.6 prohibits discrimination regarding membership in trade union, trade or occupational association or self-governing profession
- Direct v. adverse or constructive discrimination
- Institutional/systemic discrimination
- Substantive equality looks at impact
- Canadian experience related grounds: place of origin, ethnic origin, race, colour, ancestry



Organizational responsibilities

- Regulatory bodies have legal obligations under the Code
- Must ensure membership and licensing requirements/practices don't discriminate
- Unacceptable to choose to remain unaware of potential direct or adverse discrimination or ignore or fail to act on concerns that arise
- Procedural and substantive duties



OHRC policy implications

- A strict requirement for “Canadian experience” is discriminatory on its face and can only be used in limited circumstances
- Other membership or licensing requirements must not result in adverse discrimination
- Onus on regulatory body to show how Canadian experience or other requirements are *bona fide* and reasonable in the circumstances per legal test...



Mihaly v APEGGA 2014 AHRC

ARHC's tribunal found:

- Examination standard and Canadian experience Standard used by APEGGA to assess Mr. Mihaly's educational credentials...
- Without more individualized assessment or exploration of other options...
- Constitutes unjustified discrimination

Case under appeal



3-part legal test (Meiorin)

- To justify a discriminatory requirement, a regulatory body has to show the requirement:
 - 1) was adopted for a purpose that is rationally connected to the function being performed
 - 2) was adopted in an honest and good faith belief that it was necessary for the purpose, and
 - 3) is reasonably necessary to accomplish its purpose



Parts 1 & 2

Membership and licensing requirements/competencies for entry-to-practice should be:

- Clear, genuine and reasonable
- Directly related to:
 - being a member of the profession
 - licensing obligations
 - performing essential duties of the profession



Part 3: reasonably necessary

- No other alternative would achieve purpose
- Requirement is as inclusive as possible
- Steps are taken to accommodate candidates
 - Assess on individual basis
 - Consider non-Canadian experience and other qualifications
 - Short of undue hardship
- OHRC view – difficult to show a Canadian experience requirement is necessary



Policy implications (cont'd)

- Consider all relevant work experience and qualifications regardless of where they were obtained
- Do not disqualify, discount or treat negatively lack of Canadian experience/qualifications/references
- Do not base membership and licensing requirements on assumptions or stereotypes about people and qualifications gained abroad



Bitonti v. British Columbia (Ministry of Health) BCHRT 1999

- Involved qualifications of international medical school graduates
- Rights tribunal recognized importance of
 - Mechanism for assessing skills based on merit rather than assumptions
 - Opportunity to compete fairly
- Problematic that applicants were provided no ability to demonstrate equivalency of their qualifications



White v. National Committee on Accreditation HRTO 2010

- Involved accreditation of foreign trained lawyer
- Found evaluation standards to be *bona fide* where they are not based on assumptions about superiority of Canadian training...
- But rather use individual assessments that have regard for actual training received
- No discrimination found



Fazli v. National Dental Examining Board of Canada, 2014 HRTO

Tribunal found no discrimination regarding:

- Differential treatment of graduates from accredited versus non-accredited programs
 - No evidence re assumptions about people / places
 - Rather, based on institutional accreditation system; no evidence of institutional equivalency
- Examination requirement in English or French
 - Language can intersect with ethnicity & place of origin but no evidence Fazli disadvantaged



Best practices

- Review membership & licensing requirements & practices for potential barriers
- Separate out requirements that are “legitimate” from “nice to have”
- Only require level of proficiency *necessary* to meet qualifications for doing the job
- Avoid catch-all terms like "Canadian experience"



Best practices (cont'd)

- Frame requirements in terms of competencies and job-related knowledge and skills
- Provide clear, specific information about competencies, membership and licensing requirements and decision-making criteria...
- So candidates can see and show how their skills do or don't match up
- Assess candidates on individual flexible basis rather than screen out on general rules



Best practices (cont'd)

- Give candidates opportunity to demonstrate their competencies
 - e.g. interviews, practical test, job simulation, internship, residency probation, additional training, other alternatives
- Monitor diversity ratios of applicants and members
- Implement special programs or outreach measures to address inequity



Best practices (cont'd)

- Form partnerships with other institutions and/or retain experts to help address barriers
- Train staff on human rights and cultural competence
- View/find ways to leverage diverse backgrounds, qualifications, skills, experience, cultural competencies as strengthening professions



Human Rights Code OHRC policy & Fair access law

- Code sets out legal principles/framework
- OHRC policies Interpret Code giving directions on obligations and best practices
- Code and fair access legislation principles consistent/complementary
- Fair access legislation general & specific duties can help meet Code's procedural obligations
- Code ultimately the higher law with redress mechanism



Fair access legislation general duties

- Canadian experience requirement
 - Must not unjustifiably deny access
 - Must demonstrate as necessary and relevant
 - Or explain why international experience alone insufficient
- Similar to human rights legal test for *bona fide* and reasonable requirements



Consistent principles

- More inclusive qualifications assessment system (barrier removal, inclusive design)
- Breaking down competencies (rational connection between requirements and duties)
- Promoting/demonstrating continuous improvement (planned, progressive realization; mitigate human rights complaint)
- No progress/baby steps problematic (risk human rights complaint)



Consistent principles (cont'd)

- Human rights training for membership/licensing decision makers (education/prevention)
- Recommendations for improvement/action plans (accountable for known barriers)
- Ensuring prospective professionals don't face unreasonable hurdles for certification (barrier removal, inclusive design, *bona fide* reasonable requirements)

