A SOCIO-LEGAL ANALYSIS OF FOREIGN CREDENTIALS ASSESSMENTS AND RECOGNITION IN CANADA IN LAW AND THE MEDIA: LOGIC, LEGITIMATION AND LIMITATIONS REGARDING FOREIGN TRAINED PROFESSIONALS (FTPS)

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ABSTRACT

Recent statistics and research literature suggest that Canadian immigrants are facing high underemployment and unemployment rates, with many struggling to find employment that is on par with their education, skills, and work experience (Ontario Human Rights Commission 2). As Canada attracts and accepts more immigrants, in an effort to overcome issues pertaining to its aging population, decreasing birthrate, and shortage of skilled workers, the country must also assume full responsibility for establishing effective systems and processes which can help to facilitate the integration of foreign trained professionals (FTPs) into the labour market, at levels that correspond to their skills and credentials (Ontario Human Rights Commission 2; Mata par. 6). Given that the struggles of FTPs in Canada are largely attributable to social and structural barriers relating to their accreditation, the objective of this dissertation is to identify recommendations and policy options geared at improving foreign credentials assessments and recognition in Canada. To achieve this end, a variety of sources – including, doctrinal legal materials (i.e. human rights tribunal and court cases), policies, news media reports as well as secondary literature in law and socio-legal studies – will be qualitatively analyzed and synthesized. The argument will be made that more work needs to be done in relation to: a) the reassessment/improvement of accreditation and employment requirements for FTPs; b) the revision of immigration policies to ensure that they are in tune with labour market demands as well as regulatory requirements and processes; and c) the provision of more expansive legal interpretations/decisions by human rights tribunals and courts, in the realm of regulatory policies and human rights protections, which demonstrate more sensitivity to the social and structural challenges experienced by FTPs. Although regulatory bodies, employers, governments, and legal arbitrators within the justice system have already taken steps towards addressing the predicament

of FTPs, a prominent concern for many stakeholders has to do with how best to balance as well as maintain public safety and regulatory standards, while making space for the effective integration of FTPs in the Canadian workforce.

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CHAPTER ONE

Introduction

In the aftermath of the controversial 2016 U.S. presidential election and the Brexit vote in Britain, it is imperative for Canada, more than ever before, to think about its future and presence on the world stage, as it moves forward (Pearson par. 2). Undoubtedly, Canada has been influenced by and maintains longstanding historical as well as political links to both the U.S. and Britain; however, Canada's national identity stands apart from its neighbour south of the boarder and commonwealth counterpart overseas (Pearson par. 2; 4). Although far from perfect, Canada has a unique approach to identity in that is accepts difference as well as the "complexity of the Canadian experience" (Mallinder par. 6; Pearson par. 18). Instead of seeking to develop a unified culture into which newcomers must assimilate, Canada has, for the most part, strived to be a heterogenous and multiculturally diverse nation – one that is home to immigrants from all around the world (Mallinder pars. 1; 4; and 16). For many of these immigrants, particularly internationally trained professionals, Canada represents a beckon of hope or a place of opportunity for a better life, amid peaceful and democratic governance (Ontario Human Rights Commission 2). In return, immigrant professionals have served to diversify Canada's national identity, as well as strengthen the country's labour pool and economic well-being (Ontario Human Rights Commission 2).

Despite Canada's welcoming nature, however, recent statistics and research literature suggest that Canadian immigrants are facing high underemployment and unemployment rates, with many struggling to find employment that is on par with their education, skills, and work experience (Ontario Human Rights Commission 2). This trend is concerning because it severs

the idea of Canada as being a place of refuge, inclusivity, and opportunity (Mallinder par. 18). As Canada attracts and accepts more immigrants, in an effort to overcome issues pertaining to its aging population, decreasing birthrate, and shortage of skilled workers, the country must also assume full responsibility for establishing effective systems and processes which can help to facilitate the integration of foreign trained professionals (FTPs) into the labour market, at levels that correspond to their skills and credentials (Ontario Human Rights Commission 2; Mata par. 6). To this effect, the objective of this dissertation is to examine the social and structural issues relating to the accreditation of FTPs, in an effort to identify recommendations and potential policy options which can be pursued by regulatory bodies, governments, and the justice system, with the intention of improving foreign credentials assessments and recognition in Canada.

In the words of Fernando Mata:

> Undoubtedly, the lack of accreditation of foreign-trained professionals has negative impacts on the state of race relations in Canada. When large numbers of individuals from particular ethnic or racial backgrounds are blocked in their entry into the trades or professions there is an accumulated societal effect of higher levels of inter-group tension, individual and collective alienation as well as generalized perceptions of 'institutional' discrimination (par. 29).

Contributions to Socio-Legal Scholarship

This dissertation makes three fundamental contributions to socio-legal scholarship.

1) First, I will provide a media analysis of how select online news sources, within the last decade, describe and present the challenges experienced by FTPs in Canada (particularly those working in highly skilled, "traditional" professions such as medicine, dentistry, law, engineering, and architecture). I will focus on news sources from Ontario, Alberta, and British Columbia. Since chapter four examines ten case studies from the provinces of Ontario, Alberta, and British Columbia, my media analysis will also focus on these same provinces for the sake of maintaining consistency throughout my dissertation (see page 105 for details). Particular attention will be paid to reoccurring themes, contradictions, and narratives used to frame the social, structural, and legal problems experienced by internationally educated professionals. Furthermore, I will seek to determine: a) whether news media coverage surrounding FTPs and their struggles correspond with what the majority of research literature appears to suggest, and b) whether media accounts adopt a policy versus a legal undertone when proposing potential solutions to the challenges face by FTPs. Two key questions that will be guiding my media analysis include: 1) Whose interests or concerns (the state vs. FTPs) are being routinely voiced or highlighted in media articles? And 2) are there similarities or differences in the media coverage provided by various news sources? Once again, I am mindful that my media analysis is limited to a select sample of online news sources/media articles and therefore my findings cannot be seen as representative of all news media stories, nor are they predictive of future news media accounts.

2) Second, recognizing that there appears to be a gap in literature with respect to the utility of human rights and fair access legislation in effectively surmounting some of

the barriers experienced by foreign trained professionals, my dissertation will address that void. While a significant amount of research has been done to date on the social and structural challenges experienced by foreign trained professionals in Canada, the majority of literature appears to take a policy oriented approach when proposing potential solutions or changes to credential recognition practices, professional training programs, and immigration policies. Alternatively, my dissertation will take a more legal approach by examining the issue of foreign trained professionals in Canada through a socio-legal lens, with particular attention to how pieces of Canadian legislation and the courts can be used as tools or vehicles for change and seeking justice. An attempt will be made to reveal unique insights by comparatively examining a number of human rights tribunals as well as court cases in Ontario, Alberta, and British Columbia between 1995 and 2016. My sample of cases were selected on the basis of convenience and are representative of the kinds of legal issues pursued by FTPs. That said, I am mindful of the strengths and limitations associated with adopting a socio-legal approach. Although this socio-legal project will comparatively analyze a select number of cases, I am aware that my findings cannot be generalized or applied to all cases, nor should they be seen as indicative of future trends. Rather, the goal behind adopting a socio-legal lens is to provide an interdisciplinary analysis of the social and legal contexts in which the issues of FTPs can be situated.

3) Third, I hope to contribute to and move forward pre-existing research literature surrounding: a) the role of news media in spreading awareness about societal

problems; b) the interplay of law, race, legal analysis, narratives, and judicial activism within Canadian human rights tribunals/courts; and c) the prevalence of legal consciousness in Canada, specifically among foreign trained professionals. In particular, I will be using the works of scholars such as, Natalie Jomini Stroud, Seon-Kyoung An and Karla K. Gower, David L. Altheide, Michael Schudson, Gaye Tuchman, Dietram A. Scheufele and David Tewksbury, Rachel Best, Kitty Calavita, David Kairys, Constance Backhouse, Peter Brooks, Paul Gewirtz, Patricia Ewick, and Susan Silbey, and Christopher Wolfe in order to guide my analyses of news media accounts and Canadian case law.

Research Questions

I will seek to explore and answer the following research questions throughout the various chapters of my dissertation:

News Media and the Coverage of Social Issues

1) Does the news media highlight the interests and concerns of both the state (governments) and FTPs, when exploring the issue of foreign credentials assessments and recognition in Canada?

2) Is the media coverage provided by various news sources, uniform or different?

Law and the Legal System

3) Are human rights tribunals and courts responsive to the expectations/concerns of FTPs and to what extent?

4) Is judicial power distributed in such a way that certain groups or interests are consistently favoured?

Law and Race

5) In cases of alleged racial discrimination, have FTPs successfully used human rights and fair access legislation to seek justice?

Law, Legal Analysis, and Narratives

6) What kind of language and narratives are being used in legal arenas to frame issues surrounding FTPs and their employment prospects in Canada?

Judicial Activism

7) Is there evidence that human rights tribunals and courts are: a) hesitant to encroach upon policy matters, specifically in relation to the assessment and recognition of foreign credentials? and b) advancing human rights protections for FTPs?

Legal Consciousness

8) From a theoretical/sociological standpoint, are FTPs in Canada legally conscious of their rights as well as the various legal mechanisms that exist to assist them when they have been wronged by employers or regulatory bodies?

Conceptual/Theoretical Frameworks

Outlined below are the conceptual/theoretical frameworks which should be kept in mind while reading this dissertation. I will attempt to highlight these conceptual/theoretical frameworks upon analyzing and cohesively combining all research materials in order to develop answers to my research questions. While the first framework is specifically relevant to discussions in chapter three, the remaining frameworks are more expansive and pertinent to issues covered in both chapters four and five.

1) *News Media and the Coverage of Social Issues*

Different media sources allow for the transmission of different perspectives and viewpoints to diverse audiences (Stroud 360). The news media – particularly online news sources - can be regarded as mediums which help define and shape public opinion (An and Gower 107). In fact, some scholars argue that "people's news media patterns are changing" as more and more people are turning to the Internet for information and news coverage instead of print newspapers (Stroud 346). Although some worry that online news sources provide individuals with ample opportunities to conveniently select information and news stories that reaffirm or correspond to their beliefs and values, others argue that the advent of online news reporting allows for exposure to diverse views and perspectives (Stroud 341). Natalie Jomini Stroud explains:

> The Internet, in particular, provides people with ample opportunities to encounter information that either complements or contradicts their political predispositions. In embracing this freedom of choice, it is an open question whether people will seek out likeminded or opinion-challenging online content. On the one hand, it is possible that

> people will use the Internet to fragment into ever more specific likeminded groups. On the other hand, people may use the Internet to explore diverse opinions (346).

Either way, research suggests that people's viewpoints on social and political issues are often "related to their media exposure" and this pattern tends to persist across various media types (Stroud 341). As suggested by David L. Altheide, "media and public perceptions of issues and problems are inexorably linked" (648). Some scholars maintain that media and news sources are complicit in relaying strategic messages to the public with regards to social phenomena and public policy issues (An and Gower 107). The creation and dissemination of news to the general public can be regarded as a social production - the social production of reality (Schudson 273). In the words of Gaye Tuchman, "To say that a news report is a story, no more, but no less, is not to demean the news, not to accuse it of being fictitious. Rather, it alerts us that news, like all public documents, is a constructed reality possessing its own internal validity" (97). When a societal problem or crisis exists, people want answers and news media coverage is often one source of information that many seek out in an effort to identify causes, assign blame or find solutions (An and Gower 107). According to Seon-Kyoung An and Karla K. Gower, it is imperative to look at how the news media frame crisis events and their causes because all these frames or accounts exert influence over public perceptions, political decision-making and societal response strategies for resolving problems (107).

Framing theory suggests that the news media frame stories by choosing what to include and exclude in their accounts (An and Gower 108). By doing so, the news media limit or expand the meanings and inferences that people can derive from their stories, ultimately influencing people's interpretations or understanding of a given social problem, crisis or public policy issue

(An and Gower 108; Scheufele and Tewksbury 11; Altheide 650). Studies indicate that "public perceptions of problems and issues incorporate definitions, scenarios and language from news reports" (Altheide 649). Among the various frames that appear in the news, research literature suggests that 'economic' and 'attribution of responsibility' frames are amongst the most frequently used frames in the news media (An and Gower 108; 111). While 'economic' frames "report an event, problem, or issue in terms of the consequences it will have economically on an individual, groups, organizations, or countries", 'attribution of responsibility' frames attribute responsibility for causes or solutions to either the government or individuals and groups (An and Gower 108). As such, the news media play a significant role in molding public opinion about "who is responsible for causing or solving social problems" (An and Gower 108).

Additionally, Altheide maintains that media reports are involved in agenda setting, often distorting social problems by over-representing issues and thus causing the public to overestimate or misperceive the frequency of such problems in reality (649). According to Dietram A. Scheufele and David Tewksbury, "agenda setting refers to the idea that there is a strong correlation between the emphasis that mass media place on certain issues and the importance attributed to these issues by mass audiences" (11). That said, Scheufele and Tewksbury caution that the use of framing in news media reports does not mean that most journalists try to spin stories or push forth agendas with the intention of deceiving their audiences" (12). Rather, framing is a necessary tool that many journalists use in order to present complex issues "efficiently and in a way that makes them accessible to lay audiences" (Scheufele and Tewksbury 12). Reflecting on media coverage of social problems, Rachel Best, astutely points out:

> Not all adverse conditions are perceived as social problems – that is, as negative situations that are matters for public action. When the media portray a situation as a social problem, it rises on the public and policy agendas, with important consequences for public opinion, social policy decisions, and collective action. Therefore, it is vital that we understand the condition under which the media portray specific events, arrangements, or situations as social problems (74).

I will be analyzing a select sample of Canadian news media sources and articles, with the intent of exploring how they represent as well as impact the situation of FTPs in Canada.

2) Law and the Legal System

While law is routinely shaped and expressed in the institutions and interactions of human society, most people tend to retain an idealized version of law (Calavita 3). Even when cynicism emerges with respect to the law, this cynicism does not interfere with or harm the abstract ideal of "real law" as magisterial, untainted, neutral, and objective (Calavita 3). Law and society challenges this conventional view in the sense that it examines how law is closely interconnected with society (Calavita 5). From a law and society standpoint, law is everywhere (Calavita 5). Every aspect of our lives is pervaded with law, including social, economic, and cultural contexts (Calavita 5). The problem, however, is that there appears to be a gap between the law-on-the-books and the law-in-action (Calavita 9). This means that the law as it is written and made available to the public is rather different from the way in which it functions in reality (Calavita 9). While Kitty Calavita acknowledges law's potential to bring about social change, she recognizes that laws are often selectively enforced, strategically used, and even nullified at times

by various actors and institutions (Calavita 149). To explain these tendencies, some scholars point to racial or class biases; others claim that it has to do with the nature of capitalist democracies and an unfair or biased logic that has been built into particular laws (Calavita 149). Law, therefore, can be viewed as both hegemonic and oppositional, but at the same time provoking people to contest the power of law (Calavita 151).

In line with Calavita, David Kairys maintains that there is a need to challenge traditional assumptions about the judicial process in order to understand the functioning of law in contemporary society (Kairys 3-6). According to popular perception, law is separate from and above politics, economics, culture, and the values, experiences, or preferences of judges (Kairys 1). This separation is maintained through a decision-making process that is based on judicial subservience to a Constitution, statutes, and precedents; the quasi-scientific, objective nature of legal analysis; and the technical expertise of judges and lawyers (Kairys 1). David Kairys rejects this popular perception by arguing that the law shapes and is shaped by social forces and people-made decisions (Kairys 6). The courts have increasingly favoured government, corporations, and those at the top of the socio-economic ladder over middle-class and poor people, minorities, and women (Kairys preface). The judiciary, therefore, can be seen as a non-majoritarian institution, that is neither popularly chosen nor effectively represents the will of the people (Kairys 1). Furthermore, instead of focusing on "the substance of decisions or the nature and social significance of judicial power", debates are narrowly preoccupied with instances where the courts deviate from the idealized model of law and justice (Kairys 2). According to Kairys, this is reflective of conservative hegemony in the law (Kairys 3). Traditional jurisprudence tends to overlook social and historical realities by hiding the presence of "social conflict and oppression with ideological myths about objectivity and neutrality" (Kairys 6).

In this light, one of the main objectives of my dissertation will be to explore whether the Canadian justice system is responsive to the legal challenges instigated by various FTPs in the quest for seeking justice.

3) Law and Race

Canadian history is rooted in racial distinctions, assumptions, laws, and activities, despite the fictional nature of race as a concept (Backhouse 7). Constance Backhouse argues that Canadian society needs to closely examine the records of its past to locate deeply rooted racist ideology (Backhouse 7). Historically, racial prejudice and racism have been prevalent in Canada despite the country's reputation as a raceless society (Backhouse 13). Detailed documentation reveals that Canada's legal system created and preserved racial discrimination within society (Backhouse 13). This is problematic because white supremacy within our justice system in the past has left a damaging legacy of inequality which still persists today (Backhouse 13). According to Backhouse, racial classifications, both in the past and present, serve to justify inequitable access to resources, status, and power in Canada (Backhouse 6). The concern is that most acts of racial discrimination tend not to be characterized as racist, and while race is a mythical construct, racism is not (Backhouse 7). Omitting to study the records of our past only further perpetuates the popular misconception that portrays Canada as innocent of systemic racial exploitation (Backhouse 7). The ideology of racelessness, which is considered by some to be a hallmark of Canadian tradition, has been complicit in spreading or perpetuating a national mythology that Canada is not a racist country (Backhouse 14). The author points out that while

the United States admits to the fact that racism has and continues to exist, Canada is characterized by a stupefying innocence (Backhouse 14).

My dissertation will seek to explore whether human right tribunals and courts help perpetuate racial discrimination in the context of FTPs.

4) Law, Legal Analysis, and Narratives

Books about law usually treat it as a system of rules and social policies (Brooks and Gewirtz 2). Instead Peter Brooks and Paul Gewirtz look at law not as rules and policies but as stories, explanations, linguistic exchanges – namely, as narratives and rhetoric (Brooks and Gewirtz 2). Nowadays, scholars are interested in law's stories and how those stories are told and interpreted by litigants, lawyers, courts, juries, the media, the general public, and scholars themselves (Brooks and Gewirtz 2). Treating law as narrative and rhetoric involves focusing on facts more than on rules, the language used as much as the idea expressed (Brooks and Gewirtz 3). From this perspective, laws can be seen as artifacts that reveal a culture as opposed to social policies that develop and control a culture (Brooks and Gewirtz 3). Furthermore, the trial process can be regarded as a struggle over various stories and narratives (Brooks and Gewirtz 8). Written justifications in the body of judicial opinions give judicial decisions authority and binding power (Brooks and Gewirtz 10). Thus, in their dominant rhetoric, judges tend to root new decisions in texts that precede the decision of the case at hand – this includes the text of the Constitution, a statute, as well as prior judicial rulings (Brooks and Gewirtz 10). This rhetorical mode allows courts to justify their decisions based on pre-existing law as well as to preserve the institutional

authority of the court (Brooks and Gewirtz 10-11). Some scholars claim that the turn to narratives recognizes that traditional modes of legal analysis are connected to the preservation of the political status quo and are rarely responsive to the interests or concerns of disadvantaged social groups, minorities, and women (Brooks and Gewirtz 12).

Drawing on the utility of narratives and storytelling as a method for studying the law, Patricia Ewick and Susan S. Silbey contend that stories/narratives (inherent in court transcripts) reflect the various ways in which legality is understood and enacted in the daily lives of ordinary citizens (Ewick and Silbey xii). The authors suggest that legal practices and formal legal institutions demonstrate a persistent contradiction between the ideal and the actual in the law (Ewick and Silbey xiii). Legality is an emergent feature of social relations as opposed to an external force acting upon society (Ewick and Silbey 17). This means that legality is not merely maintained by the formal law of the Constitution, legislative statutes, court decisions, or heavy-handed demonstrations of state power (Ewick and Silbey 17). Instead, legality is also shaped by commonplace stories and experiences that take place in people's everyday lives (Ewick and Silbey 17). Law should not be conceived of as existing separate from social relations or produced only by groups of powerful law makers (i.e. the positive law of legislatures, and common law of appellate courts) (Ewick and Silbey 19). Rather law should be seen as a bottom up product that is created through the social interactions of ordinary citizens (Ewick and Silbey 19). Stories, therefore, can be used as a lens to study law in everyday life (Ewick and Silbey 29). When individuals share their stories or personal narratives - in legal arenas such as, tribunals or courts - they participate in the production of legality (Ewick and Silbey 30).

I will be focusing on 10 case studies in Canada in an effort to identify the kind of language and narratives used, within legal arenas, when framing various legal predicaments experienced by FTPs.

5) Judicial Activism

Judicial activism, for the purpose of this dissertation, can be defined as legal rulings that may be tainted or influenced by personal or political considerations instead of being rooted in existing codified and case law. Alternatively, Christopher Wolfe expands this definition, in a more broader sense, by offering a different perspective with regards to the role or meaning of activist legal arbitrators:

> Most simply put, the basic tenet of judicial activism is that judges ought to decide cases, not avoid them, and thereby use their power broadly to further justice – that is, to protect human dignity – especially by expanding equality and personal liberty. Activist judges are committed to provide judicial remedies for a wide range of social wrongs and to use their power, especially the power to give content to general constitutional guarantees, to do so (2).

According to Wolfe, activist judges place less weight on the need to strictly follow precedent and procedural requirements, when seeking to achieve principles of justice (3-4). Although adhering to precedent cases and legal procedures allows for certainty and uniformity within the law, these elements should not be amplified at the expense of discouraging or disallowing activists to overrule outdated precedents (Wolfe 3).

I will be engaging in discourse analysis, in an attempt to explore judicial decision-making practices in Canada, in relation to FTPs and their legal battles. Specifically, I will be using ideology (as expressed in human rights tribunal and court decisions) as a tool for pinpointing those ideological practices and predispositions which guide human rights tribunals/courts and their judicial activism.

6) Legal Consciousness

As suggested by Susan Silbey, legal consciousness can be described as "a reciprocal process in which actions and interpretations given by individuals to their world – and law and legal institutions as part of the lived world – become repeated, patterned, stabilized. These meanings, through repetition and dispersal, become part of the material and discursive systems that limit and constrain future meaning-making" (336). The study of legal consciousness, in other words, centers on how legality is experienced and understood by ordinary people as they engage, avoid, or resist the law and legal meanings (Ewick and Silbey 35).

I will be drawing on Ewick and Silbey's notion of legal consciousness in order to explore: a) the extent to which FTPs in Canada are legally conscious of their rights; and b) whether FTPs perceive of or actively use human rights and fair access legislation as effective tools for contesting and/or resisting 'unjust' policies or credential recognition practices used by employers and regulatory bodies.

Methodology

For the purpose of my dissertation, I will be analyzing qualitatively and synthesizing doctrinal legal materials, policies, news media reports as well as secondary literature in law and socio-legal studies. Primary data to be gathered will be either legal in nature, in the form of legislation (i.e.: human rights codes and acts; fair access legislation), regulations (i.e.: credential recognition practices; immigration policies) and adjudicative decisions, or media related, in the form of online news media sources/articles. The following methodologies were utilized:

1. Searched legislative databases to locate all relevant federal and provincial legislation

2. Scanned Canlii to find Canadian case law (human rights tribunals and court decisions) in relation to foreign trained professionals' credentials assessment

3. Analyzed articles from online news sources in order to identify reoccurring themes, contradictions, and narratives used to frame the struggles of foreign trained professionals

4. Analyzed case law (involving foreign trained professionals and the assessment of credentials) to uncover patterns, contradictions, interpretive gaps, emerging narratives, as well as instances of judicial activism and legal consciousness

5. Contacted the Office of The Fairness Commissioner in Ontario in order to request: 1) general information on their experience in assisting foreign trained professionals with legal issues; 2) guidance in terms of what they believe to be gaps in research when dealing with foreign trained professionals and the assessments of their credentials

6. Searched for secondary socio-legal literature that can help shed light on a) the role of news media in framing social, structural, and legal problems pertaining to FTPs; b) the

interplay of law, race, legal analysis, narratives, and judicial activism; and c) the situation of foreign trained professionals in Canada and their legal consciousness.

Organization

Chapter Two - Chapter two will examine research literature in relation to foreign credentials assessments and recognition in Canada, with attention to debates, themes, and gaps in research. Topics of discussion will include: a) individual and structural barriers experienced by FTPs; b) efforts made by governments, regulatory bodies, and employers to alleviate conditions for FTPs; c) necessary changes in the realm of credential recognition practices, professional training programs as well as immigration policies; and d) the utility of Canadian legislation to fight against unjustified instances of discrimination or human rights violations.

Chapter Three – Chapter three will analyze the way in which news media represent the predicament of FTPs in Canada. Attention will be paid to a number of factors, including: a) routinely voiced interests and concerns – i.e. those of FTPs versus the state, regulatory bodies, and employers; b) commonalities as well as differences between news media versus academic accounts of FTPs' struggles; and c) news media's emphasis on policy initiatives or undertakings (as opposed to legal avenues) when seeking to ameliorate circumstances for FTPs.

Chapter Four – Chapter four will comparatively examine and analyze 10 human rights tribunal as well as court cases, in Ontario, Alberta, and British Columbia, which involve legal challenges undertaken by FTPs. Discussions will seek to highlight how pieces of Canadian legislation have been used, interpreted, and applied in legal arenas, by both FTPs and justice officials.

Chapter Five – Chapter five will provide a final pulling together of the main themes highlighted throughout this dissertation, with attention to policy suggestions as well as potential avenues for future research.

CHAPTER TWO

Literature Review - Foreign Trained Professionals, Assessing and Recognizing Foreign Credentials, and Employment Opportunities in Canada

This chapter will provide a reflective review of the major debates, themes, and gaps in research presented in the literature surrounding foreign trained professionals (FTPs), credential recognition practices, employment opportunities for highly skilled professional immigrants, and immigration policies in Canada. Emphasis will be placed on regulated professions in the province of Ontario because: a) there is a significant amount of information available on the topic and b) Ontario provides a useful and interesting model for other Canadian provinces.

Given the broad range of topics and discussions covered in this chapter, I have identified and focused on four thematic questions in hopes of providing a clear overview of the literature on FTPs in Canada. This statement has selectively engaged with relevant readings, reports and research data which succinctly shed light on the four questions. Although an attempt has been made to answer all questions as thoroughly as possible, it must be noted that there is always room for more detail and elaboration when answering the thematic questions. Thus, while the aim of this chapter is to provide a concise introduction to the key debates, themes, and gaps in research in the realm of FTPs, further research and extensive reading is undoubtedly required in order to develop more intricate answers to each thematic question.

Please note that throughout this dissertation, I will frequently use the term Foreign Trained Professionals (FTPs) when referring to the wide range of highly skilled professional immigrants (i.e. doctors, dentists, lawyers, engineers, and architects) who have been trained and

educated outside of Canada, and who are currently seeking employment in the same regulated professions in Canada (PCPI, "Strategic Workforce" 8). Occasionally, I will also use the term Internationally Educated Professionals (IEPs) when referring to foreign trained professionals. Lastly, this chapter (along with the remainder of this dissertation) has focused on regulated professions as opposed to non-regulated professions in an attempt establish focused discussions and analyses.

1) **What are the individual and structural challenges faced by foreign trained professionals in Canada?**

One of the main concerns consistently expressed throughout the literature on FTPs has to do with their inability or struggle to find employment that is on par with their foreign credentials and training. As noted by Reuben Garang, "Being an immigrant in the advanced world may appear to open a window of opportunity and bring peace of mind. But these positive images are almost always juxtaposed with a real sense of disillusionment" (5). Research suggests that many internationally educated professionals experience difficulties when seeking entry into various regulated professions. Canada's immigrants arrive with high levels of education and extensive work experience, at times even more advanced that their Canadian counterparts and yet, they are unable to obtain professional licenses despite having been licensed to practice in their country of origin (OFC, "Academic Requirements" 5; Laroche and Rutherford xiii). This scenario becomes clearer, but all the more troubling upon examining the host of challenges faced by FTPs. Liying Cheng and her colleagues identify two main types of barriers experienced by FTPs: individual versus structural barriers (3).

Individual Barriers

Individual barriers for FTPs include a variety of different factors including: lack of Canadian experience (both cultural and professional); inadequate English skills; lack of networks; and limited financial resources (Cheng et al. 3; Deters 7).

According to the Office of the Fairness Commissioner (OFC), employers prefer applicants who have Canadian working experience ("Academic Requirements" 10; Laroche and Rutherford xiii). This barrier has been so prominent that the Ontario Human Rights Commission has warned employers and regulatory bodies that rejecting applicants based on this factor may constitute a human rights violation and provide grounds for legal action and repercussions (OFC, "Academic Requirements" 10). Despite this warning, however, some employers continue to hire highly skilled FTPs into positions that are not commensurate with their level of education and training, precisely because of their lack of Canadian work experience (OFC, "Academic Requirements" 10). This of course creates an advantageous scenario for employers whereby FTPs engage in highly-skilled work without being offered positions or salaries that are suitable for those skills (OFC, "Academic Requirements" 10).

Problems associated with FTPs' language assessment and learning is another significant area that needs to be addressed (OFC, "Academic Requirements" 9). In Canada, many IEPs have expressed dissatisfaction with the slow pace and generic set-up of intermediate language programs (OFC, "Academic Requirements" 10). Many explain that a significant amount of time (up to five years) is wasted on achieving language benchmarks required by programs and regulatory bodies without any guarantees or increased likelihood of finding appropriate work at

the end of the entire process (OFC, "Academic Requirements" 10). Extended time away from a particular practice or profession can lead to the deterioration of skills among applicants and a lack of up-to-date expertise, all of which further compromise FTPs' chances of becoming licensed (OFC, "Academic Requirements" 10).

At the same time, however, corporate respondents and employers have been found to cite inadequate language skills as one of the biggest barriers to employment for IEPs. With regards to recruiting and hiring practices, employers admit that they heavily focus on communication skills, including writing, listening and speaking in English (PCPI, "Progress: IEP's Experience" 4). Moreover, research has found that most non-governmental agencies that provide social services spend too much time structuring resumes for immigrants and FTPs who in reality have virtually no or very limited English language proficiency (Garang 10). The agencies tend to focus on assisting immigrants to find suitable employment without ensuring that they have the necessary language skills required for their occupations of interest (Garang 10). Interestingly, the Progress Career Planning Institute (PCPI) reports that the largest apparent difference between employer and IEP perceptions involves inadequate language skills as an obstacle to securing employment (PCPI, "Best Practices" 6). While employers almost unanimously rate language as a serious barrier, very few IEPs in comparison see themselves as having language problems or communication barriers (PCPI, "Best Practices" 6). Offering some statistics, Ping Deters contends that while only 22% of FTPs identify the lack of official language skills as a barrier for labour market participation, this percentage is much higher among private and public sector employers at 66% (8). This clear difference in perceptions requires further investigation and Cheng et al. highlight the need for more research on the role that the English language plays in successfully obtaining professional licensure and certification among IEPs (4; Deters 8). Such

information is needed in order to determine: a) whether language proficiency is being used as a gate-keeper to exclude FTPs from the labour market; and b) whether language tests are being used for just, fair, professional, and ethical purposes (Cheng et al. 3).

Laura Visan proposes that agencies and social services designed for newcomers should assist immigrants and FTPs alike to engage in community activities encouraging civic participation (2). By establishing social networks outside of close family circles and friends, newcomers not only develop a better understanding of the social, economic, and political context of their new country, but it enables them to strengthen their language skills – an asset which is likely to facilitate their integration and transition into the Canadian labour market (Visan 2). In effect, the development of social capital resources can simultaneously lead to the expansion of both personal and professional networks (Visan 1). According to Progress Career Planning Institute, the lack of network systems is a significant barrier for FTPs in finding employment, with networking being one of the main reasons successfully employed IEPs were able to find and maintain suitable work (PCPI, "Progress: IEP's Experience" 5).

The difficulties associated with overcoming the 'Canadian experience' barrier, acquiring strong language skills, as well as developing social/professional network systems are magnified when looking at the financial situation of many FTPs. Internationally educated professionals often have limited financial resources and limited access to financial aid (OFC, "Academic Requirements" 36). The structure of funding systems make it difficult to access training and higher education necessary for addressing skills, qualifications or competency gaps (Myers and Conte 5). Federal and provincial financial aid systems are designed to provide young people with enough money and support to pay for their initial educational endeavours, however, such funding

does not meet the needs of many adult newcomers who have families and significantly higher living expenses (Myers and Conte 5).

Reflecting on the various individual barriers experienced by FTPs, Yogendra B. Shakya and her colleagues argue that current employment and settlement services in Canada are ineffective because they only provide superficial help without addressing the real needs of FTPs (3). Thus, passive job search services and resume clinics which simply reshuffle resumes are next to useless - especially in situations where marginalized FTPs have limited or no access to professional bridging, mentoring, and language training programs that can increase their likelihood of finding stable as well as suitable employment (Shakya et al. 2-3).

Structural Barriers

While the individual barriers described above provide some context with regards to the challenges experienced by FTPs, other dimensions of hardship which emerge in the lives of FTPs are due to certain structural barriers embedded in our society. Structural barriers for FTPs include: the non-recognition of international credentials by employers and occupational licensing bodies (accompanied with difficulties in satisfying licensure and certification testing requirements) as well as professional organizations acting as gatekeepers to include and exclude IEPs (Cheng et al. 3).

In a study conducted by Basran and Zong, IEPs considered the non-recognition or devaluation of foreign credentials as the main reason for their inability to access professions that match their skills and expertise (Cheng et al. 3). This finding was also echoed in PCPI's 2012

report, which stated that from the perspective of FTPs, not having Canadian work experience and recognized credentials posed as major barriers for their job search, with healthcare workers having the most difficulty in securing credential recognition ("Progress: IEP's Experience" 5). Ironically, however, that same report found that employers in Canada tend to have very positive perceptions and experiences regarding the integration of IEPs into the workplace (PCPI, ("Progress: IEP's Experience" 3). Two thirds of the respondents (66%) indicated that their organization did not have any issues with IEP integration, and of the small number that did have problems, they unanimously identified language barriers as the primary concern as opposed to the non-recognition of credentials (PCPI, ("Progress: IEP's Experience" 3). This lack of congruence between the diverging perspectives of FTPs versus employers points to the necessity of further research in the area.

In 2012, Shakya prepared a report outlining ten powerful case studies of immigrant families from racialized backgrounds who were struggling to find employment in Canada. Unsurprisingly, the report confirms the findings of research literature in terms of individual and structural barriers leading to the downward mobility of FTPs. Among the various factors discussed in the report, Shakya emphasizes the concerns of FTPs with respect to: systemic discrimination and distrust in the labour market; insular and limited professional networks; non-recognition of credentials; limited economic capital; unnecessary hurdles in getting permanent residence status; policy gaps and ineffective settlement services (Shakya et al. 1). Ivy Lynn Bourgeault and her colleagues describe the situation and experiences of FTPs in Canada as a 'brain waste' problem or lost labour, whereby highly skilled and educated FTPs, who have a lot to contribute in terms of expertise, are not able to effectively access the labour market in order to

realize their full potential (Bourgeault et al. 7). As a result, many work in unskilled jobs that do not utilize their skills and are not on par with their qualifications.

While the non-recognition or devaluation of foreign credentials is of huge detriment to FTPs, such practices by employers, professional organizations, and occupational licensing bodies can lead to an adverse gatekeeping effect that grants power, social status, and higher income to the members of a closed group (OFC, "Academic Requirements" 13). As cautioned by the OFC, "This can lead to protectionism, where escalating academic requirements and strict licensing practices exclude new members unnecessarily" (OFC, "Academic Requirements" 13). Of course, from the point of view of professional regulatory bodies, regulating a profession inevitably requires that one define acceptable qualifications and establish a distinction between people who are qualified to practice the profession and those who are not (OFC, "Academic Requirements" 13). This distinction is appropriate in so far as it serves to protect the public from unqualified practitioners (OFC, "Academic Requirements" 13). Professionalization, however, can undermine public interest when it is specifically designed to prevent foreign trained workers from entering their profession in order to protect existing service providers from competition (Schwartz 7). Evidence suggests that this situation is not beneficial to the public because it reduces the number of practitioners, lowers the quality of services, and causes prices to rise (Schwartz 7).

In an attempt to understand the logic behind protectionism and its gatekeeping effects, the beginnings of a sociological theory of professions can be found in the work of Max Weber in the early 20th century (Turegun 3). His concept of *social closure* is of central relevance to discussions surrounding access to regulated professions. *Social closure* can be defined as: "A dual process of exclusion from and inclusion in group membership based on any attribute

including race, language, religion, geographic or social origin, property status and education" (Turegun 4). The obsession or preoccupation with credentials can be regarded as an exclusionary closure devised to control and monitor entry into different areas of the labour market (Turegun 4). According to Adnan Turegun, it can be argued that "professional credentials are more about the monopolization of opportunities than about the requirements of actual work in Western sinecure society" (5). In effect, this means that the undervaluation and underutilization of foreign credentials, skills, and experience can be seen as a form of systemic racism against immigrants (Turegun 5). Cleary, systemic discrimination and racism against FTPs exists in Canada, however, it becomes extremely troubling when individuals with prejudice against racial minorities draw on "non-prejudicial justifications – such as lack of qualifications meeting Canadian standards and lack of Canadian work experience – for their discriminatory actions (Turegun 5).

In line with Turegun, Bryan Schwartz further reminds us that although barriers to entry may be born out of protectionism on the part of existing providers, other factors such as ignorance, stereotypes, and biases about the nature or quality of training, education, and testing in other countries may also play a role in producing the gatekeeping effect (8). For all of these reasons, professionalization and self-regulation must be balanced by oversight and accountability – a front which requires a lot more work despite progress that has been made through the establishment of human rights pathways and fair access legislation (OFC, "Academic Requirements" 14).

2) **How have foreign trained professionals, governments, regulatory bodies, and employers dealt with/responded to the challenges identified in question one?**

Foreign trained professionals are among the most educated individuals in Canada, however the discounting or devaluation of their foreign credentials and educational investments abroad are providing them with limited working prospects (OFC, "Academic Requirements" 7; Deters 7). A variety of barriers to the successful integration of FTPs in the Canadian labour market have been identified by researchers and include: poor information available to prospective immigrants; difficulties associated with understanding policies; credential recognition practices and procedures for registration; as well as the time and costs linked with having their credentials and competencies assessed (Bourgeault 3). Bourgeault attributes some of these challenges or barriers to the lack of communication across stakeholders and various organizations involved in the integration process of immigrants (3). Emphasizing the lack of coordinated policies in the political landscape across Canada, she states: "There are complex and interdependent actors in multiple jurisdictions with unaligned accountabilities. Governments do one thing, educational institutions do another, and regulatory authorities do a third" (Bourgeault 7).

The response to this situation has been to improve recognition practices for internationally acquired qualifications, particularly for those educated in a regulated profession (OFC, "Academic Requirements" 7). Also, key partnerships have started to emerge between governments, regulatory bodies, educational institutions, and employers in order to develop programs addressing the barriers experienced by FTPs (Bourgeault 3-4). While these trends have been helpful for some FTPs, others have found alternative ways to overcome the challenges they are faced with.

Foreign Trained Professionals (FTPs)

Literature suggests that few researchers have focused on the choices that FTPs make and the strategies they use when they cannot find work in the highly skilled professions for which they are trained (Turegun 1). According to Turegun, three options exist for FTPs in Canada: *exit*, *de-professionalization*, and *professional rebuilding* (Turegun 6).

Exit means that FTPs may choose to return to their countries of origin or move to a third country in hopes of finding better employment prospects – this option is frequently used by many foreign trained health professionals in Canada (Tuergun 6).

De-professionalization can be regarded as a second type of exist option, in the sense that it represents the departure of FTPs from their professional field. This route is all-too-common among immigrants and those who choose this option often do so involuntarily. In many cases, unemployment or working in a field that does not require any professional skills is not driven by choice, but by individual and structural circumstances over which FTPs have little control (Turegun 6, Munro 5).

Professional rebuilding or *re-professionalization*, is a third option which involves acquiring skills and training for work in a new profession, which may or may not be related to FTPs' original profession (Turegun 6). Individuals who pick this pathway may lose interest in their original field due to the time and costs associated with having their foreign credentials recognized as well as completing bridge and language training programs. For some, this option may be the inevitable last choice after several failed attempts to establish themselves in their original professions (Turegun 1). For others, however, a second profession may be a temporary solution or a way of avoiding complete de-professionalization as they prepare for re-entry into

their original profession (Turegun 6). Interestingly, literature suggests that the settlement service sector has emerged as an enticing avenue for those who choose to re-professionalize. Settlement workers help newcomers to Canada understand their rights and responsibilities as well as find the programs and services they need to successfully integrate into Canadian society. As explained by Turegun, "The settlement service sector emerges as a familiar and credible alternative because many of them have already been there, seeking help for their settlement and employment needs, but also engaging in community leadership" (7).

Governments

Government policy-makers have frequently changed the way Canada chooses its skilled immigrants. In 2002, the *Immigration and Refugee Protection Act* established a human capital model that allotted points on the basis of language, education, and work experience, while subsequent changes reintroduced a priority occupations list (OFC, "Academic Requirements" 10). From the perspective of the OFC, adjusting immigration selection criteria is not enough and has not been effective in improving economic outcomes for immigrants and FTPs alike. Canada, as a result, has also sought to improve processes for recognizing and assessing foreign credentials (OFC, "Academic Requirements" 13).

Literature suggests that public awareness regarding the ineffective integration of FTPs in Canada started as early as the 1980s, when real life stories started circulating in the media about immigrants with PhDs and MDs who were driving taxis and delivering pizzas (Turegun 3). These discussions made room for concerns to emerge about the non-recognition of foreign credentials in immigration policy debates (Turegun 3). Since the regulation of professions and

trades falls under the jurisdiction of the provinces, provincial governments have maintained center stage in shaping policy initiatives designed to integrate FTPs into the Canadian labour market (Turegun 3).

In the context of Ontario, as a province which, until recently, received more than 50 percent of immigrants to Canada, hearing stories about overqualified and underutilized internationals professionals proved to be alarming. In 1988, the province developed a Task Force on Access to Professions and Trades, in an attempt to create an inventory of barriers faced by FTPs in accessing regulated profession and trades. This inventory was then used as a basis for proposing a variety of solutions addressing the challenges experienced by FTPs (Turegun 3). Unfortunately, for over a decade, the provincial government in Ontario did very little to implement the suggestions of the task force. Aside from establishing an Access to Professions and Trades unit in 1995 under the then Ministry of Citizenship, Culture, and Recreation, it wasn't until the early 2000s that Ontario began to take significant actions (Turegun 3). Thanks to political mobilization and immigrant advocacy, the *Fair Access to Regulated Professions and Compulsory Trades Act* (Ontario's first fair access legislation) was finally introduced in 2006 (Turegun 3). That same year, Ontario's Office of the Fairness Commissioner (OFC) was also developed alongside the fair access legislation to ensure that professions comply with the law.

The OFC is an arm's length agency of the Ontario government and its mandate is to confirm that certain regulated professions and trades maintain registration practices that are transparent, objective, impartial and fair. Since 2007, the OFC has monitored changes in professional standards by Ontario's regulated professions and although positive advancements have been made, for the most part, requirements for licensing in the professions have not changed

(OFC, "Academic Requirements" 7). While the OFC can recommend that professions re-evaluate the necessity and relevance of their requirements, it does not have the power to legally order professions to make any changes (OFC, "Academic Requirements" 7). As noted by the OFC in its 2013 report, "It is a basic principle of self-regulation that the profession itself establishes the registration requirements that are considered necessary to ensure the safe and competent practice of the professions" ("Academic Requirements" 7).

Since 2006, Manitoba and Nova Scotia have followed Ontario's suit by establishing similar fair access legislation (Turegun 3). In 2008, the Manitoba government appointed a fairness commissioner under its *Fair Registration Practices in Regulated Professions Act* ("Frequently Asked Questions – OFC"). The Nova Scotia government did the same by establishing *The Fair Registration Practices Act* (2008) and called for the appointment of a review officer ("Frequently Asked Questions – OFC"). Finally, in 2009, the Quebec government set up a Commissioner to handle complaints dealing with the recognition of professional competence ("Frequently Asked Questions – OFC").

There has even been indication of collaboration between federal and provincial governments. In 2009, for instance, the Forum of Labour Market Ministers from the federal, provincial, and territorial governments drafted the *Pan-Canadian Framework for the Assessment and Recognition of Foreign Qualifications*. This framework has sought to: a) emphasize the importance of effective credential assessment and recognition practices by regulatory bodies; b) provide regulatory stakeholders with more financial support; c) encourage active collaboration between federal/provincial governments and regulatory stakeholders; and d) to increase "national

coordination and harmonization of professional standards" (OFC, "Academic Requirements" 11; 13; Turegun 4).

In the area of programs and services, the Ontario government has made big investments geared at maximizing immigrants' contributions to the Canadian economy. Currently, Ontario provides four types of employment and training programs for FTPs including, employment support services, bridge training programs, mentoring and internships (Myers and Conte 8). Research consensus shows that these programs successfully help newcomers to unlock their human capital. As proposed by Karen Myers and Natalie Conte, "Small investments in training post-migration may enable undervalued, pre-migration human capital to become valued in the local labour market at or near the level of equivalent training acquired in Canada" (11-12).

Overall, Ontario has come a long way and it has been recognized as a Canadian leader in developing effective programs for FTPs. Its provincial government has worked with numerous organizations to develop, deliver, and sustain projects for regulated professions (Myers and Conte 10).

Regulatory Bodies

The OFC reports that in recent years, professional regulators and credential-assessment agencies have made efforts to carry out more flexible and well-rounded practices for assessing the academic credentials of FTPs ("Academic Requirements" 7). To assist with this endeavor, federal and provincial governments have provided additional funding to create as well as further improve existing competency assessments and bridge training programs (OFC, "Academic

Requirements" 7). These initiatives have not only shifted the focus of assessments from applicants' paper credentials to their actual competencies, but it has established new acceptable alternatives for acquiring and assessing necessary competencies (OFC, "Academic Requirements" 5; 7).

Regulatory bodies are increasingly offering acceptable alternatives for satisfying academic requirements (OFC, "Academic Requirements" 5). Five types of acceptable alternatives that currently exist include: paper-based assessments of education and experiences, direct assessments of knowledge and skills, self-paced learning, bridging programs, as well as advanced standing in academic or professional degree programs (OFC, "Academic Requirements" 5). Research suggests that "nationally, there is a significant correlation between the accessibility of acceptable alternatives and reduced disadvantage for internationally educated professionals" (OFC, "Academic Requirements" 5). While this may be true, each alternative also has its fair share of challenges in terms of time commitments and costs – these alternatives are not accessible, affordable, or sustainable for all immigrants (OFC, "Academic Requirements" 5). In other words, although acceptable alternatives have been recognized to facilitate FTPs access to licensing, they do not address or provide all encompassing solutions to the numerous individual and structural barriers that they experience. For this reason, regulators must consistently make sure that academic requirements are relevant and necessary to the practise of each profession (OFC, "Academic Requirements" 5).

Additionally, in hopes of improving circumstances and work prospects for FTPs, regulatory bodies in Ontario no longer require citizenship or permanent residence status and now accept applicants with appropriate work authorization from Citizenship and Immigration Canada

(OFC, "Academic Requirements" 10). Some professions have even established provisional-licence or limited-licence categories in order to increase opportunities and facilitate applicants' entry into the Canadian labour market (OFC, "Academic Requirements" 7; 10).

Employers

Following the example set by governments and regulatory bodies, employers have also taken measures to include and integrate IEPs into their workforce through workplace diversity programs as well as language training (PCPI, "Progress: IEP's Experience" 3). According to a study undertaken by PCPI in 2012, 80% of employers indicated that IEP support programs are necessary and over half of the employers surveyed thought that it was not difficult to hire and integrate IEPs into their workforce (PCPI, "Progress: IEP's Experience" 4). For the most part, employers continue to have favourable attitudes with respect to IEPs integration and many either have or are developing IEP related policies (PCPI, "Best Practices" 8).

Unfortunately, although Canadian companies continue to support the hiring of IEPs, only a minority of employers have successfully put into place "tangible, IEP friendly policies and programs" (PCPI, "Strategic Workforce" 4; PCPI, "Best Practices" 5; PCPI, "Progress: IEP's Experience" 3). The Progress Career Planning Institute attributes the inability of employers to effectively adopt IEP policies and programs to problems of cost and long-term sustainability (PCPI, "Best Practices" 9). Given Canada's economic situation and companies' insufficient resources, IEP friendly policies have been difficult to adopt (PCPI, "Best Practices" 6). According to PCPI,

> The majority of employers participating in this study clearly demonstrate a commitment to workforce planning and the inclusion of IEP considerations in their workforce plans; they view IEPs as an important part of meeting their future skills needs; employers consider cultural intelligence as important and vital for their front line managers yet have concerns on current success in developing this skill in front line managerial staff ("Strategic Workforce" 5).

While this statement was made as part of PCPI's 2007 report, similar findings were also expressed in their subsequent reports in 2009 and 2012.

Lionel Laroche and Don Rutherford also emphasize the importance of cultural awareness and intelligence with regards to the effective recruitment and retention of FTPs (xiii). Employers and recruiters must be careful not to discount or discriminate against prospective foreign trained applicants merely because of cultural differences (Laroche and Rutherford xiii). When it comes to hiring practices, many employers tend to "stay away from groups of people they feel they do not understand" (Laroche and Rutherford xiii). This is very problematic when one considers Canada's foreseeable future – one which will heavily rely on FTPs in order to address labour shortages. Laroche and Rutherford maintain that in Canada:

> Labour market entrants are very different from the people who are retiring: There is a much higher percentage of women, visible minorities, and aboriginal people among them than among retiring baby boomers, so the demographics of many North American organizations are likely to be quite different in 10 years from what they are today. For most large organizations and developed countries, finding ways to integrate

> culturally different people without losing their identity and purpose will be one of the major challenges of the 21st century (xv).

3) **What changes do we need to implement in credential recognition practices, professional training programs, and immigration policies in order to accommodate foreign trained professionals in Canada?**

As previously discussed in the prior questions, internationally educated individuals frequently struggle with licensing systems that undervalue their international qualifications and underrate their overseas experience (OFC, "Academic Requirements" 4). This highlights the need for developing new strategies conducive to overcoming licensing barriers as well as optimally mobilizing the knowledge and skills of FTPs (OFC, "Academic Requirements" 9). Thus, Canada's credential recognition practices, professional training programs, and immigration policies are all areas which require substantial change and improvement.

Credential Recognition Practices

In its 2013 report, the OFC called on regulatory bodies to be more flexible in their assessments and to increasingly recognize as well as provide acceptable alternatives that are both affordable and sustainable for FTPs ("Academic Requirements" 4; 36). Daniel Munro argues that "If Canada is going to rely on highly educated immigrants to meet skills and occupational needs, then a better system of credential recognition will be needed" (20).

According to PCPI, as well as other research literature, credential recognition is central to higher earnings, suitable education-job matches, and employee satisfaction in the regulated professions (PCPI, "Progress: IEP's Experience" 9). Despite these findings, Ontario's regulated professions have been slow to make changes to their credential recognition practices. One possible explanation for this disappointing trend can be found in the legal constraints imposed on professions. The OFC reports that:

> Ontario's regulated professions operate within the constraints imposed by their statutes, regulations, and bylaws. Professions can propose changes to any of these official documents, but the amendment process can be long and cumbersome. Changes to statutes and regulations must be approved by the Ontario government. Changes to bylaws must be approved by the profession's membership ("Academic Requirements" 20).

While these strict processes are intended to encourage the careful consideration of changes and amendments, it at the same time hinders regulators from responding to challenges experienced by FTPs in a timely and effective manner (OFC, "Academic Requirements" 20). Regardless, Munro reminds us that current efforts to achieve a better system of credential recognition requires cooperation and collaboration between federal and provincial governments, educational institutions, regulatory stakeholders, and employers (25).

Professional Training Programs

Although improving credential recognition practices can be seen as a stepping stone to improved labour market participation and outcomes for FTPs, federal and provincial governments need to further invest in skills development for newcomers and immigrants (Munro 25).

Skills development can be achieved through a variety of different options such as mentorship programs, paid internships, and on the job learning programs; however, the majority of research literature points to the need for more professional bridging programs (Shakya et al. 2). At the provincial level, the Ministry of Citizenship and Immigration has provided significant support for bridge training, but this should not be seen as a cure all (OFC, "Academic Requirements" 36). First, when designing such programs, regulatory stakeholders together with education providers must keep affordability in mind and provincial/federal governments need to increase financial aid assistance to make sure that all costs associated with the licensing process (i.e. assessments, exams, and bridge training) are covered (OFC, "Academic Requirements" 36). Second, bridging and other alternatives should not be used to mask or compensate for the inability of assessors to accurately evaluate the credentials and competencies of FTPs (OFC, "Academic Requirements" 36; Myers and Conte 7).

Researchers and scholars reveal that workforce development programs are poorly evaluated or studied, therefore their impact on successfully integrating immigrants into the labour market is not absolutely clear (Myers and Conte 11). Evidence suggests that investments in such programs can begin to help unlock FTPs' human capital, but it is difficult to pinpoint which programs are the most effective (Myers and Conte 1). To add to this problem, there is little incentive for employers to engage in workforce development programs, especially if businesses

are small with inadequate financial resources to make such investments (Myers and Conte 2). PCPI-commissioned research has consistently shown that for the past five years, Toronto employers have made efforts to incorporate and accommodate IEPs in their onboarding practices, however, their training programs lack workplace culture and company job specific orientations (PCPI, "Progress: IEP's Experience" 6-7). As stated by PCPI, "survey results indicate that the issue of workplace diversity for the IEPs is a matter of all parties needing to acquire cultural intelligence" (PCPI, "Progress: IEP's Experience" 3). These issues point to the fact that Canadian employers cannot be solely relied upon in order to implement effective workforce development programs and training. Rather, a system-wide approach to the provision of specialized services for FTPs is needed. An approach which encourages cross-sector collaboration among numerous stakeholders including: governments, colleges, universities, employers, professional associations, and regulators (Myers and Conte 13; Shakya et al. 4). Together, these stakeholders can bring about successful system-level changes and reforms which address deep structural barriers, inequalities as well as policy issues (Shakya et al. 1).

Nevertheless, organizations and programs mandated to implement IEPs' workforce integration should seek to: a) minimize the duration of career disruptions experienced by FTPs so that they can promptly transition into Canada's economy (PCPI, "Progress: IEP's Experience" 6; 9), and b) remove the disconnect between training content (emphasizing individual skills development) and the realities of life/ systemic barriers for newcomers (Fursova 12). Julia Fursova reminds us that we must see newcomers not as strictly economic producers and consumers, but rather as "informed and critically aware individuals" (12). This means that the participation of FTPs in the planning and evaluation of programs is of great importance (Fursova 14). While some initiatives, such as amendments to human rights and fair access legislation can

be carried out independently by each province, other initiatives involving the establishment of institutions and programs to evaluate foreign credentials as well as the provision of training require cooperation between federal and provincial governments (Schwartz 20). In the words of Schwartz, "Admitted but included is a far more just and socially beneficial scenario than continuing the status quo, which wastes talent, training, competence and dreams" (21).

Immigration Policies

Changing and amending Canadian immigration policies is a third pathway which can more broadly assist FTPs in: a) avoiding certain structural barriers, and b) acquiring a more realistic understanding or picture of Canada's labour market potential.

For many decades, Canada's immigration policies have focused on recruiting and retaining highly skilled professionals and labourers in an attempt to support Canada's long-term economic interests (Cheng et al.). Turegun explains that since the development of the points system in the late 1960s, immigration and public policies sought to attract skilled workers with higher levels of education than that of the Canadian-born population (2). This economic strategy, however, needs to be re-examined as Canada begins to face labour shortages, an aging population and low birth rates (Cheng et al. 2). As great numbers of people are leaving the Canadian workforce, fewer young people are entering the workforce to replace them (PCPI, "Strategic Workforce" 7). Studies also suggest that Canada's economic performance has not only steadily deteriorated since the 1980s, but there is evidence of a widening gap in employment, earnings, and wealth between recent immigrants, former immigrants, and the Canadian-born population (Turegun 2). Consequently, scholars seem to suggest that Canada needs an influx of skilled

foreign trained professionals "whose tax contributions will offset the social cost of an aging population and the rising costs of government programs" (Schwartz 4). Highlighting the paradox surrounding FTPs, Laroche and Rutherford astutely point out:

> On the one side, immigrants are blamed for being security risks, stealing jobs, diluting national culture, and burdening the social, health, and educational systems. On the other side, immigrants are said to be creating new jobs, making our societies more dynamic and prosperous, and paying more in taxes than they draw out of the system (xiv -xv).

Given labour shortages and the need for more workers throughout Canada, Statistics Canada projects that by 2030, immigration will be the main source of new workers in the labour market (PCPI, "Progress: IEP's Experience" 6; Laroche and Rutherford xv). This means that continued and rising immigration rates are likely to be a fact or reality in Canada's projected future (Laroche and Rutherford xv). While the aforementioned scenario may seem like a good solution to Canada's labour shortages, ironically, literature also reveals that internationally educated professionals are significantly under-represented within the Canadian labour force even though they represent a promising 'untapped human resource' than can be used to strengthen Canada's economy and future (PCPI, "Strategic Workforce" 2). If Canada fails to successfully integrate FTPs in its workforce, governments will struggle to gather enough revenue to support essential public services and this in turn will negatively impact the quality of public services as well as create higher taxes for those individuals who are already working (Schwartz 7).

In a research project carried out by Bourgeault and a team of colleagues, internationally educated health professionals were seen to choose Canada as a country of destination for a number of reasons including its: 1) easy immigration process; 2) reputable political and economic stability; 3) fair international politics; 4) promotion of multiculturalism; and 5) abundance of suitable working opportunities (7-8). Upon arrival, however, many experienced a great deal of confusion, disappoint, and frustration when trying to overcome various barriers related to obtaining a license to practice and assist with Canada's shortages in healthcare (Bourgeault et al. 5). Unfortunately, these sentiments characterize the experiences of many other IEPs and are not limited to the healthcare profession. Canada's immigration system is failing to live up to its promise and action needs to be taken in order to change this reality as we head into the future (Myers and Conte 1). As a result, immigration policies which once offered optimistic results for economic growth and development, now have to be reformulated.

Schwartz proposes that the federal government should improve Canada's current immigration laws and practices by redefining the points system used for evaluating the strength of applications for immigration (8). This can be achieved by introducing a new formula which emphasizes transparency with regards to the extent to which applicants' home country credentials and competencies are likely to be recognized in Canada. This way, newcomers and FTPs alike can have a better and more realistic idea of the work prospects awaiting them in Canada should they choose to immigrate (Schwartz 19). Furthermore, immigration should be viewed as a tool for nation-building as opposed to a "supply-side labour market strategy which treats immigrants as sources of cheap, disposable labour" to meet Canada's labour market agendas and goals (Shakya et al. 2). Reforms to immigration policies should occur in tandem with reforms to labour market policies in order to allow for a 'humanist policy' interested in welcoming and effectively

integrating immigrants as valued, permanent, long-term members of our society (Shakya et al. 2). Lastly, in an effort to facilitate the integration of newcomers in Canada, information sessions should be made available to prospective entrants and IEPs from the outset, with consistent messages about the immigration process, likely outcomes for employment, credential recognition practices, literacy and communication skills requirements, as well as potential alternative employment options which would still draw on IEPs' high skills and training (Bourgeault et al.5).

4) What pieces of Canadian legislation can be used to help alleviate or address the challenges experienced by foreign trained professionals?

Discussions surrounding the use of Canadian legislation to address the challenges experienced by FTPs appear to be lacking in a lot of literature. Most pieces have a policy oriented focus with regards to the design of credential recognition practices, professional training programs, and immigration policies. Hardly discussed is the utility of human rights and fair access legislation in effectively surmounting some of the barriers experienced by FTPs.

Human Rights Legislation

Bryan Schwartz emphasizes the need for federal and provincial authorities to strengthen and develop robust human rights legislation in Canada in order to help FTPs fight against unjustified discrimination as well as achieve their merited licensing status through investigations conducted by human right tribunals (5-8). Human rights legislation not only serve to curtail the differential treatment of FTPs, but they provide individuals with the opportunity to file formal complaints and obtain legally binding remedial orders from independent bodies (Schwartz 13).

That said, however, the use of human rights statutes to fight against unjustified barriers is rare, as many FTPs cannot afford the legal costs associated with sustaining their cases (Schwartz 13).

To make matters even more complex, Schwartz notes that the warfare between FTPs and employers is often asymmetric (13). Regulatory and occupational bodies tend to have significant resources at their disposal when fighting legal battles. In addition to hiring experts and lawyers to prepare cases against applicants, regulators and employers have the further advantage of drawing on a vast amount of institutional experiences gained through fighting similar battles (Schwartz 13). In comparison, FTPs are less likely to have the monetary funds and time required to maintain prolonged disputes as they struggle to maintain a livelihood and find stable employment. Thus, although the use of human rights legislation is one pathway towards eliminating undue discrimination against FTPs, this option has its limits when looking at the realities faced by FTPs. As a result, Schwartz and the Office of the Fairness Commissioner highlight the need for simultaneous reforms in the area of fair access legislation (Schwartz 14).

Fair Access Legislation

Thus far, the provinces of Ontario, Manitoba, and Nova Scotia have enacted fair access legislation (Schwartz 14). With regard to Ontario's fair access legislation, the *Fair Access to Regulated Professions and Compulsory Trades Act* identifies two important criteria for encouraging fair access to the professions: "first, all requirements for licensing should be relevant and necessary to the practice of the professions and second, competencies are more important than credentials" (OFC, "Academic Requirements" 15). The *Act* also states that admission practices maintained by regulated professions must be transparent, objective, impartial, and fair

(OFC, "Academic Requirements" 35). Provincial governments should enact and improve fair access legislation because fair access standards override other statutes, including those that give authority to the regulated professions (Schwartz 15). This factor alone can serve to discourage the development of evaluation criteria that use unfounded assumptions or stereotypes about foreign training and the equivalency of foreign credentials (Schwartz 14).

Second, fair access legislation can potentially reduce the need for FTPs to take actions against occupational bodies on human rights grounds. Knowing that FTPs have the option of obtaining legally binding remedies through fair access legislation should deter regulatory bodies and employers from engaging in discriminatory practices as well as creating unjustified obstacles for entry into respective professions (Schwartz 8). Rather, with the development of fair access legislation, regulated professions are more likely to feel the pressure to: a) establish mechanisms for properly assessing credentials and competencies; b) develop acceptable alternatives for meeting licensing requirements; c) inform applicants of such alternative routes; and d) offer bridging programs designed to overcome gaps in skills and licensing requirements (Schwartz 15; OFC, "Academic Requirements" 35). Lastly, fair access legislation promotes accountability and public oversight, as it requires the professions to conduct an audit of their practices and report to an independent commission (Schwartz 15).

Concluding Remarks

This chapter has provided a literature review of the significant debates, themes, and gaps in research surrounding foreign credentials assessments and recognition in Canada. The underlying thread which emerged throughout the various discussions centered on the fact that

although gradual steps have already been taken by various actors (i.e. governments, regulatory bodies, and employers) to address the predicament of FTPs in Canada, much more remains to be done as we move forward, particularly in terms of: a) improving credential recognition practices, professional training programs and immigration policies, as well as b) recognizing the potential and utility of Canadian legislation in overcoming injustices or human rights violations experienced by FTPs. The next chapter will shift gears by focusing on insights that can be derived from a media analysis of news coverage on FTPs.

CHAPTER THREE

Media Analysis - News Coverage on Foreign Trained Professionals in Canada and the Assessment/Recognition of their Foreign Credentials

In contrast to the previous chapter's focus on academic research literature, this chapter will seek to highlight and reveal the way in which news media share and portray the situation of FTPs in Canada. In particular, discussions will focus on a variety of issues, including: a) routinely voiced interests and concerns in news media surrounding foreign credentials assessment and recognition in Canada; b) similarities and differences between news media versus academic accounts of FTPs and their struggles; and c) news media's emphasis on policy approaches as opposed to legal avenues when seeking to assist and improve the situation of FTPs.

Methodology Used for the Selection of News Media Articles

My media analysis will centre on a select sample of Canadian news media articles, ranging from September 2004 to January 2016, published in the provinces of Ontario, Alberta and British Columbia. The rationale for focusing on this thirteen year time frame is based on two factors, the first being that this is the date range that naturally emerged upon reviewing my search results and the second being due to time constraints associated with my dissertation completion deadline (I had to impose a cut-off point on my data collection in order to carry on with my analysis). Furthermore, given that chapter four focuses on legal cases from the provinces of Ontario, Alberta and British Columbia, I decided to also centre my media analysis on these same provinces for the sake of consistency. This was done intentionally in an attempt to maintain a unified geographical focus throughout discussions in this chapter as well as the next.

Listed below are the 10 online news media sources which have formed the basis of my media analysis in this chapter. I have also indicated, in parentheses, the number of articles that were retrieved from each news source, in descending order:

- The Globe and Mail – http://www.theglobeandmail.com (8)
- The Toronto Star – http://www.thestar.com (6)
- CTV News – http://www.ctvnews.ca (5)
- CBC News – http://www.cbc.ca (4)
- Edmonton Journal – http://edmontonjournal.com (3)
- Calgary Herald – http://calgaryherald.com (4)
- The Huffington Post – http://www.huffingtonpost.ca (2)
- Times Colonist – http://www.timescolonist.com (3)
- National Post – http://news.nationalpost.com (2)
- Financial Post – http://www.finacialpost.com (2)

The following methodological steps were followed for the purpose of gathering/collecting and analyzing the selection of online news media sources identified above:

1. I developed a list of search terms and used Google Search in order to find media articles (published by the 10 news sources selected) on the topic of FTPs in Canada. I specifically used Google Search because I wanted to base my analysis on online news sources that are available to the general public through search engines, such as Google, without requiring people to have access to or knowledge about how to

navigate online academic databases. Listed below are the Google search terms I used to yield relevant article results:

- The Globe and Mail foreign professionals
- The Globe and Mail foreign credentials
- The Toronto Star foreign trained professionals
- The Toronto Star foreign professionals
- CTV News foreign credentials
- CTV News foreign professionals
- CBC News foreign professionals
- CBC News foreign credentials
- CBC News foreign professional accreditation
- Edmonton Journal foreign professionals
- Calgary Herald foreign professionals
- Calgary Herald foreign credentials
- Huffington Post foreign trained professionals
- Times Colonist foreign credentials
- The National Post foreign professionals
- Financial Post foreign credentials

2. Upon gathering 39 media articles in total, I read each one in an attempt to identify reoccurring topics, contradictions, and media narratives used to frame the social and structural struggles of FTPs in Canada.

3. I established a list of 7 overarching themes expressed across my sample of 39 online media articles and used these general themes as a way of organizing my discussions and analyses about reoccurring topics, contradictions and media narratives throughout the chapter. The 7 overarching themes include:

    1. Individual Barriers Experienced by FTPs
    2. Structural Barriers Experienced by FTPs
    3. FTPs' Expectations and Assumptions about Job Prospects in Canada Versus Reality
    4. FTPs as Integral to Canada's Future
    5. Solutions and Steps Taken by FTPs and Governments
    6. The Need for Change: Improving Immigration Policies, Credential Recognition Practices, and FTPs' Integration into the Labour Market
    7. FTPs and the Use of Canadian Legislation as a Means of Seeking Justice

Overarching Analysis of News Media Articles: Reoccurring Themes, Contradictions, and Narratives

1) Individual Barriers Experienced by FTPs

One theme that repeatedly appeared in many news media stories had to do with the individual barriers experience by FTPs. In line with discussions in the previous chapter, media articles emphasized that factors such as lack of Canadian experience (both cultural and

professional), inadequate English language communication skills, lack of professional networks, as well as limited financial resources all pose as significant barriers for FTPs in Canada.

a) Lack of Canadian experience (both cultural and professional)

There seemed to be a consensus expressed across numerous media articles that, given Canada's competitive labour market, FTPs without Canadian work experience are faced with a disadvantage when looking for employment that is on par with their training and expertise (Jermyn par. 1). Many employers tend to want 'a track record' which demonstrates or proves that FTPs can meet Canadian workplace standards and expectations (Immen, "A path to acceptance" par. 18). Some sources pointed to the fact that a requirement for Canadian experience is merely a "polite way to exclude people who are different" from the Canadian labour market (Smolkin par. 19). Other sources suggested that requiring Canadian experience serves as an "excuse" for employers who do not want to take the time to assess international credentials, skills, and training (Smolkin par. 5). Issue was also taken with the ambiguity or vagueness of "Canadian experience" requirements as well as employers' lack of specifications with regards to 'what type of work' and 'what length of time worked' qualify as sufficient "Canadian experience" (Smolkin par. 18).

b) Inadequate English language communication skills

Another reoccurring topic of discussion in the media articles centered on FTPs inadequate English language skills. Employers tend to place great emphasis on communication skills – which include listening, speaking, and writing abilities – when assessing potential candidates for

hire (Immen, "Immigrants looking for a better welcome" par. 9). As a result, despite possessing excellent technical skills and expertise, many FTPs fail to find jobs in their chosen fields due to poor language skills, as well as unfamiliarity with specific terms, phrases and work specific jargon used in Canada (Immen, "A path to acceptance" par. 20).

According to Linda Coutts, an employer adviser at the Centre for Skills Development and Training in Burlington Ontario, "Language barriers and lack of what employers consider Canadian experience is a major obstacle for many immigrants who may have the right credentials and speak the language, but don't quite understand the cultural references or nuances needed to fit in" (Maurino par. 20).

c) Lack of professional networks

Adding to the Canadian experience and language challenges experienced by FTPs, many news sources reaffirmed that FTPs struggle with developing professional network and soft skills. This is problematic because jobs are most often found through networking and professional connections (Immen, "A path to acceptance" par. 22). While FTPs tend to have an easier time developing support networks, friendships, and a sense of community in their adopted country, these particular social networks – while beneficial from an emotional and practical standpoint – are not the most conducive to finding employment in a given field (Polczer pars. 13-14).

d) Limited financial resources

Last but not least, numerous articles touched on the issue that many immigrants simply do not have the financial means to take exams or courses set out by Canadian regulatory boards, nor do they have credit histories allowing them to get bank loans to cover the costs (Levitz par. 5). As one article highlighted "36 percent of immigrants encounter financial barriers to getting their foreign credentials recognized. Fees can range from $100 to $25,000 and can include money for retraining to a Canadian standard, fees to write exams or licensing costs" (Lunn par. 7).

The news excerpts listed below are examples which serve to illustrate the various aforementioned individual barriers experienced by FTPs. While some of the excerpts are written from the perspective of news reporters describing the experiences of interviewed FTPs, other excerpts consist of direct quotations from the FTPs themselves.

- Al Sabery has an engineering degree from the University of Baghdad and wanted to become licensed in Ontario. However, to meet the requirements he had to work for a full year in Canada under the supervision of a licensed engineer. Al Sabery was faced with the classic immigrant dilemma. He needed Canadian experience to upgrade his qualifications, but no one would hire him without Canadian experience (Smolkin pars. 2-3)

- Although Onyeka has seven years' experience as an engineer in Nigeria, he doesn't have the prerequisite Canadian work experience that would allow him to become an APEGGA member and become certified in this country (Polczer par. 17)

- Helen Hai says a lack of Canadian experience and having English as a second language were the two biggest challenges she faced when she came to Canada. She had left a management position at HSBC in her native China when her husband's company transferred him to the Toronto area in 2011. She had believed her experience with an international bank would help her land a similar job in Canada but, instead, found herself volunteering while she applied for job after job. Hai was eventually hired as a customer service agent at a major Canadian bank, but will now have to work her way back up the corporate ladder (Maurino pars. 10-12)

- When Iraqi-trained engineer Hiam Al Sabery came to Canada in 2005, in eight months he sent resumes to over 250 companies and didn't land a single interview. As a result, the savings he brought with him which he hoped to use to buy a house was quickly eroded by his family's everyday expenses (Smolkin par. 1)

- In both companies I was working with engineers from all around the world. We all spoke English but we were not getting anywhere and I could see that cultural differences were a big factor. I could see that a lot of qualified immigrants – technically qualified with good educations- were not getting the kind of positions that I thought were in line with their education. (Polczer par. 12)

- It was a big psychological challenge because Canadian employers ask for Canadian experience and I felt I'd have to start all over again and reinvent myself, at a time when the economy was at its worst (Immen, "A path to acceptance" par. 39)

- It was a struggle finding a job in Canada even with a Canadian degree, because I did not have network contacts (Immen, "A path to acceptance" par. 45)

2) Structural Barriers Experienced by FTPs

In addition to the individual barriers experienced by FTPs, news media sources also highlighted a host of structural barriers, in line with the previous chapter, that exist for international migrants seeking professional employment in Canada.

The most frequently discussed narratives in relation to structural barriers included: a) difficulties associated with satisfying licensure and certification testing requirements; b) the diverse as well as complex nature of industry regulations and standards; c) the non-recognition or devaluation of international credentials by employers and occupational licensing bodies; and d) precarious working conditions. Despite these narratives, some news sources still attempted to buttress the widely held impression that Canada, as a multicultural society, does well on immigrant integration when compared to other countries internationally (Friesen pars. 1-3; 16). Although many FTPs tend to struggle economically nowadays compared to previous generations, some articles argued that immigrant workers and their families "have some of the best labour market opportunities in Canada - far better than in Europe on average or the U.S." (Friesen pars. 13-14). Reflecting on the contentious issue of immigrant integration in Europe, one article maintained that:

> In recent months, the leaders of Germany, France and Britain have all declared multiculturalism a failure in their countries. Political parties on the continent scramble

> to craft policies that appear tough on migrants and limit immigration targets. In contrast, Canadian opinion polls show majority public support for the world's highest immigration levels and no party advocates cutting immigration (Friesen par. 8).

a) The struggle to satisfy licensure and certification requirements

For many FTPs, across many regulated professions, the experience is similar as they struggle to meet licensing and certification requirements before losing up to date currency in their given fields (Augustine par. 4). While most professions tend to provide FTPs with an initial assessment of their applications within one year, the process to have international credentials recognized in Canada is both long and strenuous (Augustine par. 3; "Attracting skilled immigrants" par. 7). Often times FTPs find themselves returning to school, in order to meet Canadian standards and qualifications, despite having worked in their home countries. As is the case for many foreign professionals, including medical doctors, dentist, accountants and engineers, the long process frequently involves perfecting English language skills, passing qualifying exams and acquiring Canadian working experience in a competitive labour market (Maurino par. 21; "Foreign trained professionals determined" par. 10).

b) The maze of industry regulations and standards

Several news stories also pointed to the fact that FTPs' struggle to obtain recognized credentials is further amplified by the maze of industry regulations and standards in Canada. Immigrants have long complained about the "labyrinth of bureaucracy and rules they need to

navigate" in order to have their foreign credentials and training recognized in Canada (Delacourt pars. 7-8). As one news article explained:

> In Canada, about 20 per cent of jobs are regulated, including teachers, nurses, physicians and engineers. And according to Citizenship and Immigration Canada there are more than 400 regulatory bodies nationally. The maze of regulations makes it even harder for newcomers to get through all the red tape ("Foreign trained professional determined" pars. 15-16).

Some argue that regulated professions need to introduce "single pan-Canadian standards" in order to curtail any confusion or misinformation about the credentials and qualifications FTPs need to be on par with Canadian standards (Levitz pars. 11-12). Others take issue, more generally, with the existence of protectionism in Canada, particularly within regulatory bodies and the labour market. From the perspective of one reporter, the biggest challenge for new Canadians searching for employment is:

> …the protectionist provincial, municipal and professional occupational licensing requirements that make entering a trade or profession an unnecessarily long, expensive and difficult (if not impossible) process. These regulations are more about raising government revenues and coddling industry insiders from competition than they are about helping the public. The problem is that they get so little attention or scrutiny that they remain in place unchallenged year after year – at great cost to both the country's economy and new Canadians trying to make a living for themselves and their families (Soupcoff pars. 5-7).

c) The non-recognition or devaluation of international credentials

While the process of getting international credentials recognized in Canada is undoubtedly a complex and time-consuming endeavour, a good number of media articles discussed even deeper and more pervasive systemic barriers experienced by FTPs ("Foreign trained professionals determined" par. 17). In particular, many FTPs struggle with the non-recognition or devaluation of international credentials by employers and occupational licensing bodies due a variety of reasons, including: unfamiliarity with foreign qualifications; biases about foreign education; systemic discrimination; and so called 'public safety' concerns.

The reality is that the issue of foreign-credential recognition is "one of the most prominent barriers to the economic success of new Canadians" (Levitz pars. 11-12). FTPs deal with a job market that doesn't know how to assess and integrate their foreign skills in the Canadian workforce (Immen, "A path to acceptance*"* par. 6). According to a 2006 study from the University of Calgary, FTPs feel that Canadian institutions do not understand how academic systems in foreign countries work, thereby assuming that their foreign qualifications are inferior (Chapin par. 63). As a result, while some employers are receptive to FTPs and take the time to determine whether they have qualifications that are on par with Canadian standards, other employers regard foreign credentials as an "unnecessary risk" that they cannot afford, given labour market pressures to hire efficiently and successfully (Immen, "A path to acceptance*"* par. 19; Chapin par. 65). As one news reporter astutely maintained:

> In my experience a big hurdle preventing employers from hiring immigrants is confirming their foreign credentials and work experience; how do mangers know

> whether Vincent's experience and education will translate to Canada? How do they know whether an educational institute in a far away country exists and/or has similar standards to Canadian universities? (Tatla par. 3).

Research also suggests that Canada needs to address workplace biases against various cultures – biases that are often "unspoken and deeply ingrained" (Chapin par. 60). According, to David Cohen – a Montreal-based immigration lawyer: "Employers have a built-in bias and prejudice (against ethnic minorities),…We don't recognize their language, and we don't recognize their skill set or education" (Chapin par. 20). In fact, a 2001 study found that some employers even treat foreign names as a sign that applicants may lack necessary language and social skills for a given job (Chapin par. 61). The study titled 'Why do some employers prefer to interview Matthew, but not Samir?' revealed that:

> …after sending out resumes to English-speaking employers in Toronto, Montreal and Vancouver, those [FTPs] with Chinese, Indian or Pakistani names were on average 40 percent less likely to be interviewed than those with English-sounding names… The researchers found that adding other qualifications, such as the fact that an international applicant's university was accredited by a 'Canada International Skills Certification Board' did not change the results (Chapin pars. 60; 62).

While Canada, as a state, may prize diversity and take pride in being a multicultural 'melting pot', many companies and employers do not necessarily share that same mentality (Chapin par. 53). At the end of the day, discrimination still exists in the country, whether it's through the lack of recognition of foreign credentials or displaying intentional (or unintentional) bias in favour of

Anglo Saxon names when selecting prospective employees (Maurino par. 8). While there is no guaranteed way to monitor discrimination or to stop employers from viewing FTPs through a biased lens, there appears to be a general consensus among several new media sources that "Canada's global competitiveness will suffer unless companies deal with biases that are keeping professional immigrants underemployed" (Chapin pars. 32-33; Maurino par. 1). Compounded with a lack of professional networks, one can imagine how difficult it is for many FTPs to find jobs despite having extensive credentials and working experience in their home countries (Keung par. 7). Upon sharing the stories and experiences of FTPs in Canada, one article explained: "Lin knows he is qualified, that he brings a unique advantage for having worked in Asia, where technology has been developing faster. But he also knows foreign credentials are worthless. Paired with a Chinese accent, he already has two strikes against him" (Chapin par. 42). Quoting a foreign-trained doctor, another article wrote: "Masood Sedghi is a foreign trained doctor, he says 'I have been to university about eight years in my home country, after that I have 13 years of experience practicing medicine, but here they don't even accept us being a volunteer'" ("Foreign trained professionals determined" par. 5).

In an attempt to overcome issues of built in biases and discrimination, some articles emphasized that there is a need to familiarize Canadian institutions with foreign credentials as well as the nature and quality of training/education programs in foreign countries. Indeed, part of the hesitancy to hire or grant licenses to FTPs (in many professions) has to do with professional organizations and employers acting as gatekeepers because of preoccupations with ensuring as well as maintaining public safety. Other articles also recommended spreading awareness about the existence of discrimination within the Canadian labour market. Although some forms of discrimination are intentional, other instances are at times unintentional and merely "a result of

people just not thinking or not being sufficiently knowledgeable about some of these issues" (Maurino par. 9).

d) Precarious working conditions

Another re-occurring topic of discussion, in the realm of structural barriers, had to do with FTPs' precarious working conditions - particularly in the field of medicine. Generally speaking, many news articles shed light on the fact that FTPs are often over-worked, over-qualified and underpaid. Moreover, for those who manage to get a 'foot in the door' into their professions, it's often at beginner levels characterized by undesirable and unstable working situations (i.e. poor pay, long hours, and impermanent or temporary contract positions) that are not on par with their expertise and which offer limited opportunities for professional advancement. Drawing attention to this state of affairs, one new reporter contended:

> Immigration has little impact on Canadian wages [sic.], it can, however, affect the wages of immigrants who compete with each other inside parallel immigrant labour markets. Consequently, immigrants often earn less for longer than the average Canadian, a serious problem that has increased with time (Summerville and Porta par. 8).

Some media articles went as far as tackling the issue of precarious working conditions by focusing on the struggles of a group of foreign-trained doctors in Alberta. Although the specific case of these foreign-trained doctors will be further addressed in the pages to follow, several articles used this example to illustrate the employment conditions which force many experienced

foreign-trained doctors to work as clinical assistants for long hours and little pay. Describing the situation of a foreign-trained doctor in Alberta, one contributor wrote:

> Ahmed's official title is clinical assistant – sometimes called a hospitalist or a physician extender – which means he is supposed to be constantly supervised. Ahmed received his medical degree in Egypt, passed necessary Canadian medical and language exams, as well as an intense six-month evaluation period. He has a limited physician licence and said he currently earns about half what full family doctors earn, or about $ 150,000 to $200,000 (Sinnema, "Foreign-trained doctors at odds" par. 4).

With regard to another foreign-trained doctor in Alberta, a second article shared:

> Labib has a medical certificate from Egypt and completed his medical residency there in general surgery. As a clinical assistant, he's bound by a limited medical licence in Alberta, meaning he can only work in a hospital and cannot set up his own independent practice. He works in surgical services at the Royal Alexandra Hospital, doing rounds and patient care in neurosurgery, thoracic, plastic and spine surgery. Sometimes he is the only physician supervising up to 100 patients. Other clinical assistants fill similar, pressing gaps in the province's medical system, for roughly half the pay of their Canadian-trained counterparts (Warnica pars. 4-6).

Although some foreign-trained doctors are content earning half the salary of fully licensed Canadian family doctors, most express discontentment with having to take on unwanted shifts and heavier workloads for less pay (Sinnema, "Alberta health minister says" par. 10). Referring to foreign-trained doctors like himself, one doctor astutely pointed out: "We are the best deal in

the health-care system…We do physician work for half the cost" (Sinnema, "Foreign-trained doctors at odds" par. 5). Of course, one of the biggest problems with having doctors work in precarious conditions is that it jeopardizes public safety. According to a number of news stories, clinical assistants, like Dr. Ahmed and Dr. Labib work long hours during nights, weekends and holidays, often as the only physician on site, with limited support from fully licensed doctors (Sinnema, "Foreign-trained doctors at odds" par. 3). From Dr. Ahmed's perspective, patient care is at risk when clinical assistants are routinely working shifts independently and "admitting seriously ill patients from emergency into medical wards" (Sinnema, "Foreign-trained doctors at odds" pars. 3; 14). Ironically, for many of these clinical assistants, the problem is not that they need supervision or guidance from fully licensed physicians in terms of how to care for patients. In fact, most of these clinical assistants have extensive medical training and work experience from their home countries. Rather, the problem has to do with the overwhelming number of patients they have to care for independently as well as the limited authority they have as clinical assistants to administer or make decisions in terms of medical procedures. Even when foreign trained doctors meet Canadian standards established by regulatory bodies (i.e. passing Canadian medical exams and working on the front line for a six-month assessment period), they are still not given the recognition they deserve based on their expertise, experience and skills (Sinnema, "Foreign-trained doctors at odds" par. 12). Confirming this reality, Dr. Ahmed explained:

> 'It's very upsetting the way we are treated,' Ahmed said. 'We do the shifts that the fully licensed physicians do not do. Our patients just know us as Dr. So-and-So. They don't even know the difference between us and the other doctors. They don't know that we get paid differently. To them, we are just a doctor there. We are not very known in the community' (Sinnema, "Foreign-trained doctors at odds" par. 12)

> 'AHS [Alberta Health Services] has been putting us under severe stress and trying to cut our salary,' Ahmed said. 'I work independently, but they place us in a category to say we need to be supervised… You are affecting patient safety and patient care by interrupting the delivery of patient care and the quality of experience of those guys working in Canadian hospitals for years and years' (Sinnema, "Foreign-trained doctors at odds*"* par. 14).

By virtue of discussing the precarious working conditions of foreign-trained doctors, media article implicitly raised two important questions: 1) Does Canada really have a shortage of medical professionals? or 2) Is the so-called 'shortage' partly produced as a result of the underutilization (even exclusion) of foreign-trained doctors from the labour force?

As expressed in various media articles, professional organizations, employers and governments, in general, tend to prize the maintenance of public safety as a national priority, however, at the same time, they are complicit in: a) perpetuating precarious working conditions for workers, and b) neglecting the need to effectively integrate FTPs into the Canadian labour market. It is here that the paradox lies: Canada appears to have a vast supply of FTPs (with relevant expertise) needed to address various labour shortages, yet they are unable to realize their full potential by finding work that is on par with their qualifications and credentials. Thus, more efforts need to be geared towards striking an appropriate balance which ensures public safety while also making room for the integration of FTPs in the Canadian workforce.

3) FTPs' Expectations and Assumptions about Job Prospects in Canada Versus Reality

In an attempt to reinforce and highlight the difficulties experienced by FTPs in Canada, a good majority of news articles discussed FTPs' expectations and assumptions about job prospects in Canada versus the realities they face upon arrival.

A main narrative prevalent in various media sources centered on the argument that Canada's Immigration System and it policies perpetuate false hopes and disappointment among FTPs in relation to easily finding relevant employment in Canada upon arrival. In reality, there appears to be a huge gap between FTPs' expectations about employment opportunities in Canada and their actual integration into the Canadian labour force. As Jack Layton, NDP's former leader, pointed out:

> 'The tragic fact is that we lure people to come here, we give them points for their experience, and their professional credentials,'… 'they tell their families that Canada wants us a doctors, accountant, engineers, experts… they come here and the doors are simply closed'… 'It's one of the great tragedies we see in all of our immigrant communities' ("NDP calls for recognition of foreign credentials" pars. 2-4).

Unsurprisingly, many FTPs tend to express regret with regards to their decision to move to Canada and feel shame for taking on 'survival jobs' - others claim to have lost hope that they will find employment in their chosen fields ("Only half of international medical grads in Canada" pars. 9-11). While some FTPs choose to immigrate to Canada for reasons such as, improved socio-economic or political situations as well as better education and quality of life for their families, even the most educated and well-off FTPs - who managed to live comfortable lifestyles in their home country – still struggle with individual and structural barriers upon immigrating to

Canada and seeking opportunities for professional advancement ("Only half of international medical grads in Canada" par. 7; Maurino par. 7).

Reflecting on a FTP's experience in Canada and his sense of despair, one new reporter wrote:

> When Lin moved to Canada in 1999 from Gutian county, in the southeastern Chinese province of Fujian, he was full of hope. He had almost 10 years of experience as a mechanical engineer and a bachelor's degree from one of the most prestigious schools in China. He had a master's degree from a university in Japan and had worked in the country, a place more racist toward other Asians than he thought Canada could ever be. Lin estimated it would take him a few months to find professional work [in Canada]. Instead, after sending out 150 resumes over the course of six months, he didn't receive one call (Chapin par. 3).

When interviewed about his experience in Canada, another FTP stated: "I wanted to come to Canada because of the equality, because of the respect' he said 'Can you tell me that I got any of that?'… 'Disappointment, frustration, loss of hope he said. 'I lost 10 years of my life" (Warnica pars. 16; 18).

Canadian statistics and research data discussed in the media articles consistently pointed to the fact that even though immigrants (including FTPs) tend to be more educated than those born in Canada, only a small percentage – about 24% - maintain employment in their chosen fields and even then, they work for less money in comparison to those native to Canada (Chapin

pars. 14-15). According to one article, more than half of recent immigrants have a university degree (in comparison to a quarter of those born in Canada), however "their unemployment rate is five times the unemployment rate for university-educated", Canadian-born counterparts (Maurino par. 6). Another news source further indicated that while 62 per cent of the Canadian-born population work in regulated professions, the comparative figure for foreign-educated immigrants is significantly lower at approximately 24 per cent (Levitz par. 9). Adding to the disadvantaged situation of FTPs, "the national unemployment rate among recent immigrants in the prime working age group of 25 to 54" is more than double that of the Canadian-born population (Maurino par. 5).

Given the discouraging statistical figures surrounding FTPs' job prospects in Canada, some news sources briefly pointed to a variety of different factors in an attempt to explain the disadvantage experienced by FTPs. For instance, emphasis was placed on the fact that FTPs' ability to find employment is at times affected by their birthplace or the country from which they emigrated ("Birthplace affects job prospects" par. 1). Arrival dates to Canada were also said to impact FTPs' ability to find relevant work due to variations in the economy overtime and changing labour market demands ("Birthplace affects job prospects" pars. 7-8). Even destination choices for immigration were cited as influencing job prospects. While many, if not most, FTPs move to big metropolitan cities such as, Toronto, Vancouver, and Montreal, in hopes of finding more work opportunities, in reality, this sometimes ends up being to their own detriment as it creates increased competition for a small number of job openings ("Attracting skilled immigrants" par. 4).

4) FTPs as Integral to Canada's Future

Despite individual and structural barriers experienced by FTPs as well as their disillusionment with the Canadian labour market, many news media articles emphasized the fact that Canada needs FTPs in order to ensure its long-term success in the future (Lewington par. 3). Upon discussing this theme, media articles addressed a variety of narratives including: a) FTPs as valuable assets to the Canadian economy (in the present and future); b) the lack of FTP's integration into the Canadian workforce; and c) mixed messages circulating about FTPs.

a) FTPs as valuable assets to the Canadian economy

As Canada heads into the future, it should invite more immigrants and newcomers (FTPs included) in order to maintain its competitive edge in the international labour market (Wood pars. 17; 19). Given the country's low national birth rate, many worry that there will be fewer workers entering the Canadian labour market to take the place of those who retire (Immen, "A path to acceptance" par. 12). To date, the federal government has focused on a variety of different demographics in an effort to solidify Canada's future labour pool (Scoffield par. 15). Among its various efforts, the federal government has tried to raise the age of retirement to 67, fiddled with immigration and temporary foreign worker rules, as well as dedicated some funding towards youth employment (Scoffield par. 15). However, much more remains to be done in the realm of improving the recognition of foreign credentials for FTPs – an endeavour that requires all levels of government to get involved in integrating immigrants into Canadian society ("NDP calls for recognition of foreign credentials" par. 23). As one article emphasized, "Canada is sitting on an underused gold mine of diverse talent" (Chapin par. 16). Consequently, attracting, retaining, and integrating the best international professionals is central to alleviating concerns in relation to the country's fertility rate and its long-term labour pool ("Wait times reduced on foreign credentials"

par. 2; "NDP calls for recognition of foreign credentials" par. 23). According to one article, "The key to ensuring a sustainable demographic increase rests on public policy that recognizes the challenges of raising immigration levels and fertility rates to ensure that a rising population is consistent with best-in-class economic and social outcomes" (Summerville and Porta par. 6). This, of course, is not an easy task since experts claim that "competing global markets and skilled labour shortages" will force Canada to compete with Japan and Western Europe for internationally trained professionals ("Foreign trained professionals determined" CTV News par. 2).

Countering the important contributions that FTPs can make to the Canadian job market and economy, some news sources highlighted preoccupations that an influx of immigration will create even bigger financial burdens for the country ("Professional newcomers to get funding" par. 7). According to Wendy Cukier - founder and director of the Diversity Institute at Ryerson University, "Many people still don't get it. They still think that accepting immigrants to Canada is a social agenda, not recognizing that it is absolutely essential…for our global competitiveness" (Maurino par. 2). Publicly expressed concerns about increased immigration seem to be misplaced, particularly in relation to "diluted wages among Canadians, overburdened public finances and the inability of immigrants to assimilate into Canadian culture" (Summerville and Porta par. 7). Research demonstrates that the cost of immigrants (including FTPs) to taxpayers is much less than what most people think - as Paul Summerville and Rowan Porta explain,

> This is principally because of the fiscal contributions immigrants make over the course of their working lives. Lesser known is that immigrants also play important roles in innovation and have successfully created new businesses in several sectors of the

> economy… Immigrants are often better educated than average Canadian because of Canada's immigrant points system, which emphasizes education. This has also led to significant immigrant cultural contributions to the arts and academia (Summerville and Porta pars. 10-11).

Furthermore, given reports that more than one million jobs will go unfilled in Canada over the next few decades, in sectors such as mining, oil, and health care, many believe that integrating FTPs into the Canadian workforce is an excellent way of solving problems associated with labour shortages (Chapin par. 18; Walberg par. 1). In fact, according to a recent study from RBC, welcoming internationally trained professionals to Canada allows employers to connect with an additional 1.6 million Canadians with diverse backgrounds, foreign training, credentials and expertise (Chapin par. 18). Reflecting on the value of FTPs and the competitive advantage they offer, Cukier notes that, "Companies need to realize it's a competitive advantage to have people in your organization who look like the people you're going to serve, if you want to expand internationally" (Maurino par. 3). That said, some also caution that while integrating FTPs into the Canadian labour market may be a good solution for dealing with labour shortage issues, competitive wages must also be offered at the same time in order to retain foreign trained workers who are working in Canadian industries and regions experiencing labour shortages.

From the standpoint of Dr. Frances Woolley – Professor of Economics at Carleton University:

> 'I would question the premise that there's a true shortage,'… 'If you're not offering a competitive wage, then if you can't find an employee, it's not a shortage. In a

> competitive market, in the long run, there won't be a shortage. When there's a shortage of electricians, and electricians are well paid, there might be a temporary shortage as people train for these jobs, but there won't be a shortage in the longer term. Now if the jobs are not well paid, if they involve work on an oil rig or up north or something else that's intrinsically not desirable, then you won't find people who want those jobs, but that's a function of competition. Competitive markets abhor shortages' (Walberg par. 5).

b) Lack of FTP's integration into the Canadian workforce

Ironically, news media coverage about the importance of FTPs to Canada's future economic prosperity was frequently accompanied by discussions about the lack of immigrant integration into the Canadian labour market. Many Canadians seem to conveniently ignore or forget that "though this country excels at adopting immigrants, it too often fails at integrating them into the Canadian workforce" (Chapin par. 12). According to one article, "Canada is known internationally as the poster country for multiculturalism. We have the highest level of immigration per capita of any country, about 250,000 immigrants a year. Almost 20 per cent of our residents are foreign-born" (Chapin par. 11). Furthermore, in about two decades, Statistics Canada foresees that roughly a quarter of Canada's population will be foreign born (Chapin par. 12). Despite these figures, however, FTPs continue to struggle with finding employment that is on par with their credentials and expertise. As Canada looks more and more to immigration for the young labour pool it needs in the future, it is imperative to provide FTPs with opportunities to gain meaningful employment so that they can both earn a living and utilize their internationally acquired skills and experience ("Credentials in limbo" par. 3). Ensuring that FTPs are effectively

integrated into the labour market is not only important for the sake of the Canadian economy, but also because they are the ones who are either unemployed or underemployed at rates that far exceed the average (Walberg par. 12; Maurino par. 16).

In fact, studies report that underutilizing the skills of internationally trained professionals produces an "earning deficit totalling billions of dollars" ("NDP calls for recognition of foreign credentials" par. 12). The lack of success in recognizing FTPs' international credentials itself costs the economy about "$2.4 billion to $15 billion a year" (Delacourt par. 14). Furthermore, a study from 2012, estimated that "employment and wage gaps between new immigrants and native-born Canadians costs the economy more than $20 billion in foregone earnings" every year (Smolkin par. 14). The reality is that when new immigrants struggle to re-establish their lives in Canada, this not only causes hardships for themselves and their families, but it also has a significant impact on Canada's economy. As Nora Priestly – program manager at the bridging program for internationally educated professionals at York University – points out, "At the most basic level, if you're paying personal income tax as a taxi driver versus personal income tax as a middle or high-level manager in financial planning, that in itself has an effect in the economy" (Maurino par. 17).

Implicitly expressed throughout the various news sources was the idea that Canada, in effect, is characterized by an inherent paradox. Namely, while Canada will have to depend on FTPs to ensure its future economic well-being, it nonetheless fails to meaningfully incorporate them into the labour market, thus perpetuating an unequal distribution of the country's wealth and prosperity among members of the Canadian population. As one news article astutely noted,

"not all Canadians many of them newcomers and the very people the country's labour force depends on, fully share in the country's prosperity" (Lewington par. 6).

c) Mixed messages circulating about FTPs

It is also important to mention that there were mixed messages expressed in the various media articles, particularly in relation to FTPs in the medical field.

The first mixed message conveyed in various media sources had to do with the concern that there is a shortage of medical professionals in Canada, yet foreign trained medical professionals are increasingly struggling with brainwaste scenarios as their skills, insights and experiences are not being effectively utilized by the medical field ("Only half of international medical grads in Canada" par. 14). As one news article argued, "Although many Canadians list health care and doctor shortages as top concerns, foreign-trained doctors and other health professionals complain that they can't work in the country" ("Attracting skilled immigrants" par. 5). This is quite perplexing since "there are just one-quarter of the geriatricians graduating as needed, and fewer psychiatrists, dermatologists and emergency doctors" than needed (Blackwell par. 25). Statistics suggest that only about half of international medical graduates residing in Canada work as doctors due to high competition for residency positions and training that can lead to permanent jobs ("Only half of international medical grads in Canada" par. 1; "Attracting skilled immigrants" par. 6). Moreover, roughly 4.6 million people lack a primary-care physician yet, at the same time, there are many foreign-trained doctors who are working as taxi drivers and in gas stations, unable to get a license to practice medicine (Blackwell par. 28; "NDP calls for recognition of foreign credentials" par. 13). Such brainwaste scenarios are not only unconducive

to the Canadian economy, but they also compromise public health and safety. As one news reporter maintained, all this begs the question: "what is wrong with Canada's medical-education system, and why is so much high-cost talent being squandered – at least temporarily – as patients still line up for many services, or go without a family physician?" (Blackwell par. 5).

A second mixed message brought to light in various news stories had to do with the inability of Canadian medical school graduates to secure residency positions – just like the FTPs. In an attempt to explain why Canadian medical graduates are not obtaining residencies, some articles suggested that this was due to pressures to accommodate international graduates (Blackwell par. 26). This argument, however, contradicted the perspective of other articles which illustrated that many foreign trained medical professionals are struggling with brainwaste situations and unable to secure residency positions. Thus, while Canada clearly has a shortage of medical physicians, some new articles attributed this problem to the ineffective integration of FTPs into the medical field, while other articles blamed FTPs for the inability of Canadian medical graduates (with recognized credentials) to find residency positions leading to permanent jobs.

In both cases, whether foreign trained or a Canadian graduate, the reality is that high cost talent is being wasted while patients are on waiting lists for medical services. Furthermore, when medical professionals (internationally or Canadian trained) are unable to secure jobs in order to alleviate physician shortages within the country, this points to the fact that perhaps there are much larger problems within the field of medicine in Canada as well as the Canadian health care system, in general.

5) Solutions and Steps Taken by FTPs and Governments

Focusing on advancements made thus far, many news articles examined FTPs solutions to dealing with Canada's inaccessible labour market as well as steps taken by governments to address the needs of FTPs in Canada.

a) Foreign trained professionals

As discussed in the previous chapter, when FTPs come face to face with the myriad of individual and structural barriers which exist in Canada, they often resort to three viable options – exit, de-professionalization and professional rebuilding (re-professionalization) – as a way of resolving their inability to find relevant employment in their fields of expertise. Unsurprisingly, the vast majority of media sources confirmed this reality.

All too often, many skilled immigrants who come to Canada move away within the first 10 years (either to their countries of origin or a third country) in order to pursue employment opportunities elsewhere (Maurino par. 4). In line with research literature, media articles reinforced that the decision to exit Canada is frequently chosen by foreign trained health professionals. For instance, several articles made reference to the struggle of foreign trained doctors in Alberta. In particular, a number of clinical assistants, working physicians shifts in Edmonton, were said to leave the country upon the expiration of their job contracts at the end of the year in 2015 (Sinnema, "Alberta health minister says" par. 1; Sinnema, "Foreign-trained doctors at odds" par. 1). Instead of reapplying for new jobs, at half the salary, many of these

foreign trained health professionals planned to find work as doctors outside of Canada, in countries such as Dubai or Australia (Sinnema, "Foreign-trained doctors at odds*"* par. 11).

Nevertheless, for those FTPs who choose not to leave Canada, many tend to go down the de-professionalization route (usually involuntarily) in order to sustain a living and to support their families. For many, this means scarifying professional ambitions in order to create a better future for themselves and their children. Professionals such as, doctors and lawyers often struggle to get recognition for their foreign credentials and as a result feel compelled to take on unskilled work that is not equivalent to their qualifications and often completely unrelated to their original fields of work ("Attracting skilled immigrants" par. 3; "Birthplace affects job prospects" par. 4; Delacourt par. 9). According to one FTP: "skilled immigrants often find themselves doing menial jobs when their skills and experience have far more value for themselves and for society as a whole" (Polczer par. 5). Working in shops or gas stations, carrying out security guard duties, driving cabs, and delivering pizzas are among the many 'survival jobs' that FTPs take on despite the modest pay acquired from these jobs (Immen, "A path to acceptance*"* par. 9; "Only half of international medical grads in Canada" par. 5). Since getting into a new country and finding relevant employment can take anywhere from five to seven years, taking on 'survival jobs' is an involuntary choice that "can throw people into a rut they find difficult to overcome" (Maurino par. 22). Confirming this state of affairs, one FTP contended: "I have seen many immigrants get into a rut of working for low pay in a job that doesn't use their talent. It becomes increasingly harder to get out" (Immen, "A path to acceptance*"* par. 42).

Several news articles shared the experiences of various FTPs who were forced into de-professionalization due to individual and structural barriers. The snippets included below serve

to illustrate why some FTPs resort to taking on unskilled work that does not require professional credentials or skills.

- …Mozgha Nuviue came to Canada from Iran. She told The Canadian Press that she got extra points because she holds a master degree in pharmacy. 'During these nine months, I looked for a job related to my field, but I wasn't able to find one… so, I took a job as a cashier at a grocery store… but I really need to find the right job, because I am an educated person and I came to this country with hope' ("NDP calls for recognition of foreign credentials" pars. 9-11)

- …Qumar Taghabon, who like 42 per cent of immigrants in Canada, is overqualified for his job and has so far failed to find better employment. Taghabon, a fully-qualified architect from Iran, has a string of advanced degrees. But in Toronto, he drives a taxi to make enough money to support his family. 'I'm basically overqualified and I can't do anything about that because of my family, because of my bills' ("Feds to speed up wait times" pars. 5-7)

- 'I have been looking for other jobs all along. Every week I send out resumes, but they say I am either overqualified or that I have no professional experience,' he says. For more than a year, he worked in what he calls a 'survival job' at minimum wage in a call centre (Immen, "A path to acceptance" par. 33)

- Before coming to Canada four years ago, Tony Onyeka was an electrical engineer in Nigeria, designing power grids and electrical systems. Now he's working in IT – not a bad job, but not his field of expertise (Polczer par. 3)

- Half a year after arriving in Canada, Lin had discovered that a former Chinese colleague was running a convenience store in Toronto. Lin decided to do the same. The man, who had a master's degree in economics, bought the store after growing tired of doing manual labour in a clothing factory – the only job he could find in three years (Chapin par. 43)

- Lin receives weekly job opportunities through e-mails from a Chinese government association. If he had only himself to think about, Lin would move to China in a second and resume his professional career. But he is focused on his family's roots, now firmly planted in Canada. Lin's ambitions may be held hostage in the store, but at least it provides a steady income so that his sons may one day have professions that would justify his decision to immigrate (Chapin pars. 71-72)

- Su immigrated as an electrical engineer in 2002 with 10 years of Chinese experience. After unsuccessfully applying for jobs during his first month, Su returned to night school for Canadian certification as a machinery auditor, a job he had done for two years in China. He took a low paying job in a food packaging factory outside the city, waking up at 5 a.m. and working until 3 p.m. After a few months of the routine, he had lost 30 pounds. When Su took the certification exam, he failed because his language skills had not improved enough to sufficiently answer the questions (Chapin par. 46)

Ironically, none of the articles in my sample of news media sources discussed or provided any successful examples of professional rebuilding among FTPs. Perhaps this is due to the time and financial constraints associated with acquiring skills and training for work in a new profession. Furthermore, for those FTPs who are already struggling to gain accreditation due to

language barriers, re-professionalization may seem like a more difficult, expensive and arduous pathway compared to the quick fix offered by de-professionalization as a whole.

b) Governments

In an attempt to alleviate the struggles experienced by FTPs, various media articles suggested that governments have undertaken a number of initiatives throughout the years as a way of helping FTPs. Examples of such initiatives include: 1. Developing loan programs; 2. Speeding up foreign credential recognition processes; 3. Revising immigration policies; as well as 4. Working cooperatively with Fairness Commissioners in Ontario, Manitoba, Nova Scotia and Quebec.

1. Loan programs

One way the Canadian government has sought to help FTPs gain accreditation is to both fund as well as establish federal loan programs offering repayable loans. The logic behind such an initiative is to provide FTPs (especially those experiencing financial barriers) with the opportunity to get their professional training in line with national standards (Levitz par. 1). According to a 2015 news article, the conservative government promised that it would add $40 million over a course of 5 years to an existing federal loans program – money that would come in addition to a previous $35 million allotted for the program in the last budget ("Promises, promises: leaders' pledges" par. 26).

Some news articles, for instance, made reference to the Foreign Credential Recognition Loan Program. This loan program was introduced by the federal government in 2011 as a pilot project and was made permanent in 2015 (Lunn pars. 2; 4; Levitz pars. 2-4; 6). Many FTPs lack a credit history necessary for getting loans from regular banks for the purpose of getting their credentials recognized - this is why the loan program is viewed as a necessary initiative towards helping new Canadians integrate into the Canadian labour market (Lunn par. 8). According to Stephen Harper, Canada's former prime minister, "When doctors are driving taxis and engineers are waiting tables, Canada can do better and Canada must do better" (Lunn par. 3).

The money from these loan programs can be used for a variety of purposes, including covering tuition for training, the cost for licensing exams, as well as child care in order to allow applicants to go back to school and upgrade their skills in line with Canadian standards (Levitz par. 7). Apparently, the program has been relatively successful as $6 million in loans were given to more than 1,000 people in the first year it was established, with less than 1 per cent of borrowers defaulting on their repayments (Levitz par. 8).

Discussions about smaller scale micro loans for FTPs were also mentioned in some news articles. The Immigrant Access Fund program (IAF), for example, is a grassroots organization developed in 2003 by a group of community builders, designed with the intent to assist newcomers experiencing employment barriers in Canada ("Our Story – Immigrant Access Fund" par. 1). By providing microloans, the goal is to help FTPs finance the cost of earning Canadian accreditation and to have their credentials recognized quickly ("Professional newcomers to get funding" pars. 1-3; Lewington par. 8). Although the IAF initially opened in Calgary in 2005, it later expanded to Edmonton in 2007 and to Saskatchewan in 2012 ("Our Story – Immigrant

Access Fund" par. 8). In 2014, a third Canada wide program was established and by 2015, all three IAF organizations (IAF Alberta, IAF Saskatchewan, and IAF Canada) amalgamated to operate as a single entity under the name Immigrant Access Fund Canada ("Our Story – Immigrant Access Fund" pars. 8-11). Federal and provincial governments provide support with operating funds, while private donors contribute to financing the loans (Lewington par. 11).

2. *Speeding up credential recognition processes*

According to several news articles, the need to improve and speed up credentials recognition processes in Canada is a concern that crosses all party lines ("Credentials in limbo" par. 5; "NDP calls for recognition of foreign credentials" par. 20). Liberals, conservatives and new democrats appear to recognize that the "lack of portability of foreign credentials" must be addressed in order to prevent an "underclass of new immigrants" from emerging ("Credentials in limbo" par. 4). Making an effort to ensure that foreign qualifications are assessed properly and in a timely manner allows FTPs to optimize their talents as well as contribute to the Canadian workforce (Sankey par. 8; Maurino par. 4; Wood par. 8). From the perspective of Diane Finley – Canada's former Conservative Minister of Human Resources:

> …shorter waits are meant to attract and keep top international talent in Canada, which is crucial to long-term economic success. 'This is essential to help people find a fulfilling job, rewarding work that contributes to Canada's future… We want a system that is fair, that's consistent, that's efficient and that's accessible…We want to encourage newcomers to put their training and talent to work here' ("Feds to speed up wait times" pars. 12-14).

One way the federal government has sought to achieve these ends is by opening foreign credentials referral offices across Canada since 2007. Located in major cities across Canada (including, Vancouver, Calgary, Montreal, Halifax, Winnipeg, and Toronto), these offices assist internationally trained immigrants to get their credentials assessed so that they can go on to obtaining the accreditation needed to practice in their chosen field and areas of expertise ("Immigrant aid office to open" pars. 3; 6; "NDP calls for recognition of foreign credentials" par. 21). These offices also seek to speed up the process of credential recognition by providing FTPs with the information, support and referral services they need, in advance, before arriving to Canada (Sankey par. 12; "Immigrant aid office to open" par. 6).

Another step taken by Canadian governments to speed up the recognition of international credentials as well as improve the integration of internationally trained workers into the Canadian labour market includes the implementation of the *Pan-Canadian Framework for the Assessment and Recognition of Foreign Qualifications* in 2009 (Delacourt pars. 12-13). Thanks to this framework, the government of Canada has been working collaboratively with the provinces and territories as well as regulatory bodies to achieve a number of objectives, including: a) the timely assessment of foreign credentials, so that individuals will know within one year whether their qualifications will be recognized by provincial regulatory and accreditation bodies across Canada as well as whether additional requirements will be necessary for professional registration (Forum of Labour Market Ministers 7; "Feds to speed up wait times" pars. 1-2; Sankey par. 3); b) the harmonization of professional standards and increased national coordination in terms of the methods used for the assessment and recognition of foreign qualifications; c) the establishment of clear, transparent, objective and reasonable methods for the assessment of foreign qualifications that do not exhibit bias; and d) the equal treatment of Canadian and internationally trained

applicants in relation to the requirements needed to achieve recognition of qualifications (Forum of Labour Market Ministers 4-5). Although the framework applies to all regulated professions, a number of occupations have been targeted by this framework, including: architects, engineers, financial auditors and accountants, medical laboratory technologists, occupation therapists, pharmacists, physio therapists, registered nurses, dentist, engineering technicians, licensed practical nurses, medical radiation technologists, physicians, and teachers of kindergarten to grade 12 (Delacourt pars. 1-4; Sankey par. 5; Forum of Labour Market Ministers 12).

3. Immigration processes

The subject of revising Canadian immigration policies as a way of helping FTPs in Canada was also discussed in various new articles. Issue was taken with the fact that a discrepancy exists between Canada's immigration policies and the reality that awaits FTPs once they arrive to Canada. Namely, while immigration application programs place great emphasis on and count potential immigrants' skills as well as professional backgrounds towards the 'points' they need to be accepted as an immigrant, these assets do not appear to be conducive towards helping them gain entrance into the Canadian labour market once they arrive ("NDP calls for recognition of foreign credentials" par. 8). References were made to the Federal Skilled Workers program and the Provincial Nominee Program (PNP) in various news sources.

With regard to the Federal Skilled Workers program (arguably, Canada's economic immigration system), applications are selected based on applicants' human capital and their ability to economically succeed in the Canadian workplace (Chapin par. 13; "Canadian Immigration – Federal Skilled Worker Category" par. 1). Some argue that attention needs to be

paid in terms of the most valued criteria throughout the selection process in order to help lessen "the overeducated and under- or unemployed phenomenon that currently plagues immigrants" in Canada (Chapin par. 10). Under the current points system, prospective immigrants must obtain at least 67 points out of 100 points based on six selection factors: education, language skills, work experience, age, arranged employment, and adaptability (Chapin par. 26). Provided that research literature and employers have identified limited language skills as one of the most frequent barriers for many FTPs, Citizenship and Immigration Canada (CIC) has made this category the most significant by increasing its maximum points up to 28 points (Chapin par. 26). Furthermore, FTPs are now required to prove their language levels by completing a language test from an agency approved by CIC (Chapin par. 26). This requirement is geared at ensuring prospective immigrants possess 'adequate intermediate' level language skills necessary for expressing opinions, using idioms, carrying out research and delivering presentations (Chapin par. 26).

In the realm of work experience, the maximum number of points that can be scored in that category has been reduced to 15, given that employers tend to place limited value on foreign work experience (Chapin par. 28). For the adaptability factor, at least one year of full-time work in Canada can earn applicants the maximum amount of points available under this category (Chapin par. 28). Lastly, with regard to education, instead of merely awarding points based on types of degrees held, the Federal Skilled Workers program requires that foreign education be assessed by an agency approved by CIC in order to show that it is valid and on par with/equivalent to Canadian credentials (Chapin par. 28).

While the Federal Skilled Workers program is regarded by many as one of the best ways to ensure that FTPs are selected equitably, critics claim that "Canada, a nation that prides itself on its multiculturalism" has started to turn its back on maintaining diversity within the country's population (Chapin par. 10). As one news reporter pointed out: "Just as the economy is becoming more global, our government will make it harder for ethnically diverse immigrants to enter" (Chapin par. 10).

In terms of the Provincial Nominee Program (PNP), although a few references were made to it, news articles did not discuss the program at great length in comparison to the Federal Skilled Workers program. In essence, the PNP program gives Canadian provinces and territories the opportunity to select immigrants who would like to move to Canada and settle into a specific province ("Provincial Nominee Program – Canadian Immigration" par. 1). These programs are designed to "more effectively and efficiently welcome newcomers" based on regional needs; thus, through this program, applicants with pre-arranged employment are selected based on the rationale that they will be able to work in the region and contribute to the local workforce ("Provincial Nominee Program – Canadian Immigration" par. 3).

While PNP programs allow employers to play a greater role in the selection process, according to one media source, this model has some weaknesses. In particular, newcomers who enter through this program tend to be less educated and they also receive lower salaries in the long term in comparison to those who enter Canada through the federal points system (Chapin par. 31; "Canada must actively recruit" par. 10).

4. *Fair Access legislation and the Office of the Fairness Commissioner (OFC)*

Last, but not least, a few news articles also mentioned the implementation of fair access legislation as another initiative undertaken by some provincial governments (including Ontario, Manitoba, Nova Scotia, and Quebec) to effectively integrate FTPs in the Canadian workforces as well as to encourage transparency, accountability, and fair access to regulated professions (Keung par. 6). Thanks to fair access legislation and the establishment of fairness commissions, regulatory bodies, governments and employers have been challenged to address barriers to professional licensing (Smolkin par. 15; Keung par. 4). From the perspective of Ontario's former Fairness Commissioner, Jean Augustine:

> …the conversation is already changing around what Canadian experience means for professionals. 'There is licensing to protect the public and then there is fair licensing where everyone gets complete information about what they must do to qualify and a fair shot at getting into his or her profession' (Smolkin par. 22).

6) The Need for More Change: Improving Immigration Policies, Credential Recognition Practices, and FTPs' Integration into the Labour Market

Although steps have been taken by governments, regulatory bodies and employers to address as well as improve the situation of FTPs in Canada, a theme that was not sufficiently covered in media articles was the need for more change. Namely, change in relation to immigration policies, credential recognition practices, and the integration of FTPs in the Canadian workforce.

According to a forecast by the Conference Board of Canada, Canada's immigration level will increase to roughly "350,000 annually by 2030, up from about 252,000 in 2009"; thus, it is imperative that federal immigration policies be further revised in order to allow Canadian immigrants, including FTPs, to succeed in the Canadian labour market (Immen, "A path to acceptance" par. 13). To date, the Board has recommended that the following revisions be made:

> 1. Increase the weight given to immigrants' skills that are needed in the Canadian market; 2. Improve recognition of foreign educational and professional credentials; 3. Increase involvement of employers in the process of getting immigrants into the labour force; 4. Streamline the immigration system (Immen, "A path to acceptance" pars. 13-17).

In line with these recommendations, authors Paul Summerville and Rowan Porta contend that,

> Canada needs to strengthen policies that facilitate the assimilation of immigrants into the workforce. These include extending the length of work visas for foreign graduates of Canadian universities, fast-tracking immigrants who are proficient in Canada's official language and who have job offers, creating programs to accelerate foreign-credential recognition, and providing support to immigrants on arrival (par. 9).

a) Immigration policies

According to some media articles, international competition is one of the main reasons why immigration policies in Canada need to be further improved. Reflecting on Canada's

immigration system and the changes made to it over the years, Sima Zerehi – a member of the Coalition for Change for Temporary Foreign Workers and Migrant Workers stated, "I think what we have here is a series of feel-good announcements that are supposed to put a veneer of positive immigration changes over substantially regressive immigration policies" ("Wait time reduced on foreign credentials" par. 8). Many argue that a disconnect still exists between the immigration selection process and how immigrants are treated upon arrival ("NDP calls for recognition of foreign credentials" par. 7). When faced with the prospects of dealing with a cumbersome immigration process, the non-recognition of foreign credentials and systemic barriers preventing access to the Canadian labour market, FTPs are increasingly starting to look to other countries for a better life and employment opportunities. People are no longer willing to put their careers on hold in order to move to Canada. As one news reporter explained: "Canada takes for granted that it can attract diverse immigrants. Our country's immigrant narrative, that newcomers will sacrifice their own career as a means for their children to succeed in a free and inclusive society filled with opportunity, has become less and less completing" (Chapin par. 54).

While Canada is cited as being the third most popular destination for individuals seeking to relocate (with the U.S. being first, and the U.K. second), media reports suggested that international competition is beginning to rise for the best immigrants ("Canada must actively recruit" pars. 3-4). FTPs are no longer automatically migrating to Canada. When FTPs realize that they have options and that there are other developed countries (like Australia) which can fact-track their applications for permanent residency, they are not likely to wait years to have their applications processed ("Canada must actively recruit" pars. 1-2). For those who are educated, entrepreneurial, skilled, ambitious, and impatient for success, immigrating 'elsewhere'

(somewhere other than Canada) is increasingly looking more attractive ("Canada must actively recruit" par. 1). As one news article explained:

> It's becoming a seller's market… Canada must learn to compete. Educated professionals, entrepreneurs, leaders, will not waste their most productive years trying just to get through the door. They know where they are wanted, and if they're not wanted here they will pack their bags and go to where they are, taking with them all their potential and promise ("Canada must actively recruit" par. 12).

International competition for FTPs is not just coming from developed countries. Rather, "some of Canada's biggest source countries have made efforts to lure back the best and brightest immigrants" (Chapin par. 55). According to one article, governments in countries such as China and India are utilizing investment, tax and visa incentives to attract "the highly educated children of Chinese and Indian immigrants to their ancestral homeland" ("Canada must actively recruit" par. 2). In China, for instance, the 'Thousand Talents program' has lured back over 2,000 Chinese expats (in three years) by giving them "central government offering jobs, research grants and moving allowances" (Chapin par. 55). That said, it is interesting to note that while countries such as China and India are still viewed as 'not developed' according to Western standards, one can argue conversely that they are in fact moving well beyond 'developing' to 'developed' status given their current economies.

In light of these realities, it is therefore important that Canada further reviews and improves its inefficient immigration selection system. To achieve these ends, "…first and foremost, Canada needs to change its mentality around immigration. It should be designed as

much around whom Canada wants, as who wants Canada" ("Canada must actively recruit" par. 11). In addition to dealing with issues of discrimination in the labour market and gate keeping effects by professional associations, Canada must take more steps towards ensuring a better fit between "the skills of new Canadians and the needs of the Canadian economy" ("Canada must actively recruit" par. 11; Walberg pars. 2-3). As Fariborz Birjandian – a FTP and CEO of the Calgary Catholic Immigration Society CCIS – maintains, it is important to pay attention to supply and demand shifts when developing or revising Canada's immigration selection system, otherwise "everyone will be qualified and certified in Canada, but supply and demand will tell us how many of them get jobs" (Sankey pars. 11; 13). By harmonizing immigration policies with supply and demand shifts in the labour market, FTPs should be able to more effectively use as well as apply their foreign credentials within the Canadian workforce (Walberg pars. 2-3; "Canada must actively recruit" par. 11).

According to some media stories, one approach to meeting labour market needs is to link "visas or immigration directly to employment", as in the case of the United States (Walberg pars. 14-15). Part of this process would allow for educational or professional credentials to be accepted before granting status to workers (Walberg par. 13). As one article suggested:

> 'Any program that matches immigrants with jobs right away, ideally before they set foot in the country, should be encouraged,' according to Dr. Oreopoulos. 'Even a small amount of Canadian experience makes them much more attractive to employers. Coordinating immigrant applicants with shortages in businesses or regions would be really helpful' (Walberg par. 13).

That said, some caution that this approach can create circumstances leading to the potential exploitation of immigrants who become dependent on specific employers for a given length of time (Walberg pars. 14-15). Others argue that aligning immigration with specific gaps in the labour market can result in "awarding points to applicants too uncritically or without an eye to the demands of Canadian employers" (Walberg par. 7). While it is true that recognized foreign credentials and work experience may increase the likelihood of applicants being accepted into the country, "degrees or years of employment" alone do not guarantee that FTPs will be successfully integrated into the Canadian labour market (Walberg par. 7). From the perspective of Dr. Barry Chiswick – chair of the economics department at George Washington university:

> As tempting as it is to use immigration to meet local and industry-specific employment needs, micromanaging leads to its own problems… 'It's very hard for government officials to know where the so-called shortages really are, as opposed to succumbing to pressure from interest groups'… 'The better approach is to attract skilled workers, particularly STEM workers- those with science, technology, engineering and mathematical skills – and then let the market determine where they will settle within Canada' (Walberg par. 10).

In the case of Atlantic Canada, for instance, regional shortages are often the result of out-migration, whereby young professionals migrate to other provinces offering greater employment opportunities (Walberg par. 11). As a result, immigration strategies developed to attract immigrants to Atlantic Canada are in effect "Band-Aid solitons", because new Canadians (i.e. FTPs) are just as susceptible to the same market forces that persuade or influence native-born workers to migrate elsewhere (Walberg par. 11).

b) Improving credential recognition practices

Alongside Canada's tedious immigration process, numerous media articles also looked at FTPs' inability to secure work in their fields due to long wait times associated with obtaining recognition for their foreign degrees and certifications ("Feds to speed up wait times" par. 10).

Although some efforts have been geared towards developing standards for the timely approval of foreign credentials, immigrants (including FTPs) are still not realizing their full potential in the Canadian economy (Walberg par. 9). According to one news article:

> Almost two-thirds of Canadian immigrants with post-secondary training have not had their qualifications verified by an educational institution or a professional body within their first year in the country, putting them at risk to become trapped in underemployment. In Australia, by contrast – and in part due to pre-immigration screening – the majority of immigrants have their credentials assessed and 85% are approved within two months of their arrival, which greatly speeds their in-titration into the workforce (Walberg par. 9)

While all levels of government must co-operate in order to speed up foreign credential recognition processes, some argue that more action is required on the part of the federal government, in particular ("NDP calls for recognition of foreign credentials" pars. 1; 22). As stated by the late NDP leader, Jack Layton: "It's the federal government that has to act and we have not seen action by either the Liberals or the Conservatives" ("NDP Calls for recognition of foreign credentials" par. 19). To be fair, some media reports did suggest that the federal

government has been working for over a decade to remove credential recognition barriers experienced by FTPs, however a major impediment to federal action with regards to the matter has been that most regulated occupations are overseen by provincial governments (Levitz par. 10). As a result, while co-operation at all levels of government is important, governments also need to closely work alongside regulatory bodies, colleges, universities, and employers in order to further research credential recognition processes, with the ultimate goal of bringing about positive changes for FTPs who are trying to join the Canadian labour market ("Feds to speed up wait time" par. 17; Soupcoff par. 9).

c) FTPs' integration into the labour market

In an attempt to facilitate FTPs' integration in the Canadian workforce, a number of implicit recommendations were made throughout various news sources with regards to how employers and governments (federal, provincial, and territorial) can help bring about change.

First, many articles emphasized that there is a need to improve social support services for FTPs, both before and after their arrival to Canada ("Feds to speed up wait times" par. 15; "Wait time reduced on foreign credentials" par. 12). In particular, more detailed guidance and information should be provided to FTPs about foreign credential recognition processes as well as job prospects. Also, FTPs need to be further familiarized with the Canadian job market, so that they learn how and where to find work that is on par with their qualifications once they arrive to Canada. As one article stressed, it is important to help "new immigrants identify transferable skills that can be applied to occupations that utilize their skills to avoid highly trained newcomers working as taxi cab drivers or day labourers" (Sankey par. 14). To achieve these goals, bridging

programs can be established to give internationally trained professionals "the cultural and industry-specific information they need to succeed" (Smolkin par. 17). Second, employers need to change their mentality with regards to FTPs and open up to the benefits of having a diverse pool of employees. Workplaces need to get on board with the idea of hiring FTPs and viewing them as assets to the workforce. According to David Watt - Professor at the University of Calgary, "We haven't changed out mentality to support the professional integration of highly skilled immigrants. That's a fundamental change we need to make as a society" ("NDP Calls for recognition of foreign credentials" par. 16). With a positive change in mentality, employers will begin to appreciate the value FTPs can add to their companies instead of automatically excluding applicants on the basis of their unfamiliar foreign credentials and work experiences abroad (Smolkin par. 23). One news article maintained that roughly "three-quarters of Toronto-area employers believe they have successful programs to integrate foreign-trained professionals into their workplaces, but only 49 per cent of immigrants say the places they have worked have policies that welcome new Canadians" (Immen, "Immigrants looking for a better welcome*"* par. 1). Although internationally educated professionals are undoubtedly responsible for learning about the Canadian workplace and labour market, employers have yet to take more steps towards welcoming foreign workers from diverse cultures (Immen, "Immigrants looking for a better welcome*"* par. 12). With regards to employer programs established over the past few years, Silma Roddau – president of Toronto-based Progress Career Planning Institute – argues that "workplace diversity and recruitment policies lack the bite needed to really make a difference" (Immen, "Immigrants looking for a better welcome*"* par. 2).

Additionally, in an effort to welcome the expertise and unique skills set of FTPs, some articles maintained that employers need to revise job descriptions in order to ensure that listed qualifications are relevant to the advertised positions. As one article explained:

> Managers need to looks at what it is they really need. It is important to identify and describe requirements of a positon appropriately… most companies stick to very generic job postings and descriptions that don't reflect the nature of the work. These descriptions create barriers for both employers and potential hires because qualified candidates are weeded out based on qualifications irrelevant to the job (Tatla par. 4).

In relation to the assessment of FTPs' qualifications, some media stories suggested that interview questions used by employers should focus on confirming candidates' work experiences as opposed to judging unfamiliar foreign credentials. By delving into FTPs' work experiences, employers can begin to determine whether candidates have the requisite skills and training to do a given job (Tatla par. 6). The same logic should also be adopted by FTPs when seeking to gain employment in their fields – educational and work experiences should always be described instead of simply being listed off (Tatla pars. 6-7). Reflecting on the experience of a FTP in Canada, one news reporter noted that:

> The challenge is to work a little harder to remove the barriers that prevent highly skilled people like Vincent from participating in Canada's work force. One can imagine the insight, experience and skills Vincent would bring to an organization if given the opportunity. It is up to a skilled manager to identify his value and Vincent's responsibility to highlight his value (Tatla par. 8).

7) FTPs and the Use of Canadian Legislation as a Means of Seeking Justice

A final topic of discussion which emerged from my media analysis was the use of Canadian legislation by FTPs as a means of seeking justice. Contrary to the six previous themes, this theme was the least addressed throughout my sample of news source. When mentioned, however, discussions surrounding FTPs' interaction with the Canadian legal system were case specific and focused on the emergence as well as progression of 2 select legal disputes.

In line with the literature review findings in chapter two, lacking from my sample of media articles were narratives surrounding: 1) the utility of human rights and fair access legislation in effectively surmounting some of the barriers experienced by FTPs; 2) the need for federal and provincial authorities to strengthen and develop more human rights legislation in Canada to assist FTPs' fight against unjustified discrimination; and 3) the asymmetric warfare between FTPs versus employers and regulatory bodies, whereby most FTPs cannot afford the legal costs associated with initiating as well as sustaining legal disputes.

Of the two legal cases that were discussed in the media sources, the first looked at Ladislav Mihaly's human rights complaint against the Association of Professional Engineers and Geoscientists of Alberta (APEGA), and the second centered on a dispute between a group of foreign-trained doctors and Alberta Health Services (AHS).

I will be discussing and analyzing Mihaly's case in the next chapter; therefore, I will refrain from extensively discussing the facts of the case in this chapter for the sake of avoiding repetition. What is important to mention, however, is that in the end analysis, the Court of

Queen's Bench of Alberta ruled in favour of APEGA by reversing an earlier Alberta Human Rights Tribunal ruling in favour of Mihaly (a foreign trained engineer).

In terms of the legal dispute with AHS, the basic facts of the case revolve around a group of foreign-trained doctors who launched a human rights complaint against AHS. The doctors, who worked as clinical assistants in hospitals, claimed that:

> Alberta Health Services discriminated against them because they were not born in Canada. They say Alberta Health Services (AHS) denied them collective bargaining and arbitration, which they claim they have a right to, even though they don't belong to a formal union (Warnica pars. 1-2).

This human rights complaint emerged after AHS notified 40 foreign trained doctors that their contracts would not be renewed at the end of the year in 2015. According to the doctors, AHS reposed their jobs at half the current pay, requiring them to formally reapply for their old jobs (Sinnema, "Alberta health minister*" says* pars. 3-4; Sinnema, "Foreign-trained doctors at odds*"* par. 6; Warnica pars. 7-8).

Despite the factual differences between the two aforementioned cases, the issue of maintaining public safety and professional standards is central to both cases and reappeared as an underlying thread among media articles which discussed both legal disputes.

When asked why the clinical assistants' contracts were being terminated, Sarah Hoffman, Alberta's Health Minister, maintained that the decision was primarily driven by concerns for

public as well as employee safety and well-being. According to one article, Hoffman explained that the contracts being terminated allowed clinical assistants to work 80 hours per week; however this was deemed to be an unsafe number of hours by AHS and the College of Physicians and Surgeons of Alberta (Sinnema, "Alberta health minister says", pars. 5-6). Alternatively, the new jobs being offered (in the place of the old contract positions) provide a standardized plan which limits weekly workloads to 50 hours and ensures compensation fairness among all clinical assistants (Sinnema, "Alberta health minister says", pars. 5-6). As stated by Hoffman:

> The goal is to make sure clinical assistants are treated with respect and that their hours are reasonable so that they can have top work-life balance, that they don't work extreme hours so that (AHS) can assure their clinical assistants can have the top sharpness in supporting patients… I want to say that the transition of course is challenging. The No. 1 thing is making sure patients are safe (Sinnema, "Alberta health minister says" pars. 7-8).

Hoffman's perspective, of course, stood in contradiction to the realities described by several clinical assistants. As one foreign trained doctor explained, abruptly terminating 40 medical contracts is not conducive to ensuring public safety because hospitals already have a shortage of senior medical doctors and staff (Sinnema, "Foreign-trained doctors at odds", pars. 13-14). Although clinical assistants are overworked and maintain heavy weekly workloads, they are currently the ones who nonetheless cover night physician shifts and bear the brunt of caring for patients with little assistance (Sinnema, "Foreign-trained doctors at odds" par. 2).

In relation to the Mihaly case, Mark Flint, APEGA's former CEO, also buttressed the importance of maintaining public safety and professional standards. In support of the decision by the Court of Queen's Bench of Alberta, Flint argued that had the Court upheld the ruling of the Human Rights Tribunal of Alberta, it would have negatively impacted the ability of professions to regulate themselves as well as to establish rigorous Canadian standards to protect public safety ("Judge reverses Alberta human rights ruling" pars. 9-10). In reference to FTPs and the process of upgrading their technical or language skills, Flint was quoted saying:

> 'You need to get the requisite education and write the professional practice and ethics exam. Those are rigorous bars to meet,' he said. 'The process is straightforward. The attainment of those standards is not always easy' ("Judge reverses Alberta human rights ruling" pars. 18-19).

Concluding Remarks

Overall, my media analysis findings support the issues and concerns raised by research literature (as discussed in the previous chapter) surrounding FTPs in Canada. Although news articles do not provide detailed and extensive background information when examining the topic of foreign credentials assessment and recognition in Canada, it is fair to argue nonetheless that media accounts do provide a good introduction to the situation and struggles of FTPs. Thus, for members of the general public who may not have access to or are not familiar with academic research literature on FTPs, enough information is provided in news media sources so as to raise awareness about the importance of effectively integrating FTPs in the Canadian workforce as we head into the future.

Although my initial approach to analysing news media coverage of FTPs in Canada involved looking for evidence or signs of political leaning within news articles, this endeavour became more and more difficult as I began to gather my sources. In particular, one problem I came across during my data collection stage was the fact that some news sources have a tendency to re-publish the same articles written by the Canadian Press – a national news agency in Toronto which writes news articles and allows for its content to be re-published by major Canadian news outlets. This scenario made it difficult to pin point instances of political leaning or bias within news accounts as different newspapers, typically affiliated with very different or opposing political views, ended up selecting and publishing the same articles from the Canadian Press. Arguably, perhaps this shows that the issue of FTPs in Canada is a widespread concern that crosses all party lines and which most news media outlets care to report on, regardless of their political orientations to the left or right.

In contrast to this chapter's focus on news media and its coverage of FTPs, the next chapter will adopt a legal lens to analyze the role of human rights tribunals and courts in addressing issues surround foreign credentials in Canada.

CHAPTER FOUR

Legal Analysis - The Role of Human Rights Tribunals and Courts in Addressing Issues Surrounding Foreign Credentials and Employment Prospects in Canada

This chapter will examine the situation of FTPs in Canada through a socio-legal lens, by exploring how pieces of Canadian legislation have been used, interpreted, and applied in tribunals and courts, by both FTPs and justice officials. To achieve this end, a number of human rights tribunal as well as court cases in Ontario, Alberta, and British Columbia will be comparatively examined.

In particular, my legal analysis will focus on 10 legal cases in Canada (listed below) ranging from 1995 to 2016. Part A of this chapter will provide a synopsis of each case and will include an overview of: the applicant's position, respondent's position, and the reasons for the final decision. Subsequently, Part B will provide an overarching analysis of the cases, with attention to commonalities, differences and interpretive gaps.

Of the 10 cases, the earliest one is from 1995 with the most recent one being form 2016. The majority of the cases – 4 in total – were heard at the Ontario Human Rights tribunal, one case was heard at the Ontario Board of Inquiry and one case was heard at British Columbia's Council of Human Rights. The remaining cases reached higher court levels including the Federal Court of Canada (1 case), the Ontario Superior Court of Justice (1 case), and the Court of Queen's Bench in Alberta (2 cases). In terms of the types of complaints filed, three of the cases involve complaints against three different provincial Colleges of Physicians and Surgeons and the rest of the complaints are geared at a variety of other regulatory bodies including: the Law Society of

Upper Canada, the Canadian Architectural Certification Board, the Association of Professional Engineers and Geoscientists of Alberta, the National Dental Examining Board of Canada, the Mackenzie Valley Land and Water Board, as well as the University of Toronto. Also, worth noting is that of all these cases, only three resulted in a win for the FTPs involved.

List of cases:

1. *Neiznanski v. University of Toronto, 1995 – Ontario Board of Inquiry BOI*
2. *Bitonti v. The College of Physicians and Surgeons of British Columbia et al., 1999 – The British Columbia Council of Human Rights*
3. *Sangha v. The Mackenzie Valley Land and Water Board, 2007 – Federal Court of Canada*
4. *White v. National Committee on Accreditation, 2010 – Human Rights Tribunal of Ontario*
5. *Durakovic v. Canadian Architectural Certification Board, 2011 – Human Rights Tribunal of Ontario*
6. *Grant-Kinnear v. Law Society of Upper Canada, 2013 – Ontario Superior Court of Justice (Divisional Court)*
7. *Keith v. College of Physicians and Surgeons of Ontario, 2013 – Human Rights Tribunal of Ontario*
8. *Fazli v. National Dental Examining Board of Canada, 2014 – Human Rights Tribunal of Ontario*
9. *Farhat v. College of Physicians and Surgeons of Alberta, 2014 – Court of Queen's Bench of Alberta*

10. *The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly, 2016 – Court of Queen's Bench of Alberta*

Upon analyzing these legal cases, attention will be paid to a variety of factors, including: 1) The responsiveness of courts and human rights tribunals to the expectations/concerns of FTPs; 2) The way in which judicial powers advantage or disadvantage certain groups or interests; 3) The role of the courts in relation to the development of public policy; 4) The language and narratives used in legal arenas to frame issues surrounding FTPs and their employment opportunities in Canada; and 5) The role of courts and human rights tribunals in advancing human rights protections for FTPs.

Rationale and Methodology Used for the Selection of Cases

The 10 cases listed above were selected based on a number of reasons. First, these were the cases that emerged once I started researching and exploring the situation of FTPs in Canada. Some of the cases were frequently discussed in academic literature, while others were merely found by virtue of reading court/tribunal decisions and paying attention to precedent cases used by judges and adjudicators to justify/explain their legal reasoning. Second, all the cases selected involve FTPs in Canada who were seeking to achieve recognition for their foreign credentials. Lastly, each case helps to legally situate and bring to life some of the issues and themes discussed in previous chapters (particularly chapters 2 and 3).

Upon finalizing the list of 10 legal cases I wanted to focus on, I used the Canlii website (www.canlii.org/en/on) in order to retrieve PDF copies of tribunal/court decisions. Alternatively,

for those decisions that were not available on the website, I simply found PDF copies by typing the case names in google search.

Part A: Case Synopses

1. Neiznanski v. University of Toronto, 1995 – Ontario Board of Inquiry BOI

Between: Dr. Leslie Neiznanski (Complainant) and University of Toronto; Dr. John Provan (Respondents)

Adjudicator: Peter A. Cumming, Q.C.

Decision: Mr. Cumming found that there was no unlawful discrimination against Dr. Neiznanski and dismissed his complaint (page 24).

Applicant's Position:

At the time of this case, Dr. Neiznanski was a 64 year old medical doctor and Canadian citizen residing in Ontario (*Neiznanski v. University of Toronto* 2)**.** He obtained his training in ophthalmology at the University of Warsaw Poland and had practised there, in his field, for over 20 years (*Neiznanski v. University of Toronto* 2). Upon becoming a landed immigrant in Canada, back when he first arrived, Dr. Neiznanski wrote and passed the Medical Council of Canada Evaluating Examination (MECCEE) (*Neiznanski v. University of Toronto* 2)**.** With the ultimate goal of becoming licensed as an ophthalmologist in Ontario, the successful completion of the MECCEE meant that Dr. Neiznanski could proceed to seek admission to a Residency Program (*Neiznanski v. University of Toronto* 2).

In July of 1984, Dr. Neiznanski was admitted as a Clinical Fellow in the Department of Ophthalmology at the University of Toronto (*Neiznanski v. University of Toronto* 3). During that year, he also worked at the clinics of both Toronto General Hospital and St. Michael's Hospital (*Neiznanski v. University of Toronto* 3). In July of 1985, he became a Resident in the Residency Program of the Department of Ophthalmology at the University of Toronto and also started working at the St. Joseph's Health Centre (*Neiznanski v. University of Toronto* 3). Dr. Neiznanski completed his first year of residency and continued on to his second year in July of 1986 (*Neiznanski v. University of Toronto* 3)**.** His Resident position throughout both years was unfunded (*Neiznanski v. University of Toronto* 3)**.** During his second year, however, Dr. Nieznanski did not pass his annual examination and was not permitted to progress on to his third year in order to finish his Residency Program (*Neiznanski v. University of Toronto* 3)**.** His Residency was terminated in June of 1987 (*Neiznanski v. University of Toronto* 3)**.** Following this termination, he was given a second opportunity to retake the exams in December of 1987 and May of 1988, but again he was not able to successfully complete them in line with the minimum results required for re-admission (*Neiznanski v. University of Toronto* 3; 17)**.** In June of 1988, Dr. Neiznanski was informed that he would not be re-admitted into the Department of Ophthalmology in order to finish his training (*Neiznanski v. University of Toronto* 3-4)**.** Upon receiving this decision, Dr. Neiznanski appealed the termination of his Residency to the University of Toronto, Faculty of Medicine, Academic Appeals Committee, but was unsuccessful (*Neiznanski v. University of Toronto* 4)**.** He subsequently further appealed his case to the Academic Appeals Committee of the Governing Council, University of Toronto, which also dismissed his appeal in June of 1989 (*Neiznanski v. University of Toronto* 4)**.** Following these two dismissals, Dr. Neiznanski filed a complaint under the *Ontario Human Rights Code*, R.S.O. 1990, c. H. 19, as amended (the *Code*), claiming that he had been discriminated against

(*Neiznanski v. University of Toronto* 4). He alleged that the Governing Council of the University of Toronto and Dr. John Provan discriminated against him 1) in facilities and services on the basis of age (contrary to sections 1 and 9 of the *Code*), and 2) in employment due to place of origin and ethnic origin - in violation of sections 5(1) and 9 of the *Code* (See Appendix A) (*Neiznanski v. University of Toronto* 4)**.** Dr. Neiznanski also claimed that he experienced constructive or indirect discrimination contrary to section 11 of the *Code* (*Neiznanski v. University of Toronto* 4).

Respondent's Position:

With regard to the admission process for Residency positions, Dr. Provan (Associate Dean of Postgraduate Medical Education, Faculty of Medicine, University of Toronto) maintained that there was no differential or discriminatory treatment between foreign trained and Canadian trained applicants on the basis of national origin, citizenship, or age (*Neiznanski v. University of Toronto* 7). Although Dr. Neiznanski did not rank as part of the top 20 candidates to be interviewed and was not selected as one of seven students to receive funded positions for the ophthalmology Residency Program, the admissions committee along with the department still allowed him into the Residency Program in 1985 as a way of giving him "a break" (*Neiznanski v. University of Toronto* 8; 10). Dr. Mortimer (the applicant's mentor and benefactor as well as a member of the admission committee) explained that when Dr. Neiznanski was granted the unfunded position in the Residency Program, he was forewarned of the potential difficulties arising from the lack of funding as well as the unavailability of bursaries (*Neiznanski v. University of Toronto* 10). Despite these circumstances, Dr. Neiznanski was eager to get into the Program and therefore accepted the unfunded position (*Neiznanski v. University of Toronto* 10).

Adjudicator's Analysis and Reasons for Decision:

Based on the evidence presented, the adjudicator maintained that the selection process for admission into the ophthalmology Residency Program (including the seven funded positions) was objective and fair (*Neiznanski v. University of Toronto* 7; 10; 13). Although ophthalmology is a competitive specialty, difficult to get into, and offers a limited number of funded positions, Mr. Cumming noted nonetheless that there had been many foreign trained physicians accepted into the Residency Program (*Neiznanski v. University of Toronto* 6; 7). While the lack of funding aggravated Dr. Neiznanski's situation, this was not because of any discrimination on the part of the Respondents (*Neiznanski v. University of Toronto* 10). Likewise, the adjudicator found that the Respondents had not unlawfully discriminated against the complainant with regards to his evaluation and testing in the program, nor in their decision to terminate his Residency. Rather, throughout out all these processes, Dr. Neiznanski had been evaluated fairly and objectively on the basis of his academic merits (*Neiznanski v. University of Toronto* 17-18).

Also, the adjudicator found that offering Dr. Neiznanski an unfunded position as an eight Resident was an act of compassion on behalf of the Department and Dr. Mortimer (*Neiznanski v. University of Toronto* 11). There was no legal obligation to provide Dr. Neiznanski with funding and the fact that he accepted the unfunded position (knowing full well that such an endeavour would be challenging as well as time consuming) was his own choice – the Residency position was never imposed upon him (*Neiznanski v. University of Toronto* 11). Thus, Dr. Neiznanski was not "denied access to education" when he was not offered a funded position (*Neiznanski v. University of Toronto* 12). Mr. Cumming emphasized that the Ontario Government funds only seven new Residents each year and that these seven physicians are chosen through a fair

admission process (*Neiznanski v. University of Toronto* 12). In this way, Dr. Neiznanski was no different than other physicians (whether Canadian trained or foreign trained) seeking to become ophthalmologist, but who are unable to obtain a funded Residency position through the competitive admissions process (*Neiznanski v. University of Toronto* 12).

Furthermore, upon comparing Dr. Neiznanski's treatment with that of other residents, the adjudicator noted that he had not been treated unfairly (*Neiznanski v. University of Toronto* 14-15). Mr. Cumming explained that there was only one other Resident - Dr. Eplett- who like Dr. Neiznanski had failed the second year of the Residency Program, but still managed to gain re-admission into the Residency Program upon retaking the second year annual examinations (*Neiznanski v. University of Toronto* 14). Although Dr. Eplett had performed similarly to Dr. Neiznanski on the oral exams and only marginally better than him on the Ophthalmic Knowledge Assessment Program exam, she had scored exceptionally well on the written exam - ranking first overall among all the Residents. It was on the basis of this exceptional performance that she was allowed to re-enter the Residency Program (*Neiznanski v. University of Toronto* 14-15).

In relation to the issue of discrimination on a prohibited ground, the adjudicator found that "place of education or training" was not among the prohibited grounds under the *Code* (*Neiznanski v. University of Toronto* 21). As a result, requiring candidates with foreign education and credentials "to complete additional academic evaluations, examination or experience requirements prior to licensure" in Ontario was not in violation of the *Code* (*Neiznanski v. University of Toronto* 21). Rather, in order to be entitled to protection under the *Code,* one must be able to demonstrate that the more onerous licensing requirements, which are in place due to "place of education or training" (not a prohibited ground), have the effect of discriminating

against certain individuals on the basis of place of origin (a prohibited ground). That said, Mr. Cumming went on to acknowledge that constructive or indirect discrimination is depictive of the unequal treatment that foreign trained professionals often experience. Although such individuals tend to be discriminated against on the basis of their foreign credentials this in turn has the effect of also excluding or discriminating against them because of their place of origin, race, colour or ethnic origin (*Neiznanski v. University of Toronto* 22). Since individuals tend to obtain their education or training in their place of origin, place of education or training can be used as a proxy for place of origin (*Neiznanski v. University of Toronto* 22). Thus, professionals like Dr. Neiznanski, who recently obtained Canadian citizenship or landed immigrant status and who were excluded from consideration for a Residency position merely because of their foreign training could in effect argue that they were constructively or systemically discriminated against on the basis of place of origin, in violation of section 11(1) of the *Code* (*Neiznanski v. University of Toronto* 22). In such cases (where a claim of constructive discrimination has been effectively made under section 11), the adjudicator explained that two questions must be considered: 1) Why are unequal requirements used if they result in constructive discrimination, and 2) Is the exclusion of foreign-trained physicians (whether they are Canadian or landed immigrants) necessary in order to protect the public interest? (*Neiznanski v. University of Toronto* 22).

Upon answering these questions in relation to Dr. Neiznanski's case, Mr. Cumming explained that the reason why more rigorous licensing requirements were imposed upon foreign trained physicians was to maintain necessary public standards in relation to societal safety, health and welfare (*Neiznanski v. University of Toronto* 23). The protection of the public interest, he found, was a reasonable and *bona fide* ground for discrimination on the basis of place of education or training (*Neiznanski v. University of Toronto* 23). Thus, although the Residency

Program imposed more onerous licensing requirements on foreign trained physicians, the purpose of this differential treatment was to ensure that only Residents who meet the medical profession's standards in Canada graduate and move on to the Royal Society's exams (*Neiznanski v. University of Toronto* 23). As stated by Mr. Cumming, " in order to have a fair system and one that produces the most qualified specialists, the admissions process should consider all candidates on the merits" regardless of their pace of education or training (*Neiznanski v. University of Toronto* 23).

2. Bitonti v. The College of Physicians and Surgeons of British Columbia et al., 1999 – The British Columbia Council of Human Rights

Between: Dr. Rosa Bitonti, Dr. Adina Alexescu (formerly Cimpeanu), Dr. Teofilo Goyengko, Dr. Raminder Randhawa, and Dr. Gabriele Salvadori (Complainants) and The College of Physicians & Surgeons of British Columbia, The Fraser Burrard Hospital as Represented by The Royal Columbian Hospital, The Lions Gate Hospital, The Sisters of Charity of Providence in British Columbia as Represented by St. Paul's Hospital, The Greater Victoria Hospital Society, Her Majesty the Queen in Right of the Province of British Columbia as Represented by the Ministry of Health, and the University of British Columbia (Respondents)

Council Member: Tom W. Patch

Decision: Mr. Patch concluded that the complaints against the Hospitals, the Ministry of Health, and the University of British Columbia (UBC) were not justified and therefore were dismissed. In contrast, the complaint against the College of Physicians and Surgeons of British Columbia was justified and thus allowed (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 382).

Applicants' Position:

All the Complainants in this case (with the exception of Dr. Salvadori) immigrated to Canada in the 1980s and all experienced struggles when seeking to find employment as doctors in British Columbia (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 1). Their complaints took root in the allegation that "the system for training and licensing medical practitioners in British Columbia discriminates against graduates of medical schools of certain countries outside North America" (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 1)**.**

In particular, the Complainants took issue with Rules of the College of Physicians and Surgeons of British Columbia (College), which are responsible for licensing foreign-trained doctors to practise medicine in British Columbia (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 1). At the time of the applicants' complaint, the College's requirements differentiated between two categories of physicians under Rule 73 made pursuant to the *Medical Practitioners Act,* R.S.B.C. 1996, c. 285 (*MPA*) (See Appendix A): a) Category I, which consisted of graduates from medical schools in Canada, the United States, Great Britain, Ireland, Australia, New Zealand or South Africa; and b) Category II, which consisted of graduates from other international medical schools not included in Category I (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 1). Graduates from Category II countries could obtain their licence by completing two years of post-graduate training in a Category I country, with one year consisting of a rotating internship and the other year specifically located in Canada (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 2). The Complainants took issue with this Rule because foreign-trained

doctors from Category II had to compete with Canadian trained doctors for a limited number of intern positions (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 2). This requirement, they believed, was the reason why graduates from Category II were: a) almost invariably unsuccessful in obtaining intern positions; and b) unable to satisfy the College's licensure requirements (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 2)**.** From the perspective of the Complainants, the Respondents were all complicit in denying them a realistic opportunity to work as an intern and obtain the necessary licence to practice medicine in British Columbia (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 2)**.** Accordingly, in 1992, the Complainants filed complaints under the *Human Rights Act*, S.B.C. 1984, c. 22, as amended (the *Act*), on the grounds that the College, the Ministry of Health, the Hospitals and UBC had discriminated against them due to race, colour, ancestry or place of origin in contravention to sections 3 and 8 of the *Act* (their complaints were later amended to include an allegation that the College had discriminated against them in violation of section 9 of the *Act*) (See Appendix A) (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 3; 12).

More specifically, the Complainants started off by alleging that the purpose of Rule 73 was discriminatory because it drew a distinction between applicants based on place of training. The Complainants maintained that this was an "artful way to discriminate directly on the basis of ancestry and place of origin" (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 98). They also emphasized that there was a high correlation between place of origin and place of education among Category I and Category II countries (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 141). As such, the Complainants alleged that the College's Rules adversely affected them in relation to their place

of origin or ancestry (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 110).

Second, the Complainants claimed that the Hospitals' selection criteria for internships directly discriminated against applicants of non-Canadian origin on the basis of their place of origin, by giving preference to Canadian graduates over non-Canadian graduates (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 241). They argued that there is a high correlation between place of origin and place of education (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 244).

Third, the Complainants insisted that the Ministry of Health discriminated against them in relation "to terms and conditions of employment or refused to employ them contrary to section 8 of the *Act* and/or refused them a service customarily available to the public contrary to section 3 of the *Act*" (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 310). The Complainants maintain that the Ministry does not provide sufficient funds for internships in British Columbia, and as a result foreign medical school graduates are prevented from obtaining internships and ultimately practising medicine (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 310). They also stress that the inadequacy of funds is an allocation issue (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 310). By funding a small internship program for foreign medical school graduates (with inadequate funds) priority is given to UBC medical graduates (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 310).

Lastly, Dr. Bitonti individually filed an additional complaint claiming that UBC (the University of British Columbia) had discriminated against her in violation of sections 3 and 8 of the *Act* (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 344). She argued that in 1991, she had informally applied to a number of UBC's medical departments, seeking to be admitted as a student and inquiring about their residency programs; however, all the departments rejected her application because she was a foreign medical school graduate (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 344). Instead, they informed her that she would have to successfully write the Test of English as a Foreign Language – a test that was not imposed on graduates of Category I medical schools. As such, Dr. Bitonti submitted that UBC's "differential treatment in its selection of residents" is proof of direct and adverse effect discrimination (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 344)

Specifically, with regard to her claim of direct discrimination, Dr. Bitonti maintained that UBC's residency selection criteria furthered "the College's discriminatory practice by requiring that applicants have completed a one-year rotating internship in North America prior to applying for residency" (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 358). Also, she emphasized that UBC had expressed in letter to several of the Complainants that residency positions were not available for foreign medical school graduates, as preference was given first and foremost to Canadian graduates (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 358). Dr. Bitonti's position in relation to adverse effect discrimination revolved around the argument that while residency programs at UBC require a North American internship as a prerequisite, the issue with this requirement is that Category II graduates often have slim chances of securing internships in Canada. According to Dr. Bitonti,

there was a "high correlation between place of graduation and place of origin", and as a result, graduates whose place of origin fell into a Category II country were adversely affected by the prerequisite (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 362).

Respondents' Position:

-*The College of Physicians and Surgeons*-

The College maintained that "a Category II place of origin" was not a "place of origin" according to the meaning of the *Act* (which suggests that place of origin encompasses place of birth, including the country of birth) (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 149), because Category II applicants seeking Registration come from a variety of different places and are not a homogenous group (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 149). The College made the same argument in terms of Category I applicants (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 149). The College further argued that even "if the Complainants established a *prima facie* case of direct discrimination, that discrimination was *bona fide* and reasonably justified. Alternatively, if the College's conduct was found to constitute adverse effect discrimination, the College nonetheless accommodated the Complainants to the point of undue hardship" (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 191).

From the perspective of the College, the historical development of the medical training system in Canada and other Category I countries justified the distinction it made between Category I and Category II graduates (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 212). The College argued that the medical training in Category II countries was not known to the College (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 212). Evidence demonstrated that "physicians trained in Category I countries outside Canada performed competently in the Canadian setting" whereas Category II trained physicians performed less competently in comparison to locally-trained graduates (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 212).

-The Hospitals-

The Hospitals submitted that the intern selection process did not make a distinction between Category I and Category II graduates. Instead, a distinction was made between graduates of Canadian medical schools and all foreign trained graduates, regardless of the Category they fell into (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 244). The Hospitals further argued that the Complainants had not established an adverse effect because census data demonstrated that Canadian-born physicians are under-represented in the physician population in comparison to the general population (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 245).

-The Ministry of Health-

The Ministry argued that since it is not an employer or a service provider within the meaning of the *Act*, the British Columbia Council of Human Rights (Council) did not have jurisdiction over the complaints against the Ministry (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* pars. 311; 316). Likewise, the Ministry's expenditure of funds by the provincial government is a legislative act that should be immune from review by the Council (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 315). The Ministry also claimed that the Complainants had not established that discrimination had occurred in the case at hand, emphasizing that "country of education is not synonymous with place of origin" (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 311).

-*The University of British Columbia (UBC)*-

UBC maintained that place of origin and place of medical training are not equivalent (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 353). For this reason, the Human Rights Council did not have the jurisdiction to determine whether "a distinction based on place of medical school graduation can be equated to a distinction based on any of the prohibited grounds" identified in the *Act* (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 353). Furthermore, in relation to Dr. Bitonti's complaint, UBC submitted that: a) it had not rejected an application by Dr. Bitonti for a residency positon because she never formally applied to a residency program. Thus, given the absence of an actual application, it could not have discriminated against her by refusing her admission (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 356) and b) its admission requirements did not discriminate in contravention of the *Act* (*Bitonti v. The College of*

Physicians and Surgeons of British Columbia et al. par. 353). Instead, UBC emphasized that had she formally applied, her application would have been assessed fairly and objectively regardless of her national origin, race, colour or ancestry (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 356).

Council Member's Analysis and Reasons for Decision:

-*The College of Physicians and Surgeons*-

To begin with, the Council Member first examined the Complainants' allegations against the College. While the Complainants initially filed their complaints under sections 3 and 8 of the *Act*, the Council Member found that these sections were inapplicable to the complaints against the College. Instead, he allowed the Complainants to amend their complaints to include an allegation of discrimination against the College under section 9 of the *Act* (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 86). Mr. Patch explained that section 8 is concerned with discrimination in relation to "employment", yet in the case at hand, the Complainants had not secured employment "positions of any sort" (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 81). Instead, their dilemma was that they were unable to lawfully practise medicine without a licence granted by the College, and therefore denied the opportunity "to earn a livelihood in British Columbia in their desired profession" (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* pars. 80; 81).

With regard to section 3, Mr. Patch maintained that this section was inapplicable to the case because it focused on the provision of services, whereas section 9 appropriately applied to

occupational associations (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 69). The Council Member argued that the College is an "occupational association" within the meaning of section 1 of the *Act* (See Appendix A) and therefore the relevant issue or question was whether the College had contravened that section (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* pars. 90; 92).

Starting with the Complainants' allegation of direct discrimination against the College, Mr. Patch found that place of training is not a prohibited ground of discrimination and that distinguishing on the basis of place of training does not constitute direct discrimination under the *Act* (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 97). Rather, a successful claim of direct discrimination requires that the Complainants prove that the distinction "is a veiled attempt to discriminate on one of the prohibited grounds" (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 97). Namely, "that the College intended that Rule 73 distinguish between applicants for membership in the College based on their ancestry or place of origin" (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 101). The Council Member found that Rule 73 "speaks only to place of medical training" and does not make any differentiation on the basis of ancestry or place of origin" (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 102). Given that there was no evidence that Rule 73 was established so as to directly discriminate against applicants based on their ancestry or place of origin (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 106), Mr. Patch concluded that the Complainants had not made a successful claim of direct discrimination by the College (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 107).

Next, the Council Member addressed the Complainants' allegations of adverse effect discrimination. Emphasizing once again the lack of evidence in relation to ancestry, Mr. Patch contended that a *prima facie* case of discrimination based on ancestry had not been made out and dismissed that portion of the complaint (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 113). In terms of place of origin, the Council Member maintained that the Complainants had not proven that physicians born in Category II countries were adversely affected by the College's rules for registration (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 138). Rather, data demonstrated that physicians registered with the College who were born in Category II countries were not under-represented when compared with the proportion of individuals living in Canada who were born in those countries (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 138). That said, Mr. Patch did agree with the Complainants that the correlation between place of origin and place of graduation was high (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 147). The Council Member specified that place of origin encompasses place of birth, including country of birth (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 148). Contrary to the College, Mr. Patch argued that a protected group does not have to be homogenous, rather it must possess a shared characteristic that is recognized as a ground of discrimination under relevant legislation (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 152). With regards to the case of the Complainants, since place of origin includes place of birth in a Category II country, "the fact that the members of the protected group were born in different Category II countries is irrelevant" provided that the various countries are in Category II (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 152). As a result, the Council Member concluded that a Category II place of

birth constituted place of origin within the meaning of the *Act* (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* pars. 161; 162).

In relation to Rule 73, Mr. Patch found that the Rule "in its effect, distinguished between medical graduates with Category I and II places of origin, and to the disadvantage of those in Category II" (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 173). Emphasizing that there was a high correlation between place of training and place of origin, the Council Member explained that based on the evidence before him Rule 73's requirement that individuals with Category II medical training must complete a year of internship in Canada was almost impossible to meet (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 176). The Canadian internship requirement did not apply to graduates of medical schools in Category I countries (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 171). Consequently, physicians with category II medical training seeking to register with the College were faced with an additional obstacle that did not exist for those trained in Category I countries (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 176). In this way, persons in Category II were adversely affected by the College's Rule (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 177). Rule 73 did not, on its face restrict foreign trained graduates from seeking admission to the medical profession in British Columbia, nor did anything in the Rule limit foreign trained graduates from applying to internships or residency positions (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 190). That said, the effect of requiring foreign-trained medical graduates to complete a Canadian internship, despite the slim chances of securing such a position, was to deny them access to the medical profession (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 190). The Complainants,

therefore, could not comply with Rule 73 due to the unlikelihood of securing internship positions (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 377). The Council Member agreed that the Complainants has established a *prima facie* case that the distinction in Rule 73 between Category I and Category II graduates discriminated on the basis of place of origin, thus urging the College and the Complainants to resolve any remedial matters amongst themselves (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 190).

-*The Hospitals*-

Second, the Council Member addressed the Complainants' claim that the Hospitals' discrimination against them on the basis of place of graduation constituted direct discrimination on the basis of place of origin (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 242). Mr. Patch alternatively found that the Complainants had not established a *prima facie* case that the Hospitals had discriminated against them on the basis of any prohibited ground under the *Act* (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 309). He explained that 'place of graduation' is not included in 'place of origin' (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 242). As a result, a successful complaint of direct discrimination needs to demonstrate that any preference based on place of graduation is a pretext for discrimination on the basis of place of origin (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 242).

With regard to the case at hand, the Council Member contended that the Complainants had not provided evidence to support such an allegation (*Bitonti v. The College of Physicians and*

Surgeons of British Columbia et al. par. 242) nor was there any evidence to suggest that foreign-born graduates are under-represented in the internship populations (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 246). Having said that, the Council Member went on to acknowledge that there was evidence in support of a high correlation between place of origin and place of medical training (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 246). According to Mr. Patch, individuals born outside Canada are more likely to have trained outside Canada in comparison to those born in Canada (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 246). Canadian trained physicians have an advantage in the intern matching process because "hospitals are in a better position to assess their individual abilities" in comparison to those of foreign medical school graduates (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 307). In this way, the Council Member found that there was a distinction based on place of origin in the Hospitals' internship selection process (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 246). Not every distinction, however, amounts to discrimination (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 247). The Hospitals' internship selection practices do not make the assumption that medical graduates from some countries are more or less qualified then others. It also doesn't selectively impose "burdens on the graduates of some medical schools that aren't imposed on others" (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 307). Instead, the Hospitals' practices are rooted in its legitimate goal to select the best candidates (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 307).

-The Ministry of Health-

Third, Mr. Patch discussed the Complainants' claim that the Ministry's limited funding prevented foreign medical school graduates from having a realistic chance of obtaining internships (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 315). Mr. Patch begun by noting that although the Complainants maintained discrimination in contravention to section 3 of the *Act*, they had not indicated what service the Ministry provided that was involved in the alleged discrimination (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 312). Due to the lack of evidence in support of a service relationship between the Ministry of Health and the Complainants, the Council member found that the Ministry was not a service provider according to the meaning of section 3 of the *Act* (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 315).

Next Mr. Patch examined whether the Ministry could be considered an "employer" within the meaning of the *Act.* The Council Member argued that while the Hospitals were in an employment relationship with their interns, just because the Ministry funded the internship programs, that did not make it an employer as well (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 317). Rather, the Complainants must prove that the Ministry engaged in discriminatory conduct with regards to their "potential employment with the Hospitals" (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 317).

Upon reviewing the facts of the case, Mr. Patch found that there was no evidence to suggest that the alleged inadequate funding had any impact on the ability of foreign trained graduates to access internship positions (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 339). Thus, the real issue, he maintained was not that there were

very few internship positions (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 339). Instead, he emphasized that the real barrier for foreign trained graduates was that they were "almost invariably ranked too low", in the matching process, to compete with Canadian graduates (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 339). According to the Council Member, the Ministry did not have an obligation under the *Act* to provide additional funding and its failure to do so was not discriminatory on the basis of place of origin (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* pars. 340-341). Recognizing the licensing barriers experienced by foreign medical graduates, the Ministry created a program to which only foreign medical school graduates could apply (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 341). Although the program was small and fell short of meeting the demand for internship positions among foreign trained graduates, Mr. Patch argued that the Ministry had no obligation under the *Act* to implement a special program that would address all the licensing issues experienced by foreign trained graduates (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 341). Nor was it required to expend funds that would fully accommodate or meet the needs of foreign trained graduates (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 342). Upon deciding to provide funds to improve access to post-graduate training for foreign medical school graduates, the Council Member affirmed that the Ministry was entitled to distribute those funds to a program as it saw fit, so long as the program was not "discriminatory in intent or effect" (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 342). While the Complainants argued that the money spent on the Program for foreign medical graduates could have funded seven positions in the regular intern program, the Council Member disagreed (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 342). Just because the Complainants

preferred a different allocation of funds that would suit them did not provide valid grounds to allege discriminatory conduct (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 342). Thus, while the net effect of the program was to decrease the number of training positions available for foreign trained graduates, Mr. Patch found that this was not the result of prohibited discriminatory conduct by the Ministry (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 341). As such, he concluded that the Complainants had not established a *prima facie* case that the Ministry had discriminated against them in violation of the *Act* (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 343).

-*University of British Columbia*-

Lastly, Mr. Patch addressed Dr. Bitonti's complaint against UBC in relation to direct and adverse effect discrimination. The Council Member explained that although Dr. Bitonti had not formally applied for admission to UBC's residency programs, it would be unreasonable to require that she make a formal application when it was clearly stated by various UBC medical departments (in response to her informal inquiry applications) that either there were no opening for graduates of foreign medical schools or that she did not meet the minimum requirements (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 357). Such an application would be "fruitless" since she lacked the prerequisites for the programs (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 357).

In particular, he explained that most programs' requirement that applicants possess a North American internship applied to all applicants. On its face, therefore, this requirement did

not discriminate on the basis of place of origin or place of medical education (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 360). Also, there was no evidence indicating that this requirement was put in place as a way of a) preventing the acceptance of applicants from particular places of origin or b) giving preference to applicants from particular places of origin (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 360). Upon concluding that there was no evidence of direct discrimination based on place of origin, the Council Member emphasized again that "place of education and place of origin are not equivalent. Nor is discrimination based on citizenship equivalent to place of origin discrimination" (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 360).

In terms of adverse effect discrimination, Mr. Patch found that Dr. Bitonti had not provided evidence in support of such a complaint (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 366). Dr. Bitonti alleged that the fact that few non-Canadians are matched to residency programs with UBC was evidence of adverse effect discrimination (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 371). Alternatively, the Council Member specified that although correspondence from the residency programs did indicate that foreign trained graduates were at a competitive disadvantage, Dr. Bitonti's argument was not sufficient to establish an adverse effect because it did not focus exclusively on Category II graduates, but rather graduates of foreign medical schools in general (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 371). Mr. Patch concluded, therefore, that Dr. Bitonti had not established a prima facie case that UBC had discriminated against her on the grounds of race, colour or place of origin (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 372).

Overall, upon reviewing all the complaints against the various Respondents in the case, Mr. Patch found that only the complaints against the College were justified; the rest were dismissed (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 376). The Council Member agreed with the Complainants that the College's distinction between graduates of Category I and Category II medical schools constituted discrimination based on a person's place of origin (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* pars. 376; 382). Drawing on a legal test set out in *Meiorin* (See Appendix A), Mr. Patch concluded that the onerous requirements of Rule 73 (as it read prior to 1993) was not "reasonably necessary" (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* pars. 232; 236). The Complainants had successfully demonstrated that the College discriminated against them in violation of section 9 of the *Act* based on their place of origin by "imposing more onerous and inflexible registration requirements on graduates of Category II medical schools than on those of Category I medical schools" (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 236). While recognizing the College's concern about the importance of ensuring training equivalencies, the Council Member found that the College had not sufficiently demonstrated that two years of post-graduate training in a Category I country was necessary to "ensure equivalent practical experience for Category II graduates" (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 232). Furthermore, in addition to the inflexible application of the Rule, there was no mechanism or system in place to allow Category II graduates to demonstrate the equivalency of their practical training to that of Category I graduates as well as their familiarity with Canadian standards (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* pars. 227; 229). From the point of view of Mr. Patch, although "the College could not individually assess the clinical skills of Category II applicants" it would not have been impractical for it to develop a mechanism which permitted

Category II applicants to establish the equivalency of their qualifications (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 235).

3. Sangha v. The Mackenzie Valley Land and Water Board, 2007 – Federal Court of Canada

Between: Gian Singh Sangha (Applicant) and the Mackenzie Valley Land and Water Board (Respondent)

Judge: The Honourable Mr. Justice de Montigny

Decision: Justice de Montigny allowed Dr. Sangha's application for judicial review arguing that the Canadian Human Rights Tribunal (Tribunal) erred in finding that Dr. Sangha did not have a serious possibility of acquiring an RO position (*Sangha v. The Mackenzie Valley Land and Water Board* par. 38). As a result, Justice de Montigny ruled that the decision of the Tribunal be set aside and for the matter to be remitted to the same Tribunal member for reassessment in accordance with the reasons he set out in Federal Court (*Sangha v. The Mackenzie Valley Land and Water Board* par. 38).

Applicant's Position:

Dr. Sangha is of East Indian origin and his educational background is in the area of agriculture, environmental science and land planning (*Sangha v. The Mackenzie Valley Land and Water Board* par. 2). He holds a Bachelor of Science in Agriculture from the Punjab University, a Masters of Science in landscape Planning, a Ph.D. in Environmental Science, and a Certificate in Project Planning & Management from the Technical University of Berlin (*Sangha v. The*

Mackenzie Valley Land and Water Board par. 2). Prior to moving to Canada, Dr. Sangha worked for the German Federal Government as an environmental scientist and was also an Associate Professor at Punjab Agricultural University (*Sangha v. The Mackenzie Valley Land and Water Board* par. 2). Upon arrival in Canada, however, he was not able to find employment commensurate with his qualifications and work experience abroad (*Sangha v. The Mackenzie Valley Land and Water Board* par. 2).

On August 11, 2001, The Mackenzie Valley Land and Water Board placed an ad in the Vancouver Sun for Regulatory Officer (RO) positions (*Sangha v. The Mackenzie Valley Land and Water Board* par. 5). In terms of education, experience and skills requirements, the advertisement indicated that candidates needed either a) an undergraduate degree in science, environmental studies, ecology, resource management or a related field with two years of work experience or b) a post-secondary diploma in environmental management or a related field with three years of experience (*Sangha v. The Mackenzie Valley Land and Water Board* par. 6). Additionally, candidates needed to have: knowledge of environmental issues in Canada's North pertaining to mining and oil/gas developments as well as technologies associated with the reduction of impacts arising from such developments; knowledge of Microsoft office software; experience working in remote locations; skills to write technical reports; and a Class 5 driver's licence (*Sangha v. The Mackenzie Valley Land and Water Board* par. 6).

Dr. Sangha applied for the RO position; however, in September 2001, he received an email from the Mackenzie Valley Land and Water Board (Board) informing him that he was not offered a position (*Sangha v. The Mackenzie Valley Land and Water Board* par. 11). In January of 2002, Dr. Sangha contacted the North West Territory Fair Practices Office in order to make a

complaint on the basis that he had been discriminated against by the Board upon not being hired (*Sangha v. The Mackenzie Valley Land and Water Board* par. 12). Given its lack of jurisdiction to handle the matter, the Office sent Dr. Sangha's complaint to the Canadian Human Rights Commission (the Commission) (*Sangha v. The Mackenzie Valley Land and Water Board* par. 12). Consequently, in May of 2002, Dr. Sangha filed a complaint with the Commission submitting that the Board - in its decision to not offer him an RO position - discriminated against him on the basis of race, national or ethnic origin, colour, religion and age in violation of section 7 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the *Act*) (See Appendix A) (*Sangha v. The Mackenzie Valley Land and Water Board* par. 13). After a five day hearing and a review of all the evidence submitted by the Commission and the Board, the Tribunal decided that Dr. Sangha successfully established a *prima facie* case that he had been discriminated against on the basis of national or ethnic origin (a prohibited ground) (*Sangha v. The Mackenzie Valley Land and Water Board* pars. 14; 16). According to the Tribunal, Dr. Sangha indeed possessed the necessary qualifications for the RO job and, if anything, was overqualified for the position (*Sangha v. The Mackenzie Valley Land and Water Board* par. 14). The Tribunal also noted that Dr. Sangha was a visible minority, therefore questioning the correlation between his visible minority immigrant status and his overqualified professional status (*Sangha v. The Mackenzie Valley Land and Water Board* par. 15). According to the Tribunal, visible minority immigrants are disproportionately excluded from the higher echelons of the job market and therefore seek jobs where their qualifications and expertise are well beyond that which is required (*Sangha v. The Mackenzie Valley Land and Water Board* par. 15). Thus, the experience of being overqualified for a job is disproportionately an immigrant experience and when employers establish rules against the hiring of overqualified candidates, this has an even great impact on visible minority immigrants who are seeking employment (*Sangha v. The Mackenzie Valley Land*

and Water Board par. 15). Although the Board was given an opportunity to refute the correlation between overqualified status and visible minority immigrant status as a means of disproving Dr. Sangha's *prima facie* case, the Tribunal was not convinced of the Board's rebuttal (*Sangha v. The Mackenzie Valley Land and Water Board* par. 16). In its end analysis, the Tribunal accepted Dr. Sangha's request to be awarded $9,500 plus interest for pain and suffering; however, it rejected the Applicant's request to be hired for the next available RO position as well as compensation for 3 years of lost wages (*Sangha v. The Mackenzie Valley Land and Water Board* par. 17). From the perspective of the Tribunal, Dr. Sangha was not entitled to last wages or for instatement because: 1) he "did not meet the threshold of showing that there was not just a mere possibility of acquiring the job, but a serious one" and 2) the candidates who were selected for the RO position possessed qualifications that were more congruent for the job in comparison to Dr. Sangha (*Sangha v. The Mackenzie Valley Land and Water Board* par. 17). Lastly, the Tribunal also ordered the Board to no longer use any policy or practice that would "automatically" disqualify a visible minority candidate seeking a position with the Board based on their overqualification for a job (*Sangha v. The Mackenzie Valley Land and Water Board* par. 18).

Not entirely satisfied with the decision of the Tribunal, Dr. Sangha filed an application for judicial review under section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (See Appendix A) with regards to discriminatory practices in employment on the prohibited ground of national or ethnic origin in violation of section 7 of the *Canadian Human Rights Act* (*Sangha v. The Mackenzie Valley Land and Water Board* par. 1).

Respondent's Position:

The Board maintained that an interview committee of three persons was developed at the Board to review potential candidates for the RO positon (*Sangha v. The Mackenzie Valley Land and Water Board* par. 7). The Board screened out all candidates with only a Grade 12 education as well as all those holding post-graduate degrees, except for Dr. Sangha (*Sangha v. The Mackenzie Valley Land and Water Board* par. 7). Although Dr. Sangha was granted an interview given his educational qualifications and work experiences, the Board did not offer him an RO position claiming that he was over-qualified and would not be challenged in an entry level RO position (*Sangha v. The Mackenzie Valley Land and Water Board* pars. 9; 14).

Judge's Analysis and Reasons for Decision:

The matter for judicial review before Justice de Montigny was whether the Tribunal granted Dr. Sangha the appropriate remedy and whether it should have considered compensation for loss of an employment opportunity (*Sangha v. The Mackenzie Valley Land and Water Board* par. 19). Another issue to be reviewed was whether the Tribunal made an erroneous finding in claiming that Dr. Sangha did not have a serious possibility of obtaining the RO position despite the evidence in support of Dr. Sangha's qualifications? (*Sangha v. The Mackenzie Valley Land and Water Board* par. 19).

In relation to the issue of compensation, the Federal Court did not find error in the legal analysis of the Tribunal (*Sangha v. The Mackenzie Valley Land and Water Board* par. 29). Justice de Montigny explained that although case law may show that there may be a presumption in favour of awarding damages to complainants of discriminatory practice, this does not mean that every complainant who has succeeded in showing a *prima facie* case of discrimination is

entitled to compensation (*Sangha v. The Mackenzie Valley Land and Water Board* par. 27). Instead, section 53 of the *Act* (See Appendix A) should be interpreted to be consistent with the basic principle in tort law aimed at making victims whole for the damages caused – this however, does not mean or imply that human rights awards can or should be used to overcompensate victims (*Sangha v. The Mackenzie Valley Land and Water Board* par. 28).

In relation to the second matter, Justice de Montigny argued that although the Tribunal used the correct line of reasoning to look for evidence that there was not just a mere possibility for Dr. Sangha to acquire the job but a serious one, its assessment of the facts did not withstand judicial review (*Sangha v. The Mackenzie Valley Land and Water Board* par. 29). In line with the Board's position, the Tribunal maintained that even if the issue of over-qualification was set aside, the other candidates chosen for the RO position were more qualified and that their qualifications were more congruent for the RO position than those of Dr. Sangha (*Sangha v. The Mackenzie Valley Land and Water Board* par. 33). Alternatively, Justice de Montigny found that the Tribunal erred in concluding that Dr. Sangha had not met the threshold of demonstrating that there was not just a mere possibility for him to acquire the job but a serious one (*Sangha v. The Mackenzie Valley Land and Water Board* par. 33). Rather, the Federal Court contended that it was far from obvious that the other candidates were more qualified than Dr. Sangha once the over-qualification factor was completely set aside (*Sangha v. The Mackenzie Valley Land and Water Board* par. 37). Justice de Montigny argued that the precise definition of "congruency" in terms of qualifications was missing in the Tribunal's reasons and in the Respondent's submissions (*Sangha v. The Mackenzie Valley Land and Water Board* par. 37). In this regard, the judge stated, "there is room to suspect that this highly subjective criterion is nothing more than a back-door reintegration of the over-qualification factor that was required to be disregarded as

being discriminatory" by the Tribunal (*Sangha v. The Mackenzie Valley Land and Water Board* par. 37). Justice de Montigny also noted that the Board itself had admitted that the Applicant's overqualified status played a large role in its decision not to hire him; therefore the issue of over-qualification could not be ignored and was indeed relevant as to why Dr. Sangha was not offered an RO position (*Sangha v. The Mackenzie Valley Land and Water Board* par. 34).

4. White v. National Committee on Accreditation (NCA), 2010 – Human Rights Tribunal of Ontario

Between: Svetlana White (Applicant) and the National Committee on Accreditation (Respondent)

Adjudicator: Mark Hart

Decision: Mr. Hart dismissed Ms. White's application claiming that the National Committee on Accreditation's (NCA) decision that Ms. White did not qualify for advanced standing was not discriminatory (*White v. National Committee on Accreditation* pars. 45; 46).

Applicant's Position:

In 1986, Ms. White obtained "a diploma qualification of lawyer specializing in law and business account in social security system from Armavir School of Law in Russia" followed by a "diploma and qualification of lawyer specializing in jurisprudence" from the Russian Rostov State University in 1993 (*White v. National Committee on Accreditation* par. 17). After obtaining her permanent residency status in Canada in May 2000, White enrolled in a Police Foundation Program at Mohawk College in September 2002 (*White v. National Committee on Accreditation*

par. 21). In November of 2002, Ms. White also applied to the NCA for the purpose of obtaining a Certificate of Equivalency demonstrating that her legal education and experience in Russia was equivalent to that of a Canadian common law LL.B. program (*White v. National Committee on Accreditation* par. 17).

Ms. White claimed that the National Committee on Accreditation (NCA) discriminated against her on the basis of ethnic origin and place of origin with regards to goods, services and facilities in violation of sections 1 and 9 of the *Ontario Human Rights Code*, R.S.O. 1990, c. H. 19, as amended (the *Code*) (See Appendix A) when she was not given advanced standing upon applying for a Certificate of Equivalency to a Canadian law degree (*White v. National Committee on Accreditation* par. 2). Ms. White filed this application, under section 53(5) of the *Code*, (See Appendix A) (*White v. National Committee on Accreditation* par. 1) and her complaint with the Ontario Human Rights Commission in September 2004 (*White v. National Committee on Accreditation* pars. 1; 29).

Respondent's Position:

The role of the NCA in relation to certification is to ensure that applicants understand and have knowledge of Canadian law at a level that is equivalent to that of graduates of Canadian common law LL.B. programs (*White v. National Committee on Accreditation* par. 7). According to the NCA, applicants are evaluated based on their legal background including academic and professional profiles (this applies to Canadians with foreign legal education, foreign nationals with foreign legal education as well as applicants with Quebec civil law degrees) (*White v. National Committee on Accreditation* par. 7). This means that the NCA considers an array of

factors, including: the source of the country of legal education (i.e. common law, hybrid, non-common law or "other"), subjects studied, academic grades and standing, nature of the institution granting the degree, professional credentials, as well as the length and nature of professional legal experience (*White v. National Committee on Accreditation* par. 8). In particular, the NCA explained that when an applicant's legal education is obtained in a jurisdiction where the legal system lacks a significant common law component, the NCA evaluates such applicants on a case by case basis (*White v. National Committee on Accreditation* par. 15). If applicants have neither academic common law exposure nor professional legal experience in common law, it is unlikely for the NCA to recommend these individuals for advanced standing in approved Canadian law schools (*White v. National Committee on Accreditation* par. 15).

Ms. White's application to the NCA was reviewed by Mr. Krishna in December of 2002 (*White v. National Committee on Accreditation* par. 22). Mr. Krishna did not grant Ms. White advanced standing mainly due to the fact there wasn't any evidence in Ms. White's application that her legal training and education in Russia was equivalent or comparable to Canadian common law courses (*White v. National Committee on Accreditation* par. 23). In January 2003, the NCA sent out a letter informing Ms. White of its decision (*White v. National Committee on Accreditation* par. 24). The letter explained that upon reviewing her credentials, the NCA found that she lacked substantial Canadian legal education necessary for taking the Bar Admission program of a common law province in Canada (*White v. National Committee on Accreditation* par. 24). The NCA recommended that White should complete three years of Canadian legal education in order to achieve equivalency to a Canadian LL.B. graduate (*White v. National Committee on Accreditation* par. 24). The NCA also specified that the NCA's decision did not exempt Ms. White from applying to law schools of her choice – Ms. White would have to gain

admission as a regular student in a Canadian LL.B program as well as write the Law School Admission Test (LSAT) (*White v. National Committee on Accreditation* par. 25).

Upon receiving Mr. Krishna's decision on behalf of the NCA, Ms. White appealed the decision to the full NCA committee in May of 2004 on the basis that it was discriminatory (*White v. National Committee on Accreditation* par. 26). At a bi-annual meeting in June of 2004, Ms. White's file (including her original application and the NCA decision by Mr. Krishna) was reviewed by the full NCA committee; however, the decision reached was to stand by the original recommendations identified by Mr. Krishna without making any changes to the initial assessor's decision (*White v. National Committee on Accreditation* par. 27).

Adjudicator's Analysis and Reasons for Decision:

Mr. Hart determined that this case was a matter of adverse effect discrimination as opposed to direct discrimination (*White v. National Committee on Accreditation* par. 30). With regard to the general requirement for a LL.B. from a Canadian law school, Mr. Hart found that this was a facially neutral rule which at times may have an adverse impact on individuals identified by a prohibited ground of discrimination under the *Code* (*White v. National Committee on Accreditation* par. 30). The adjudicator went on to explain that although the NCA did consider the fact that Ms. White had received her legal education and experience in Russia, it did so in the context of determining whether she could be accommodated through an advanced standing designation with a Certificate of Equivalency (*White v. National Committee on Accreditation* par. 30). Thus, by applying the general requirement rule to Ms. White's case, the NCA's goal was not to directly discriminate against Ms. White, but rather to consider whether an

exception could be made in her case with respect to the general rule that a person must have an LL.B. from a Canadian law school in order to gain admission to the Bar (*White v. National Committee on Accreditation* par. 30). That said, Mr. Hart proceeded to argue, however, that the general requirement rule nonetheless did have an adverse effect on Ms. White for reasons related to her ethnic origin or place of origin (*White v. National Committee on Accreditation* par. 31). While the NCA maintained that its concern was not with a person's ethnic origin or place of origin, but rather where a person received their legal education and experience, the adjudicator emphasized that "the strong correlation between the fact that Ms. White attended a law school and obtained her legal experience in Russia and the fact that Ms. White is from Russia" could not be denied (*White v. National Committee on Accreditation* par. 31).

Having acknowledged that Ms. White's case was one of adverse effect discrimination, Hart continued his analysis of the LL.B. requirement rule used by the NCA in relation to three factors: 1) whether the rule was adopted for a rational purpose; 2) whether the rule was adopted in an honest and good faith belief that it was necessary; and 3) whether the rule was reasonably necessary to the accomplishment of its purpose (*White v. National Committee on Accreditation* par. 35).

The adjudicator argued that there was indeed a rational connection between having obtained education and training in a Canadian LL.B. program and an individual's ability to offer competent legal services to the general public in Canada's common law jurisdiction (*White v. National Committee on Accreditation* par. 37). Mr. Hart found that the requirement that individuals have an LL.B. degree from a Canadian law school was adopted by the NCA "for a rational purpose and in an honest and good faith belief that it was necessary" for assessing the

education and experience of foreign trained lawyers, with the intent of ensuring that they have the relevant knowledge and training required to effectively practice law in Canada (*White v. National Committee on Accreditation* par. 37). Furthermore, in finding that the LL.B. requirement rule was reasonably necessary to adopt when assessing foreign legal training and credentials, Mr. Hart further recognized that, generally speaking, the NCA had made substantial efforts to accommodate foreign trained professionals (*White v. National Committee on Accreditation* par. 38). The process used by the NCA not only provided for individualized assessments of foreign trained lawyers applying for a Certificate of Equivalency, but it also allowed applicants to demonstrate that their foreign legal training and experience was equivalent to some or all aspects of the legal training offered in Canadian law schools (*White v. National Committee on Accreditation* par. 39). Upon reviewing Ms. White's legal education, Mr. Hart argued that there was no evidence before him to demonstrate that the courses taken by Ms. White at The Rostov State University or at Armavir Law School were equivalent to the courses offered at Canadian law schools - which the NCA regarded as necessary for competent services in common law (*White v. National Committee on Accreditation* par. 40). Lastly, in relation to the courses taken by Ms. White as part of her Police Foundation program, Mr. Hart maintained that these courses undoubtedly provided Ms. White with education and training in Canadian common law; however, they did not count as the NCA did not recognize college diploma courses or Bachelor degree courses when making equivalency assessments (*White v. National Committee on Accreditation* par. 43). Mr. Hart explained that not having regard to Canadian college or Bachelor degree courses did not equate to discrimination on any prohibited ground (*White v. National Committee on Accreditation* par. 43). Rather, to have a valid claim, Ms. White needed to prove that "the education and experience that she obtained in Russia were not adequately or appropriately considered by the NCA, not that subsequent Canadian education she received was

not considered, as it is not considered for any applicant to the NCA" (*White v. National Committee on Accreditation* par. 43). In this light, although the requirement for an LL.B. from a Canadian law school had an adverse impact on Ms. White due to her Russian origin, she did not provide sufficient evidence establishing a case of adverse effect discrimination (*White v. National Committee on Accreditation* par. 44). Alternatively, the NCA demonstrated that its assessment of the applicant's education and experience was appropriate (*White v. National Committee on Accreditation* par. 44).

5. Durakovic v. Canadian Architectural Certification Board, 2011 – Human Rights Tribunal of Ontario

Between: Slobodan Durakovic (Applicant) and the Canadian Architectural Certification Board (Respondent)

Adjudicator: Ailsa Jane Wiggins

Decision: Ms. Wiggins found that the process employed by the Canadian Architectural Certification Board to assess the academic credentials of Mr. Durakovic and graduates of unaccredited schools was not discriminatory (*Durakovic v. Canadian Architectural Certification Board* par. 38). Mr. Durakovic's application was dismissed (*Durakovic v. Canadian Architectural Certification Board* par. 39).

Applicant's Position:

Mr. Durakovic is a graduate of the School of Architecture from the University of Zagreb in Croatia (*Durakovic v. Canadian Architectural Certification Board* par. 2). The applicant

claimed that he was discriminated against by the Canadian Architectural Certification Board in relation to services due to ancestry and place of origin (*Durakovic v. Canadian Architectural Certification Board* par. 2). The application was filed in February of 2008 under section 53(3) of the *Ontario Human Rights Code*, R.S.O. 1990, c. H. 19, as amended (the *Code*) (See Appendix A) (*Durakovic v. Canadian Architectural Certification Board* par. 1). According to Mr. Durakovic, upon certifying his academic qualifications, the Canadian Architectural Certification Board charged him an application fee that was almost ten times more than the fee charged for graduates of Canadian schools of architecture (*Durakovic v. Canadian Architectural Certification Board* par. 4). Thus, from the applicant's perspective, the fee differential between international versus Canadian graduates was discriminatory and based on the prohibited grounds of ancestry and place of origin (*Durakovic v. Canadian Architectural Certification Board* par. 24).

Respondent's Position:

The Canadian Architectural Certification Board argued that, in charging Mr.Durakovic a higher fee, it did not discriminate against Mr. Durakovic on the basis of his ancestry or place of origin (*Durakovic v. Canadian Architectural Certification Board* par. 5). Rather, the higher fee was due to the fact that he was a graduate of an unaccredited international school of architecture - graduates coming from unaccredited institutions are charged more as a result of the extra time that is spent towards assessing their credentials and qualifications (*Durakovic v. Canadian Architectural Certification Board* par. 5). The respondent further maintained that Mr. Durakovic was treated the same as a Canadian who attended an international, unaccredited school of architecture (*Durakovic v. Canadian Architectural Certification Board* par. 25). Therefore, the amount of the fee charged was based on the applicant's place of graduation and not his ancestry

or place of origin (*Durakovic v. Canadian Architectural Certification Board* par. 25). According to the respondent, place of graduation or the place a person receives their training/education is not a prohibited ground under the *Code* (*Durakovic v. Canadian Architectural Certification Board* par. 27).

Adjudicator's Analysis and Reasons for Decision:

Drawing on the evidence presented before her by the respondent as well as several precedent cases, the adjudicator considered and addressed two questions: a) was the fee differential discriminatory? and b) was the fact or process of evaluating international credentials discriminatory?

The adjudicator found that the Canadian Architectural Certification Board successfully demonstrated that the reason for Mr. Durakovic's fee differential was due to his place of education (non-prohibited ground) and not his ancestry or place of origin (prohibited grounds) (*Durakovic v. Canadian Architectural Certification Board* par. 32). Ms. Wiggins also reaffirmed that higher fees were justified when assessing international credentials given the additional time required to carry out the task (*Durakovic v. Canadian Architectural Certification Board* par. 32). With regard to the fact of evaluating international credentials, Ms. Wiggins claimed that it was not discriminatory for the respondent to assess the applicants' qualifications as both domestic and international graduates are required to have their academic credentials certified by the Canadian Architectural Certification Board (*Durakovic v. Canadian Architectural Certification Board* par. 33). In this respect, international and domestic graduates are not treated differently (*Durakovic v. Canadian Architectural Certification Board* par. 33). In terms of the process of certification, the

adjudicator noted that while graduates of unaccredited international schools must have their qualifications reviewed by the Canadian Architectural Certification Board to determine whether they will be certified, graduates of accredited schools are certified automatically (*Durakovic v. Canadian Architectural Certification Board* par. 34). This difference in treatment, however, does not amount to discrimination because of the fact that accredited schools of architecture have already undergone extensive and costly evaluation processes for the purpose of becoming accredited by the respondent (*Durakovic v. Canadian Architectural Certification Board* pars. 15; 33; 35). Accreditation establishes that a school meets the minimum standards required by law and that its graduates meet certification requirements, hence there is no need for the respondent to individually assess the academic credentials of such graduates (*Durakovic v. Canadian Architectural Certification Board* pars. 16; 34). Ms. Wiggins maintained that upon assessing the qualifications of graduates from unaccredited schools, the respondent does not base its evaluations on general or unfounded assumptions about their credentials; rather, it assesses each graduate on an individual basis in order to determine if they meet the requirements of the Canadian Educational Standard for Admission to Provincial Architectural Associations in Canada (CES) (*Durakovic v. Canadian Architectural Certification Board* par. 38).

6. Grant-Kinnear v. Law Society of Upper Canada, 2013 – Ontario Superior Court of Justice (Divisional Court)

Between: Juron Grant-Kinnear (Applicant) and the Law Society of Upper Canada (Respondent)

Judges: Justices Molloy, Herman and Edwards

Decision: Justices Molloy, Herman and Edwards found that the policy used by the National Committee on Accreditation (NCA) to evaluate Mr. Grant-Kinnear's legal education as well as

the decision to not recognize his law degree were both reasonable (*Grant-Kinnear v. Law Society of Upper Canada* par. 14). Mr. Grant-Kinnear's application was dismissed (*Grant-Kinnear v. Law Society of Upper Canada* par. 16).

Applicant's Position:

In 2007, Mr. Grant-Kinnear obtained his law degree from the University of Kent in England with the intention of practising law in Ontario (*Grant-Kinnear v. Law Society of Upper Canada* par. 1). Mr. Grant-Kinnear maintained that the NCA's accreditation process violated section 6 of the *Fair Access to Regulated Professions Act, 2006*, S.O. 2006, c. 31 (FARPA) (See Appendix A) and that he should be allowed to either a) gain entry into the Lawyer Licensing Process in Ontario or b) write relevant exams to demonstrate his competency (*Grant-Kinnear v. Law Society of Upper Canada* par. 2).

In June 2010, Mr. Grant-Kinnear applied to the NCA in order to obtain a Certificate of Qualification (*Grant-Kinnear v. Law Society of Upper Canada* par. 7). In August 2010, an NCA assessor informed the applicant that his law degree would not be recognized and that he would have to complete a three-year Canadian common law degree in order to gain access to the Lawyer Licensing Process (*Grant-Kinnear v. Law Society of Upper Canada* par. 7). In August of 2011, Mr. Grant-Kinnear appealed this decision to the NCA Appeal Panel, arguing that the NCA's assessment of his credentials was not objective or fair and in violation of section 6 of the FARPA (*Grant-Kinnear v. Law Society of Upper Canada* par. 8). In December 2011, the Appeal Panel decided to uphold the NCA's initial assessment to not recognize Mr. Grant-Kinnear's law

degree, claiming that the NCA's "assessment process was transparent, objective, impartial and fair in accordance with FARPA" (*Grant-Kinnear v. Law Society of Upper Canada* par. 8).

Respondent's Position:

In order to gain entry into the Law Society of Upper Canada's Lawyer Licensing Process, a graduate must possess a law degree from either an accredited Canadian law school or a Certificate of Qualification from the NCA (*Grant-Kinnear v. Law Society of Upper Canada* par. 1)**.** Each application submitted to the NCA is assessed individually (*Grant-Kinnear v. Law Society of Upper Canada* par. 4). Upon evaluating the qualifications of graduates with foreign or non-common law legal credentials, the NCA assesses each applicant's legal training and professional experience in order to determine whether they are qualified for admission to a common law bar in Canada – this aforementioned responsibility is delegated to the NCA by the Law Society (*Grant-Kinnear v. Law Society of Upper Canada* par. 4). When necessary, the NCA notifies applicants if they need to pursue additional legal education or exams in order to ensure that their legal knowledge (especially with regards to common law) is equivalent to that of graduates from Canadian law schools (*Grant-Kinnear v. Law Society of Upper Canada* par. 4). Once the required legal education or examinations are successfully completed, applicants receive their Certificate of Qualification from the NCA (*Grant-Kinnear v. Law Society of Upper Canada* par. 4). The NCA's policies further state that if an applicant's overall academic performance is poor, the NCA will not give recognition for their legal education (*Grant-Kinnear v. Law Society of Upper Canada* par. 5). The NCA, therefore, refused to recognize Mr. Grant-Kinnear's law degree due to the fact that he graduated with Third Class Honours – as per the NCA's policy, a Third Class standing in the United Kingdom is to be considered as poor overall academic

performance (*Grant-Kinnear v. Law Society of Upper Canada* pars. 1; 5). The NCA's assessment was further upheld by the NCA Appeal Panel when the applicant decided to appeal the assessor's decision (*Grant-Kinnear v. Law Society of Upper Canada* par. 1).

Judges' Analysis and Reasons for Decision:

With regard to the NCA's decision, the judges determined that it was objective and a reasonable outcome (*Grant-Kinnear v. Law Society of Upper Canada* par. 12). Justice Molloy emphasized that the NCA as well as its appeal panel possess a high degree of expertise in assessing foreign credentials and that their decision in Mr. Grant-Kinnear's case was indeed "justified, intelligible and transparent" (*Grant-Kinnear v. Law Society of Upper Canada* pars. 11-12). Writing on behalf of all three Justices, Justice Molloy acknowledged that although giving the applicant an opportunity to write required exams to demonstrate his competence in core areas would also be a reasonable outcome, it was not the only reasonable outcome in the case. As a result, there was no basis for the Court to intervene with the decision of the NCA or its policies (*Grant-Kinnear v. Law Society of Upper Canada* par. 13).

In relation to the fairness and lawfulness of the NCA's accreditation process generally (beyond how it was applied to the applicant) as well as whether it violated the FARPA, the Ontario Superior Court of Justice expressed hesitancy to comment on that subject matter as it did not clearly fall under the Superior Court's authority or jurisdiction to decide upon (*Grant-Kinnear v. Law Society of Upper Canada* par. 15). Justice Molloy explained that accreditation processes are significantly policy-laden "closer to an administrative process than a judicial one in the decision-making spectrum" (*Grant-Kinnear v. Law Society of Upper Canada* par. 15).

Instead the judges focused on the facts pertaining to the applicant's case, stating that the accreditation process utilized by the NCA upon evaluating Mr. Grant-Kinnear's legal education was fair, reasonable and in accordance with the FARPA (*Grant-Kinnear v. Law Society of Upper Canada* par. 15).

7. Keith v. College of Physicians and Surgeons of Ontario, 2013 – Human Rights Tribunal of Ontario

Between: Arthur Keith (Applicant) and the College of Physicians and Surgeons of Ontario (Respondent)

Adjudicator: Jennifer Scott

Decision: Ms. Scott concluded that the distinction of the Register between RCPSC (Royal College of Physicians and Surgeons of Canada) and CPSO (College of Physicians and Surgeons of Ontario) specialist was not discriminatory because there was no evidence that it resulted in any adverse treatment or disadvantage (*Keith v. College of Physicians and Surgeons of Ontario* par. 71). Dr. Keith's application was dismissed (*Keith v. College of Physicians and Surgeons of Ontario* par. 72).

Applicant's Position:

In 1979, Dr. Keith graduated from medical school in the United States (*Keith v. College of Physicians and Surgeons of Ontario* par. 16). Subsequently, the American Board of Psychiatry and Neurology (ABPN) certified him as a specialist in Psychiatry in 1987 (*Keith v. College of Physicians and Surgeons of Ontario* par. 16). In 1996, Dr. Keith obtained additional

certification as a sub-specialist in Forensic Psychiatry from the ABPN and this sub-specialty was re-certified in 2006 (*Keith v. College of Physicians and Surgeons of Ontario* par. 16). While in Canada, Dr. Keith was granted a license to practice medicine in Ontario in 1992, although his speciality in psychiatry was not recognized by the CPSO (*Keith v. College of Physicians and Surgeons of Ontario* par. 17). It wasn't until April of 2007, however, that the CPSO's Registration Committee granted his application to be recognized as a specialist in psychiatry (*Keith v. College of Physicians and Surgeons of Ontario* par. 21). The College of Physicians and Surgeons of Ontario's Register (Register) designated Dr. Keith as a CPSO recognized specialist with a speciality in psychiatry (*Keith v. College of Physicians and Surgeons of Ontario* par. 4).

Dr. Keith maintained that the distinction on the Register between CPSO (College of Physicians and Surgeons of Ontario) and RCPSC (Royal College of Physicians and Surgeons of Canada) specialists discriminated against CPSO specialists on the grounds of place of origin, as most CPSO specialists are foreign trained (*Keith v. College of Physicians and Surgeons of Ontario* par. 2). According to Dr. Keith, there was a strong correlation between place of training and place of origin, therefore differential treatment due to ones place of training was tantamount to differential treatment due to one's place of origin (*Keith v. College of Physicians and Surgeons of Ontario* par. 2). Dr. Keith argued that foreign credentials are devalued in Canada when compared with Canadian credentials and this is problematic because most CPSO specialists are foreign trained, while RCPSC specialists tend to be trained in Canada (*Keith v. College of Physicians and Surgeons of Ontario* par. 3). Thus, CPSO specialists tend to be devalued as a group in comparison to RCSPC specialists and the distinction on the Register further maintains this devaluation (*Keith v. College of Physicians and Surgeons of Ontario* pars. 3; 36).

Dr. Keith filed his application with the Human Rights Tribunal of Ontario in December of 2008, under section 34 of the *Ontario Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the *Code*) (See Appendix A), arguing in essence that the CPSO discriminated against him on the basis of his place of origin and that because most people are trained in their place of origin, place of training can be regarded as a proxy for place of origin (*Keith v. College of Physicians and Surgeons of Ontario* – Interim Decision par. 1; *Keith v. College of Physicians and Surgeons of Ontario* par. 33).

Respondent's Position:

The College of Physicians and Surgeons of Ontario contended that the public register it maintains in Ontario was established for the purpose of informing the public about physicians' specialties as well as the body that accredited them (*Keith v. College of Physicians and Surgeons of Ontario* par. 1). The Register consists of three specialist accreditation bodies, including: the RCPSC, the College of Family Physicians of Canada (CFPC), and the CPSO (*Keith v. College of Physicians and Surgeons of Ontario* par. 1).

Using data from the 2010 National Physicians Survey (NPS), the CPSO argued that the reason why CPSO recognized physicians are more likely to be foreign trained is because the policy was developed to assist those physicians (*Keith v. College of Physicians and Surgeons of Ontario* par. 39). That does not mean, however, that a foreign trained physician is more likely to be CPSO recognised (*Keith v. College of Physicians and Surgeons of Ontario* par. 39).

Adjudicator's Analysis and Reasons for Decision:

Reflecting on the evidence put forth by both the applicant and the respondent, the adjudicator recognized that: a) the number of CPSO specialists in Ontario is small in comparison to RCPSC specialists, as most specialists in Ontario are RCPSC certified, and b) of the few CPSO specialists in Ontario, very few have received training in Canada (*Keith v. College of Physicians and Surgeons of Ontario* par. 42). On the basis of these two factors, the adjudicator accepted the applicant's stance that CPSO specialists are "predominantly foreign trained or immigrants" and that "a distinction on the basis of foreign training is a distinction based on place of origin" (*Keith v. College of Physicians and Surgeons of Ontario* pars. 35; 42). Alternatively, the adjudicator found that devaluation on its own is not enough to prove discrimination; rather there must be evidence of adverse treatment or disadvantage arising from the differential treatment (*Keith v. College of Physicians and Surgeons of Ontario* par. 44).

In terms of the applicant's claim that certain groups tend to be devalued due to their immigrant status, Ms. Scott argued that there was no evidence to suggest Dr. Keith belonged to a devalued group or that American trained physicians were a disadvantaged group (*Keith v. College of Physicians and Surgeons of Ontario* par. 45). Thus, although the harm asserted by Dr. Keith could be technically associated with a devalued group, he was not a member of any such group (*Keith v. College of Physicians and Surgeons of Ontario* par. 45).

In relation to the distinction on the Register between CPSO and RCPSC specialists, the adjudicator noted that such distinction does not reflect devaluation but rather substantive differences between the two groups of specialists (*Keith v. College of Physicians and Surgeons of Ontario* par. 46). Ms. Scott explained that there was not only a lack of evidence supporting the

claim that CPSO and RCPSC specialists are the same, but there was also a lack of evidence showing that the distinction on the Register produced adverse treatment because of Dr. Keith's place of origin (*Keith v. College of Physicians and Surgeons of Ontario* pars. 50; 52).

Lastly, addressing Dr. Keith's allegation that he was excluded from employment opportunities, due to the distinction on the Register, Ms. Scott found that there was a lack of evidence to substantiate such a claim as well (*Keith v. College of Physicians and Surgeons of Ontario* pars. 56; 60). In line with the CPSO's policy, the adjudicator reaffirmed that the purpose of the Register is to provide the general public with information about authorized physicians who are practicing medicine in Ontario (*Keith v. College of Physicians and Surgeons of Ontario* par. 68). Providing information about physicians' training, education, and qualifications is necessary in order to ensure that the public is able to make informed decisions about their health care (*Keith v. College of Physicians and Surgeons of Ontario* par. 68). This includes informing the public as to whether a physician has been accredited by the RCPSC or recognized by the CPSO, given that they are two "different processes with different breadth" (*Keith v. College of Physicians and Surgeons of Ontario* par. 69). Such a distinction is not discriminatory because there is no evidence that it results in harm, adverse treatment or disadvantage (*Keith v. College of Physicians and Surgeons of Ontario* pars. 69; 71). While Dr. Keith may have experienced disadvantage when seeking employment opportunities, this disadvantage was due to prospective employers' requirement for RCPSC accreditation (*Keith v. College of Physicians and Surgeons of Ontario* pars. 69; 71). The fact that the applicant did not have RCPSC accreditation or that employers required such accreditation was not, however, the fault of the CPSO (*Keith v. College of Physicians and Surgeons of Ontario* pars. 69; 71). For these reasons, Dr. Keith application was dismissed (*Keith v. College of Physicians and Surgeons of Ontario* par. 72).

8. Fazli v. National Dental Examining Board of Canada, 2014 – Human Rights Tribunal of Ontario

Between: Sher Fazli (Applicant) and the National Dental Examining Board of Canada (Respondent)

Adjudicator: Sheri D. Price

Decision: Ms. Price concluded that the evidence presented before her did not demonstrate that Dr. Fazli's training in Afghanistan was equivalent to that offered by institutions accredited by the National Dental Examining Board of Canada (*Fazli v. National Dental Examining Board of Canada* par. 54). Ms. Price determined that requiring Dr. Fazli to pass the National Dental Examining Board of Canada's examination in English for the purpose of certification did not constitute discrimination based on his place of origin (*Fazli v. National Dental Examining Board of Canada* par. 55). Dr. Fazli's application was dismissed (*Fazli v. National Dental Examining Board of Canada* pars. 55; 57).

Applicant's Position

Dr. Fazli is from Afghanistan (*Fazli v. National Dental Examining Board of Canada* par. 2). In 1983, he obtained his dentistry degree from Kabul University and practiced the profession in Afghanistan, Pakistan and India (*Fazli v. National Dental Examining Board of Canada* par. 2). In 1998, Dr. Fazli immigrated to Canada (*Fazli v. National Dental Examining Board of Canada* par. 2). While in Canada, Dr. Fazli tried to achieve certification by the National Dental Examining Board of Canada (NDEB) in order to work as a qualified dentistry professional (*Fazli v. National Dental Examining Board of Canada* par. 3). Dr. Fazli was unsuccessful in meeting

the NDEB's certification requirements (*Fazli v. National Dental Examining Board of Canada* par. 3).

In July 2013, Dr. Fazli filed an application under section 34 of the *Ontario Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the *Code*) (See Appendix A) claiming that the NDEB discriminated against him in terms of membership in a vocational association due to his place of origin and that this was not in accordance with section 6 of the *Code* (See Appendix A) (*Fazli v. National Dental Examining Board of Canada* par. 4). From Dr. Fazli's perspective, the NDEB treated differently graduates from non-accredited versus accredited dental programs and this amounted to discrimination based on place of origin (*Fazli v. National Dental Examining Board of Canada* par. 5). In other words, the applicant submitted that the NDEB's differing processes and requirements for certification with regard to graduates from accredited and non-accredited dental programs not only disadvantaged him, but were generally speaking discriminatory based on graduates' place of origin (*Fazli v. National Dental Examining Board of Canada* pars. 33; 35). Dr. Fazli explained that unlike graduates of accredited programs, graduates of non-accredited dental programs are required to complete more exams in order to obtain certification and that they also have the additional burden of paying for fees that arise from the examinations in the Equivalency Process (*Fazli v. National Dental Examining Board of Canada* par. 34). The applicant submitted that this scenario put him and other similarly situated graduates at a disadvantage in comparison to graduates of accredited programs who directly go to the Certification Process examinations without having to complete the Equivalency Process (*Fazli v. National Dental Examining Board of Canada* par. 34). Instead Dr. Fazli argued that all individuals should be allowed to go directly to the Certification Process regardless of whether

their dental programs are accredited or non-accredited (*Fazli v. National Dental Examining Board of Canada* par. 35).

Furthermore, Dr. Fazli alleged that the NDEB's requirement that he write and pass dentistry examinations in English further disadvantaged him because of his place of origin (*Fazli v. National Dental Examining Board of Canada* par. 5). Dr. Fazli maintained that he was disadvantage by the NDEB's certification requirements because a) he was not a native English speaker and b) he completed his dental education in Afghanistan (his country of origin), where there are no accredited dental programs (*Fazli v. National Dental Examining Board of Canada* pars. 31; 33). Having been unsuccessful at completing the NDEB's Equivalency Process, this meant that Dr. Fazli would have to complete an accredited Qualifying Program in order to become certified by the NDEB (*Fazli v. National Dental Examining Board of Canada* par. 29). Dr. Fazli explained that this was not an option for him because he did not have the required amount of time and money to invest in such a program (*Fazli v. National Dental Examining Board of Canada* par. 29).

Respondent's Position

Contrary to Dr. Fazli, the NDEB contended that treating applicants differently based on having graduated from an accredited or non-accredited dental program did not add up to discrimination on the basis of place of origin (*Fazli v. National Dental Examining Board of Canada* par. 6). According to the NDEB, an accredited institution is one that has been approved by the Commission on Dental Accreditation of Canada (CDAC) – the commission is responsible for developing, approving and revising accreditation requirements for programs that educate and

train dentists (*Fazli v. National Dental Examining Board of Canada* par. 11). Conversely, a non-accredited institution is one that has not been accredited by the CDAC (*Fazli v. National Dental Examining Board of Canada* par. 11).

With regard to Dr. Fazli's case, the NDEB maintained that Kabul University is not accredited by the CDAC and that there are no accredited dental programs in Afghanistan (*Fazli v. National Dental Examining Board of Canada* par. 15). In 2011, however, the NDEB developed a new process which would allow graduates from non-accredited dental programs to become candidates for certification by the NDEB, so long as they successfully completed three equivalency examinations – the Assessment of Fundamental Knowledge test (AFK), the Assessment of Clinical Skills (ACS), and the Assessment of Clinical Judgment (ACJ) (*Fazli v. National Dental Examining Board of Canada* pars. 21-22). The NDEB requires that an individual must pass the AFK first before taking subsequent ACS and ACJ exams (*Fazli v. National Dental Examining Board of Canada* par. 22). Furthermore, NDEB's bylaws indicate that a person who has failed the AFK exam three times is not eligible to apply to redo the Equivalency Process (*Fazli v. National Dental Examining Board of Canada* par. 26). The purpose of the NDEB's Equivalency process is to allow graduates from non-accredited programs to become certified without having to complete a qualifying program at an accredited institution (*Fazli v. National Dental Examining Board of Canada* par. 21).

Dr. Fazli wrote and failed the AFK three times in February 2011, February 2012 and February 2013 (*Fazli v. National Dental Examining Board of Canada* par. 25). In or around April 2013, Dr. Fazli contacted the NDEB in order to request permission to write the AFK for a fourth time on the basis of compassionate grounds in relation to the February 2012 examination

(*Fazli v. National Dental Examining Board of Canada* par. 27). The respondent, however, denied Dr. Fazli's request in June of 2013, explaining that appeals made on compassionate grounds must be made within seven days of the examination in question (*Fazli v. National Dental Examining Board of Canada* par. 28). In Dr. Fazli's case, the applicant had written the exam in February 2012, therefore, his April 2013 appeal was significantly late (*Fazli v. National Dental Examining Board of Canada* par. 28).

Adjudicator's Analysis and Reasons for Decision

Ms. Price indicated that in this case, Dr. Fazli assumed the onus of proving through evidence that the respondent discriminated against him due to his place of origin (*Fazli v. National Dental Examining Board of Canada* par. 30). According to the adjudicator, Dr. Fazli did not successfully demonstrate that the differential and disadvantageous treatment that he claimed to have experienced - due to having graduated from a non-accredited dental program - constituted discrimination against him on the basis of his place of origin (*Fazli v. National Dental Examining Board of Canada* par. 36). The adjudicator acknowledged that any disadvantage experienced by graduates of non-accredited dental programs in the NDEB's system is linked to individuals' place of study or training, not their place of origin (*Fazli v. National Dental Examining Board of Canada* par. 37). Under the *Code*, place of study or training is not a prohibited ground of discrimination (*Fazli v. National Dental Examining Board of Canada* par. 37). Although Dr. Fazli understood this reasoning, he argued that place of training can also be a proxy for place of origin because, often times, individuals obtain training in their place of origin (*Fazli v. National Dental Examining Board of Canada* par. 38). In response to Dr. Fazli's argument, Ms. Price explained that in situations were more onerous certification or licensing

requirements are imposed on individuals merely on the basis of negative assumptions about their place of origin, one could potentially make a finding of discrimination based on place of origin (*Fazli v. National Dental Examining Board of Canada* par. 39). In Dr. Fazli's case, the adjudicator contended that the evidence at hand did not establish that the NDEB imposed more onerous certification requirements on Dr. Fazli based on assumptions about Afghanistan or any other country (*Fazli v. National Dental Examining Board of Canada* par. 40). Rather, the evidence in the case clearly demonstrated that the NDEB's differential treatment of graduates from accredited programs was rooted in "actual knowledge about the programs garnered through a sophisticated and ongoing process of evaluation of the program" (*Fazli v. National Dental Examining Board of Canada* par. 40). According to Ms. Price, differential treatment in the aforementioned scenario is not discriminatory (*Fazli v. National Dental Examining Board of Canada* par. 40). The reason why NDEB treats graduate from non-accredited versus accredited dental programs differently is not rooted in: a) negative assumptions about the people or places where non-accredited institutions are located and b) positive assumptions about the people or places where accredited institutions are located (*Fazli v. National Dental Examining Board of Canada* par. 41). Rather, graduates from accredited schools can go straight to the Certification Process because the accreditation system recognized by the NDEB informs and assures the respondent that graduates from accredited dental schools have met certain minimum standards upon graduating (*Fazli v. National Dental Examining Board of Canada* par. 41). Without such "knowledge-based assurances" with regard to graduates from non-accredited programs, one cannot claim that the NDEB is being discriminatory by requiring such graduates to complete the Equivalency Process in order to establish that their dental training and education is equivalent to that which is offered in accredited institutions (*Fazli v. National Dental Examining Board of Canada* par. 41).

Ms. Price further added that the NDEB's accreditation system did not accredit institutions based on the place where they are located (*Fazli v. National Dental Examining Board of Canada* par. 42). Instead, she explained that accreditation is institution specific and depends on whether a given institution has met certain requirements as well as maintained certain standards (*Fazli v. National Dental Examining Board of Canada* par. 42). In the adjudicator's words, "the fact that accreditation is accorded to specific institutions as opposed to all institutions within a given country or place further undermines the applicant's claim that differential treatment based on graduation from an accredited school is tantamount to differential treatment based on place of origin" (*Fazli v. National Dental Examining Board of Canada* par. 42). For these reasons, Ms. Price dismissed Dr. Fazli's claim that the NDEB discriminated against him based on his place of origin by requiring that he go through the certification requirements designated for graduates of non-accredited dental programs (*Fazli v. National Dental Examining Board of Canada* par. 43).

Last, in terms of the issue of language, Ms. Price agreed with Dr. Fazli that although language is not a prohibited ground of discrimination under the *Code*, it can nonetheless "be a defining characteristic of ethnicity or place or origin and in that sense language can be a proxy for another prohibited ground of discrimination under the *Code*" (*Fazli v. National Dental Examining Board of Canada* par. 47). Alternatively, however, Ms. Price noted that it is possible for individuals to be proficient in English despite their country of origin, and furthermore she emphasized that there have been cases in the past in which the Human Rights Tribunal of Ontario found that disadvantage arising from a failure to communicate in a particular language was insufficient to establish a claim of discrimination based on place of origin (*Fazli v. National Dental Examining Board of Canada* par. 47). The adjudicator agreed with the NDEB that there was an absence of evidence establishing that Dr. Fazli was disadvantaged by the requirement that

he write the AFK in English (*Fazli v. National Dental Examining Board of Canada* par. 50). Even the applicant himself testified that the reason he did not do well on the exam was not because of a language barrier, but rather due to the difficult and tricky nature of the questions (*Fazli v. National Dental Examining Board of Canada* par. 50). For this reason, Ms. Price dismissed the language aspect of Dr. Fazli's discrimination claim (*Fazli v. National Dental Examining Board of Canada* par. 50).

Overall, the adjudicator emphasized that there was a lack of evidence before her to prove that the training and dental knowledge which Dr. Fazli obtained in Afghanistan at Kabul University was equivalent to that provided by accredited dental programs (*Fazli v. National Dental Examining Board of Canada* par. 52).

9. *Farhat v. College of Physicians and Surgeons of Alberta, 2014 – Court of Queen's Bench of Alberta*

Between: Ziad Farhat (Applicant) and the College of Physicians and Surgeons of Alberta (Respondent)

Judge: Honourable Madam Justice D.L. Pentelechuk

Decision: Justice D. L. Pentelechuk quashed the Decision of the Review Panel of the Appeals Committee (Review Panel) of the Council of the College of Physicians and Surgeons of Alberta and found that Dr. Farhat was entitled to a new assessment carried out by a new assessor (*Farhat v. College of Physicians and Surgeons of Alberta* pars. 70-71).

Applicant's Position:

In 2000, Dr. Farhat obtained a medical degree in Russia and subsequently he completed four years of general radiology in Syria (*Farhat v. College of Physicians and Surgeons of Alberta* par. 6). From November 2009 to October 2011, Dr. Farhat was recruited to work for the Alberta Children's Hospital in Calgary (*Farhat v. College of Physicians and Surgeons of Alberta* par. 7). During this time, he was placed on the Courtesy Register of the College in order to pursue a fellowship in diagnostic radiology with the University of Calgary (*Farhat v. College of Physicians and Surgeons of Alberta* par. 7). In October of 2012, Dr. Farhat was then placed on the Provisional Register – Physician Undergoing Practice Assessment in order to determine whether he was competent for independent practice (*Farhat v. College of Physicians and Surgeons of Alberta* par. 8). The College of Physicians and Surgeons of Alberta (College) found that Dr. Farhat was not competent to practice as a Pediatric Radiologist and therefore was not granted licensing registration with the College (*Farhat v. College of Physicians and Surgeons of Alberta* par. 1).

Upon receiving the decision of the College, Dr. Farhat requested disclosure under section 30(4) of the *Health Professions Act*, RSA 2000, c H-7 (*HPA*) (See Appendix A), so that he could "review the documents used by and created by the registrar, registration committee or competence committee" when assessing his application (*Farhat v. College of Physicians and Surgeons of Alberta* par. 15). In response to this request, Dr. Bhargava explained in a February 2013 letter, that the Stollery Hospital used a paper-less reporting system and therefore none of Dr. Farhat's reports were saved. Also, with regards to tests and test scores, Dr. Bhargava refused to release such records claiming that it would compromise the validity of the tests for future use (*Farhat v. College of Physicians and Surgeons of Alberta* par. 16). As a result, Dr. Farhat

appealed the decision of the College to the Review Panel of the Appeals Committee (Review Panel) of the Council of the College of Physicians and Surgeons of Alberta on the basis of two procedural issues: 1) the failure of the College to provide Dr. Farhat with the evaluation records used to assess his competency as a Pediatric Radiologist and 2) the condensed nature of his evaluation (*Farhat v. College of Physicians and Surgeons of Alberta* pars. 1; 14).

In October of 2013, however, the Review Panel dismissed Dr. Farhat's appeal and upheld the decision of the College (*Farhat v. College of Physicians and Surgeons of Alberta* pars. 1; 17). According to the Review Panel, the team approach used for Dr. Farhat's evaluation increased the reliability of the assessment results and that all six assessors were, generally speaking, experienced in the task of undertaking assessments (*Farhat v. College of Physicians and Surgeons of Alberta* par. 17). Furthermore, the Review Panel noted that Dr. Bhargava's letter from December of 2012 (which was sent to Dr. Farhat by the Assistant Registrar of the College) was sufficient disclosure and consequently Dr. Farhat was not deprived of procedural fairness (*Farhat v. College of Physicians and Surgeons of Alberta* par. 17).

Not satisfied with the decision of the Review Panel, Dr. Farhat further applied for judicial review of the Decision of the Review Panel (*Farhat v. College of Physicians and Surgeons of Alberta* par. 1). The main issues to be considered by the Court of Queen's Bench of Alberta were whether: 1) the College conformed with its statutory duty of disclosure under section 30(4) of the *HPA*, and 2) whether the assessment of Dr. Farhat's competence to practice as a Pediatric Radiologist was procedurally fair (*Farhat v. College of Physicians and Surgeons of Alberta* par. 2).

Respondent's Position:

The Assessment and Competency Enhancement Department of the College contracted Dr. Bhargava to carry out Dr. Farhat's Preliminary Clinical Assessment at the Stollery Children's Hospital in Edmonton (The Alberta Children's Hospital in Calgary wanted to hire Farhat, therefore the assessment was not carried out there, as that would have resulted in a conflict of interest) (*Farhat v. College of Physicians and Surgeons of Alberta* par. 10). Along with five other pediatric radiologists, Dr. Bhargava carried Dr. Farhat's assessment. The assessment team found that Dr. Farhat was not competent to practice as a Pediatric Radiologist and therefore denied his application for individual practice registration (*Farhat v. College of Physicians and Surgeons of Alberta* par. 11).

In December 2012, Dr. Bhargava sent a letter to the College outlining his decision in relation to Dr. Farhat and the reasons why he did not successfully pass the assessment (*Farhat v. College of Physicians and Surgeons of Alberta* par. 12). Upon receiving this letter, the Assistant Registrar of the College wrote to Dr. Farhat informing him that he needed to undergo further training in order to gain licensure in Alberta – Dr. Bhargava's letter report was also enclosed in the communication (*Farhat v. College of Physicians and Surgeons of Alberta* par. 13).

Judge's Analysis and Reasons for Decision:

Justice D.L. Pentelechuk found that although Dr. Bhargava was contracted by the College's competency committee, this did not omit him from fully complying with the statutory duty of disclosure obligation set out in section 30(4) of the *HPA* (*Farhat v. College of Physicians*

and Surgeons of Alberta pars. 31; 34). Rather, by virtue of being contracted by the competency committee and acting with its authority, this meant that Dr. Bhargava was required to produce the documents he used or created upon assessing Dr. Farhat (*Farhat v. College of Physicians and Surgeons of Alberta* par. 34). Justice D.L. Pentelechuk disagreed with the Review Panel's finding that Dr. Bhargava's December 2012 letter contained enough detail and information to allow the College to make a decision in relation Dr. Farhat's application for registration (*Farhat v. College of Physicians and Surgeons of Alberta* par. 39). On the contrary, the judge maintained that the Review Panel was rather dismissive of Dr. Farhat's statutory right under section 30(4) of the *HPA* in that it did not question or provide reasons for accepting Dr. Bhargava's refusal to release test scores or his explanation that the diagnostic reports prepared by Dr. Farhat were not retained (*Farhat v. College of Physicians and Surgeons of Alberta* pars. 39-41). In fact, Justice D.L. Pentelechuk maintained that Dr. Bhargava and his team of assessors could have retained Dr. Farhat's report had they chosen to do so (*Farhat v. College of Physicians and Surgeons of Alberta* par. 42).

In particular, the judge referred to section 1(1)(f)(ix) of the *Health Information Act*, RSA 2000, c H-5 (*HIA*) (See Appendix A) explaining that under this section Dr. Bhargava was designated as a "custodian" and as such, under section 32(1) of the *HIA* (See Appendix A), he could have disclosed non-identifying health information to Dr. Farhat by redacting any identifying patient information in the diagnostic reports (*Farhat v. College of Physicians and Surgeons of Alberta* pars. 44-46). The judge also took issue with the fact that the Registrar accepted Dr. Bhargava's December 2012 letter without asking for a completed assessment form or any documentation to support the competency deficiencies he had identified with regards to Dr. Farhat (*Farhat v. College of Physicians and Surgeons of Alberta* par. 38). Justice D.L.

Pentelechuk argued that the Review Panel had erred in holding that the disclosure provided to Dr. Farhat was sufficient (*Farhat v. College of Physicians and Surgeons of Alberta* par. 48). From the judge's point of view, the Review Panel's Decision lacked "necessary justification, transparency and intelligibility" (*Farhat v. College of Physicians and Surgeons of Alberta* par. 49). As opposed to requesting the documents used by or created by Dr. Bhargava and his team of assessors, the Review Panel "relied on the experience and qualifications of the assessment team" in order to validate Dr. Bhargava's decision as reliable (*Farhat v. College of Physicians and Surgeons of Alberta* par. 48). Thus, Dr. Farhat was deprived of the evidentiary foundation supporting Dr. Bhargava's finding that he was not competent to practice as a pediatric radiologist (*Farhat v. College of Physicians and Surgeons of Alberta* par. 38).

In relation to the shortened nature of Dr. Farhat's assessment, the judge maintained that Dr. Bhargava's decision to terminate the assessment earlier than expected, did not, in and of itself, deprive Dr. Farhat of procedural fairness (*Farhat v. College of Physicians and Surgeons of Alberta* par. 61). The judge claimed that matters relating to the assessment process were under the control of the College (*Farhat v. College of Physicians and Surgeons of Alberta* par. 61). That said, however, the fact that Dr. Farhat's assessment was less than four weeks further emphasized the importance of respecting Dr. Farhat's statutory right to disclosure by providing him with the details and supporting documentation necessary to a) understand that case against him and b) make full answer and defence before the Review Panel (*Farhat v. College of Physicians and Surgeons of Alberta* par. 62).

Overall, Justice D. L. Pentelechuk argued that the degree of procedural fairness owed to Dr. Farhat according to the law was rather high; however, it was not successfully met in his case

(*Farhat v. College of Physicians and Surgeons of Alberta* par. 63). Although the assessment team was undoubtedly qualified to assess Dr. Farhat's competence, the judge explained that the issue was not with whether the conclusion reached in their assessment was correct but whether the assessment was carried out fairly (*Farhat v. College of Physicians and Surgeons of Alberta* par. 68). Accordingly, the judge concluded that in the event an individual is denied the right to a fair hearing, this always renders a decision invalid because an unfair assessment cannot be justified on the basis of the qualifications, experience and expertise of those carrying out the assessment (*Farhat v. College of Physicians and Surgeons of Alberta* par. 69). As a result, Justice D.L. Pentelechuk decided that Dr. Farhat was entitled to a new assessment, to be conducted by a new assessor, because the documentation in support of his competency deficiencies - as identified by Dr. Bhargava - were not kept (*Farhat v. College of Physicians and Surgeons of Alberta* pars. 70-71).

10. The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly, 2016 – Court of Queen's Bench of Alberta

Between: The Association of Professional Engineers and Geoscientists of Alberta (Applicant - Respondent on Cross-Appeal) and Ladislav Mihaly and Alberta Human Rights Commission (Respondents - Applicant on Cross-Appeal)

Judge: The Honourable Madam Justice J.M. Ross

Decision: Justice J.M. Ross ruled that the decision of the Human Rights Tribunal of Alberta should be reversed, without the need to remit the case back to the Tribunal (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 153). The judge also

dismissed Mr. Mihaly's remedy related cross-appeal (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 154).

Applicant's Position (Respondent on Cross-Appeal):

The Association of Professional Engineers and Geoscientists of Alberta (APEGA) appealed the decision of the Human Rights Tribunal of Alberta (Tribunal) (issued in February 2014) in the case of Mr. Mihaly, seeking a reversal of the Tribunal's decision (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 15). Mr. Mihaly had filed a complaint with the Tribunal claiming that APEGA had discriminated against him in violation of sections 4 and 9 of the *Alberta Human Rights Act*, RSA 2000, c A-25.5 (*AHRA*) when he applied to be registered as a professional engineer (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 1; *Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta* pars. 1; 30; 34). Ruling in favour of Mr. Mihaly, the Tribunal ruled that APEGA had discriminated against Mr. Mihaly on the grounds of his place of origin by: a) refusing to recognize his education as the equivalent of an engineering degree from an accredited university in Canada, and b) requiring that he write a number of examinations as a way of confirming his foreign academic credentials (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 1).

Alternatively, APEGA argued that upon reviewing and assessing Mr. Mihaly's application for registration, they determined that Mr. Mihaly's Master's degree was equivalent to a Bachelor's degree according to the Foreign Degree List (FD list) and his program was found to be more in line with Chemical Engineering as opposed to Mechanical or Petroleum Engineering

(*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 37). APEGA explained that Canada and other countries which have "substantially equivalent accreditation processes for engineering programs" can enter into Mutual Recognition Agreements (MRAs) so that graduates of accredited programs included in MRAs are for the most part exempt from examinations by APEGA (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 31). In terms of Mr. Mihaly's situation, Slovakia had not applied to the Canadian Engineering Accreditation Board (CEAB) requesting an equivalency assessment of its accreditation process to that of the Canadian process. Also, there was no MRA between Slovakia and Canada (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 31). For engineering programs which have not foregone CEAB assessment, they can alternatively be included on the FD List, which is prepared based on publicly available information about the institutions (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 33). Graduates of programs on the FD List are usually assigned three confirmatory examinations or the Fundamentals of Engineering Examination (FE exam) developed by the National Council of Engineering Examiners and Surveyors in the U.S. (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 33).

In Mr. Mihaly's case, APEGA maintained that his work experience had been reviewed in order to see whether he could be exempt from examinations (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 37). The Board of Examiners found that although Mr. Mihaly had a lot of experience working in piping design and fabrication, it was not the type of experience with increasing responsibility or complexity (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 37). As a result, Mr. Mihaly

was required to write the standard confirmatory examinations or the FE exam (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* pars. 37; 40).

In its appeal, APEGA raised four main issues surrounding: procedural fairness, jurisdiction, *prima facie* discrimination and justification (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 54). First, APEGA argued that the Tribunal breached the rules of procedural fairness when it decided on issues that were not raised by or with the parties (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 54). Namely, the Tribunal came to the conclusion that "examinations assigned by APEGA were not for the purpose of correcting a perceived academic deficiency as required or contemplated by section 8 (b)(ii) of the *Engineering and Geoscience Professions General Regulation*, Alta Reg 150/1999 (*EGPR)*" (See Appendix A) (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 55). APEGA argued that the Tribunal's reference to section 8 of the *EGPR* constituted a breach to the duty of fairness, as neither party had raised the section during the hearing, nor were they given an opportunity to address it (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 55).

Second, the Association maintained that the Tribunal did not have jurisdiction to determine whether discrimination based on the place a person receives their education consists of discrimination based on place of origin (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 54). The reason was that the *Alberta Human Rights Act*, RSA 2000, c A-25.5 (*AHRA*) (See Appendix A) does not protect against discrimination based on the place of origin of academic qualifications (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 60). APEGA argued that in *Grover v. Alberta Human*

Rights Commission, it was determined that place of origin does not encompass place of education, and that the Tribunal was bound to follow this definition (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 65).

Third, APEGA submitted that the Tribunal had not used the correct legal test, nor applied it reasonably when assessing Mr. Mihaly's complaint in relation to *prima facie* discrimination (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 54). According to the Association, one of the requirements of *prima facie* discrimination is that a complainant must show that the adverse impact they experienced was based on arbitrary or stereotypical treatment (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 73). From APEGA's perspective, the evidence put before the Tribunal demonstrated that its policies were not based on discriminatory assumptions (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 84). The Association further argued that it does not make assumptions about the qualifications of any institutions' graduates, until the institution has indicated to APEGA, through the CEAB accreditation process, that its graduates meet required academic standards (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 84). Furthermore, APEGA noted that Mr. Mihaly was not able to establish an adverse impact as he did not write the confirmatory examinations or the FE Exam, therefore, whether he would have passed is not known (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 78).

Last, the Association argued that the Tribunal's finding that APEGA's registration requirements were unjustified, was unreasonable (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 54).

Respondents' Position (Applicant on Cross-Appeal):

Mr. Mihaly was born in the former Czechoslovakia (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 4). In 1975, he received an M.Sc. Diploma with a specialization in Technology of Fuel and Thermal Energy from the Slovak Technical University in Bratislava (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 4). In 1981, he also obtained a Certificate in Corrosion Engineering from the Institute of Chemical Technology in Prague (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 4). Upon immigrating to Canada in 1999, Mr. Mihaly applied to APEGA for registration as a professional engineer (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 5). In May of 1999, APEGA informed Mr. Mihaly that he would have to send his transcripts as well as write the National Professional Practice Exam (NPPE) (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 6). After APEGA's Board of Examiners reviewed Mr. Mihaly's application, in February of 2000, APEGA explained to Mr. Mihaly that in addition to passing the NPPE, he would also have to write three confirmatory examinations as well as "take a course or pass an equivalent examination in Engineering Economics by May 2001" (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 7). APEGA also notified Mr. Mihaly that his first attempt at passing the NPPE in January of 2000 was not successful (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 7). In August of 2000, Mr. Mihaly applied to re-write the NPPE in October of 2000 for a second time, but did not show up the day of the test (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 8). In June of 2001, APEGA informed Mr. Mihaly that his application for registration as a Professional Engineer has been withdrawn given that he had not written the

required confirmatory examinations by the May 2001 deadline (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 9). A year later, in May of 2002, Mr. Mihaly contacted APEGA in order to reactivate his application for registration (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 10). In June 2002, APEGA reactivated his file and reminded him that he was required to write the three confirmatory examinations by May 2003, as well as to complete the Engineering Economics course or examination by November 2003 (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 11). In July of 2002, Mr. Mihaly applied and wrote the NPPE for a third time, but failed (par. 10). His fourth attempt at writing the exam January of 2003 was also unsuccessful (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 12). In August of 2003, APEGA withdrew Mihaly's application once again due to the fact that Mr. Mihaly had not written the required confirmatory examinations by APEGA's deadline (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 13). Once again, in October of 2006, Mr. Mihaly requested that APEGA reactivate his application (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 14). While accepting Mr. Mihaly's request to reactivate his file, APEGA advised him that he would have to provide them with an updated resume and a list of updated references (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 15). In November of 2006, Mr. Mihaly submitted this information (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 15). Finally, in August of 2007, the Board of Examiners re-examined Mr. Mihaly's application and determined for a second time that Mr. Mihaly would still have to complete three confirmatory examinations in addition to a course or examination in Engineering Economics, or FE Exam (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 16). The Board also informed Mr. Mihaly that he had not

acquired the one year of Canadian professional engineering experience that was required, the reason being that the position where he had worked was not at a high enough Canadian engineering experience level (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 16).

Ultimately, Mr. Mihaly never wrote the required examinations. Instead, in August of 2008, he filed a complaint with the Alberta Human Rights Commission (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 17). Mr. Mihaly argued that APEGA had discriminated against him based on his place of origin upon denying him registration as professional engineer (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 17). In February of 2014, the Tribunal ruled that Mr. Mihaly had successfully established that the examination and experience standards used by APEGA to assess his foreign credentials constituted discrimination and was not justifiable under the *AHRA* (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 18). With regard to the issues raised by APEGA, the Tribunal argued that the application of the *Moore* legal test was required in Mr. Mihaly's case in order to determine whether a *prima facie* case of discrimination could be made out (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 76). As the complainant, Mr. Mihaly had the onus to demonstrate a *prima facie* case of adverse effect discrimination (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 76). The *Moore* test was relevant because it required Mr. Mihaly to establish that: a) he had a characteristic that was protected from discrimination; b) that he experienced an adverse effect; and c) that the protected characteristic was a factor in the adverse effect (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* pars. 67; 76).

First, the Tribunal maintained that "place or origin is a prohibited ground of discrimination and that Mr. Mihaly was undoubtedly treated as a foreign graduate in light of "the origin of his educational credentials", which in this particular case was a proxy for place of origin (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 77). Second, the Tribunal found that Mr. Mihaly has experienced an adverse effect because of APEGA's requirements that he write confirmatory examinations or the FE Exam (requirements which did not apply to engineering graduates from Canada or countries given their MRAs with APEGA) (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 77). Third, the Tribunal held that there was no doubt that the adverse impact experienced by Mr. Mihaly was related to his place of origin because "his engineering qualifications were inextricably linked to his place of origin" (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 79). The Tribunal maintained that APEGA assumed that engineers with qualifications from foreign countries (without MRAs with APEGA) had qualifications which were not equivalent to Canadian engineering accreditation standards and that this assumption was embedded in APEGA's examination and experience requirements (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 79). As a result, this created a barrier for foreign engineering graduates seeking to obtain membership to APEGA (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 79).

While acknowledging the necessary imposition of policies to ensure competency as well as safety in professional fields, the adjudicator noted that certain requirements imposed by APEGA on foreign educated immigrants, like Mr. Mihaly, were too restrictive and resulted in the categorization of immigrants on the basis of the country in which their qualifications were

obtained as opposed to individual assessments (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 81). In Mr. Mihaly's case, the requirements to pass confirmatory exams, the FE and NPPE exams, as well as possess one year of Canadian experience together perpetuated disadvantage (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 81). APEGA's requirements, therefore, constituted substantive discrimination (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 81). In relation to the justification behind APEGA's registration requirements, the Tribunal found that APEGA had not reasonably accommodated Mr. Mihaly because of two factors: 1) the requirement that he write confirmatory examinations or the FE Exam and 2) the requirements that he write the NPPE and complete one year of Canadian experience before being certified (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 117). The Tribunal further elaborated that the requirement to write confirmatory examinations or the FE Exam was *prima facie* discriminatory and not justifiable under section 11 of the *AHRA* (See Appendix A) for two reasons: a) an individualized assessment of Mr. Mihaly's credentials should have been carried out in order to allow him to write only examinations that would correct his perceived academic deficiencies (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 118) and b) the confirmatory examinations and the FE Exam were standardized "one size fits all" examinations which did not allow for individualized assessments nor took into account candidates' background, specific training, actual knowledge and experience (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 124). Instead of expecting internationally educated graduates to meet a single standard, the Tribunal found that "through individual assessment, there may be other ways to properly assess internationally educated graduates' ability to practice safely and competently" (*The Association of Professional Engineers and Geoscientists of Alberta v.*

Mihaly par. 143). As a result, the Tribunal ordered APEGA to reconsider Mr. Mihaly's application as well as to establish a committee to specifically explore and investigate various options (including exemptions from the FE Exam or the NPPE, in combination with the implementation of a different method of assessment) for individually assessing Mr. Mihaly's qualifications and correcting any perceived academic deficiencies (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 144).

In terms of the composition of the committee, the Tribunal recommended that members should include "engineers who received their qualifications in institutions and countries outside of Canada and who have successfully integrated themselves into the engineering profession" (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 144). Also, APEGA was required to match Mr. Mihaly with a mentor with a similar background in order to: a) guide him through challenges as an engineer seeking to integrate into the profession; b) assist him in networking with other foreign engineering graduates experiencing similar struggles; and c) help him improve his English language skills and fluency (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 145). In terms of monetary compensations, the Tribunal awarded Mr. Mihaly $10,000 in general damages (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 18).

Judge's Analysis and Reasons for Decision:

Upon reviewing the issues raised by the appellant (APEGA), the judge found that APEGA had not successfully established that the Tribunal breached rules of procedural fairness when it rooted its decision in section 8 of the *EGPR* (*The Association of Professional Engineers*

and Geoscientists of Alberta v. Mihaly par. 59). Justice J.M. Ross found that the Tribunal's reference to section 8 of the *EGPR* was part of the reasoning leading to its conclusion that APEGA's standards constituted *prima facie* discrimination and were not justified under section 11 of the *AHRA* (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 57). The judge also noted that "Tribunals, or courts for that matter, are not required to give parties an opportunity to be heard regarding every point of law that they refer to in deciding a case" (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 57).

With regard to the two issues of jurisdiction and *prima facie* discrimination, Justice J.M. Ross concluded that APEGA had not shown that the Tribunal lacked jurisdiction when interpreting the meaning or scope of 'discrimination' in Mr. Mihaly's case (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 69). Instead, she found that the Tribunal did indeed have jurisdiction to apply the correct legal test in order to identify whether a successful *prima facie* case of adverse effect discrimination had been established by Mr. Mihaly (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 68). The judge maintained that since Mr. Mihaly alleged adverse effect discrimination based on his place of origin, the Moore test (as set out in *Moore v. British Columbia*) was the correct test to be used in order to demonstrate *prima facie* discrimination (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 67). She also clarified that according to the *Moore test*, "place of origin" does not have to be interpreted as including "place of education" (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 68). However, "discrimination is not limited to rules or practices that are directly based on the listed grounds in the *AHRA*. Discrimination will also occur where a neutral rule or practice

has an adverse impact and the listed ground of discrimination (i.e. place or origin) is a factor in that adverse impact" (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 68).

Justice J. M. Ross agreed with the Tribunal's finding that having to write examinations constituted an adverse impact (independent from the issue of whether one passes the examinations) because those required to do so have to spend time and money to prepare for and write the examinations (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 78). In relation to APEGA's claim that arbitrariness or stereotyping is a required element of *prima facie* discrimination, the judge maintained that these considerations are relevant, but not required (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 75) elements in establishing the link between a ground of discrimination and an adverse impact (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 83).

While the Tribunal argued that discriminatory assumptions underpinned APEGA's policies in relation to foreign educated graduates, the judge found that this claim was not supported by evidence and therefore unreasonable (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* pars. 84; 88). Evidence cited by the Tribunal did not demonstrate that APEGA assumed that internationally educated engineers (from countries without MRAs with APEGA) had qualifications that were not equivalent to Canadian engineering accreditation standards (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 84). Rather, Justice J. M. Ross stressed that evidence cited in the case demonstrated that "the distinction between accredited or equivalent programs and other programs

is not based on assumptions, but on knowledge about the programs" (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 86). As a result, when APEGA differentiates between applicants of known and tested engineering programs versus applicants of unknown programs, it does so on the basis of the information and knowledge it possesses about applicants' programs – it does not assume that applicants of unknown programs have inferior academic qualifications (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 86).

That said, the judge acknowledged that one cannot dispute the Tribunal's findings that: 1) Mr. Mihaly's place of education was "inextricably linked" to his place of origin and 2) Mr. Mihaly's place of origin was a factor in the adverse impact he experienced (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* pars. 100; 103). Upon addressing the scope of the Tribunal's finding of *prima facie* discrimination, Justice J.M. Ross acknowledged the Tribunal's position that APEGA's requirements to pass the confirmatory exams or FE exam perpetuated disadvantage and resulted in substantive discrimination (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 104). In contrast, however, the judge did not agree with the Tribunal's argument that the requirements to pass the NPPE Exams and possess one year of Canadian experience perpetuated disadvantage or constituted adverse impact discrimination (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 106). According to the judge, the NPPE is required of all applicants regardless of their place of education and there was no evidence to suggest that the NPPE "disproportionately excluded foreign engineering graduates from registration with APEGA" (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 106). As for the Canadian experience requirement, the judge maintained that APEGA requires

registered professional engineers to have four years of experience, "one year of which must be in Canada" (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 107). Justice J.M. Ross emphasized that there was no evidence to support the claim that this requirement had an adverse impact on Mr. Mihaly due to his national origin (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 108).

Finally, upon addressing the issue of justification and APEGA's registrations requirements, Justice J.M. Ross maintained that the Tribunal had applied the correct legal test of justification, as set out in *Meiorin* and *Grismer* which required APEGA to prove that: 1) its standards were adopted for a purpose or goal that is rationally connected to the function being performed; 2) its standards were adopted in good faith, in the belief that they were necessary for the fulfillment of its purpose or goal; and 3) its standards were reasonably necessary to accomplish its purpose or goal, because it would be impossible to accommodate the claimant without undue hardship (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 112). The judge also confirmed that the Tribunal had correctly applied the first two elements of the test. Namely, the Tribunal found that APEGA's standards were adopted for safety and competency reasons and that these standards were rationally connected to APEGA's function and adopted in good faith (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 113). Alternatively, however, Justice J. M. Ross took issue with the Tribunal's application of the third element of the test (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 113). According to the judge, APEGA does not assign confirmatory examinations or the FE Exam to applicants based on perceived academic deficiencies. Rather, such examinations are assigned in order to objectively assess the quality of graduates' undergraduate engineering programs, their competence, and their

qualifications/knowledge (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* pars. 122; 142). As such, Justice J. M. Ross found APEGA's policy to be consistent with the *EGPR* and "its objective of ensuring the competency of professional engineers" (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 123).

In the end, the judge agreed that the Tribunal reasonably concluded that Mr. Mihaly had established *prima facie* discrimination in relation to APEGA's policy requiring him to write confirmatory examinations or the FE Exam (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 150). Contrary to the Tribunal, however, she found that APEGA had successfully justified its requirements under section 11 of the *AHRA* and for this reason, the judge deemed the Tribunal's decision unreasonable and ordered that it be reversed (*The Association of Professional Engineers, Geologists and Geophysicists of Alberta v. Mihaly* pars. 150; 153). Furthermore, in response to the Tribunal's suggestions that APEGA should: a) individually assess and guide Mr. Mihaly into the engineering profession, as well as b) "become proactive and discuss and negotiate agreements with other institutions (and to the extent it is able, other countries) from which engineers come to Canada", Justice J.M. Ross maintained that such endeavours were not only costly and time consuming, but that there was no evidence to suggest that APEGA had the necessary resources to pursue them without incurring undue hardship (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* pars. 121; 146; 147).

Part B: Overarching Analysis of Cases

Having established an overview of the ten case studies in Part A, this section will present an overarching analysis of the cases in order to identify commonalities, differences and interpretative gaps among the various tribunal as well as court rulings.

1) Human Rights Claims and Legal Consciousness

One commonality among the case studies has to do with the fact that almost all of the complaints, which emerged out of the cases, revolved around claims of discrimination on the basis of one's 'place of origin'. That said, some complainants expanded the scope of their legal challenges by making additional reference to other grounds of discrimination, such as 'ethnic origin', 'age', 'race', 'color', 'ancestry', and 'religion'.

With regard to the types of legislation used to file complaints, the majority of the complainants (FTPs) grounded their claims in human rights legislation. In particular, the *Ontario Human Rights Code*, R.S.O. 1990, c. H.19 was used in five cases, while the *Human Rights Act*, S.B.C. 1984, c. 22, the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, and the *Alberta Human Rights Act*, RSA 2000, c A-25.5 were each used once, in respective cases. By contrast, in the realm of fair access legislation, only one case utilized and made reference to the *Fair Access to Regulated Professions Act, 2006*, S.O. 2006, c. 31. A number of professions related and miscellaneous legislation were also cited in several cases, including: the *Medical Practitioners Act* R.S.B.C. 1996, c. 285, the *Health Professions Act*, RSA 2000, c H-5, the *Health Information*

Act, the *Engineering and Geoscience Professions General Regulation*, Alta Reg 150/1999, as well as the *Federal Courts Act*, R.S.C. 1985, c. F-7.

While it may appear that the complainants in the ten case studies demonstrate legal consciousness given their recourse to human rights tribunals and the courts as a means of seeking justice, a more critical analysis would raise questions as to whether they truly manifest legal consciousness. An alternative and perhaps more accurate way of looking at their scenario would be to suggest that the extent of the complainants' legal consciousness is framed by their predicaments (namely, the realization that an injustice has been done to them) as well as the information given to them by legal advisors, rather than their own in-depth knowledge about or prior experiences with relevant pieces of Canadian human rights legislation, human rights tribunals and appeal processes. Furthermore, it is important to recognize that the decision of the complainants to purse legal challenges in the face of claimed injustices is not necessarily representative of how all FTPs chose to or are able to cope with their predicaments. The option and process of resorting to the Canadian justice system as a means of seeking justice may seem straightforward and accessible to all from the perspective of the privileged, regulatory bodies, justice system officials, and the state; however, in reality, one's ability to access legal avenues and remedies is significantly influenced by the personal and structural barriers which individuals are faced with. Although not much information and detail is revealed about the life circumstances of the complainants in each of the case studies, one can argue nonetheless that their legal consciousness and ability to engage with the justice system over extended periods of time is not reflective of all FTPs' circumstances. Interestingly, all the FTPs filing legal complaints in the ten cases are part of or practice in rather prestigious professions, and almost all of them possess a significant amount of working experience in their fields, along with established

careers abroad. Of the 10 cases, four complaints pertained to the field of medicine, two were associated with the field of law, and the remaining four cases focused on the fields of dentistry, engineering, architecture, and environmental science.

What appeared to be insufficiently discussed in the vast majority of the case studies was acknowledgment of the fact that, for may FTPs, their ability to effectively purse and afford legal battles is very much dependent upon their social status and financial situation in life. Given the social and structural hardships that are all too often experienced by FTPs (as discussed in chapters two and three), pursuing timely and costly legal challenges is not a viable option for most FTPs. Adjudicators in only two cases – namely *Neiznanski v. University of Toronto* and *Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta* (at the Tribunal level) – explicitly discussed and acknowledged the difficult as well as restrictive socio-economic predicaments of the applicants before them. Thus, the ten cases studied should be regarded as exceptional cases as opposed to common undertakings or a norm among FTPs.

2) Direct versus Indirect or Constructive (adverse effect) Discrimination

Among the ten cases examined in Part A, five of the cases consisted of legal discussions surrounding two types of discrimination: direct versus indirect or constructive (adverse effect) discrimination.

Discrimination can take place in many different forms, whether in a direct manner or indirectly ("10. Forms of discrimination" pars. 1-2). Direct discrimination can be said to occur

when a person or a group of people are treated less favourably than others due to a protected characteristic that they have, without a legitimate or *bona fide* reason ("Direct discrimination" par. 1; "10. Forms of discrimination" par. 1). According to the Supreme Court of Canada, "direct discrimination occurs… where an employer [or institution] adopts a practice or rule which on its face discriminates on a prohibited ground" (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 93). Although the *Ontario Human Rights Code*, R.S.O. 1990, c. H.19 does not specifically define discrimination, the Ontario Human Rights Commission (OHRC) suggests that occurrences or instances of discrimination usually include the following elements:

a) not individually assessing the unique merits, capacities and circumstances of a person
b) making stereotypical assumptions based on a person's presumed traits
c) having the impact of excluding persons, denying benefits or imposing burdens ("2. What is 'discrimination'?" pars. 1-2).

It is a common misconception to think that discrimination cannot occur if the impact was not intended ("2. What is 'discrimination'?" par. 2). In many cases, however, discrimination takes place without any specific intent to do harm or perpetuate disadvantage ("2. What is 'discrimination'?" par. 2). Some argue that discrimination is a social product that emerges from "a tendency to build society as though everyone is the same as the people in power – all young, one gender, once race, one religion or one level of ability" ("2. What is 'discrimination'?" par. 4). Such a tendency or approach is problematic, of course, because it can produce discriminatory barriers to access (even if unintended) for persons with protected characteristics identified in human rights legislation ("2. What is 'discrimination'?" par. 4). According to the OHRC, "it is a

principle of human rights that persons should be judged on their individual attributes, skills and capabilities" instead of on stereotypes, prejudice or assumptions which can lead to discriminatory policies and practices ("2. What is 'discrimination'?" par. 5).

By contrast, the OHRC suggests that constructive (adverse effect) discrimination occurs when "a rule or practice unintentionally singles out particular people and results in unequal treatment" ("constructive-adverse effect" par. 1). This means that while regulatory policies, procedures, requirements and qualifications may not be explicitly discriminatory (namely, they appear to be neutral on the surface and applicable to everyone in the same way), some may have the adverse effect and exclusionary impact of creating a position of relative disadvantage as well as barriers to achievement and opportunity for certain people identified by human rights grounds ("2. What is 'discrimination'?" pars. 23; 25; 29; Ontario Human Rights Commission 8). Additionally, constructive discrimination can overlap with other forms of discrimination that are not neutral ("10. Forms of discrimination" par. 50). A case in point would be when a policy that has an adverse discriminatory effect is compounded by the discriminatory attitudes or biases of the person(s) or institutional organization administering it ("10. Forms of discrimination" par. 50).

According to the OHRC, if a rule, policy, procedure, requirement or qualification "is not inclusive and does not accommodate individual differences to the point of undue hardship, it is discriminatory" ("2. What is 'discrimination'?" par. 29). Conversely, in order for a rule, policy, procedure, requirement or qualification to be upheld as non-discriminatory or *bona fide*, there must be proof that it:

1. was adopted for a purpose or goal that is rationally connected to the function being performed
2. was adopted in good faith, in the belief that it is necessary to fulfill the purpose or goal
3. is reasonably necessary to accomplish its purpose or goal, because it is not possible to accommodate the person without undue hardship ("2. What is 'discrimination'?" par. 31).

Furthermore, with regard to constructive discrimination, section 11(1) of the *Ontario Human Rights Code*, R.S.O. 1990, c. H.19 states that:

> **Section 11 (1)** A right of a person under Part 1 is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
>
> **(a)** the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
> **(b)** it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.
>
> R.S.O. 1990,c. H.19, s. 11(1).

Overall, whether direct or indirect, the OHRC cautions that discrimination can sometimes be hard to detect and prove, especially when it is subtle in nature. As a result, it is important to look critically at the facts and circumstances in a given case. While individual rules, policies, procedures, requirements or qualifications may appear to be neutral at first glance, when examined as part of a bigger picture, they can nonetheless be discriminatory in nature in the way they treat or adversely effect certain groups of people identified by protected grounds in human

rights legislation ("2. What is 'discrimination'?" par. 17). In such cases, the OHRC recommends "thinking about evidence that compares how others were treated in a similar situation, or evidence that a pattern of behaviours exits" ("2. What is 'discrimination'?" par. 19). The OHRC also states that it is "necessary to consider an individual or group's already disadvantaged position in Canadian society" when assessing whether any form of discrimination has taken place because "the broader context of societal stigma… pervasive negative stereotyping, and experiences of historical, economic and social marginalization may all be relevant to someone's personal experience of discrimination within an institution or sector" ("10. Forms of discrimination" par. 53).

In *Neiznanski v. University of Toronto*, the Complainant (Dr. Neiznanski) claimed that he had experienced both direct and constructive discrimination contrary to sections 1, 5(1), 9 and 11 of the *Ontario Human Rights Code*, R.S.O. 1990, c. H. 19 (*Neiznanski v. University of Toronto* 4). The adjudicator (Mr. Cumming) alternatively found that Dr. Neiznanski had not been directly discriminated against on a prohibited ground (*Neiznanski v. University of Toronto* 21). Rather, his case was one of constructive discrimination (*Neiznanski v. University of Toronto* 22). Mr. Cumming recognized that constructive or indirect discrimination is representative of the unequal treatment that foreign trained professionals frequently experience (*Neiznanski v. University of Toronto* 22). That said, however, where a claim of constructive discrimination has been successfully made under section 11, two factors need to be considered in order to determine whether there is a reasonable and *bona fide* ground for discrimination (*Neiznanski v. University of Toronto* 22). The first involves looking into whether a reason or rationale exists behind the unequal requirements or treatment and second, whether the exclusion or discriminatory treatment is necessary for the protection of the public interest (*Neiznanski v. University of Toronto* 22).

Based on this framework, Mr. Cumming ultimately found that though Dr. Nieznanski had experienced constructive discrimination, such discrimination was reasonable and *bona fide* for the sake of maintaining public safety (*Neiznanski v. University of Toronto* 23).

In *Bitonti v. The College of Physicians and Surgeons of British Columbia et al.*, the Complainants (Dr. Bitonti et al.) also maintained that they had been subject to both direct and constructive discrimination in violation of sections 3, 8 and 9 of *the Human Rights Act*, S.B.C. 1984, c. 22 (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 3). Upon examining the various claims of discrimination in the case, the Council Member (Mr. Patch) explained that a successful claim of direct discrimination requires that Complainants prove that any distinction they are subject to is a veiled attempt to discriminate on a prohibited ground (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 97). Using this guideline, Mr. Patch concluded that the Complainants had not effectively established a case of direct discrimination by the College, the Hospitals, the Ministry of Health, and the University of British Columbia (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 107). Instead, the Council Member ruled that the Complainants had successfully made out a case of constructive (adverse effect) discrimination in relation to the College's Rule 73 (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 177). From the perspective of Mr. Patch, the Rule did not explicitly limit foreign trained graduates from seeking admission to the medical profession in British Columbia or applying to internships/residency positions. Rather, by requiring foreign trained medical graduates to complete a Canadian internship, compounded with the unlikelihood of landing such a position, the Rule had the adverse effect of discriminating against foreign trained medical graduates by denying them access to the medical profession (*Bitonti v. The College of Physicians and Surgeons of British*

Columbia et al. par. 190). According to Mr. Patch, the College had not taken significant steps towards considering foreign equivalencies and instead made assumptions based on the country where FTPs acquired their education and training (Thompson 16). Although the Council Member acknowledged that "the College is not required to research the education and training of applicants to ensure that they meet acceptable standards", he took issues with the fact that the College had not given the Complainants an opportunity to establish the equivalency of their qualifications (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 235). In his own words, Mr. Patch explained:

> The problem is clearly a complex one with national dimensions, which requires co-operation by a number of different organizations to solve… It seems an opportune time for the institutions responsible for the training and licensing of physicians, and those responsible for funding that training, to develop a comprehensive mechanism for ensuring that graduates of foreign medical schools are able to have their skills assessed based on merit rather than assumption and that they be given an opportunity to compete fairly with graduates of Canadian medical schools for available post-graduate positions (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 381).

In *White v. National Committee on Accreditation*, the applicant (Ms. White) argued that she had been directly discriminated against in violation of sections 1 and 9 of the *Ontario Human Rights Code*, R.S.O. 1990, c. H.19 (*White v. National Committee on Accreditation* par. 2). By contrast, the adjudicator (Mr. Hart) clarified that Ms. White's case was a matter of adverse effect discrimination as opposed to direct discrimination (*White v. National Committee on Accreditation*

par. 30). According to Mr. Hart, although the NCA's requirement for an LL.B. from a Canadian law school had an adverse impact on Ms. White due to her place of origin, she had not sufficiently provided evidence in support of a case of adverse effect discrimination (*White v. National Committee on Accreditation* par. 44). Instead, the adjudicator concluded that the NCA had made significant efforts to accommodate foreign trained professionals, thus demonstrating that its assessment of the applicant's education and experience was appropriate (*White v. National Committee on Accreditation* par. 44).

In *Keith v. College of Physicians and Surgeons of Ontario*, the applicant (Dr. Keith) contended that he had been subject to discrimination in violation of the *Ontario Human Rights Code*, R.S.O. 1990, c. H.19 because his foreign credentials were devalued in Canada when compared with Canadian credentials (*Keith v. College of Physicians and Surgeons of Ontario* par. 3). Addressing this issue, the adjudicator (Ms. Scott) specified that devaluation on its own is not sufficient to prove or establish a case of discrimination (*Keith v. College of Physicians and Surgeons of Ontario* par. 44). Rather, there must be evidence of adverse treatment or disadvantage arising from the differential treatment (*Keith v. College of Physicians and Surgeons of Ontario* par. 44). According to Ms. Scott, there was a lack of evidence suggesting that: a) CPSO and RCPSC specialists are the same and b) the distinction on the CPSO's Register produced adverse treatment, disadvantage or harm because of Dr. Keith's place of origin (*Keith v. College of Physicians and Surgeons of Ontario* pars. 52; 69; 71).

Last, in *The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly*, the Applicant (APEGA – respondent on cross-appeal) stressed that among the requirements necessary for successfully establishing a case of *prima facie* discrimination, one

most show that an adverse impact has been experienced and that this impact is based on arbitrary or stereotypical treatment (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 73). From APEGA's perspective, the evidence it presented to the Tribunal demonstrated that its policies were not rooted in discriminatory assumptions about the qualifications of any institutions' graduates (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 84). Additionally, the Respondent (Mr. Mihaly - applicant on cross-appeal) never wrote the confirmatory examinations or the FE Exam, therefore he could not establish an adverse impact (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 78).

Reflecting on the facts of the case, the judge (Justice J.M. Ross) concurred with the Tribunal's finding that Mr. Mihaly had been subject to an adverse impact upon requiring him to write the confirmatory or FE examination given the time and money required to prepare for as well as write the examinations (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 78). The judge noted that whether he would have actually passed the examinations was a separate issue (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 78). Justice J.M. Ross highlighted that "discrimination is not limited to rules or practices that are directly based on the listed grounds in the *Alberta Human Rights Act*, RSA 2000 c A-25.5" (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 68). Rather, discrimination can also take place in situations where a neutral rule or practice has an adverse impact and a listed ground of discrimination is a factor in that adverse impact (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 68). Thus, from the judge's point of view, APEGA's requirements to pass the confirmatory exams or the FE exam indeed perpetuated disadvantage and resulted in adverse effect

discrimination (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 103). Alternatively, the judge did not agree with the Tribunal's argument that the requirements to pass the NPPE Exam and possess one year of Canadian experience perpetuated disadvantage or constituted adverse impact discrimination, as these requirements are required for all applicants regardless of their place of education (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 107). Furthermore, there was no evidence to support the claim that discriminatory assumptions underpinned APEGA's policies in relation to foreign educated graduates (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* pars. 78; 84; 88). In the final analysis, the judge found that though Mr. Mihaly had established adverse effect discrimination in relation to APEGA's policy regarding confirmatory examinations and the FE Exam, APEGA had nonetheless successfully justified its requirements under section 11 of the *Alberta Human Rights Act*, RSA 2000, c A 25.5 (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* pars. 150; 153).

In general, all five cases revolved around constructive (adverse effect) forms of discrimination as opposed to direct discrimination. Although almost all the applicants made allegations that they had experienced both direct and constructive discrimination, the adjudicators (and judge, in Mihaly's case) clarified that the legal complaints or issues in question were rather the result of constructive (adverse effect) discrimination, provided that: a) the applicants could meet the onus of proof imposed upon them through evidence and b) the adverse effects could not be legally justified by the respondents.

3) Language of the Law: 'Place of origin' versus 'Place of education or training'

It is interesting to note that in all ten cases, there weren't any direct allegations of racism per say, nor was there proof of explicit racism in any of the tribunal/judicial rulings. Instead, the issue of racism was implicitly couched in the complainants' allegations of discrimination on the basis of their place of origin as well as place of training or education. As such, the language of the law was a major and re-occurring topic of discussion throughout numerous cases. In particular, attention was paid to the wording of various pieces of human rights legislation as a means of determining whether they afforded protections against discrimination on the basis of one's 'place of origin' (a prohibited ground) versus one's 'place of education' (a non-prohibited ground).

Although there appeared to be a consensus among adjudicators, in several cases (namely, those of Dr. Neiznanski, Mr. Mihaly, Ms. White, Dr. Bitonti et al., and Dr. Keith), that place of education or training is not a prohibited ground of discrimination under the law, slightly different explanations or interpretations were offered in some of the cases with regard to the link that exists between place of education or training and place of origin.

In *Neiznanski v. University of Toronto*, the adjudicator maintained that since individuals usually obtain their education or training in their place of origin, place of education or training can be used as a proxy for place of origin (*Neiznanski v. University of Toronto* 22). Along the same lines, in *The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly*, the judge explained that while place of origin does not have to be interpreted as encompassing place of education; in some cases, a person's place of education can be inextricably linked to their place of origin – which in turn, can be a factor in the adverse impact experienced (*The*

Association of Professional Engineers, Geologists and Geophysicists of Alberta v. Mihaly pars. 68; 100; 103).

Using a different choice of words, in *White v. National Committee on Accreditation*, the adjudicator stressed that there is a strong correlation between one's pace of education or training and place of origin (*White v. National Committee on Accreditation* par. 31). Similarly, in *Bitonti v. The College of Physicians and Surgeons of British Columbia et al.*, the Council Member agreed with the Complainants that there was a high correlation between place of origin and place of education (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 176). Namely, "while place of origin does not include place of medical training per se, its interpretation is broader than simply place of birth" (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 64). That said, the Council Member also clarified that despite this correlation, place of education or training and place of origin are not equivalent (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 354). Furthermore, although place of origin encompasses place of birth (including country of birth), place of graduation is not included (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* pars. 148; 242). Last, in *Keith v. College of Physicians and Surgeons of Ontario*, the adjudicator also recognized that a correlation exists between place of training and place of origin by arguing that a distinction on the basis of foreign training is a distinction based on place of origin (*Keith v. College of Physicians and Surgeons of Ontario* par. 35).

4) Fair Access Legislation

In contrast to the nine out of ten cases which focused on human rights claims rooted in human rights legislation, *Grant-Kinnear v. Law Society of Upper Canada* was the only case in which an applicant drew upon fair access legislation in order to file a legal challenge. As discussed in chapter two, the intent behind fair access legislation is to ensure that regulated professions are overseen by registration practices that are transparent, objective, impartial and fair (OFC, "Academic Requirements" 35). To achieve these goals, fair access legislation stress the need for licensing requirements that are relevant and necessary to specific professions, encourage paying more attention to competencies rather than credentials, and highlight the importance of providing necessary information to applicants so that they can meet licensing requirements (OFC, "Academic Requirements" 15; 35).

Although Mr. Grant-Kinnear was not successful in establishing that the NCA's accreditation process violated section 6 of the FARPA, the final outcome in this case was interesting given the rationale used by the Court to rule in favour of the NCA. Writing on behalf of all the Justices in the case, Justice Molloy placed great emphasis on the high degree of expertise retained by the NCA officials when assessing foreign credentials and developing related accreditation policies. In effect, the judge's decision to uphold the NCA's accreditation policies and guidelines as reasonable appeared to be largely predicated upon the Court's respect for the accreditation committee as a highly expert and thus competent entity in the realm of assessing legal training and professional experience. This case exhibits or manifests: a) a level of deference or support that, some may argue, exists between the courts and regulatory bodies, as well as b) the unequal or asymmetric plane field that exists between FTPs and regulatory bodies when pursuing legal battles – tendencies extending beyond and not limited to Mr. Grant-Kinnear's case.

All in all, the *Grant-Kinnear v. Law Society of Upper Canada* case stands apart from the other 9 cases due to its reliance on the *Fair Access to Regulated Professions Act, 2006* in order to challenge a regulatory board's accreditation process.

5) Public Safety Narratives and The Maintenance of Rigorous Academic Standards

Narratives surrounding public safety and the maintenance of rigorous academic standards when assessing foreign credentials emerged in two cases, in particular.

In *Nieznanski v. University of Toronto*, the adjudicator (Mr. Cumming) justified the imposition of rigorous licensing requirements upon foreign trained physicians as a means of ensuring high standards in the realm of public safety, health and welfare (*Nieznanski v. University of Toronto* 23). The argument was made that protecting the public interest is a reasonable and *bona fide* ground for discrimination based on a person's place of education or training (*Nieznanski v. University of Toronto* 23).

In *The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly*, the Alberta Human Rights Tribunal and the Court of Queen's Bench of Alberta held markedly different views with regards to the need for rigorous policies when assessing the credentials of foreign trained professionals.

At the Tribunal level, the Tribunal Chair (Mr. Moosa Jiwaji) maintained that while is it necessary to impose high standard requirements on foreign trained professionals in order to ensure competency and public safety, some of the requirements imposed by APEGA on Mr.

Mihaly were too restrictive. Instead of categorizing FTPs based on individual assessments, APEGA's policies perpetuated disadvantage by categorizing immigrants based on the countries in which their qualifications were received (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 81).

Alternatively, the judge at the Court of Queen's Bench of Alberta argued that though the Tribunal had reasonably concluded *prima facie* discrimination in Mr. Mihaly's case due to the policies and requirements imposed upon him by APEGA, Justice J.M. Ross found that APEGA had nonetheless justified its requirements under section 11 of the *AHRA* (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* pars. 150; 153). Justice J.M. Ross's viewpoint emphasized that APEGA's standards were reasonable and justifiable because they objectively assessed academic qualifications and ensured competency among FTPs, with the ultimate goal of promoting public safety. As such, the standards demonstrated a rational connection to APEGA's function and were adopted in good faith (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* pars. 113; 123).

In both Mr. Neiznanski's and Mr. Mihaly's case, the final decisions placed primacy on the maintenance of public safety, deeming it a reasonable ground for discrimination. Thus, the message which appears to be conveyed in both these cases is that while foreign trained professionals cannot be overtly discriminated against on the basis of their place of origin (a protected ground), they can be subtly discriminated against on the basis of their place of training or education - by subjecting them to more rigorous licensing requirements and standards - under the pretext that public safety is being protected.

6) Discriminatory Assumptions and the Assessment of Foreign Credentials

The issue of discriminatory assumptions in relation to foreign credentials was addressed in five cases, in particular.

In *Bitonti v. The College of Physicians and Surgeons of British Columbia et al.*, the Council Member (Mr. Patch) recognized that the distinction between Category I and Category II graduates in Rule 73 was "based on assumptions about the merits of the British education system" (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 177). As a result, the Rule, in effect, posed a barrier to membership in the College for Category II graduates – a barrier that was not based on their actual qualifications (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 180). As explained by Mr. Patch, the Rule "may have been intended to ensure some equivalency of competence to practise medicine, but was based on the premise that training equivalent to British training resulted in equivalency of competence, while other forms of training did not. In short, [Rule 73] did not consider the educational and professional qualifications or the other attributes or merits of individuals" falling into Category II (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 180). Alternatively, upon addressing the Complainants' claims against the Hospitals, Mr. Patch reasoned that Hospitals do not assume that foreign trained medical graduates from some countries are more or less qualified than others, when selecting internship candidates (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 307). Nor do they selectively impose burdens on medical school graduates (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 307). Rather, Hospitals' internship selection practices are legitimately designed for the purpose of identifying the best candidates.

In *White v. National Committee on Accreditation*, the adjudicator (Mr. Hart) clarified that the NCA's individualized assessment of foreign trained lawyers is not rooted in biased assumptions about the superiority of the Canadian legal education system, over other systems in foreign jurisdictions (*White v. National Committee on Accreditation* par. 39). Rather, assessments are carried out using research and information on foreign legal systems with attention to the type of legal training and professional experiences offered by these jurisdictions (*White v. National Committee on Accreditation* par. 39). Given that the NCA categorizes different jurisdictions according to "common law, hybrid or other" classifications, internationally trained applicants are provided with the opportunity to establish the equivalency of their legal training or professional experiences to that which is offered in Canadian law schools (*White v. National Committee on Accreditation* par. 39).

In *Durakovic v. Canadian Architectural Certification Board*, the adjudicator (Ms. Wiggins) also upheld the Canadian Architectural Certification Board's accreditation process by arguing that it was not based on discriminatory assumptions about foreign academic credentials (*Durakovic v. Canadian Architectural Certification Board* par. 38). In order to effectively assess the qualifications of graduates from unaccredited schools, each graduate must be assessed on an individual basis, with attention to whether they meet the requirements of the Canadian Educational Standard for Admission to Provincial Architectural Associations in Canada (CES) (*Durakovic v. Canadian Architectural Certification Board* par. 38).

In *Fazli v. National Dental Examining Board of Canada*, the adjudicator (Ms. Price) concluded that the NDEB did not place more onerous certification or licensing requirements on foreign trained graduates based on negative or discriminatory assumptions about their place of

origin. Instead, the NDEB treats graduates from unaccredited programs differently because such programs have not undergone extensive evaluation processes (*Fazli v. National Dental Examining Board of Canada* par. 40). As a result, such graduates must complete the Equivalency process in order to ensure that their dental training and education is on par with that of accredited institutions (*Fazli v. National Dental Examining Board of Canada* par. 41).

Finally, in *The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly*, the judge (Justice J.M. Ross), in line with the above cases, also reaffirmed that discriminatory assumptions were not rooted in APEGA's policies regarding foreign educated graduates (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* pars. 84; 88). According to Justice J.M. Ross, APEGA maintains a distinction between accredited versus non-accredited programs, based on actual knowledge and information about the programs and not due to negative assumptions about the inferiority of unaccredited programs (*The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly* par. 86).

Overall, in all but one of the five cases, a commonalty exists in that the adjudicators (and judge, in Mihaly's case) emphasized that there was a lack of evidence indicating that discriminatory assumptions about foreign educated graduates and their credentials underpinned the various policies and practices in question. Instead, narratives regarding the need to select the best and most qualified candidates were used in order to uphold such policies and practices.

7) The Over-Qualification Factor

As discussed in chapter two, internationally trained professionals arrive to Canada with high levels of education and extensive work experiences from abroad, yet despite being at times even more qualified than their Canadian counterparts, they struggle to obtain professional licenses for work in various fields (OFC, "Academic Requirements" 5; Laroche and Rutherford xiii). This unfortunate reality was illustrated in the landmark *Sangha v. The Mackenzie Valley Land and Water Board* case - the only case which explicitly addressed the issue of over-qualification. As such it serves as an example of how the over-qualification factor can sometimes work to the detriment of FTPs. Also, the final outcome in this case can be regarded as a genuine victory for the applicant, given the judge's attention to the general predicament of FTPs.

At the Tribunal level, the adjudicator contended that even if the over-qualification factor was set aside in Dr. Sangha's case, other candidates chosen for the RO position were more qualified in comparison to him because their qualifications were more "congruent" for the RO position (*Sangha v. The Mackenzie Valley Land and Water Board* par. 33). Upon reaching a final decision, the judge (Justice de Montigny) took issue with this reasoning based on the fact that the exact definition of "congruency" in terms of qualifications had not been defined by the Tribunal or by the Respondent's submissions (*Sangha v. The Mackenzie Valley Land and Water Board* par. 37). Fortunately for the Applicant, Justice de Montigny alternatively found that Dr. Sangha had in fact met the threshold of demonstrating that there was a serious possibility for him to acquire the job and that it was far from obvious that the other candidates were more qualified than Dr. Sangha, even if his over-qualification was not taken into consideration (*Sangha v. The Mackenzie Valley Land and Water Board* pars. 33; 37). In this regard, the judge rightly concluded that the "congruency" criterion was highly subjective and merely a "back-door" reintegration of the over-qualification factor (*Sangha v. The Mackenzie Valley Land and Water*

Board par. 37). Thus, Dr. Sangha's over-qualified status could not be ignored and was certainly relevant as to why he was not hired (*Sangha v. The Mackenzie Valley Land and Water Board* par. 34).

8) Procedural Fairness and the Statutory Duty of Disclosure

The *Farhat v. College of Physicians and Surgeons of Alberta* case is unique because of the legal arguments used by the judge (Justice D.L. Pentelechuk) to quash the decision of the Review Panel, in favour of the applicant's appeal. Rather than dealing with claims of discrimination in the realm of foreign credentials assessment (whether direct or constructive in nature), this case centered on the issue of procedural fairness and the statutory duty of disclosure owed to the applicant under the law.

In order to rule in favour of Dr. Farhat, Justice D.L. Pentelechuk maintained that the applicant's statutory right under section 30(4) of the *HPA* had not been sufficiently met, given the lack of evidence in support of the College's claim that he was not competent to practice as a pediatric radiologist (*Farhat v. College of Physicians and Surgeons of Alberta* pars. 38; 48). While acknowledging that the assessment team, contracted by the College, was undoubtedly qualified and experienced to assess Dr. Farhat's competency, Justice D.L. Pentelechuk stressed that the problem per say in this case was not with the correctness of the conclusion reached by the assessment team, but rather with the unfair manner in which the assessment was carried out (*Farhat v. College of Physicians and Surgeons of Alberta* pars. 68; 69). For this reason, the judge rendered the Review Panel's decision (in favour of the College) invalid due to the fact that Dr. Farhat had been denied the right to a fair hearing, despite the high degree of procedural

fairness owed to him under the law (*Farhat v. College of Physicians and Surgeons of Alberta* par. 69).

9) The Legal Arena, Public Policy Matters, and Judicial Activism

Last but not least, the ruling in *Grant-Kinnear v. Law Society of Upper Canada*, is of great importance given the perspective it offers in relation to policy matters and their place within the judicial sphere. In this case, the judge (Justice Molloy) emphasized that accreditation processes fall outside the purview of the courts given that they are policy-laden and of greater relevance to administrative versus judicial decision-making practices (*Grant-Kinnear v. Law Society of Upper Canada* par. 15). The Court demonstrated deference to the NCA and the Law Society of Upper Canada on the basis that it is not the role of a reviewing court to rewrite policies or to push forth its own views or those of an applicant with regards to the best method for assessing foreign credentials (*Grant-Kinnear v. Law Society of Upper Canada* par. 15).

Although virtually all ten cases required either human rights tribunals or the courts to examine as well as comment on various accreditation processes as part of reaching a final decision, *Grant-Kinnear v. Law Society of Upper Canada* is the only case in which the judge boldly and openly expressed hesitancy about intervening with a regulatory board's policies and expertise. Comparatively, such hesitancy was not as explicitly manifested in the other nine cases. Instead, the decision not to interfere with or rule against regulatory policies was often masked by the narrative that accreditation processes and guidelines have been purposefully devised by highly expert regulatory bodies that are well equipped and capable of objectively assessing foreign credentials.

Concluding Remarks

Overall, an analysis of the ten case studies reveals that adjudicators and judges in these cases appeared to exercise strict or narrow interpretations of the law, without sufficient attention to the difficulties faced by the complainants. In arguably all but two cases (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* and *Sangha v. The Mackenzie Valley Land and Water Board*), there was a lack of willingness among adjudicators and judges to be more expansive in their readings of regulatory policies and human rights provisions, in an effort to help FTPs overcome barriers.

Furthermore, in line with discussions in chapters two and three, a variety of barriers experienced by FTPs were also highlighted by the ten cases, including:

1) Difficulties associated with passing regulatory/equivalency examinations necessary for satisfying licensure requirements.

2) Costly fees associated with the assessment of international credentials and examinations.

3) The non-recognition or devaluation of foreign qualifications/credentials by regulatory boards due to their lack of familiarity with unaccredited international programs and educational institutions.

4) Lack of work opportunities for FTPs due to their over-qualified status.

5) Lack of transparency in foreign credentials evaluation processes.

The next and final chapter of this dissertation will thematically revisit and address a number of salient research questions explored throughout the various chapters, in an effort to identify policy suggestions and avenues for future research.

CHAPTER FIVE

Conclusion – Thematic Considerations and Future Empirical Prospects

In the very first chapter of this dissertation, a number of thematic research questions were proposed which, at this point, merit revisiting in order to determine what insights and conclusions can be drawn from the media and case analyses.

News Media and the Coverage of Social Issues

1) Does the news media highlight the interests and concerns of both the state (governments) and FTPs, when exploring the issue of foreign credentials assessments and recognition in Canada?

My collective sample of news media sources did a good job of raising awareness about the diverging viewpoints of and challenges experienced by both the state and FTPs in Canada, in the realm of foreign credentials assessments and recognition. In doing so, however, a number of contradictions and paradoxes were implicitly brought to the forefront which need to be addressed, as we head into the future, in order to maintain important public safety and regulatory standards, while also making more space for the effective integration of FTPs in the Canadian labour market.

2) Is the media coverage provided by various news sources, uniform or different?

For the most part, the media coverage offered by my collection of news sources is uniform and, to some extent, repetitive in that a lot of the same issues and topics were

consistently discussed throughout many articles. That said, a few sources stood out in comparison to others, not because of the unique subject matters they discussed, but rather because of the alternative perspectives and viewpoints they offered in their news coverage (i.e. those sources which questioned narratives suggesting that Canada, as a multicultural society, does well on integrating FTPs in the workforce). Additionally, despite thematic connections, much of the legal dilemmas highlighted in the case analyses summarized in chapter 4 were either missing or hardly mentioned across news stories in chapter 3.

Law and the Legal System

3) Are human rights tribunals and courts responsive to the expectations/concerns of FTPs and to what extent?

Based on my sample of ten cases, I would argue that tribunals and courts are responsive to the concerns of FTPs to the extent that they acknowledge the unequal treatment that FTPs frequently experience as a result of constructive (adverse effect) forms of discrimination. This acknowledgement, however, falls short when one considers the final outcomes in the ten case studies. In effect, the majority of the rulings (seven out of ten) were in favour of regulatory boards and associations as opposed to FTPs. Although recognizing FTPs' predicaments is a step in the right direction, I would suggest that from the perspective of FTPs, such recognition is not equivalent to a legal victory and thus not 'responsive enough' to their expectations. In most of the cases, adjudicators and judges justified as well as reinforced strict readings of regulatory provisions, ultimately serving to downplay the importance of substantive equality ideals embedded in the law and the effects of constructive (adverse effect) discrimination. Rather than questioning and assessing the legitimacy of regulatory standards and policies, human rights

tribunals and courts often viewed them through what they claimed was a "neutral" lens, instead shifting the focus to whether individual complainants were or could be accommodated, while leaving the actual regulatory provisions in question, intact (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 195). This approach, in effect diverted "attention away from the substantive norms" underpinning regulatory standards and policies to the duty to accommodate where discriminatory adverse effects were experienced (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 195). As stated by the Court in *Meiorin*:

> The difficulty with this paradigm is that it does not challenge the imbalances of power, or the discourses of dominance, such as racism… which result in society being designed well for some and not for others. It allows those who consider themselves "normal" to continue to construct institutions and relations in their image, as long as others, when they challenge this construction are "accommodated" (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 195).

4) Is judicial power distributed in such a way that certain groups or interests are consistently favoured?

Reflecting on my ten case studies, it appears that human rights tribunals and courts exercised their judicial powers in a way that exhibited deference to the interests of regulatory bodies and associations, at the expense of FTPs. Even when there were clear indications of adverse effect discrimination (contrary to the interest of FTPs), responsibility was placed, first and foremost, on FTPs to meet the onus of proof imposed upon them by the law, through the provision of 'sufficient' evidence. One can take issue with this approach to judicial reasoning

because a determination of what constitutes 'sufficient' evidence is, in many ways, a discretionary exercise of power that is not immune to the subjectivities of legal arbitrators, even if objective legal tests are established to guide adjudicators or judges in their decision-making practices. Second, even when instances of adverse effect discrimination were 'sufficiently' proven by FTPs, regulatory bodies and associations were given the opportunity to defend their policies by providing legal justifications as to why such adverse effects were reasonable and *bona fide* – justifications which were, more often than not, accepted and upheld by the legal arbitrators.

Law and Race

5) In cases of alleged racial discrimination, have FTPs successfully used human rights and fair access legislation to seek justice?

Reflecting back on this question is important because contrary to what I had initially expected, not a single one of my case studies involved direct allegations of racism, nor was there direct evidence of racially discriminatory rulings being released by human rights tribunals and courts, as adjudicators and judges justified their legal rationales using existing case law as well as relevant precedents. Rather, potential instances of racial discrimination or racism were implicitly imbedded in complainants' allegations of discrimination (perpetrated by various regulatory boards or accreditation bodies) on the basis of their place of education/training and/or place of origin. Thus, a review of my case analysis findings demonstrates that though FTPs endeavoured to use a variety of human rights legislation (i.e. human rights codes and acts) to fight against claimed injustices, the majority of them were unsuccessful in achieving desirable legal outcomes in recognition of their rights. Of the 10 case studies examined, only three cases resulted in wins for the complainants (FTPs). By contrast, only one case involved fair access legislation and even

then, the complainant was unable to establish a winning case. Also, worth noting is that none of the 10 examined cases utilized the *Canadian Charter of Rights and Freedoms* to ground or reinforce the parameters of their various rights claims.

Law, Legal Analysis, and Narratives

6) What kind of language and narratives are being used in legal arenas to frame issues surrounding FTPs and their employment prospects in Canada?

As one would expect, the language of the law was pertinent in all ten case studies, given the substantial amount of attention paid to the wording of various pieces of human rights legislation, by adjudicators and judges. In particular, a major and reoccurring debate in numerous judicial rulings had to do with whether the language of the law could be extended so as to allow a non-prohibited ground of discrimination to be considered as a proxy for a prohibited ground. While some cases recognized that place of education or training could be used as a proxy for place of origin, other cases provided more restrictive interpretations of the law by acknowledging that though place of origin and place of education/training may be inextricably linked or strongly correlated in certain circumstances, the two grounds are by no means equivalent and do not have to be interpreted as being proxies in all cases.

In terms of emerging legal narratives, emphasis was placed on the need to maintain rigorous foreign credentials assessment and recognition standards, for the sake of ensuring public safety. This "the end justifies the means" narrative was implicitly rooted in all ten cases and was used to justify the imposition of more demanding licensing requirements and standards on FTPs, despite the corollary adverse effects it produced for them.

Judicial Activism

7) Is there evidence that human rights tribunals and courts are: a) hesitant to encroach upon policy matters, specifically in relation to the assessment and recognition of foreign credentials? and b) advancing human rights protections for FTPs?

With reference to the select sample of case studies examined in my dissertation, it is safe to conclude that human rights tribunals and courts are, indeed, hesitant to encroach upon policy matters in the realm of accreditation policies and procedures. As discussed in the previous chapter, only one case (*Grant-Kinnear v. Law Society of Upper Canada*) openly addressed this issue when the judge clearly stated that it is not within the purview of the courts to rewrite policies or to identify the most suitable or appropriate methods for assessing foreign credentials. As for the rest of the cases, the decision not to intervene with regulatory policies was frequently overshadowed by narratives emphasizing the expert nature of regulatory bodies or associations as the most qualified actors to assess and ultimately accredit FTPs. Based on these findings, I would argue that instead of advancing human rights protections for FTPs, decisions rendered by human rights tribunals and courts for the most part served to implicitly further the logic behind protectionism and its gatekeeping effects. All in all, although there was no overt evidence to suggest that any of the legal rulings were tainted or influenced by personal, racial, or political considerations, adjudicators and judges failed to use the power vested in them expansively, under the law, to reinforce as well as give content to human rights provisions enshrined in various legal codes and acts. Instead, emphasis was placed on adhering to relevant precedent decisions as well as respecting procedural requirements.

Legal Consciousness

8) From a theoretical/sociological standpoint, are FTPs in Canada legally conscious of their rights as well as the various legal mechanisms that exist to assist them when they have been wronged by employers or regulatory bodies?

Whether or not FTPs possess legal consciousness is a tricky question and perhaps warrants further investigation beyond the scope of this dissertation. That said, based on my media as well as case analysis findings, I would argue that FTPs do exhibit some degree of legal consciousness, but that this consciousness (i.e. knowledge of human rights legislation, human rights tribunals and appeal processes) is largely the result of their predicaments and the legal advice they have received in an effort to fight against the injustices they have experienced.

Policy Suggestions and Avenues for Future Research

In a 2013 report, titled "A Fair Way to Go: Access to Ontario's Regulated Professions and the Need to Embrace Newcomers in the Global Economy", the Office of the Fairness Commissioner stated:

> No one group can create fair access to the professions. Continued progress in improving fair access to the professions calls for a commitment on the part of professional regulatory bodies and their members, the OFC, and its partners in government to deepen our understanding and strengthen our practice of the principles of transparency, objectivity, impartiality and fairness. It calls for work by researchers and pressure from the broader public. Above all, it means going far beyond the letter of the law to pursue an ambitious vision for our province that mobilizes the full

> potential of all its residents and harnesses its diversity to innovate, to develop the professions, and to better meet the growing and changing needs of Ontarians (6).

Indeed, Canadian regulatory bodies, employers, governments, and legal arbitrators within the justice system have already taken gradual steps towards addressing the predicament of FTPs; however, a prominent and reoccurring concern that remains for many of these stakeholders has to do with how best to balance as well as maintain public safety and regulatory standards, while making space for the effective integration of FTPs in the Canadian workforce. In an effort to address this concern more effectively, as we head into the future, more work and research needs to be done in relation to: a) the reassessment/improvement of accreditation and employment requirements for FTPs; b) the revision of immigration policies to ensure that they are in tune with labour market demands as well as regulatory requirements and processes; and c) the provision of more expansive legal interpretations/decisions by human rights tribunals and courts, in the realm of regulatory policies and human rights protections, which demonstrate more sensitivity to the social and structural challenges experienced by FTPs. The majority of the recommendations, which have been identified below, consist of select policy undertakings which have already been initiated by varies actors and represent steps in the right direction, but require further implementation and improvements.

1) *The reassessment/improvement of accreditation and employment requirements for FTPs*

Regulators and employers need to continue efforts geared at reassessing and improving accreditation as well as employment requirements, so that FTPs can be effectively integrated into the Canadian labour force. Research suggests that regulators and employers often struggle

reaching a balance between: a) ensuring that all applicants for registration/licensure or employment demonstrate entry-level competence, and b) facilitating equitable access to foreign trained applicants (Steinecke 1). Many regulatory bodies and employers are hesitant to accept unfamiliar foreign credentials and educational programs. As a result, different and more difficult requirements are often imposed on FTPs before they can gain entry into a given profession (Steinecke 1).

<u>Regulatory bodies/licensing authorities should:</u>

- Re-examine their requirements in an effort to develop more effective measures and processes for assessing FTPs' credentials and competencies. This involves ensuring that their measures and processes sensibly balance "the need to enforce professional standards for public protection with individual human rights" (Nasmith 796; Nguyen and Casey 3). According to the OFC, "there is a critical line between meaningful assessment and hoop-jumping", namely, public protection versus protectionism ("A Fair Way to Go" 16).

- Provide convincing arguments and evidence which substantiate their standards as *bona fide* occupational requirements, in the event that alternative accommodations cannot be made or enforced for FTPs (Laughton 5). This is especially important in relation to the "Canadian experience" requirement that some regulators have for accreditation purposes (Thompson 17). Though some argue that the "Canadian experience" requirement should be eliminated altogether, the Ontario Human rights Commission has urged that where a regulator "considers that Canadian experience is essential to

maintaining proper standards of performance…. it must be able to show that this requirement is *bona fide* and not related to any prohibited grounds of discrimination" (Thompson 17).

- Ensure that accreditation standards/processes are the same for, as well as applied in a fair and just manner to, all foreign trained professionals within a given profession, without being discriminatory on the basis of place of origin (Wai and McKay-Panos pars. 49-51). In doing so, regulators must give full recognition to their obligation to prevent discrimination in contravention of human rights law as well as take necessary steps to foster human dignity and equality, while carrying out their duties (Laughton 2; 8).

- Work with fellow profession-specific regulatory counterparts, across Canada, to harmonize standards associated with educational qualifications, licensing, and registration requirements in each profession (Bakos 4; Mata par. 8). In Canada, regulations not only vary by occupations and among provincial/territorial governments, but they may also vary based on FTPs country of origin, thus creating confusion for many highly skilled professional immigrants seeking to navigate the system (Sumption 1;12).

- Undertake further initiatives (with the help of funding from governments) designed to research and better understand unfamiliar foreign training programs, educational approaches, and international degrees, beyond the scope of English speaking countries

that have similar histories, traditions and cultures – this way, FTPs, with credentials equivalent to Canadian standards, can get full or partial recognition for their foreign education and training, instead of starting from scratch (Steinecke 1-2; British Columbia Ministry of Health 3; Mata par. 14). According to the Ontario Human Rights Commission, "accreditation decisions should not be made based on stereotypes about people or assumptions about the quality of work experience not gained in Canada" ("3. Legitimate employment requirements" par. 8). While developing a thorough understanding of all international academic/training programs is undoubtedly a costly and timely undertaking, that can take years to accomplish, in the meantime, FTPs must be provided with the opportunity to demonstrate the equivalency of their credentials to avoid under-evaluations (Ontario Human Rights Commission par. 12; Mata par. 60).

- Develop more voluntary "reciprocal training agreements" or "mutual training agreements" (MRAs) with regulators, in foreign countries, which consist of recognized and shared standards for professional registration (British Columbia Ministry of Health 11; Sumption 1; 9; 10). Cooperative agreements between different countries are based on the premise that "countries may have equally high standards even if their certification processes are not exactly the same" (Sumption 1). Thus far, this initiative has mostly been implemented between English-speaking and Commonwealth countries with "relatively similar educational traditions and a history of institutional cooperation or colonial ties" (Sumption 10; OFC, "A Fair Way to Go" 22; 24). As a result, more progress needs to be made in terms of expanding the scope of these agreements, so that they benefit all FTPs rather than a select group (Sumption 2; OFC, "A Fair Way to Go" 7).

- Establish regulatory committees, within each profession, whose specific directive is to explore flexible and individualized approaches for assessing FTPs' credentials, with the aim of "correcting any perceived academic deficiencies" (Selley par. 3; Ontario Human Rights Commission 4).

- Continue joint undertakings with educational institutions and provincial governments (in terms of approval and funding) to expand as well as establish more bridging programs for FTPs, designed to provide transitional training and education necessary for registration or licensure (Steinecke 2; Samuel par. 43). Regulatory bodies should actively participate in designing bridging programs, including those that are offered through third-parties (OFC, "A Fair Way to Go" 19).

- Dismantle protectionist tendencies which seek to restrict the entrance of FTPs into various professions, so that its existing members can enjoy higher levels of income (British Columbia Ministry of Health 1; Samuel par. 30; Ontario Human Rights Commission 10; Mata par. 23). Regulators need to remind themselves that the integration of FTPs into the Canadian labour market offers Canada a competitive edge in the international marketplace as well as future success in the always changing global economy (Mata par. 1; Ontario Human Rights Commission 16; Mata par. 23).

- Pay attention to the ethnic composition of accreditation/licensing bodies and internal review panels, as research suggests that visible minorities do not get equal

consideration if regulatory boards are without adequate visible minority representation (Samuel par. 31).

- Allow for provisional licenses, so that FTPs can both prove their qualifications "through paid internships, short contracts or positions with probationary periods" as well as gain Canadian work experience that is necessary for full licensure and employment (Ontario Human Rights Commission 4). Research suggests that regulators should keep away from "all-or-nothing" approaches when it comes to the certification of FTPs (Sumption 1). Instead, partial or conditional registration should be allowed so that FTPs can carry out some work in their occupation, until they qualify for full registration/licensing (Sumption 1; 8; OFC, "A Fair Way to Go" 21). This approach would help break the contradictory cycle, whereby "employers do not hire foreign trained people unless they have attained membership in appropriate professional associations while professional associations do not grant membership unless the individual applicant has some proven amount of Canadian work experience" (Mata par. 16). Additionally, providing FTPs with the opportunity to perform paid work can help offset costs associated with certification examination fees, bridging programs, and retraining (Mata par. 19).

- Ensure that they have mechanisms/procedures in place, allowing FTPs to appeal or seek internal review of decisions pertaining to the assessment and recognition of their foreign credentials (OFC, "A Fair Way to Go" 14; 42). Part of this effort requires making improvements to FTPs' access to records and regulatory bodies' document retention policies (OFC, "A Fair Way to Go" 44).

Employers should:

- Clearly indicate the specific qualifications and skills they are looking for, in job ads, instead of using "catch all terms like Canadian experience" without any further clarification ("3. Legitimate employment requirements" par. 3; Ontario Human Rights Commission 11; 14). Even if applicants lack "Canadian experience", employers should give applicants the opportunity to demonstrate their skills as well as objectively review other available information in order to facilitate reasonable and fair individual assessments ("3. Legitimate employment requirements" par. 3; 9; 14; Ontario Human Rights Commission 11; 13).

- Make an effort to completely remove "Canadian experience" requirements, where possible, as improvements are made to the approaches they use to hire and select prospective job applicants - if this cannot be done, employers must be able to clearly establish how this criterion is rationally connected to the job in question, and why no accommodations, short of undue hardship, can be made for FTPs ("Grounds Protection" par. 11; Thompson 18).

- Take necessary precautions to avoid discriminating against overqualified foreign trained professionals, as it can lead to larger scale discrimination against visible minority immigrants in the realm of employment prospects and opportunities. Research suggests that "overqualified job candidates are likely to be racial minority immigrants, which means that a policy of not hiring overqualified candidates results in screening out visible minority immigrants" (Chisholm et al. par. 15).

- Provide cultural sensitivity/anti-discrimination training for employees as well as educate interviewers on how to implement bias-free interview techniques when selecting prospective foreign trained employees (Samuel par. 31; OFC, "A Fair Way to Go" 73). A major barrier to achieving equitable hiring practices for all has to do with getting rid of "the many forms of discrimination that are hard to quantify, especially at the systemic and personal levels… racial discrimination in the workplace is becoming more subtle – often described as a 'hidden thing'" (Samuel par. 41).

- Offer on-site professional training for FTPs, in order to help them acquire skills or knowledge that they may be missing as well as familiarity with the "idiosyncrasies of host-country work practices" (Ontario Human Rights Commission 4; Mata par. 56; Sumption 13).

2) *The revision of immigration policies to ensure that they are in tune with labour market demands as well as regulatory requirements and processes*

Immigration policies need to be reviewed and reconfigured, so that they do not clash with labour market opportunities and professional accreditation. In the words of the OFC:

> Internationally trained professionals should not be seen as a reserve labour force, to be drawn upon only when domestic graduates are in short supply. Rather, they should be seen as equal citizens with equal rights. Governments and regulatory bodies must be clear that licensing is about ensuring public safety, and not about intervening in labour-market supply and demand. The proper moment for asking questions about supply and demand is at the time of setting immigration policy, and not after qualified individuals

have already arrived and begun the journey to becoming licensed in Canada ("A Fair Way to Go" 31).

The incompatibility of national immigration policies with professional accreditation processes manifests a paradox, whereby highly educated immigrants are welcomed into Canada based on their potential professional contributions to the country, yet upon arrival, the re-accreditation requirements they must fulfill frequently end up as obstacles which do not allow them to make optimal use of their skills (Boyd and Schellenberg par.3).

<u>Governments should:</u>

- Collaboratively work together to ensure that immigration policies correspond to labour market demands throughout the various provinces. Since the federal government is "primarily responsible for admitting immigrants" to Canada, it must continuously consult and touch base with the provinces in terms of immigration levels, immigrant settlement, and employment opportunities (Samuel par. 3). Priority occupations lists, used for immigration purposes, need to be reviewed and revised, where necessary, in an effort to better align them with "provincial employment realities" (OFC, "A Fair Way to Go" 60).

- Instigate as well as encourage better coordination between immigration policies and professional regulatory processes in order to allow for the smoother transition of FTPs into both accreditation/licensing systems and the Canadian labour market (British Columbia Ministry of Health 5).

- Update labour-mobility legislation in order to simplify licensing processes for FTPs who need to move between Canadian provinces – this requires collaboration among both provincial and federal governments (OFC, "A Fair Way to Go" 4).

- Establish strict targets/timelines, in relation to foreign credentials assessments, that professional regulatory bodies must meet, in an effort to speed up accreditation processes. This undertaking should be led by provincial governments, in particular, since the Canadian provinces have constitutional jurisdiction over education (British Columbia Ministry of Health 3; Mata par. 49).

- Improve pre-arrival services and information for FTPs so that they know what to expect in terms of registration/licensing requirements as well as employment opportunities, in the various provinces (OFC, "A Fair Way to Go" 31; 32). To achieve this end, governments should work closely with regulatory bodies to avoid inconsistencies, lack of clarity, or gaps in information (OFC, "A Fair Way to Go" 43).

- Consistently conduct as well as fund research projects geared at investigating: a) the impact of fair-access initiatives on FTPs as well as their access to the professions, and b) whether positive changes are being achieved (OFC, "A Fair Way to Go" 7). Systematic evaluations should include the collection of feedback from FTPs themselves about their licensing/registration experiences (OFC, "A Fair Way to Go" 47).

3) *The provision of more expansive legal interpretations/decisions by courts human rights tribunals and courts, in the realm of regulatory policies and human rights protections,*

which demonstrate more sensitivity to the social and structural challenges experienced by FTPs.

Human rights tribunals and courts need to provide more expansive legal interpretations of regulatory policies and human rights legislation when assessing cases of alleged discrimination against FTPs. Given the myriad of barriers faced by FTPs, ranging from highly restrictive licensing processes to discriminatory hiring practices, based on race or place of origin and training, redress to the Canadian justice system is one of the last - albeit expensive - avenues available to immigrant professionals in their quest to seek justice (Chisholm et al. par. 13).

<u>Human rights tribunals and Courts should:</u>

- Encourage as well as boldly direct regulators (when necessary) to develop fairer practices and policies in relation to the accreditation of FTPs, in an attempt to align labour law, human rights, and Canada's changing ethno-demographic composition (Chisholm et al. par. 19). If professional accreditation systems and policies are found to be discriminatory on the basis of applicants' ethno-racial makeup or place of training/origin, judges and human rights adjudicators should not hesitate to ask regulators to make necessary revisions geared towards more inclusive practices (Ontario Human Rights Commission 15).

- Strive to provide more expansive and flexible interpretations of human rights grounds, given the elevated legal status of human rights legislation. This way human rights legislation can better fulfill their objective as "fundamental law" as well as "provide a

means of redress for those persons" who have been discriminated against contrary to human rights provisions (Laughton 1-2).

- Emphasize as well as actively enforce the importance of "substantive equality" ideals in their decision-making practices surrounding regulatory policies. According to the Ontario Human Rights Commission, "Substantive equality looks at the impact of laws, policies or actions on disadvantaged groups, and tries to make sure that rules, requirements or treatment do not indirectly draw distinctions based on prohibited grounds" (9). Alternatively, "interpreting human rights legislation primarily in terms of formal equality undermines its promise of substantive equality and prevents consideration of the effect of systemic discrimination" (*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 195).

Concluding Remarks

Evidently, the assessment and recognition of foreign credentials in Canada is a multifaceted issue which requires further research and attention, as we head into the future. As observed by Fernando Mata:

> Regardless of the "accreditation" model followed, dealing effectively with the problem means developing more multi-partner policy strategies aimed at dismantling major barriers present in the accreditation process of immigrants. Educational institutions, licensing bodies, community organizations and all levels of government should be integral to the development and implementation of the different policy initiatives that

> emerge from these frameworks… Multi-partner projects should be founded on the harmonic balance of the principles related to public safety and civic participation of immigrants to the professional life of Canada (par. 59).

Additionally, as various stakeholders continue to work together, in order to better address issues surrounding foreign credentials, efforts must be geared towards: meeting the specific needs of each profession, acknowledging regional variations in employment opportunities, preserving standards of care and quality of service for the general public, maintaining due process for FTPs, as well as urging governments to offer more funding in order to undertake necessary initiatives (Nasmith 796).

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APPENDIX A

Legislation Excerpts

Provided below are excerpts of relevant legislation sections discussed in chapter 4 as well as the *Meiorin* legal test, listed in alphabetical order:

Alberta Human Rights Act, RSA 2000, c A-25.5 (*AHRA*)

Discrimination re goods, services, accommodation, facilities

Section 4 No person shall

(a) deny to any person or class of persons any goods, services, accommodation or facilities that are customarily available to the public, or
(b) discriminate against any person or class of persons with respect to any goods, services, accommodation or facilities that are customarily available to the public,

because of the race, religious beliefs, colour, gender, physical disability, mental disability, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or class of persons or of any other person or class of persons.

RSA 2000 cH-14 s4;2009 c26 s4;2015 c18 s3

Membership in trade union, etc.

Section 9 No trade union, employers' organization or occupational association shall

(a) exclude any person from membership in it,
(b) expel or suspend any member of it, or
(c) discriminate against any person or member,

because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or member.

RSA 2000 cH-14 s9;2009 c26 s8;2015 c18 s3

Reasonable and justifiable contravention

Section 11 A contravention of this Act shall be deemed not to have occurred if the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances.

RSA 2000 cH-14 s11;AR 49/2002 s4;2002 c30 s15

Canadian Human Rights Act, R.S.C. 1985, c. H-6 (the *Act*)

Employment

Section 7 It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or
(b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

1976-77, c. 33, s. 7;1980-81-82-83, c. 143, s. 3(F)

Complaint dismissed

Section 53 (1) At the conclusion of an inquiry, the member or panel conducting the inquiry shall dismiss the complaint if the member or panel finds that the complaint is not substantiated.

Complaint substantiated

(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

(a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including

(i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or

(ii) making an application for approval and implementing a plan under section 17;

(b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;

(c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;

(d) that the person compensate the victim for any or all addition costs of boating alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and

(e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.

Special compensation

(3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

Interest

(4) Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.

R.S., 1985, c. H-6, s. 53; 1998, c. 9, s.27

Engineering and Geoscience Professions General Regulation, Alta Reg 150/1999 (*EGPR*)

Section 8 A person who meets the following requirements and applies to the Registrar for registration is entitled to be admitted as an examination candidate:

(b) the applicant is a graduate of

(i) a university program in engineering or geoscience, or
(ii) a related academic program that is acceptable to the Board of Examiners,

but the Board of Examiners has required the applicant to complete one or more confirmatory examinations or examinations for the purpose of correcting a perceived academic deficiency.

AR 150/99 s8;55/2012

Fair Access to Regulated Professions and Compulsory Trades Act, 2006, S.O. 2006, c. 31 (FARPA)

General duty

Section 6 A regulated profession has a duty to provide registration practices that are transparent, objective, impartial and fair.

2006, c. 31, s. 6

Federal Courts Act, R.S.C. 1985, c. F-7

Application for judicial review

Section 18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief against any federal board, commission or other tribunal; and
(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

R.S., 1985, c. F-7, s. 18; 1990, c. 8, s. 4; 2002, c. 8; s. 26

Health Information Act, RSA 2000, c H-5 (*HIA*)

Interpretation

Section 1(1) In this Act,

(f) "custodian" means

(ix) a health services provider who is designated in the regulations as a custodian, or who is within a class of health services providers that is designated in the regulations for the purpose of this subclause;

RSA 2000 cH-5 s1;RSA 2000 cP-13 s47.1;
2006 c18 s2;2006 c25 s24;2007 c18 s2;2008 cE-6.6 s52;
2008 cH-4.3 s18;2009 c25 s2;2011 cH-7.2 s26;2013 cB-7.5 s11

Disclosure of non-identifying health information

Section 32(1) A custodian may disclose non-identifying health information for any purpose.

1999 cH-4.8 s32

Health Professions Act, RSA 2000, c H-7 (*HPA*)

Decision on application

Section 30(4) An applicant may, on request, review the documents used by and created by the registrar, registration committee or competence committee when considering the applicant's application.

1999 CH-5.5 s30;2000 c15 s4(7)

Human Rights Act, S.B.C. 1984, c. 22, as amended (the *Act*)

Interpretation

Section 1 In this Act

"**occupational association**" means an organization, other than a trade union or employers, organization, in which membership is a prerequisite to carrying on a trade, occupation or profession;

1984-22-1; 1992-43-1; 1993-27-1.

Discrimination in public facilities

Section 3 (1) No person, without a bona fide and reasonable justification, shall

(a) deny to a person or class of person any accommodation, service or facility customarily available to the public, or
(b) discriminate against a person or class of persons with respect to any accommodation, service or facility customarily available to the public,

because of the ancestry, place or origin… of that person or class of persons.

1992-43-2.

Discrimination in employment

Section 8 (1) No person shall

(a) refuse to employ or refuse to continue to employ a person, or
(b) discriminate against a person with respect to employment or any term or condition of employment,

because of the ancestry, place of origin… of that person…

(4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

1984-22-8; 1992-43-6.

Discrimination by unions and associations

Section 9 No trade union, employers' organization or occupational association shall

(a) exclude any person from membership,
(b) expel or suspend any member, or
(c) discriminate against any person or member

because of the ancestry, place of origin… of that person or member…

1992-43-7.

Meiorin Legal Test

"In the *Meiorin* decision, the Supreme Court of Canada set out a three-part test to determine whether a standard that results in discrimination can be justified as a reasonable and *bona fide* one. The organization or institution must establish on a balance of probabilities that the standard, factor, requirement or rule: 1. was adopted for a purpose or goal that is rationally connected to the function being performed; 2. was adopted in good faith, in the belief that it is needed to fulfill the purpose or goal, and 3. is reasonably necessary to accomplish its purpose or goal, because it is impossible to accommodate the claimant without undue hardships" (Ontario Human Rights Commission 11).

Ontario Human Rights Code, R.S.O. 1990, c. H.19, as amended (the *Code*)

Services

> **Section 1** Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.

R.S.O. 1990, c. H. 19, s. 1; 1999, c.6, s. 28(1); 2001, c. 32, s. 27(1); 2005, c. 5, s. 32(1); 2012, c. 7, s. 1.

Employment

> **Section 5(1)** Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

R.S.O. 1990, c. H. 19, s. 5(1); 1999, c. 6, s. 28(5); 2001, c. 32, s. 27(1); 2005, c. 5, s. 32(5); 2012, c. 7, s. 4(1).

Vocational associations

> **Section 6** Every person has a right to equal treatment with respect to membership in any trade union, trade or occupation association or self-governing profession without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.

R.S.O. 1990, c. H. 19, s. 6; 1999, c. 6, s. 28(7); 2001, c. 32, s. 27(1); 2005; c. 5, s. 32(7); 2012, c. 7, s. 5.

Infringement prohibited

> **Section 9** No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part. [referring to Part 1 Freedom from Discrimination]

R.S.O. 1990, c. H.19, s. 9.

Constructive discrimination

Section 11 (1) A right of a person under Part 1 is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

(a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or

(b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.

R.S.O. 1990, c. H.19, s. 11(1).

Idem (2) The Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

R.S.O. 1990, c. H.19, s.11(2); 1994, c. 27, s. 65(1); 2002; c. 18; Sched. C, s. 2(1); 2009, c. 33, Sched. 2, s. 35(1).

Idem (3) The Tribunal or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship.

R.S.O. 1990, c. H.19, s. 11(3); 1994, c. 27, s. 65(2); 2002, c. 18, Sched. C, s. 2(2); 2009, c. 33, Sched. 2, s. 35(2).

Application by person

Section 34 (1) If a person believes that any of his or her rights under Part 1 have been infringed, the person may apply to the Tribunal for an order under section 45.2,

(a) within one year after the incident to which the application relates; or

(b) if there was a series of incidents, within one year after the last incident in the series.

2006, c. 30, s. 5.

Late applications

(2) A person may apply under subsection (1) after the expiry of the time limit under that subsection if the tribunal is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay.

2006, c. 30, s. 5.

Complaints before Commission on effective date

Section 53 (1) This section applies to a complaint filed with the Commission under subsection 32(1) of the old Part IV or initiated by the Commission under subsection 32(2) of the old Part IV before the effective date.

2006, c. 30, s. 10.

Applications to Tribunal during six-month period

(3) Subject to subsection (4), at any time during the six-month period referred to in subsection (2), the person who made a complaint that is continued under that subsection may, in accordance with the Tribunal rules, elect to abandon the complaint and make an application to the Tribunal with respect to the subject-matter of the complaint.

2006, c. 30, s.10.

Applications to Tribunal after six-month period

(5) If, after the end of the six-month period referred to in subsection (2), the Commission has failed to deal with the merits of a complaint continued under that subsection and the complaint has not been withdrawn or settled, the complainant may make an application to the Tribunal with respect to the subject-matter of the complaint within a further six-month period after the end of the earlier six-month period.

2006, c. 30, s.10.

The Rules of the College of Physicians and Surgeons of British Columbia (as it read prior to 1993**)**

Rule 73 An applicant for full registration shall fall into and meet the requirements of one of the following categories:

CATEGORY I shall consist of applicants who are graduates in medicine from an approved university or medical school in Canada, the United States, Great Britain, Eire, Australia, New Zealand or South Africa. This applicant must also have completed twelve months of satisfactory internship in a hospital approved by the council, PROVIDED THAT this condition may be waived if the applicant is a certificant or Fellow of the Royal College of Physicians and Surgeons of Canada, or has completed an approved two year family practice residency program and is a certificant of the College of Family Physicians of Canada.

CATEGORY II shall consist of applicants who:

(a) hold the L.A.H. of Dublin, the L.M.S.S.A. of London or the Conjoint Diploma of England, Scotland or Ireland, or are graduates in medicine from a university or medical school not being in a country listed in Category I but listed in the World Directory of Medical Schools (as amended or supplemented to date of application) published by the World Health Organization unless a school so listed has been disapproved by resolution of the council,

(b) have completed two years of approved post graduate hospital training in a country coming within Category I – one year of which shall be in general internship and one year of which shall be in Canada, and

(c) have, if required to do so, passed the British Columbia basic sciences examination;

PROVIDED THAT, if an applicant in this category is a certificant or Fellow of the Royal College of Physicians and Surgeons of Canada and if he has taken one year of specialty training in Canada in a hospital approved by the council, or has completed an approved two year family practice residency training program and is a certificant of the College of Family Physicians of Canada the requirements of (b) and (c) may be waived.

(*Bitonti v. The College of Physicians and Surgeons of British Columbia et al.* par. 31)