Update

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STRATEGIES FOR CHALLENGING DISCRIMINATORY BARRIERS TO FOREIGN CREDENTIAL RECOGNITION.

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INTRODUCTION

While the attraction and integration of skilled professionals and tradespersons to Canada is central to the success of Canadian immigration policy, this objective continues to be jeopardized by the many barriers faced by foreign-trained immigrants in having their skills and credentials recognized.[1] These barriers have a number of sources, but the most frequently cited are the various rules of the provincial bodies which regulate access to professions and trades through licensing and registration requirements, the requirements of educational institutions and the hiring and promotion rules of employers.[2] These barriers have been recognized and studied for many years, culminating in Ontario's 1989 *Access! Report*[3] and the 1997 federal *Not Just Numbers Report*.[4] The current problem is not so much identifying the barriers, but rather establishing effective strategies for their elimination. While some actions have been taken, the problem still remains largely unremedied.

This paper argues that many of these barriers constitute systemic discrimination against foreign-trained individuals on the basis of at least their place of origin and arguably also, depending on the facts, on the basis of their ethnic origin, ancestry, race, colour and/or gender. Such discrimination is unlawful under both the governing provincial\territorial\federal human rights legislation and under section 15(1) of the *Canadian Charter of Rights and Freedoms.* This paper reviews why barriers to foreign trained professionals can be discriminatory, sets out the relevant legislative framework, explains why courts cases to date have been largely unsuccessful, and proposes legal strategies for foreign-trained professionals to effectively challenge these discriminatory barriers.

This paper also argues that removing these types of systemic barriers is best achieved through a systemic solution, such as the implementation of a "licensing equity plan" by regulatory and licensing bodies and by the implementation of "employment equity plans" by employers, rather than by relying on individual complaints lodged by vulnerable immigrants.

BARRIERS TO FOREIGN CREDENTIAL RECOGNITION

Ontario's 1989 *Access! Report* remains the most comprehensive analysis of the systemic barriers to foreign credential recognition.

Although some prior learning assessment is currently being performed in Ontario by occupational bodies, we found in many cases, significant weaknesses in the methods of assessing the background of applicants. Sometimes no credit at all is given for training outside an accredited program. Some occupational bodies rely heavily on the personal information provided by the registrar and on other informal sources. Even where a structure for assessment does exist, the information gathering often tends to be unsystematic and the standards imposed subjective and ad hoc. In addition, there is, with

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1 *Not Just Numbers - A Canadian Framework for Future Immigration,* Report of the Legislative Review Advisory Group to the Minister of Citizenship and Immigration, Minister of Public Works and Government Services Canada, 1997, Executive Summary.

2 *Not Just Numbers* Report, above, section 4.5 Access to Professions and Trades.

3 *Access! Task Force on Access to Professions and Trades in Ontario,* 1989, Queen's Printer for Ontario; and *Not Just Numbers Report,* above.

4 *Not Just* Numbers Report , above, Section 4.5

some exceptions, a general reluctance to give credit for any learning obtained outside a formal program of education, no matter how relevant and well documented that learning may be.[5]

The *Access! Report* was particularly critical of the testing and training barriers faced by foreign immigrants: For example, additional licensing tests required only of foreign trained applicants are demanding and very expensive and are typically required only because there is a lack of proper systematic assessment of prior learning. Even tests required of all candidates were often found to fail objective professional test development and analysis procedures to ensure cultural sensitivity and administrative fairness. In addition, the licensing tests frequently did not reflect the required level of competence or the level of English language fluency actually needed for the occupation.

Even where additional training was legitimately required of a foreign trained person, the *Access! Report* noted that the lack of proper prior learning assessment often led to a misidentification of retraining needs, leading to an unnecessarily onerous retraining plan. The scarcity of training programs and facilities, long delays in gaining admission to language training programs and a lack of emphasis on occupation-specific language proficiency further exacerbated the problem.

Finally, the *Report* found foreign trained persons also faced barriers in challenging these problems in that the procedures for the review of the decisions of regulatory bodies were either lacking, inadequate or cumbersome to engage while complaints to outside bodies, such as a Human Rights Commission were also unsuccessful.

The *Access! Report* concluded that the cumulative effect of these barriers was devastating for foreign-trained persons. Applicants whose paper qualifications are in fact equivalent to the Canadian paper qualifications usually find that there is no provision for a determination of equivalency, or that their qualifications are not properly evaluated. Applicants whose qualifications are not fully equivalent to the qualification requirements often find that those requirements are not reliable indicators of competence to practice or may face requirements for additional training that go beyond what is necessary to address the difference. Either way they are blocked from practising their profession or trade resulting in "the complete loss of skills that the individual brought to Canada." [6]

The *Report* recommended a move from a "certificate-based system" to a "competency-based system" with the implementation of a prior learning assessment network (not yet implemented). The purpose of prior learning assessment is to determine the equivalency of foreign-trained individual's qualifications or competencies to educational requirements in Ontario.[7]

Eight years after the *Access! Report,* the 1997 Federal Report, *Not Just Numbers - A Canadian Framework for Future Immigration* detailed once again the difficulties identified by the *Access! Report.* [8] A recent 1999 Caledon Institute report *Immigrants Need Not Apply* cited the ethnic\race relations impacts of the current barriers, stating that " visible minority immigrants who find themselves shut out of their occupations feel individually and collectively alienated, victims of institutional discrimination.[9]

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5 *Access! Report,* above, p. xiii.

6 above, p. xiv.

7 *Access! Report,* above.

8 *Not Just Numbers Report,* above.

9 Andrew Brouwer, Caledon Institute of Public Policy, Toronto, 1999, p. 5.

One expert, Fernando Mata in his 1999 paper also noted that "professional accreditation barriers for immigrant women and refugees are often insurmountable. Women are seriously disadvantaged by factors associated with their legal entry status (entitled settlement assistance) as well as from the overburdening nature of gender and family roles."[10] Refugees are often unable to meet regulatory requirements for original academic documents as they have been destroyed or lost in flight from refugee camps and political /military upheaval at home may mean there is nowhere to appeal for replacements or transcripts of these documents.[11]

The cumulative effect of these barriers requires a systemic institutional solution. Mata states:

> Some institutional measures (i.e. in post-secondary institutions, governments and licensing bodies) although not necessarily discriminating in themselves, have an aggregate effect of exclusion or of "trapping" highly qualified accreditation applicants in some of the stages of the process. Formal and informal norms (laws, manuals, unwritten understandings, customs, etc.) followed by licensing and other accrediting bodies may be responsible for exclusionary effects. Policies aimed at reforming accreditation processes and changing the institutional "ethos" require implementing some form of corporate change and institutional restructuring. [12]

A fundamental re-examination of the accreditation process is required. For example, a recent Ontario Report recognizes that one major barrier in Ontario to the certification of more foreign-trained physicians is the restricted number of funded post-graduate positions available to foreign trained physicians, currently set at 24. The Report recommends that internationally trained medical graduates be targeted as a source for new physicians, and makes a number of specific related recommendations, including that the number of funded positions be expanded to 36. A more fundamental recommendation would have been to question and remove the restriction of international medical graduates to competing for a limited number of training positions, and allowing them to compete equally with Canadian trained physicians rather than just increasing the number of positions which they can compete for. An argument that this restriction is unlawful discrimination is set out in the obiter reasoning of Board of Inquiry Chair Cumming in the *Neiznanski* case which is reviewed later in this paper.

Role of Employers and Unions

While this paper focuses primarily on the barriers erected by regulatory bodies, foreign-trained individuals also face systemic hiring and promotion barriers which exclude them from the professional ranks of employers. Employers play a very key role in the integration of foreign trained individuals by providing them with the "Canadian work experience" which is often needed for licensing or certification. Most employers do not have any procedures in place to assess the credentials of foreign-trained individuals and often instead rely without question on regulatory bodies' rules which are themselves often discriminatory, even where accreditation is neither legally required nor essential to job performance.[13] Some employers will not hire immigrant professionals because they are "overqualified" for the job for

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10 Fernando Mata, "The Non-Accreditation of Immigrant Professionals in Canada: Societal Dimensions of the Problem", 1999 and National Association of Women and the Law, "Gender Analysis of Immigration and Refugee Protection Legislation and Policy. March 1999 Submission to Citizenship and Immigration Canada, Ottawa. (nawl@ftn.net)

11 Mata, above, p. 14 and " Andrew Brouwer, "What's In an Name?: Identity Documents and Convention Refugees, Caledon Institute of Public Policy, Toronto, March 1999 at pp.6-8.

12 Mata, above, p. 23

13 Brouwer, above, p. 12

which they are applying yet they are barred when they seek access to their actual occupation.[14] Such employer action could be construed as discriminatory under provincial\territorial\federal human rights legislation, as discussed further below.

Unions also play some role in setting standards for certification and practice in some unionized trades, particularly in the construction industry.[15] The Canadian Labour Congress' recent report "Bargaining for Equality" refers to the importance of the "fair assessment of prior learning, foreign credentials, work/volunteer experience and skills.[16] *The Canadian Labour Congress Trade Union Guide to the Employment Equity Act* provides an important resource for foreign-trained workers in gaining equity at their workplace.[17]

LEGISLATIVE/POLICY FRAMEWORK

There are several layers of legislation, rules and policies relevant to the regulation of professions and trades which will affect and inform the appropriate legal strategy for challenging discriminatory barriers

Regulatory Laws

The first is the provincial legislation concerning specific professions and trades. While the federal government has the constitutional power over immigration policy, the specific power to regulate professions and trades falls under the provincial\territorial property and civil rights' power.[18] In Ontario there are at least 43 regulatory and professional bodies which regulate access to the professions and more than 70 trades regulated by the Ministry of Education. As well, there are six formal credential assessment services in Canada in addition to many informal services.[19]

When a government creates a self-regulating profession it delegates through the provisions of regulatory laws most of the direct control over that profession to the regulating body it creates. Typically the government retains a supervisory role, most frequently by provisions requiring Ministerial approval of regulations, sometimes by provisions which allow the Minister to require the governing body to take specified actions. Under a licensing regime, the government grants license-holders an exclusive right to perform certain services or acts, without which individuals can be prosecuted for working in the field. Occupations may be governed directly by the government or may be self-governing under a statute which creates an independent self-governing body, such as the professional colleges under Ontario's *Regulated Health Professions Act.* Under a certification regime the government grants members of a private professional body the exclusive right to use a certain title. In practice the lack of the title may bar the person from working in their profession.

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14 above., p. 12-13

15 Brouwer, above at p. 13

16 "Bargaining for Equality", 1998, Canadian Labour Congress, CLC Women's Symposium. Appendix

17 authored by Mary Cornish, Karen Schucher and Amanda Pask, 1998.

18 This division of powers is set out in *The Constitution Act, 1867.*

19 *Not Just Numbers* Report, above, Section 4.5

There are occupational organizations which are only regulated by their own internal rules and the specific requirements for admission are typically found in the rules or regulations created by the organization itself. There are also wholly unregulated private organizations where membership may be a practical necessity to obtain work in a field.

As a result of this multi-jurisdictional framework, to date there are no national standards for the recognition of professions and trades and the assessing of educational and occupational qualifications. Standards still vary, sometimes substantially from province to province making it difficult not only for foreign trained professionals but also for Canadian-trained professionals moving from one province\territory to another.

The Agreement on Internal Trade - The Labour Mobility Chapter

Steps have been taken by the federal government, provinces and territories to address these inter-provincial credential recognition barriers, particularly through the 1995 *Agreement on Internal Trade* (*"AIT"*) and specifically its Labour Mobility Chapter. The *AIT*, effective July 1, 1995 requires Canada's provincial\territorial and federal governments to ensure the free movement of persons, goods, services and investments across the country. Its Labour Mobility Chapter is directed at enabling any worker qualified for an occupation in one Canadian jurisdiction to be granted access to employment opportunities in that occupation in any other Canadian jurisdiction. This is done by requiring regulatory bodies and governments to examine their practices in order to eliminate or reduce mobility barriers in three main areas; residency requirements; occupational licensing, certification and registration requirements; and differences in occupational standards.

Article 703 requires Governments "through appropriate measures" to seek compliance with the Chapter by regional or local governments and "its other governmental bodies and by non-governmental bodies that exercise authority delegated by law".[20] If a Government is unable to secure voluntary compliance within a reasonable period of time, it is required to "adopt and maintain measures to ensure compliance."[21]

The Labour Mobility Chapter, if properly implemented, will have an important impact on the recognition of foreign trained professionals since the steps required to remove inter-provincial barriers are similar to the steps needed to reduce barriers to foreign credential recognition. The Chapter sets out very detailed steps for addressing the three main barriers. For example, residency requirements are to be removed unless such requirements are necessary to achieve legitimate objectives, such as public safety, which cannot be otherwise met. [22] To avoid being barriers, licensing, certification and registration requirements must relate principally to competence, be published and readily accessible, not result in unnecessary delays and not impose burdensome fees and costs.[23] Parties are required to undertake to "mutually recognize the occupational qualifications required" of each other workers through the Red Seal Program. Parties are required to "reconcile differences in occupational standards" and undertake an assessment of occupations to determine whether there is a high degree of commonality of occupational standards and if not, to work towards "reconcil(ing) differences in occupational standards." This occupational assessment is to look at issues such as scope of practice, competencies, education, examinations, experience\internship, conduct and ethics, temporary licensing, competency assurance

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20 As defined in Annex 703.1

21 Section 2. Article 7.03

22 Labour Mobility Chapter, Article 706.

23 above, Article 707.

and practice audits, and local knowledge.[24] Each Provincial Government has a contact person to receive complaints that an actual or proposed measure of a regulatory body is inconsistent with the Chapter and this complaint can ultimately be dealt with under the AIT's Chapter 17 Dispute Resolution Procedures.[25]

The Chapter's detailed requirements deal with the same issues faced by regulatory bodies and employers in dealing with foreign-trained individuals and form an excellent reference point for the design of a remedial order in a credential recognition complaint and will be an important source of evidence in any discrimination proceeding.

A further source of such evidence will be the approaches that have actually been adopted by other professional bodies to meet the needs of foreign trained applicants. The Law Society of Upper Canada, for example, has recently adopted an approach of adapting entry requirements to meet the needs of foreign trained lawyers.

Government Agencies Facilitating Credential Recognition

As a result of the various task force reports over the years, a number of government agencies and working groups have been set up to facilitate credential recognition and removal of discrimination barriers. The mandate and work of these agencies could be relied on in any discrimination complaint to show the wide-spread acceptance of the nature and extent of the problem, its national priority and the remedial measures which are being identified.

At an international level, in 1990 Canada ratified the 1979 UNESCO *Convention on the Recognition of Studies, Degrees and Diplomas Concerning Higher Education in the States belonging to the European Region.* The implementation of this Convention is monitored by the Canadian Information Centre for International Credentials which uses the international database, TRACE on foreign degrees to develop a Canadian "higher education" database.[26] In *Into the 21st Century*: *A Strategy for Immigration and Citizenship*[27], Citizenship and Immigration Canada in 1994 committed to establishing a "national clearinghouse" on accreditation for the recognition of foreign credentials. However, this has not yet been implemented. The Ontario government, as part of its 1995 Equal Opportunity Plan, announced plans (still not fully implemented) to develop a voluntary credential assessment service. [28]

The 1997 *Not Just Numbers* report recommended that the proposed new Federal Provincial Council on Immigration and Protection should "take measures with existing assessment authorities to develop national standards and a shared database with the longer-term objective of providing a Canada-wide equivalency assessment of professional qualifications, which would be accepted in each province and territory." [29] There is also a Federal-Provincial Working Group on Access to Professions and Trades to

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24 Above, Article 708.

25 above, Article 711.

26 Mata, above, p. 19

27 Citizenship and Immigration Canada, (Ottawa: Supply and Services Canada, 1994), 21.

28 In Quebec, the Service des équivalences of the Quebec Ministère des Relations avec les citoyens et de l'Immigration participates in the Conseil interprofessionel which seeks to harmonize the way in which credentials are handled in Quebec**,** *Not Just Numbers Report,* above, Chapter 4.5

29 *Not Just Numbers*, section 4.5

facilitate federal-provincial co-operation in this area which is co-chaired by HRDC and the Ontario Government's Access to Professions and Trades Unit.

HUMAN RIGHTS OBLIGATIONS

Regulatory agencies and organizations are governed by two different, but generally complementary, sets of human rights obligations set out in the *Canadian Charter of Rights and Freedoms* and in provincial/ territorial human rights laws. In other words, in addition to any right of complaint under the particular regulatory statute, or any remedy by way of appeal or judicial review, an individual may also pursue an action under human rights law.

Similarly, courts will treat human rights legislation as `quasi-constitutional' or paramount to other laws. In other words, Courts assume that governments intend all their legislation to be non-discriminatory, and will therefore use human rights legislation to override other statutes which are found to authorize or require discriminatory conduct (unless the government has made a clear legislative statement to the contrary).[30] Some human rights legislation specifically provides that it supercedes other provincial laws.[31] This principle of paramountcy has been used, for example, to authorize a human rights tribunal to order a promotion which had been denied for discriminatory reasons, requiring the provisions of the Federal Public Service Commission to give way.[32]

THE *CHARTER OF RIGHTS AND FREEDOMS*

The *Charter's* equality rights provision, section 15(1) applies to all actions by all levels of government, including the laws, regulations and policies of legislatures, federal\provincial and territorial governments and government agencies and the policies and rules of governmental employers.[33] The *Charter* overrides all regulatory legislation or policies which are inconsistent with its terms.

Professional bodies, such as the medical colleges, who perform a public regulatory function on behalf of the legislature, are clearly subject to the *Charter* when they are carrying out that statutory function.[34] In *Re Harvey and the Law Society of Newfoundland*, the Court stated that "the mere delegation, to a

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30 See *Insurance Corporation of British Columbia v. Heespink* (1982) 2 S. C. R. 145 at 158

31 See section 47(2) of Ontario's *Human Rights Code* which provides that the *Code* has primacy over other provincial acts unless the law states otherwise.

32 See *Attorney General of Canada v. Uzoaba* {1995} 2 F. C. 569 , 26 C.H.R.R. D\428.

33 See section 32(1) of the *Charter*, *Re Blainey and Ontario Hockey Association et al*. (1986), 26 D.L.R. (4th) 728 (Ont. C.A.) and *Eldridge v. British Columbia (Attorney-General)* ,(1997) 151 D.L.R. (4th) 577 (SCC).

34 See *Re Klein and Law Society of Upper Canada* (1985) 16 DLR (4th) 489 (Ont. Div. Crt); Re Dvorak and Law Society of Upper Canada (1985), 16 D.L.R. (4th) 489 (Ont. Div. Ct.)
Re Knutson and Saskatchewan Registered Nurses Association (1990), 75 D.L.R. (4th) 723 (Sask. C.A.)

professional body, by the legislature, of powers to control professionals does not take those affected outside the ambit of the *Charter* and the protections found therein"[35].

The 1997 decision in *Eldridge v. British Columbia (Attorney General)*[36] also serves to clarify the *Charter's* reach. In that case, the Supreme Court of Canada found that a hospital, even though not otherwise a government actor, was governed by the *Charter* to the extent that the Hospital was implementing a specific government policy, i.e. providing citizens with medically required services free of charge.[37] Accordingly, the Hospital was found to have breached section 15(1) of the *Charter* when it failed to provide sign language interpretation for deaf persons where such interpretation was necessary for effective communication in the delivery of medical services. The Court articulated two governing principles. Firstly, governments cannot authorize or empower other entities to act in ways that violate the *Charter*. Secondly, governments should not be permitted to evade their *Charter* responsibilities or escape *Charter* scrutiny by delegating the implementation of their policies and programmes to private entities.[38]

Applying that ruling to this issue, to be covered by the *Charter*, any otherwise private entity involved in the foreign credential recognition must be not only performing a public purpose; but also be implementing a specific governmental policy or programme.

The *Charter* can also be used by foreign-trained individuals who wish to challenge the discriminatory policies of a governmental employer. In the 1998 case *Perera v. Canada*[39] , the Federal Court of Appeal confirmed the right of visible minority applicants to proceed with a *Charter* action against their former employer, the Canadian International Development Agency alleging that the Agency engaged in systemic discrimination against them, including biased promotion procedures and assignment of work contrary to section 15(1).[40] The Court decided that the Trial Division has jurisdiction pursuant to section 24 of the *Charter* to hear the case and "provide effective remedies for breaches of a citizen's constitutional rights to equality" and where there is "systemic discrimination" and warranting circumstances, it is appropriate to order employment equity plan measures.[41]

FEDERAL\PROVINCIAL\TERRITORIAL HUMAN RIGHTS LEGISLATION

Human rights statutes apply to private actors and institutions as well as to government bodies. This covers public sector employers, as well as all licensing and regulatory bodies as well as private organizations such as testing organizations. Where employers are unionized, discrimination claims may

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35 same, at p.501 and see also *Re Klein and Law Society of Upper Canada et al*.(1985), 16 D.L.R. (4th) 489 (Ont. Div. Ct.) at pp. 528-9. Similarly, in *Re Knutson and Saskatchewan Registered Nurses Association*, the court, relying on *Klein*, ruled that when exercising disciplinary powers, the Nurses Association is exercising a governmental power that has been delegated to it by the legislature and thus is subject to the *Charter*. See also *Re Harvey and Law Society of Newfoundland* which followed the *Klein* ruling.

36 (1997) 151 D.L.R. (4th) 577 (SCC)

37 *Eldridge*, *Ibid* at 608.

38 *Eldridge, supra* at 605, 606.

39 58 DLR (4th) 341 (F.C.A.)

40 above, Para. 2

41 see above

be processed through the grievance procedure under anti-discrimination collective agreement provisions and\or provincial labour laws which allow arbitrators to apply employment-related statutes such as human rights laws.[42]

In order for the actions of the regulatory bodies or testing organizations to fall within the type of activity protected under human rights law, it is necessary to prove that the action either relates to "membership in a occupational association or self-governing profession" or that it relates to "employment" or the provision of "services" under such laws. All Canadian human rights legislation prohibits discrimination with respect to employment and with respect to the provision of "services". Some provinces also directly prohibit discrimination with respect to membership in a occupational association or self-governing profession. Complaints under human rights legislation should refer to all potentially applicable sections of the legislation.

"Membership" Discrimination

Where there is a prohibition relating to membership in an occupational association or self-governing profession, it is clear that this covers membership in licensing and regulatory bodies. For example, section 9 of the B.C. *Human Rights Act* prohibits the discriminatory exclusion of any person from membership in an occupational organization, defined in section 1 as one "in which membership is a prerequisite to carrying on a trade, occupation, or profession" , and excluding trade unions and employer's organizations. Membership in many professional organizations is entirely voluntary and is open to all licensed professionals. Such organizations may lack the power that the B.C legislation suggest make a group an `occupational organization' deserving of the protection of the legislation. However, it may be possible to show that in practice one must be a member in order to have access to work or to maintain the knowledge and skills necessary to practice the profession on a long-term basis. In the *Mans v. B.C. Council of Licensed Practical Nurses*[43] case, the B.C. Human Rights Council ruled that, even where membership in the group was not technically required in order to practice the profession, if membership was effectively required, the organization was required to comply with section 9.

A similar provision is found at section 6 of Ontario's *Human Rights Code* (", giving a right to equal treatment without discrimination "with respect to membership in any trade union, trade or occupational association or self-governing profession". The case law has established that section 6 will apply to the membership rules of an organization where membership in that organization is necessary in order to practice the profession. In *Re Joseph and College of Nurses*, the College conceded that it was covered by section 6 and thus there was no discussion as to what falls within `self governing profession'[44]. *In*

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42 See Ontario's *Labour Relations Act, 1995*, S.O. 1995, C. 1, s. 48(12)(j).

43 (1990), 14 C.H.R.R. D/21 (B.C.Council of H.R.)at (D/224) affirmed (1991) 20 C.H.H.R. D/173 (B.C.S.C. affirmed 20 C.H.R.R.) D177 (BCCA).

44 (1985), 51 O.R. (2d) 155 (Div. Ct.) at 217

Tomen v. O.T.F. (No.3) [45] the board of inquiry concluded that the Ontario Teachers Federation constituted an `occupational association' or `self-governing profession' within the scope of section 6.[46]

It is not as clear whether this type of provision could be held to apply to a third party professional organization in its conduct of qualification examinations or testing or a credential assessment service. However, if the organization sets the test which is the standard for "membership" in a covered organization, its conduct in this regard could be argued to be effectively determining membership in an occupational organization or self-governing profession. Section 9 of the *Code* which states that no person shall infringe or do, directly or indirectly, anything that infringes a right under this Part"[47] may also be helpful to rely on to add testing organizations into a human rights complaint. If the regulatory body or professional association adopts the rules of the third party organization, then that body is responsible for those third-party rules, and a third party action should not be necessary.

"Employment" and "Services" Discrimination

In *Mans*[48] a professional licensing body that had denied a complainant a license which would enable her to seek employment was found to have discriminated against the complainant "with respect to employment" under section 8 of the B.C. *Human Rights Act,* in spite of the fact that there was no employment relationship between the complainant and the licensing body.

The recent important decision of the B.C. Human Rights Council in *Bitonti et al v. College of Physicians and Surgeons of B.C. et al*[49] held "for the purposes of this case alone" that the application of the "services" section of the *Act* was inapplicable since the statute contained section 9 prohibiting an occupational association from membership discrimination which was found to be applicable.[50] However, the Council did find that the College was a public institution which is responsible for according the right to practice medicine and that its relationship to the applicants was a public one. The public nature of the service, particularly when it is performed by a private organization such as a testing body is a key factor in determining whether the "services" section of human rights statutes is applicable. [51]

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45 (1989), 11 C.H.R.R. D/223 (Ont. Bd. of Inq.) Affirmed (1995) 28 C.H.R.R. D/242 (Ont. Div. Crt) affirmed (1997) 33 C.H.R.R.) D/72) (Ont. C.A.)

46 above, at 11 C.H.R.R. at (D/230). Note: OTF was empowered to establish and enforce a code of ethics for teachers, it prescribed compulsory fees which members had to pay and all teachers were required to be members of OTF as a condition of employment.

47 Section 46(10) of the *Code* sets out, in effect, that `person' includes both corporations and unincorporated organizations.

48 (1990) 14 C.H.R.R. D/221. This decision was upheld by the B.C. Supreme Court in a September 16, 1991 decision and by the Court of Appeal by decision dated February 26, 1993.

49 unreported decision of the B.C. Council of Human Rights dated December 8, 1999

50 *Ibid* at D/274.

51 see *Gould v. Yukon Order of Pioneers* [1996] 1 S.C.R. 571 at 585-587 and discussion in *Bitonti,* above at 17-19.

Where a province does not have an occupational membership discrimination protection, then there is a good argument that the registration of members by public professional bodies does fall within the "services" protection in human rights legislation. With respect to third party testing organizations it may be argued that they provide the "service" of examination testing and standard setting, and that, in doing so, they cannot discriminate against foreign-trained professionals.

SCOPE OF ANTI-DISCRIMINATION PROTECTION

Canadian human rights legislation provides protection against discrimination on specific listed grounds. Ontario's *Code* list is typical, and includes race, ancestry, place of origin, colour, and ethnic origin.[52] There is no direct statutory prohibition on discrimination on the basis of place of training or education although *Ontario's 1989 Access! Report* called for this statutory clarification. The *Bitonti* case reviewed later in this paper decided that discrimination on the basis of place of training was indirect discrimination on the basis of place of origin. In the result, complaints under human rights legislation must allege that rules discriminating against foreign-trained graduates amount to or result in discrimination on the basis of the above listed grounds.

The *Charter* on the other hand prohibits discrimination on grounds additional to those that are listed in the section which are race, national or ethnic origin, colour, religion, sex, age or mental or physical capacity. Faced with an allegation of discrimination on a ground not listed in s.15, such as "place of training", the courts will consider whether that ground is an "analogous ground", that is, one sufficiently similar in kind to the grounds which are listed or whether "place of training" discrimination should be dealt with as a form of indirect place of origin discrimination.

DEVELOPMENTS IN DISCRIMINATION LAW

The Supreme Court of Canada, in interpreting both section 15(1) of the *Charter* and general human rights legislation, has made a number of rulings over the last 10-15 years that have a far-reaching impact on the equity obligations of licensing bodies and employers. Most importantly, it has decided that discrimination is primarily systemic and includes policies and practices which appear neutral, and which were implemented for a legitimate purpose, but which disproportionately impact on disadvantaged groups.[53] This is sometimes referred to as constructive, adverse effect or institutional discrimination and is precisely the problem which is faced by foreign-trained individuals.

Canadian law focuses on identifying whether the "effect" of the regulatory bodies' or employer's practices is discriminatory even if its rules appear to treat everyone the same and there is no intention to

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52 See section 5 and 6.

53 See Robichaud v. Canada (Treasury Board) (1987) 2 S.C.R. 84 at 90 and *Re: Ontario Human Rights Commission v. Simpsons Sears Ltd (O'Malley)[1985] 2 S.C.R. at p.547*

discriminate.[54] If an action has both a discriminatory effect and a legitimate, non-discriminatory effect, the action will still be ruled to be discriminatory under human rights legislation.[55]

Eldridge

The *Eldridge* decision reiterated that the *Charter* protects against adverse impact discrimination and that substantive equality can require that "government" treats people differently to account for their different circumstances. The Court ruled that, in introducing a benefit programme, the government had a responsibility to ensure that the benefit was equally accessible to all. The benefit here could be argued to be the right to practice one's profession, or to access training positions.

While not addressing the obligation of positive state action under the *Charter* generally, the *Eldridge* Court ruled that once the state provides a benefit, it must do so equally and that the state may be required to take positive steps to achieve a constitutionally sound result. To comply with s. 15(1), then, the government had to take positive action and special measures to ensure that disadvantaged groups were actually able to benefit equally from "government" services and benefits.[56] Any limitations on the obligation to accommodate disadvantaged groups must only be assessed under s. 1 when determining if a *Charter* violation can be justified. This is a very high standard and one which regulatory bodies and employers may have significant difficulty meeting.

Based on the record, the *Eldridge* Court concluded that the failure to provide free sign language interpretation for deaf BC residents where it was necessary for effective communication in the delivery of medical services violated s. 15(1) and was not saved by section 1. Similarly, it could be argued that the failure of regulatory bodies or testing organizations to take positive action and special measures to ensure that foreign-trained persons have equal access to professional or trade status or certification is discriminatory.

Meiorin

The Supreme Court of Canada's 1999 decision in *B.C.(Public Service Employee Relations Commission) v. BC Government and Service Employees' Union (re Tawney Meiorin)*[57] has also established important new principles which foreign-trained individuals can use to challenge the discriminatory barriers they face.

The *Meiorin* case involved a woman challenging the aerobic test standards in a traditionally male professional job (forest fire fighting). The Court held that the government could not show the standard was reasonably necessary in order to identify those persons who are able to perform the tasks of a forest fire fighter safely and efficiently. The Court further held that an individual "must be tested against a

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54 *Action Travail des Femmes,* (1987) 1 S.C.R. 1114 at 1137 and see Keene, Judith, "Human Rights in Ontario", 2nd ed. 1992,Carswell, Toronto at pp.8-10

55 *R v. Bushnell Communications Limited.* (1974) 4 O.R. (2d) 288

56 *Eldridge, supra* at 621-624.

57 (1999) 76 DLR (4th) (S.C.C.) At p. 28-29.

realistic standard that reflects his or her capacities and potential contributions".[58] In reaching this conclusion, the Court applied the following new legal principles which have already been applied to a regulatory body in the recent *Bitonti* case which dealt with the accreditation procedures for foreign-trained doctors in British Columbia. (See discussion below).

The new legal principles are as follows: Firstly, there must now be an "unified approach" is to be applied to all forms of discrimination. This means there are no longer different rules for "direct" or "adverse effect" discrimination. All forms of discrimination are subject to the same legal analysis and the same remedies. Secondly, an "bona fide occupational requirement" ("BFOR") can only be an defence to an claim of discrimination where: the standard was adopted for an purpose rationally connected to the performance of the job; the standard was adopted in an honest and good faith belief that it was necessary to fulfil an legitimate occupational \business purpose; and the standard is reasonably necessary to accomplish that legitimate business-related purpose and the standard "accommodates" individuals and groups to the point of undue hardship. Thirdly, a "neutral" standard will be struck down where it fails to "accommodate" the diverse needs, abilities and requirements of individuals and groups protected by human rights legislation. Fourthly, employers (and regulatory bodies) have an obligation to develop workplace (professional\trade) standards which provide for the diverse needs, abilities and requirements of individuals and groups protected by human rights legislation and fifthly, where an standard is found to be discriminatory and is found not to be an BFOR, it must be replaced and the appropriate remedy will be chosen from the full range of remedies available under the human rights statute.

The *Meiorin* Court notes that there is a "positive obligation" to avoid discrimination in the development of standards.

> "Employers designing workplace standards owe an obligation to be aware of both the differences between individuals and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards. By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, in so far as this is reasonably possible".[59]

Thus, licensing bodies and employers must do all that is reasonably possible to initially develop professional standards which work for both foreign trained and Canadian trained individuals rather than developing standards based on Canadian training and then later deciding whether to make any exceptions to those standards for foreign-trained individuals.

The *Meiorin* court lists some important questions that should be asked to help determine if the rule or standard is reasonably necessary and accommodates to the point of undue hardship, and which are particularly appropriate in the context of the assessment of persons with foreign credentials:

a. has the regulatory body or employer investigated alternative approaches that do not have an discriminatory effect, such as individual testing against an more individually sensitive standard?

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58 [para. 83]

59 *Ibid* at [para. 68]

b. If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?

c. Is it necessary to have all employees (applicants) meet an single standard for the employer (regulatory body) to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?

d. Is there an way to do the job that is less discriminatory while still accomplishing the employer's (regulatory bodies') legitimate purpose?

e. Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?

f. Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles?"[60]

The Supreme Court's approach in Meiorin reinforces the need for systemic responses to structures which exclude individuals and groups from participation, or full participation, in a profession or trade. Governments, regulatory agencies, professional organizations, employers, unions and foreign trained groups and individuals can use this new framework to work towards both eliminating existing foreign credential discrimination and preventing future discrimination.

There are three ways in which this obligation may be developed: Firstly, by clearly focusing on standards and the need to ensure that these standards themselves are inclusive, the *Meiorin* decision emphasizes the importance of addressing discrimination at the systemic level as well as the individual level. Secondly, the decision expands the concept of accommodation. A standard is itself "discriminatory", not "neutral", where it reflects only the needs, abilities and requirements of one group, most often male, white and able-bodied. In this context, "accommodation" does not mean enabling individuals to meet the discriminatory standard. Rather, it means *transforming* the standard into a new and different standard which better reflects the diversity in society and the true requirements of the position. Thirdly, the decision may be argued to provide a legal basis for requiring licensing bodies to conduct the type of employment equity review which has been ordered for employers. In *Robichaud*, the Supreme Court of Canada first articulated the concept of a positive obligation on the employer to establish and to maintain a workplace free of sexual harassment.[61] *Meiorin* takes this positive obligation a significant step further by stating that standards must be designed from the outset to be inclusive, and it can be argued that service providers, like licensing bodies are required to establish and to maintain discrimination-free standards of entrance to professions and trades.

REVIEW OF EXISTING FOREIGN CREDENTIAL DISCRIMINATION DECISIONS

There have been an number of attempts by foreign-trained doctors to use human rights legislation to challenge the barriers they face in obtaining Canadian accreditation. Historically, these attempts, namely

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60 *Ibid* at pp. 28-29

61 See Action Travaille des femme, above

Jamorski v. Ontario (Attorney-General)[62],*Neiznanski v. University of Toronto,* [63]*Ramlall v. Ontario International Medical Graduate Program,*[64] and *Bakht v. Newfoundland Medical Board,*[65] have been unsuccessful, for reasons that we review below.

During the preparation of this paper, the *Bitonti et al and College of Physicians and Surgeons et al,* [66]decision was released by the B.C. Council of Human Rights, in which an group of doctors were successful in their claim that the B.C. College of Physicians and Surgeons had discriminated against them in the requirements they placed on foreign-trained doctors in the period before 1993. The *Bitonti* decision (summarized below) while limited in its impact because the discriminatory practice has now been changed, does recognize that some of the prior jurisprudence in this area which is reviewed below is unsound. This decision promises to be of considerable assistance is moving the jurisprudence forward towards the approach advocated in this paper.

Jamorski **Decision**

In the 1988 decision of *Jamorski v. Ontario (Attorney-General)*[67], the Ontario Court of Appeal rejected an application for an declaration that regulations restricting medical internships and the funding of such internships for graduates of unaccredited medical schools violated section 15(1) of the *Charter.* This decision has since been an major disincentive to the pursuit of similar cases. In *Jamorski* the appellants argued that they were wrongfully excluded from the 600 internships which are confined to graduates of accredited medical schools and were discriminated against by being forced to compete for 24 internships which also require an one year pre-internship programme. The respondents argued the evaluation processes of the unaccredited schools are not known to the Ontario authorities and that Ontario citizens who have been educated at public expense should have access first to the internships as an matter of public policy.[68]

The Ontario Court of Appeal, while finding that the graduates of accredited and unaccredited schools were treated differently, with an important effect on their ability to acquire an internship, stated that the distinction was not discriminatory, for two reasons: firstly, the person educated in unaccredited schools were not "similarly situated" to those education in accredited schools and could not be treated the same way. The Court stated:

> The appellants are the graduates of an system of medical education which is simply not known to, or monitored by, the Ontario authorities. It would be quite unrealistic to expect the graduates

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62 (1988) 49 D.L.R. (4th) 426 (Ont. C.A.)

63 *Neiznanski,* above, p. D/193

64 [1998] O.J. No. 4872, Court File No. 929/97

65 Newfoundland Court of Appeal]1986]N.J. No. 149, Action 1985 No. 251

66 British Columbia Human Rights Council, released December 8, 1999.

67 (1988) 49 D.L.R. (4th) 426 (Ont. C.A.)

68 above, at p. 167.

> of such an unknown system to be treated in the same way as graduates of systems of medical education which have been carefully assessed and accredited. [69]

Secondly, the "different treatment based on different educational qualifications" was not discriminatory. The Court found that there was nothing “invidious or perjorative in the system of classification of the medical school graduates. It has not been argued that the system of accrediting schools is anything other than an ongoing, sophisticated, bona fide system of assessing medical schools”.

There are an number of reasons why the *Jamorski* decision would likely be decided differently today in favour of the applicants. The primary reason is that the “similarly situated” test used to dismiss the *Jamorski* appeal was rejected by the Supreme Court of Canada in the subsequent *Andrews v. Law Society of British Columbia* case and in numerous other cases. Indeed, the *Bitonti* decision notes exactly this, and held that *Jamorski* could no longer be considered sound authority[70].

Further, since the time of *Jamorski* decision, the Courts have clarified the concept of analogous grounds, such that it could be argued that section 15(1) includes protection against discrimination on the basis of place of training or education. Recent decisions of the Supreme Court in *Law* and *Corbiere* state that the fundamental consideration in determining whether an ground is analogous to those enumerated in section 15 is “whether recognition of the ground would advance the purposes of s.15(1)”; namely, the prevention of violation of essential human dignity and freedom[71].

Accordingly, the analysis at the analogous ground stage requires consideration of whether differential treatment on that ground “has the potential to violate human dignity”. The Court has also stated that neither membership in an sociologically identifiable group nor historical disadvantage are necessary requirements for an successful 15(1) claim. Applying this purposive approach the Court in *Corbiere* found that “aboriginality-residence" (off-reserve band member status) was an analogous ground, with the majority holding that the analogous ground question is to be answered with reference to the question of whether recognition of the ground would serve to “prevent the violation of human dignity through the imposition of disadvantage based on stereotyping and social prejudice, and to promote an society where all persons are considered worthy of respect and consideration." There is substantial literature on the subject of foreign credential recognition that could be used to support an argument that its recognition as an analogous ground would further the purposes of section 15(1) of the *Charter*. Even apart from this argument, the *Bitonti* ruling has now decided in the circumstances of that case that “place of training” discrimination is really a proxy for “place of origin” discrimination and is therefore discriminatory on that ground.

Neiznanski

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69 above, at p. 168.

70 *Bitonti*, above, at paras 182 - 184

71 *Law v. Canada*, (1999) 70 DLR (4th) (S.C.C.) p.1 at para. 42-43
Corbiere v. Canada, (1999) 73 DLR (4th) (S.C.C.) at p. 39 at para 58, per L’Heureux-Dube J

The decision in *Neiznanski v. University of Toronto* [72] arose from an human rights complaint lodged in Ontario concerning the situation of foreign-trained doctors. The Board of Inquiry was chaired by Peter Cumming, author of the *Access! Report*. [73]

In *Neiznanski*, the Board of Inquiry found that, at the time of the complaint, foreign and Canadian trained doctors were in open competition for the spaces in residency programs and for funded positions and therefore Mr. Neiznanski was not discriminated against with respect to services and employment on the basis of his ethnic origin or place of origin. However, the Board went on to note, in passing, that the system for gaining entry for residency programs combined with the fact that the pre-Internship program restricted foreign trained doctors to competing for 24 positions likely did amount to constructive discrimination on the basis of place of origin, race, colour, or ethnic origin, contrary to the *Human Rights Code.*

Ramlall

In the case of *Ramlall v. Ontario International Medical Graduate Program,* [74] a foreign trained applicant challenged by judicial review the rule which restricted applicants to four attempts to write examinations which were used to determine who received the 24 positions available to doctors from foreign medical schools. The applicant argued that the exam restriction was unfair, vague and violated due process. The court held that there was no manifest unfairness in the process as there were appropriate policy reasons for putting a time limit on the process of seeking to qualify for an internship.

Bakht

In *Bakht v. Newfoundland Medical Board,* [75] an unrepresented foreign trained doctor, who had been rejected for registration in 5 other Canadian jurisdictions, argued that the requirements of imposing certain internship requirements on doctors who attended what was there designated as Category III Schools of medicine, ie. those outside of Canada and the United Kingdom, Republic of Ireland, Australia, New Zealand and South African, was discrimination on the basis of race, national or ethnic origin contrary to the *Charter.* It does not appear that the Court was provided with any factual basis to make this argument and the Court quickly dismissed it without any real analysis:

> The fact that a professional governing body may require certain additional information for graduates of foreign universities, which as I understand is not uncommon in any profession, before such graduates may practice their profession in Canada, merely reflects differences in approach and technique and certainly cannot be deemed to be discriminatory in any way. [76]

This ruling fails to consider at all the Eurocentric focus of the Category III Collection of medical schools which correlate to a large extent with countries “of colour”.

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72 *Neiznanski,* above, p. D/193

73 24 CHRR D/187 at D/194.

74 [1998] O.J. No. 4872, Court File No. 929/97

75 Newfoundland Court of Appeal]1986]N.J. No. 149, Action 1985 No. 251

76 above, p. 3

Bitonti

This decision of the British Columbia Council of Human Rights was released on December 8, 1999. In 1992, when the complaints were filed, the B.C. College of Physicians and Surgeons had an system that distinguished between applicants trained in Category I countries (North America and the Commonwealth) and Category II countries. Applicants for membership from Category II countries were required to do two years of internship in an Category I country hospital, one of which had to be in Canada. Category I applicants had only to do an one year internship in an approved hospital. This distinction was held to amount to indirect discrimination on the basis of place of origin.

However, in 1993 the system was changed to eliminate the one year internship for Category I graduates to substitute an two year residency for all candidates for membership. The decision does not deal with the legitimacy of the current system although the change does not appear to be one that has resulted in any marked improvement to the situation of foreign trained graduates. The decision finds that the Category I/II distinction was not an disguised attempt to discriminate on the basis of race or ancestry, (although it noted that there was an absence of reliable evidence on these grounds) and that the direct discrimination involved is on the basis of "place of training", which it held was not an protected ground under the B.C. legislation. However, it also notes that the systemic bias in favour of countries with an Anglo-Saxon tradition did support the allegation that the distinction based on place of training indirectly discriminates on the basis of place of origin.

The complaint based on ancestry was rejected primarily because insufficient or inadequate evidence was led in its support. The decision is critical, for example, of the failure to provide data concerning the ethnicity or place of training of the current medical profession in British Columbia, and of the lack of expert analysis of other statistical evidence that was provided.

Following an extensive discussion of adverse impact discrimination and the type of evidence required to demonstrate its existence the decision concludes that the requirements placed on Category II applicants discriminated on the basis of place of origin. The decision found in this regard that were was "an high correlation between place of training and place of origin" and that the requirement to complete an year of internship in Canada was one that was "virtually impossible" to meet, with the result that an heavier burden is placed on an group in which an protected group was over-represented.

Contrary to the finding in *Bakht*, the *Bitonti* decision found that the distinction "was based on assumptions about the merits of the British education system" and that the College had failed over an period of some 40 or 50 years "to have made any effort to obtain an understanding of the medical education system anywhere else in the world"[77]. He further noted the absence of any mechanism "by which graduates from Category II schools could demonstrate that their training met the standards demanded of Canadian doctors"[78]. In arriving at the decision that the system was discriminatory the decision holds that the

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[77] above, para. 177.

[78] above, para. 178.

Ontario Court of Appeal decision in *Jamorski* can no longer be considered sound authority in the face of the Supreme Court's subsequent jurisprudence under s.15(1) of the *Charter* [79].

The *Bitonti* adjudicator then applies the *Meiorin* "unified approach", described above, in considering whether the distinction was justified as an appropriate accommodation of the differences between the Category I and Category II groups. While he was not prepared to find that the requirements placed on Category II candidates were motivated by an desire to limit physician supply, he did find that the distinction failed at step 3 of the unified test. Step 3 of the test requires the decision maker to review whether an rule that discriminates is actually necessary to achieve the legitimate goals for which it was introduced.

The College led evidence in this regard that the majority of foreign trained graduates could not step directly into an rotating internship with any success, as an result of their linguistic and cultural differences as well as technical differences in their education. It argued that it had not found an way to pre-identity those individuals who would face such difficulties and was therefore justified in imposing an second year of internship. However, evidence led by the College in fact showed that an pre-internship program of 32 - 52 weeks was sufficient to compensate for these difference. In the result, the actual rules were held to be too onerous and therefore illegitimate, since those rules would still require an two year internship even after an individual had participated in an appropriate pre-internship program. The problem, it was held, was that the College was not providing applicants with any opportunity to demonstrate the equivalency of their qualifications.

The decision then goes on to determine whether the hospitals which refused internships to all non-Canadian trained graduates had engaged in discriminatory conduct. Although it was found that foreign-trained graduates had "virtually no chance of being selected", no prima facie case discrimination was held to be made out. [80]This outcome was apparently based on the conclusion that the hospitals practices "did not place any disproportionate burden" on an group in which an protected group was over-represented, and that the exclusion of foreign trained physicians flowed from their "legitimate aims ... to seek out the best candidates", and from his acceptance without analysis of the hospitals' argument that they were not in an position to properly evaluate foreign trained graduates.

This aspect of the decision underlines the importance of presenting evidence concerning alternative means of evaluation that could be employed by bodies required to assess foreign training. The validity of the conclusion that no prima facie case was made out, even on the facts accepted by the decision-maker, seems doubtful. It is difficult to see how practices that are acknowledged to systematically exclude foreign trained professionals do not impose an disproportionate burden on that group, and, by extension on an group in which an protected group is over-represented (particularly given that the correlation between foreign training and place of origin has already been recognized).

The complaint against the Ministry of Health's decision to fund two internship places in an "special program" specifically for foreign trained graduates and to bar externally funded candidates from that program unless they had been independently selected on merit alone was rejected. The grounds for this

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79 above, para. 183.

80 above, para. 258.

decision were that the program did not prevent foreign trained graduates from engaging in competition for internships also available to Canadian graduates, and that the problems faced by foreign trained graduates in this broader competition did not flow from the Ministry. Also, the bar on externally funded candidates was held to be intended to ensure that access to the program was merit based, and did not discriminate on the basis of place of origin.

While this decision is useful in moving the jurisprudence beyond the roadblock that *Jamorski* has presented, its direct impact appears to be limited to assessing the damages which the applicants suffered as an result of the pre-1993 discrimination. The BC College changed its accreditation system in 1993, and the Council did not hear evidence concerning the system that has in place in BC since that time. No comment is made about the legitimacy of the current regime, though the Council did observe in passing that the situation has not significantly improved for foreign trained graduates. There is, however, an suggestion made that the University of British Columbia, which now controls access to all residency programs, may be in an better position than were the hospitals to take steps to determine the equivalency of foreign credentials.[81]

Case Re: Restrictions on Graduate Nurses

Another interesting case which will be coming up for decision is the Ontario Board of Inquiry hearing into an complaint that the College of Nurses's policy on registration of graduate nurses violates the *Human Rights Code.* The College of Nurses instituted new rules requiring graduate nurses to pass the CNATs, the national qualifying exam set by the Canadian Nurses Association. The vast majority of these nurses are people of colour who have been trained outside of Canada who had been working for many years as graduate nurses without the requirement to pass further examinations. Among many arguments, the Commission will be arguing that the College has established an special registration class essentially for these immigrant nurses without properly recognizing their successful Canadian clinical practice. CNATS do not properly test the graduate nurses for the work they were previously qualified to practise. It is imposing an inappropriate written test as the only standard for recognizing clinical competency while not requiring such an test for its other members who are not required to requalify by passing the CNATs.

PROCEDURAL ISSUES IN CHALLENGING DISCRIMINATORY BARRIERS

Regulatory Proceedings/Appeals/ Judicial Reviews

Many private occupational organizations and most publicly regulated organizations have some internal mechanism for the appeal of a decision to deny registration or membership. Different kinds of occupational organizations will be held to varying levels of procedural fairness in making such decisions. Human rights and *Charter* claims should be initially raised in these internal proceedings.

Most publicly regulated professional bodies have appeal provisions in their governing statute providing an appeal to court from the decisions of the highest internal registration committee. These provisions typically state the grounds on which an appeal can be brought (e.g. where tribunal made a mistake about

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[81] above, para. 378.

the facts and/or about the law) as well as the administrative body or court to which the appeal should be made. The *Regulated Health Professions Act* provides for an appeal from decisions of the Registration Committee to an independent body called the Health Professions Appeal and Review Board. The Board has very limited powers to issue certificates of registration.

If a statute contains no appeal route to the courts, or if there is no appeal route from the decision that an individual wishes to challenge, a judicial review may still be available. The grounds on which a decision may be challenged in a judicial review are narrower than most appeal provisions. There is also a more restricted range of remedies.

Using the *Canadian Charter of Rights and Freedoms*

A person who alleges that a regulatory agency or organization has violated the *Canadian Charter of Rights and Freedoms* can do so in a number of ways. The argument that a registration requirement is in violation of the *Charter* can be made before any tribunal which is applying that registration requirement. The person can argue that the body should decline to apply the discriminatory rule or law or should interpret the law in a manner consistent with the provisions of the *Charter.* While regulatory bodies have the power to decline to apply a provision of their statutory framework which violates the *Charter*, they do not have the power to strike down the law.[82]

To strike down a discriminatory law or rule or to seek damages or other remedies under section 24 of the *Charter*, it is necessary to bring an application to a court of competent jurisdiction. In Ontario, such an application is usually brought before a single judge of the Ontario Superior Court of Justice under Rule 14.05 of the *Rules of Civil Procedures.* In some circumstances a constitutional challenge to an action taken by a professional organization governed by a statute may be able to be taken to a panel of the Divisional Court on judicial review.

There are many factors to be considered in determining the appropriate route in a *Charter* case. These factors include the type of claim that is being made, the kind of remedy that is requested, the evidence that will be necessary to prove the case, the avenues for appeal from the decision, the skill of the decision-making body, the importance of timing, and the cost of proceedings.

Complaints under Human Rights legislation

An argument that a provision is in violation of the applicable human rights legislation such as Ontario's *Code* can be made to any decision-making body that is applying the challenged provision. Similarly, arguments may be made to the decision-making bodies of occupational organizations that they must act in accordance with the *Code.* A complaint concerning the decision of a registration committee may also be filed directly with the provincial Human Rights Commission or Council.

In considering any human rights complaint, it will be important to consider the impact of provisions like section 34 of Ontario's *Code* which permits Human Rights Commissions to defer or decline altogether to deal with complaints where they can or should be dealt with more appropriately under another Act.

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[82] *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)* {1991] 2 S.C.R. 5

This section is sometimes used to force foreign-trained complaints to appeal the regulatory bodies' decision first. As well, Human Rights Commissions are notoriously backlogged and under-resourced which makes this route a cumbersome and frustrating one to use. By way of example, the *Bitonti* decision, while successful in principle, was issued more than seven years after the complaints were filed, and after an intervening change in the challenged rules.

Requirement for Complete Factual Record and Appropriate Expert Evidence

Courts and human rights commissions looking at whether an regulatory body has discriminated against foreign trained individual will conduct an contextual analysis and examine the social, political and legal environment experienced by foreign-trained individuals as well as the impact of challenged provisions on the groups against whom discrimination is claimed. Further, it is necessary to ensure that decision-makers are provided with an sufficient factual evidence concerning alternative approaches to evaluation and training that they may properly assess whether the challenged measures are the least onerous necessary to meet an legitimate aim.

It is impossible to overstate the importance of an full factual record established with appropriate expert evidence to the success of cases of this nature. However, there are already an significant number of studies which detail the disadvantages faced by foreign-trained persons as well as outlining the measures which must be implemented to redress the problem.

REMEDIAL ISSUES IN CHALLENGING DISCRIMINATORY BARRIERS

Assuming an finding is made under an human rights law that an regulatory agency has systemically discriminated against an group of foreign trained professionals, the board of inquiry, tribunal or court has the power to make far-reaching, pro-active orders in order to remedy the systemic discrimination.

The Supreme Court has ruled that, in the context of systemic discrimination, special measures such as hiring goals can be necessary to level the playing field and remedy systemic discrimination (in an employment case such measures are referred to as an "employment equity plan"). Such measures are available in an human rights complaint and an *Charter* complaint.[83]

These rulings provided the framework for Canada's federal *Employment Equity Act* which requires federal employers to make reasonable progress towards achieving an workforce representative of women, visible minorities, persons with disabilities and aboriginal peoples by implementing employment equity plans including positive measures and hiring goals.[84] This law starts from the premise that these groups face widespread and sets the *workplace parties on the task of first identifying how discrimination

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83 See *Action Travaille des Femmes*, above and Mary Cornish and Harriet Simand, "Religious Accommodation in the Workplace" CLELJ and See Also Shirish Prindit Chotalia "Human Rights Law in Canada", Toronto: Carswell 1995, at pp Can 6 - Can 8 and Can 50 - Can 54.

84 See Cornish, Mary, Schucher, Karen, Pask, Amanda, Canadian Labour Congress Trade Union Guide to the *Employment Equity Act, 1998.*

is operating in the workplace and then planning the steps and adjustments necessary to make reasonable progress in removing the discrimination. This perspective is an useful one to apply to in the context of remedying foreign credential recognition barriers.

This paper argues that an regulatory body could be ordered to implement an "licensing equity plan" along the lines of an "employment equity plan" in order to "prevent future systemic discrimination and to eliminate past barriers arising out of the discriminatory practices identified. *See NCARR and CHRC v. Health Welfare Canada*[85]. Adapting the obligations of employers under the *Employment Equity Act*, this would requires regulatory bodies and employers to :

1. carry out an applicants\workforce survey to determine the extent of the foreign-trained applicant\employee population;
2. identify the professional groups where the percentage of foreign-trained accredited professionals\tradespersons falls below their availability in the population;
3. communicate information on licensing\employment equity to the organization's employees, and consult and collaborate with the relevant foreign-trained professional\trades representative groups;
4. identify possible barriers in existing licensing\certification\training\employment systems which may be limiting the licensing\certification\training\employment opportunities of professional designated group members;
5. develop an licensing\employment equity plan aimed at promoting an fully equitable professional\trades licensing\certification\training system and workplaces (this plan must include positive policies and practices; measures to remove barriers, timetables and goals, and must be sufficient to achieve reasonable progress towards an representative accredited professional\trades community and workplaces);
6. make all reasonable efforts to implement its plan;
7. monitor, review, and revise its plan from time to time; and prepare an annual report on its employment equity data and activities.

Such a "corrective measures program" or licensing equity plan could include measures such as those ordered in the *NCARR* case but adapted for the context of recognition of foreign-trained professionals. Such measures might include the following: requirements to provide training programs and human rights training\workshops for staff and adjudicators of the regulatory agency with requirement for mandatory attendance; requirements to set clearly defined qualifications for positions; to develop methods to assess occupational standards; develop methods to assess foreign credentials; to implement, monitor and report arrangements to the human rights commission on the plan's progress; for the agency to say that it is an "equal opportunity licensing body."; to identify foreign trained professionals who wish to be licensed and work with them to develop an plan for achieving that goal; to establish mentoring programs and training of mentors on mentoring methods in an cross-cultural context; to appoint an agency person who is to be provided with full powers to ensure the implementation of the corrective measures program; to work with an internal review committee; to report each quarterly period on progress in achieving the goal of the plan and the numerical targets for licensing of foreign trained individuals.[86]

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85 28 C.H.R.R., D\179, p. D\217

86 above, see pp. D/219- 222

In both *Action Travail* and *NCARR* employers were ordered to comply with numerical targets for the hiring of designated group members. Arguably, this approach could also be used where it was determined that an agency, employer or training facility, through its practices and procedures, however inadvertent, had discriminated against foreign trained professionals. Such an agency could be ordered to take steps to achieve numerical targets for the admittance of foreign trained professionals, with an requirement that it provide an convincing explanation of why it was not possible to meet that target, if it failed to do so.[87]

CONCLUSION

The *Bitonti* decision, while perhaps disappointing in its immediate impact, confirms that the jurisprudential landscape has altered sufficiently that the time is ripe for further legal challenges aimed at the difficulties faced by foreign trained professionals. The decision promises at least to move the jurisprudence beyond the faulty analysis of the *Jamorski* decision, though it remains to be tested what kind of systemic remedial ruling could be achieved in an appropriate case.

While the practical difficulties in bringing an successful *Charter* challenge or human rights complaint cannot be minimized, this paper has aimed to sketch out an variety of substantive legal equality arguments which have not yet been made but which may represent a new and effective legal strategy for redressing discrimination in this area.

In light of the delays in the process before human rights tribunals and councils, it may be that an properly conceived *Charter* challenge would be the route of preference, with an court action providing the greatest potential impact. This paper has suggested that such an strategy would be based on substantive protections provided by current equality jurisprudence, and would stress the pro-active obligations to account for diversity that have been increasingly recognized by human rights decision-makers, in particular in the recent Supreme Court decision in *Meiorin.* It has also suggested that there is the potential for an remedial request in the form of an "licensing equity plan" along the lines of an "employment equity plan", designed in order to "prevent future systemic discrimination and to eliminate past barriers arising out of the discriminatory practices identified.

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87 above.