

The Legal Case to Accommodate International Medical Graduates in their Integration into Alberta's Health Care System¹

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Diversity principles are based on the notion that equality of opportunity does not require sameness; and that differences are often “value added”. Yet, it is the very notion of “sameness” or a “Canadian equivalency requirement” for graduates of foreign medical schools, that is problematic from a human rights legal point of view. The very assumption that one’s foreign medical training must be “equivalent” or “the same” as a Canadian medical school graduate strikes at the heart of valuing and respecting diversity.

There is increasing awareness on the part of human rights tribunal adjudicators and judges about the discriminatory impact of “ethnocentric” equivalency requirements. These requirements are based on assumptions and historic familiarity with the merits of the British or Anglo-Saxon educational system. Today, these assumptions about the appropriateness of Anglo-Saxon educational models continue to influence the design of systems intended to determine the “equivalency” of credentials held by graduates of foreign medical schools.² Those assumptions carry over into other processes that affect the foreign medical graduate’s ability to find employment in Canada; for example, the matching system used to place graduates in internships.

It is submitted that foreign medical graduates must be admitted to Alberta’s professional integration “system” based on an assessment of competency and merit rather than based on stereotypical assumptions about the equivalency (or lack thereof) of medical training. Assessments based on merit can protect the public while at the same time acknowledging, rather than devaluing, the rich diversity of training and experience that foreign-trained medical graduates bring to Alberta.

A key question that will face tribunals and courts in the future is whether a system that assesses individual competency and merit can be designed and implemented without causing “undue hardship” for regulatory bodies or other entities who are responsible for, or involved in, the assessment process. This question has not yet been litigated; it is submitted that it is just a matter of time before this legal challenge comes forward. Finding a voluntary way to implement

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² See *Bitonti vs. College of Physicians and Surgeons of British Columbia* [1999] B.C.H.R.T.D. No. 60 at 33, paragraph 177 and *de Leon vs. Coast Mountain School Dist. No 82 (No. 4)* (2000) 37 C.H.R.R. D/433, 2000 BCHRT 35, at 15 as printed from: <http://www/cdn-hr-reporter.ca/login/dec...0-122E.cfm&CFID=1385920&CFTOKEN=53070972>

an equitable assessment system, would allow Alberta policymakers, taxpayers and stakeholders to achieve consensus and use their valuable time, resources, and funds to support a positive outcome rather than costly and adversarial litigation.

A review of the case law indicates that foreign trained professionals from a variety of occupational groups challenge decisions made by professional regulatory bodies, other entities, and employers involved in the accreditation or hiring and employment process at one of two stages:

- 1) either prior to admission to practice and after being denied entry to the “system”;³ or
- 2) after being admitted to practice but after being denied an opportunity for advancement or accommodation by an employer or institution.⁴

³ For example, see: *Law Society British Columbia vs. Andrews*, [1989] 1 S.C.R. 243, [1989] S.C.J. No. 6. The complainant successfully challenged the Law Society’s requirement that an applicant must have Canadian citizenship to gain admission to the practice of law. This requirement was deemed contrary to equality rights set out in s.15 of the *Canadian Charter of Rights and Freedoms*. This requirement was struck down because it barred an entire class of persons from certain forms of employment and without consideration of educational and professional qualifications or other attributes as to the merit of the individuals in the group. The Supreme Court of Canada held that the rule was not rationally connected to the objective that lawyers must be familiar with Canadian institutions and customs to effectively practice law.

Also see: *Ramlall vs. Ontario International Medical Graduate Program* [1998] O.J. No. 488/72 wherein the complainant argued unsuccessfully that he should be permitted to sit for examinations leading to a licence to practise medicine an unlimited number of times and that the regulatory body’s denial of a request to write the examinations a fifth time was discriminatory.

Also see: *Tomen vs. Ontario (Human Rights Commission)* [1995] O.J. No. 1818 DRS 94-16252 wherein the complainants successfully argued that after being licensed to teach, the Ontario Teacher’s Federations practice of forcing women teachers to belong to a single sex federation was discriminatory on the basis of gender.

Also see: *Barreau du Quebec vs Choiniere* [1999] J.Q. No. 4365, wherein the complainant unsuccessfully argued that being ordered to attend professional development courses was beyond the jurisdiction of the Barreau du Quebec’s administrative committee. The complainant was successful in arguing that being required to pass the courses was beyond the committee’s jurisdiction.

⁴ For example, see: *Action Travail des Femmes vs. Canadian National*, CHRR D23/27 in which the Tribunal held that the employer discriminated against women by excluding them from positions that were traditionally occupied by men. The Tribunal found that the strength tests and welding experience requirements for the positions were not *bona fide* and that the employer’s interviewing practices were discriminatory. See page D/2334 and D/2335 for examples of stereotypical attitudes that prevailed within the workplace in the case at the Bar. The Tribunal ordered the employer to adopt and implement a program to ensure that one in four new hires are women until such time as women occupy a minimum thirteen percent of non-traditional positions.

Also see *National Capital Alliance on Race relations (NCAR) vs. Canada (Health and Welfare)* [1997] C.H.R.D. No. 3 No. T.D. 3/97. The complainant that was successful in arguing

that the employer discriminated in advancing visible minorities on the basis of race, colour and ethnic origin.

Also see: *Eldridge vs. British Columbia (Attorney General)* [1997] 3 S.C.R. 624, [1997] S.C.J. No. 86, File No. 24896. In *Eldridge*, the complainant was successful in seeking a declaration that the Province's failure to exercise its discretion under the *Medical and Health Care Services Act* to provide sign language interpreter services to deaf patients as an insured benefit violated s. 15 of the *Canadian Charter of Rights and Freedoms*. The Court recognized that if a government delegates its services to an entity, such as a hospital, then the *Charter* would apply to that private entity. *Eldridge* established that "it is also a cornerstone of human rights jurisprudence that the duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation."

Also see: *Mans vs. British Columbia Council of Licensed Practical Nurses* [1990] B.C.C.H.R.D. No. 38 in which the complainant successfully challenged a regulatory body's decision to grant licensure due to past criminal convictions. The denial based on the convictions was regarded by the Tribunal as an illegal exercise of discretionary authority under the *Nurses (Licensed Practical) Act* because the paramountcy rule required that the non-discriminatory provisions of the *B.C. Human Rights Code* prevailed. The denial based on criminal convictions was regarded as not *bona fide* in relation to the job requirements. The paramountcy doctrine was also applied in *Law Society of British Columbia vs. Mangat* [2001] S.C.J. No. 66 2000 S.C.C. 67 when the Supreme Court of Canada held that the federal *Immigration Act* prevails over a provincial *Legal Profession Act* provision that precluded the respondent from giving advice to immigrants because the respondent was not a practicing lawyer.

Also see: *Neiznanski vs. University of Toronto* (1995) C.H.R.R. Vol 24, Decision 15, D/187 in which a resident argued, unsuccessfully, that the University failed to accommodate him because it did not fund a residency position that he accepted in a desperate attempt to gain entry to the medical profession and on the understanding it was not funded. The complainant did not argue that the University had a duty to accommodate on the basis of family status. This argument might have been met with more receptivity by the Tribunal than the ethnic origin or place of origin argument used in this case.

Also see: *Alfred Abouchar vs. Ontario Human Rights Commission and Metropolitan Toronto School Board* (1998) 31 C.H.R.R. d/411 (Ont. Bd. Inq.) in which the Board of Inquiry concluded that even though an interview process was discriminatory, on the basis of race, ethnicity and place of origin, the candidate selected was more qualified for the teaching position in question; therefore, the selection process was not discriminatory.

Also see: *Grant MacEwen Community College vs. Alberta (Human Rights and Citizenship Comm.)* (2000), 37 C.H.R.R. D/421 (Alta Q.B.) in which an aboriginal student challenged course requirements that required the student to demonstrate the ability to make eye contact, evaluate other's work, and express emotions as discriminatory on the basis of race. These competencies were not perceived by Perras, J. as discriminatory because all students in the class were required to demonstrate an ability to evaluate oneself and others for life skills and coaching.

Contrast *Andrews*, *Supra* footnote 4, with *Lavoie vs. Canada* (1999) Fed. C.A. as downloaded from: <http://reports.fja/gc.ca/fc/2000/pub/v1/2000fc24525.html> wherein permanent residents of Canada attempted to challenge a citizenship requirement to gain access to employment advancement opportunities in the federal public service. The court held that although the Canadian citizenship requirement was discriminatory, it was a reasonable limitation.

Although systemic discrimination⁵ and discrimination on the basis of country of origin, ethnicity, ancestry, race or analogous grounds are typically alleged by complainants in either category, this paper focuses on cases in the former category: professionals who attempt to gain entry to the “system”. With the exception of the *deLeon*⁶ decision discussed later in this paper, a review of cases that require an assessment of alleged discrimination or denial of opportunity *after* a complainant gains entry to a profession is beyond the scope of this paper.

Cases involving professionals seeking entry to the “system” typically sought to challenge a rule, policy or statute adopted by government (or a body acting on its behalf) that appeared inherently discriminatory. Most of these cases incorporated a section 15 “equality” challenge under the *Canadian Charter of Rights and Freedoms*.

What test must a complainant meet in these cases? Human dignity is now at the centre of an analysis under subsection 15(1) of the *Charter*. Any court that deals with a section 15 challenge must carefully consider the relationship between the impugned law or state action and the human dignity of the claimant.⁷

The test applicable to a section 15, *Canadian Charter of Rights and Freedoms* challenge alleging discrimination is three fold, and consists of determining whether the:

- 1) impugned law or state action draws a distinction between the applicant and others; in other words, it denies equal benefit or imposes an unequal burden;
- 2) distinction is discriminatory. One must establish whether the distinction is made on the basis of an enumerated ground or a ground “analogous” to it. To identify a ground as analogous, one must look for grounds of distinction that are like the grounds enumerated in s.15. This concept is relevant to cases brought forward by foreign trained medical graduates because place of

⁵ Systemic discrimination in the employment context is defined by Madame Justice Abella and cited with approval by Dickson, C.J. in the *Action Travail des Femmes* case, otherwise cited as *Canada in the Canadian National Railway Co. vs. Canada (Canadian Human Rights Commission)* [1987] 1 S.C.R. 1114 at 1138-39, as: “discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination.”

⁶ *De Leon vs. Coast Mountain School Dist. No. 82 (No.4)*, *Supra*, footnote 4

⁷ *Lavoie vs. Canada, vs. Her Majesty the Queen and the Public Service Commission of Canada* [1999] Fed Court of Appeal, as downloaded from: <http://reports.fja.gc.ca/fc/2000/pu/v1/2000fc24525.html>

training has been accepted by some courts and tribunals as an “analogous ground” in relation to race, colour and ethnicity; and

- 3) distinction is discriminatory in nature; it amounts to discrimination in the context of the particular case.⁸

This paper reviews human rights and immigration cases that have been brought forward by foreign trained professionals who sought opportunities to practice their profession in Canada. It considers these cases in light of the duty to accommodate and undue hardship tests outlined in the *Meiorin*⁹ and *Eldridge*¹⁰ decisions of the Supreme Court of Canada. Throughout the paper, opportunities for further legal argument are highlighted along with recommendations for change that stakeholders may want to adopt to ensure that the processes to integrate graduates of foreign medical schools are respectful of diversity and human rights legal principles.

Human rights cases brought forward to date do not, as a whole, demonstrate much success by foreign trained graduates who sought to overturn decisions that denied them entry into their profession. The prevailing theme in these cases is that a regulatory body, hospital or other entity discriminated against the individual on the basis of ancestry, race, place of origin. The prevailing outcome in these cases is that while evidence of discriminatory conduct was accepted by the trier of fact, there was insufficient evidence to warrant a declaration that the respondent should admit the complainant into the system so that the individual could pursue a career in medicine. These cases do demonstrate that, in light of *Meiorin* and increasing judicial awareness about the importance of a system that respects human dignity, it is time for gatekeepers and stakeholders to build a system that assesses applicants based on individual merit. Systems built on stereotypical assumptions are ripe for a legal challenge based on the legal duty to accommodate and application of the undue hardship test.

A review of the case law follows:

***Bitonti vs. College of Physicians and Surgeons of British Columbia, et al*¹¹**

⁸ *Corbiere vs. Canada (Minister of Indian and Northern Affairs)* [1999] 2 S.C.R. 203 and *Lavoie, Supra* footnote 6, both applying *Law vs. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. *Law* is now the starting point for any analysis of discrimination under the *Charter*.

⁹ *British Columbia (Public Service Employee Relations Commission vs. BGSEU (1999) 176 D.I.R. (4th) 1*

¹⁰ *Eldridge vs. British Columbia Attorney General*, [1997] 3 S.C.R. 624, [1997] S.C.J. No. 8, file No. 24896

¹¹ [1999] B.C.H.R.T.D. No. 60

Bitonti was one of five foreign trained medical graduates who sought employment as physicians in British Columbia (hereinafter referred to as “B.C.”). Bitonti, and four colleagues, filed a human rights complaint alleging that the B.C. system of training and licensing medical graduates discriminates against graduates of medical schools from certain countries outside North America.¹² Specifically, they alleged that the College’s rules required them to be categorized differently, for assessment of equivalency purposes, than graduates of medical schools in Canada, the United States, and other countries where the population was primarily white and Anglo-Saxon in origin.

Based on this difference in categorization, the College’s Rule 73 required Bitonti (and others like her who graduated from non Anglo-Saxon origin countries) to complete two years of post-graduate training in an Anglo-Saxon country plus a second year of rotating internship in Canada or have completed specialty training. Graduates from “Anglo-Saxon” countries were required to complete one year of rotating internship in an approved hospital or have completed specialty training.¹³

Rule 73 was based on an assumption that a medical school that adopted British educational approaches and standards delivered training equivalent to the training delivered in Canadian schools; whereas, a medical school that did not adopt Anglo-Saxon educational approaches delivered training that was inferior to the training delivered in Canadian schools.¹⁴

This difference in categorization resulted in a situation where foreign graduates were required to attain two years of post-graduate training by competing with Canadian graduates for a limited number of internship positions.¹⁵ The evidence from those offering internships, and accepted by the Tribunal, was that graduates of foreign countries had almost no chance of obtaining an internship in a BC hospital.¹⁶ Therefore, the “system” was, by its very design, flawed because it put foreign graduates in a “no win” situation because the positions needed to advance were inaccessible.

The complainants objected to the differentiation created by Rule 73. They wanted to be treated *on par* with graduates from Anglo-Saxon schools and on the basis of merit. They argued that Rule 73 was a form of “direct” discrimination. The tribunal found no evidence that Rule 73 was designed to “directly” discriminate against the complainants based on their ancestry or place of origin.¹⁷ In other words, there was no evidence that the College was using the rule as a screening

¹² *Bitonti vs. College of Physicians and Surgeons of British Columbia, et al, Supra*, footnote 2, at 2, paragraph 1

¹³ *Id.*, 8 at paragraph 32

¹⁴ *Id.*, 10 at 106

¹⁵ *Id.*, 8 at paragraph 2

¹⁶ *Id.*, 31 at paragraph 165

¹⁷ *Id.*, 20 at paragraph 105

mechanism to keep people from the non Anglo-Saxon countries out of the BC medical profession.

The Tribunal noted that the complainants failed to demonstrate that medical doctors from non Anglo-Saxon countries of origin were disproportionately low in number compared to the general Canadian population.¹⁸

If an Alberta complainant could provide evidence that the Alberta College of Physicians and Surgeons adhered to a rule or policy similar to Rule 73, and that there were fewer Alberta physicians from the same countries of origin as those to whom the rule or policy applied, then one might be successful in demonstrating the discriminatory impact of the rule or policy in question.

In *Bitonti*, the Tribunal did accept expert evidence that:

...the rule resulted from a systemic bias that grew out of historic patterns of immigration to British Columbia. ... that bias, if it exists, is reflected in a preference for places of training where there is Anglo-Saxon tradition, not a preference for people with an Anglo-Saxon ancestry or place of origin.¹⁹

This expert evidence was relevant to the allegation that the College “indirectly” discriminated against the complainants²⁰ because their place of training was inextricably linked to their place of origin. The Tribunal adopted the view expressed in *Neiznanski vs. University of Toronto*²¹ that “*when foreign trained people are discriminated against on the basis of their foreign credentials, place of education or training can generally be used as a proxy for place of origin.*”²² In *Bitonti*, the Tribunal accepted expert evidence that a very high correlation exists between place of origin and place of education.²³

The Tribunal noted that Canadian graduates had a distinct advantage in obtaining internships, in comparison with foreign graduates, because the Canadian Intern Matching Service (CIMS) automatically processed applications from Canadian graduates for internships and assisted both hospitals and graduates by ranking, and matching, candidates to internship positions. Canadian graduates were also better positioned to obtain references from Canadian physicians and professors. References were given considerable weight during the matching process.

¹⁸ *Id.*, 27 at paragraph 138

¹⁹ *Id.*, 20 at paragraph 106

²⁰ *Id.*

²¹ (1995) C.H.R.R. VOL 24, Decision 15, D/187

²² *Id.*, 26 at paragraph 137 citing (1995) 24 C.H.R.R. D/187/ (Ont. Bd. of Inq.)

²³ *Id.* 27 at paragraph 141

Concerns about the advantage offered by CIMS to graduates of Canadian medical schools exist in Alberta today; foreign medical graduates question the rationale for their exclusion from the first round of the matching process. They also face an additional barrier when attempting to provide references that are “meaningful” to selection committees. With respect to reference letters, the Tribunal in *Bitonti* commented:

The Hospital’s heavy reliance on reference letters from known Canadian doctors does raise the potential for unfairness. It is analogous to hiring practices that rely heavily on word-of-mouth. Such practices tend to perpetuate the *status quo*. The doctors in hospitals are most likely to know other Canadian doctors. Those Canadian doctors are likely to know Canadian-trained graduates. Therefore, a practice that relies on personal references from known doctors will tend to favour Canadian graduates.²⁴

Although the Tribunal in *Bitonti* concluded that, in the case before it, a practice that preserves the *status quo* is not discriminatory, regulators of the medical profession must carefully reflect on the additional burden they create by requiring foreign applicants to produce reference letters. Courts have certainly adopted the view that preservation of the *status quo* perpetuates discriminatory attitudes.²⁵

The Bitonti tribunal applied the new analytical approach set out in *Meiorin*²⁶ to assess whether a *prima facie* discriminatory standard is a bona fide occupational requirement.²⁷ In *Meiorin*, stated that the elements of the new approach are that:

An employer may justify the impugned standard by establishing on a balance of probabilities that:

- 1) the employer adopted the standard for a purpose rationally connected to the performance of the job;
- 2) the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
- 3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be

²⁴ *Id* 54 at paragraph 306

²⁵ *Ellison vs. Brady*, 924 F.2d 872 (9th Cir. 1991)

²⁶ *British Columbia (Public Service Employee Relations Commission) vs. BCGSEU*, *Supra*, footnote 9

²⁷ *Bitonti vs. College of Physicians and Surgeons of British Columbia, et al*, *Supra*, footnote 2

demonstrated that it is impossible to accommodate individual employees sharing the characteristic of the claimant without imposing undue hardship upon the employer.²⁸

The *Meiorin* analysis permits courts and tribunals to assess the legitimacy of a standard itself; whereas prior to *Meiorin*, the only analysis permissible was whether a rule was “neutral” in its operation.²⁹ As a result of the former approach, the legitimacy of a rule, such as Rule 73, was never called into question. As a result, imbalances of power were not challenged.

The new approach in *Meiorin* requires those who consider themselves to be representative of the mainstream population to go beyond “accommodating others” so that they can fit into the mainstream approach; instead, *Meiorin* requires that consideration must be given from the outset when designing rules and systems to that all people, regardless of their diversity, are able to operate, function or be successful within that system.

In applying the *Meiorin* analysis, the Tribunal concluded that the College adopted Rule 73 for a purpose rationally connected to the practice of medicine,³⁰ and that there was no evidence that the College was motivated by a concern about an over supply of physicians.³¹ The Tribunal then moved to the third part of the *Meiorin* test and assessed whether the distinction based on place of medical training was reasonably necessary.³² The Tribunal accepted evidence from the College that there was no worldwide accreditation system for medical schools but there is one for Canadian and American schools.³³ The Tribunal also accepted that an accreditation system protects the public interest.³⁴

The Tribunal accepted expert evidence that non Anglo-Saxon medical graduates are not a homogenous group; that they have varying degrees of medical competency; and that the overwhelming majority are not capable of “*stepping directly into a rotating internship in the Canadian system.*”³⁵ The Tribunal accepted that there were many factors that contributed to graduates of non Anglo-Saxon medical schools failing to perform as well as Canadian graduates. Those factors included:

- a) deficits in basic medical knowledge (both clinical and scientific);

²⁸ *British Columbia (Public Service Employee Relations Commission) vs. BCGSEU, Supra*, footnote 9, 24-25, paragraph 54

²⁹ *Bitonti, Supra*, footnote 2, 37 paragraph 195 quoting *Meiorin, Supra*, footnote 9 at 19020, para 40-41

³⁰ *Id* at 38, paragraph 201

³¹ *Id*, paragraph 205

³² *Id* at 39, paragraph 210

³³ *Id* at paragraph 211

³⁴ *Id*

³⁵ *Id* at 40, paragraph 219

- b) a lack of hands on clinical skills; a lack of communication skills because English was not the first language spoken by the foreign medical graduate;
- c) lack of familiarity with the way clerks, residents and other staff work together in a teaching unit;
- d) lack of familiarity with expectations of Canadian patients;
- e) differences in drugs prescribed in the foreign country and in Canada; and
- f) lack of familiarity with lab tests in the Canadian context.³⁶

The Tribunal also accepted expert evidence that given a pre-internship training period of 36 to 52 weeks, the overwhelming majority of foreign medical graduates were able to overcome these obstacles, successfully complete their internship, and perform at a level comparable to graduates of Canadian medical schools.³⁷ The Tribunal was quite cognizant of the fact that:

...there was no system in place by which any Category II (non Anglo-Saxon medical school graduate) could demonstrate that he or she had an equivalent level of practical training to Category I (Anglo-Saxon medical school) graduates.³⁸

The Tribunal concluded that there was sufficient evidence to distinguish between graduates of Anglo-Saxon and non Anglo-Saxon medical schools but that there was not sufficient evidence to warrant the two-year requirement imposed by Rule 73.³⁹ The Tribunal expressed preference for a system that provided an opportunity for non Anglo-Saxon medical school graduates to participate in an appropriate pre-internship program prior to undertaking a one-year internship.⁴⁰

The Tribunal also accepted that the College could not individually assess the clinical skills of foreign applicants trained in non Anglo-Saxon medical schools.⁴¹ However, the Tribunal stated that:

...the College has not established that it was impractical for it to implement a system that provided Category I applicants an opportunity to demonstrate a level of training comparable to Category I applicants...⁴²

³⁶ *Id* at 41, paragraph 219

³⁷ *Id* at paragraph 223

³⁸ *Id* at 227

³⁹ *Id* at 42, paragraph 232

⁴⁰ *Id*

⁴¹ *Id* at paragraph 233

⁴² *Id* at paragraph 235

The Tribunal held that Rule 73 was not reasonable necessary and that the College discriminated against graduates of non Anglo-Saxon foreign medical schools on the basis of place of origin by imposing more onerous and inflexible registration requirements on graduates of non Anglo-Saxon foreign medical schools in comparison with graduates of Anglo-Saxon foreign medical schools.⁴³

The remainder of *Bitonti* analyzes the discrimination complaints filed by the complainants against several BC hospitals, the University of British Columbia and the Ministry of Health. *Eldridge*⁴⁴ establishes that government cannot pass its obligations on to other entities, such as regulatory bodies, without remaining accountable pursuant to the *Canadian Charter of Rights and Freedoms*; this reasoning was followed in *Bitonti* when assessing the complaints against these institutions. The Tribunal concluded that despite a multitude of barriers that created systemic disadvantages, the discrimination complaints filed against these bodies could not be sustained. With respect to these allegations, the Tribunal adopted the reasoning in *Neiznanski* that:

...this disadvantage is not based upon a prohibited ground, but rather springs from the fortuitous circumstances that shape each individual's life differently. Life may not be fair from one individual to the next, but that does not mean that there has been discrimination within the meaning of the Code.⁴⁵

Bitonti concludes with the Tribunal acknowledging that the College's response to this complaint (new rules that required all foreign trained medical graduates, regardless of place of medical training, to participate in one year of post-graduate study in Canada), will result in very few foreign trained graduates gaining entry to British Columbia's medical system.⁴⁶ The new rules also allowed for the licensing of practitioners who have practiced for five years on a temporary register but who do not have one year of Canadian post-graduate training. The Tribunal expressed a cautionary note in that, if the College's criteria to gain acceptance to the temporary register includes distinctions between individuals who have trained in Anglo-Saxon countries vs. non Anglo-Saxon countries, then "*the College has simply perpetuated its discriminatory conduct, albeit more subtly.*"⁴⁷

Bitonti recognized that "*the problem is clearly a complex one with national dimensions, which requires co-operation by a number of different organizations to solve.*"⁴⁸ *Bitonti* forecasts a physician shortage.⁴⁹ Most importantly, *Bitonti* urges those responsible for funding training and developing licensing criteria to:

⁴³ *Id* at paragraph 236

⁴⁴ *Supra*, footnote 10

⁴⁵ *Id* at 55, paragraph 308

⁴⁶ *Id* at 69, paragraph 378

⁴⁷ *Id* at 69, paragraph 380

⁴⁸ *Id* paragraph 381

⁴⁹ *Id* at 70, paragraph 381

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. Failure to do so may not constitute discrimination under the *Code*. However, it cannot be in anyone's interest to continue to accept into this country some of the best and brightest individuals from around the world, and to then make it virtually impossible for them to use the skills that they bring with them.⁵⁰

Bakht vs. Newfoundland Medical Board⁵¹

In this Newfoundland Court of Appeal case, the complainant failed in an attempt to challenge a statutory requirement that graduates of Category III schools was discriminatory because the requirement categorized applicants based on "race, national or ethnic origin" contrary to s. 15 of the *Canadian Charter of Rights and Freedoms*. The impact of the statutory requirement was that graduates of Category III schools were required to take extra training in comparison to graduates from Category I and II schools.. Category III schools were defined by the Committee for Accreditation of Canadian Medical Schools - CACMS – as schools "*other than those designated in Category I and II.*" Category II schools were those in the UK, Ireland, Australia, New Zealand, and South Africa. The Newfoundland Court of Appeal held that the impact of this requirement was "*merely a reflection in difference in approach and technique.*"

This Judgment is disappointing because the Court of Appeal does not provide an analysis of the equality argument based on the linkage of category III schools to race or place of origin. Instead, the Court of Appeal dismissed the case by emphasizing that the complainant fit into the Category in question, and that because other professions have similar requirements for additional education, there was no basis for an appeal.

Re Jamorski vs. Ontario (Attorney-General)⁵²

In *Jamorski*, five graduates of Polish medical schools sought a declaration that the regulations governing admission to medical internships and the funding of internships violated s. 15 of the *Canadian Charter of Rights and Freedoms*. The Ontario Court of Appeal dismissed their case. The complainants were successful in passing Medical Council of Canada evaluating examinations. None of the complainants were able to obtain an internship. An internship was a pre-requisite to gaining entry to practice medicine in Canada.

⁵⁰ *Id* paragraph 382

⁵¹ (Nfld. C.A.) Newfoundland Judgments [1986] N.J. No 149, Action 1985, No. 251

⁵² (1988) 64 O.R. (2d) Ont. C.A.

The Court of Appeal reviewed the Ontario system for gaining entry to the medical profession and noted that in that jurisdiction there was a three-stage system of medical education.⁵³ The first stage consisted of pre-med undergraduate study; the second stage consisted of obtaining a Doctor of Medicine degree that included a 52 week clinical clerkship in a hospital setting; and the third stage consisted of one year of post graduate medical training, known as “internship”, in a hospital. Interns are required to hold an “educational license”; the license was granted “as of right” once a person obtained an internship.

At the time of this case, six hundred internships were funded by the Province of Ontario; therefore, each graduate was assured of an internship.⁵⁴ Graduates were matched to positions through the Canadian Intern Matching Service; foreign graduates were not eligible to participate in the matching process for these positions. The Complainants brought their case forward because they were denied access to the internship competition process. Instead, they were required to compete for one of twenty four pre-internship positions outlined below. These twenty four positions also required an additional year of study and assessment.

The Court of Appeal reviewed the accreditation process and noted that Canadians and Americans have agreed upon a reciprocal system that recognizes, as accredited, one another’s medical schools. Medical schools in other countries are recognized as “unaccredited acceptable medical schools” if they are listed in the World Health Organization Directory and meet certain criteria.⁵⁵ In Ontario, graduates of World Health Organization Directory schools were required to take at least 36-48 weeks of postgraduate training at an accredited medical school in Ontario and participate in an assessment and training in certain areas of medicine.

The complainants attended unaccredited acceptable medical schools; therefore, they were subject to the foregoing additional educational requirement known as a pre-internship program (PIP). At the time of this case, government funding was guaranteed for twenty four PIP internships. Graduates of foreign medical schools were required to compete for these positions; they were not eligible to compete for a general internship despite the fact that they might be Canadian citizens or landed immigrants. By virtue of their place of medical school graduation, the complainants became second-class citizens under this system.

The complainants proposed that they should be eligible to compete for one of the six hundred internship positions and that the failure of the Province to provide this same equal opportunity was discriminatory.

The Province argued that:

⁵³ *Jamorski vs. Ontario (Attorney-General)* (1998) 64 O.R. (2d), Ont. C.A. at 163

⁵⁴ *Jamorski, Supra*, at 166

⁵⁵ *Id* at 164

- 1) there is no competitive test in existence that could be used to create an open competition between graduates of accredited schools and graduates of non-accredited schools;
- 2) the public paid for the education of graduates of the Ontario medical system therefore these same graduates should have access to internships that are also paid for by the public;
- 3) the Province has an interest in providing medical opportunities to citizens who seek medical education; and
- 4) the PIP program is a benefit the Province is not required to provide to graduates of non-accredited medical schools.⁵⁶

The Court of Appeal dismissed this application on the basis that although the regulation in question classifies graduates into two different categories, there is no discrimination merely as a result of different classification. The Court's reasons were three fold:

- 1) the complaints were not "similarly situated" to graduates of accredited medical schools. It is unrealistic to expect graduates of an unknown medical system to be treated in the same manner as graduates of a known medical system because to do so would put public safety at risk;
- 2) the differences in the classification system are not based on invidious or pejorative reasons; they are *bona fide*; and
- 3) if the classification system was discriminatory, it is redeemed by s. 1 of the Charter as a reasonable limitation in a free and democratic society.⁵⁷

Jamorski lacks the analysis used in *Bitonti* when considering the development of classification systems for different medical schools. The "convenience" factors and assumptions based on "Anglo-Saxon" familiarity outlined in *Bitonti* certainly come to the forefront when reading *Jamorski* and looking at the historic development of the *quid pro quo* accreditation arrangement arrived at between Canadian and American medical schools. It is this arrangement that underlies the rationale for the two-tier Canadian Intern Matching Process system that denies applicants access to the bulk of internship positions.

The 1995 *Neiznanski* case comments on the potential discriminatory impact of the Canadian Intern Matching Process system:

⁵⁶ *Id* at 166 and 167

⁵⁷ *Id* at 168

One would expect that sooner or later this new discriminatory practice in the selection of physicians for residency positions will be challenged under both human rights legislation and the *Canadian Charter of Rights and Freedoms* ... There has been a court decision which has considered the application of the *Charter* to the problems of foreign trained physicians in seeking to obtain access to licensing in Ontario, but this case dealt with the PIP situation and not the general prohibition upon foreign-trained physicians obtaining residency positions imposed as of 1994. See *Jamorski*⁵⁸
...

The lack of an assessment tool to permit graduates from non-accredited medical schools to compete against graduates from Canadian medical schools is simply accepted by the Court in *Jamorski*. *Bitonti* also accepted, without question, that developing such an assessment system would be too costly and therefore create an undue hardship. In it submitted that a thorough analysis of these conclusions is lacking in both *Jamorski* and *Bitonti*.

The need for an undue hardship analysis is highlighted in *Neiznanski* in the Tribunal's concluding remarks:

Clearly, the maintenance of necessary public standards is a reasonable and *bona fide* ground for discrimination on the basis of jurisdiction of education or training, but the question then is – can the public interest be protected while at the same time the foreign-trained person's application for licensure is accommodated without undue hardship? Is there available an alternative, less onerous, approach that would ensure the public interest is protected? The obvious answer to this question, as seen from the case at hand, is that the residency program itself will only graduate those residents who meet the medical profession's standards and those who successfully complete the residency program must then pass the Royal Society's exams. To have a fair system, and one that produces the most qualified specialists, the admissions process should consider all candidates on the merits whatever their place of education or training.⁵⁹

It appears that, in the future, in order for an applicant to be successful in a similar case, it is imperative that the applicant focus the court's attention on the cost and practicality of designing and implementing an assessment system^l so that all graduates (accredited and non-accredited) are on a level playing field when it comes to competing for scarce and highly sought after internships. The onus must be shifted to the entity denying access to demonstrate, in an objective and factual manner, that it would genuinely suffer an undue hardship to create such

⁵⁸ *Neiznanski, Supra*, footnote 4, at D/193, paragraph 48

⁵⁹ *Id* at D/194 paragraph 54

an assessment system. In each of *Jamorski* and *Bitonti*, this step did not occur. *Bitonti* certainly sets the stage for such an analysis. Both *Jamorski* and *Bakht* can be distinguished from a future case for their lack of such an analysis. As gatekeepers to the system, regulatory bodies must do more than say an assessment is impractical before a court accepts that a system is not discriminatory; they must demonstrate that an assessment system is an undue hardship.

***deLeon vs. Coast Mountain School District No. 82 (No.4)*⁶⁰**

This recent case reinforces the reasoning in *Bitonti* because it illustrates the discriminatory impact of assuming that sameness is equality. This logic flies in the face of human rights principles. In *deLeon*, the complainant was a teacher of twenty years standing. DeLeon was admitted to the teaching profession in British Columbia on the basis of teaching credentials obtained in the Philippines. The BC Teacher's Qualification Service established a framework that required all teacher applicants to have twelve years of education prior to entering undergraduate school. Applicants with less than twelve years of secondary education were permitted to count the requisite number of years from their post-secondary education program to make up the shortfall. In deLeon's case, she was required to count part of her post-secondary education as secondary education.

As a result of this requirement, deLeon was ranked lower on the teacher's salary grid than others who were able to include their full years of post-secondary education. deLeon alleged that this requirement, based on assumptions about the equivalency of years and place of training, amounted to discrimination on the basis of place of origin. deLeon conceded that categorizing and paying teachers differently based on their educational attainment is not discriminatory. Nor did she take issue with the practice of measuring all educational credentials against a B.C. standard.

The Tribunal noted that not making these two arguments were "significant" concessions.⁶¹ The Tribunal further stated "*it is far from clear to me, on the basis of the evidence that I heard, what the present justification is for imposing a requirement of Grade 12 equivalency since all teachers are required to have some post secondary education. But that is not this complaint.*"⁶² This comment illustrates that had deLeon challenged the core assumption (that all teachers must have the same secondary education) she might have been successful in arguing that the requirement is not rationally connected to an applicant's ability to teach because the applicant does go on to post-secondary training. In light of this comment, a medical graduate might also argue that physician competency, or the presumed lack thereof, should not be related to the extent of one's medical

⁶⁰ *Supra* at footnote 6

⁶¹ *Id* at paragraph 76

⁶² *Id* at paragraph 77

schooling because the medical graduate can also go on to complete an internship or a pre-internship program if a foreign medical school graduate.

The Tribunal accepted that place of origin included place of elementary and secondary school education. The Tribunal also applied the reasoning in *Bitonti* that “*the foreign credential evaluation practices of many Canadian, American and British institutions are based on deep-rooted assumptions about the superiority of the British model of education.*”⁶³ There was also recognition by the Tribunal that, because there was no mechanism was in place for foreign trained teachers to be informed by the College that they could apply to the Teacher Qualification Service and provide evidence that a BC university would recognize the equivalence of their post secondary credentials, these foreign applicants were at a disadvantage.⁶⁴ The Tribunal further speculated that the University’s assessment of foreign education credentials might be grounded in discriminatory assumptions;⁶⁵ however, neither arguments nor evidence were presented on that point. These are arguments that should be looked into more closely if a foreign medical graduate files a human rights complaint in the future.

Despite these views, the Tribunal concluded that although deLeon identified a number of ways that the Teacher Qualifications Service might discriminate against people trained in the Philippines; she failed to meet the onus on her to produce evidence from which it could be inferred that the Regulation in question caused her some disadvantage.⁶⁶

Dogra vs. The Minister of Citizenship and Immigration⁶⁷

Dogra is included in this paper because it illustrates the flaws in assuming that an understanding of the “Canadian context” is essential to the successful practice of a profession in Canada. Although the legal requirements relating to visa issuance under immigration law differ from those relating to admission requirements to practice medicine, the case illustrates the dangers of operating under stereotypes, assumptions and a belief that one definition of “Canadian culture” is universally accepted.

Ms. Dogra applied for a Canadian visa. As part of the immigration process, she was required to disclose her professional background and participate in an interview with an immigration officer. Ms. Dogra indicated that she was a teacher in her home country of India and that some of her duties included counselling children. The immigration officer assumed, incorrectly, that she was a counsellor in Pakistan. The immigration officer then asked Ms. Dogra questions that the

⁶³ *Id* at paragraph 81

⁶⁴ *Id* at paragraph 86

⁶⁵ *Id*

⁶⁶ *Id* at paragraph 87 and 89

⁶⁷ (1999) Federal Court of Canada, Docket IMM-3413-98, as downloaded from: <http://decisions.fct-cf.gc.ca/fct/1999/imm-3413-98.html>

officer believed would test Ms. Dogra's ability to effectively counsel children in a "Canadian context". The immigration officer's questions related to:

- a) when children start school in Canada;
- b) the number of grades in a Canadian high school;
- c) rock groups currently popular with Canadian teenagers; and
- d) the applicant's level of familiarity with crack cocaine.⁶⁸

The immigration officer rejected Ms. Dogra's application for a visa to Canada on the basis that her foreign work experience was worth zero points. The officer was not satisfied that:

...you have one year of Canadian equivalent experience as a school and guidance counsellor....It is evident from your responses that you would not know how to provide personal guidance to Canadian students who, for the most part, come from an entirely different background than yourself.⁶⁹

Had the immigration officer awarded Ms. Dogra full or half points for her foreign work experience, she would have qualified for a visa to enter Canada.

Mr. Justice Evans, of the Federal Court of Canada, was critical of the immigration officer's decision for several reasons. Those reasons include:

- 1) a lack of awareness about the distinction between the applicant's country of origin, India, and the immigration officer's conclusion that the applicant's country of origin was Pakistan. His Lordship noted that: *"the confusion of India and Pakistan may also suggest a cultural insensitivity on the part of the visa officer"*.⁷⁰ This error illustrates the need for cultural awareness on the part of those who engage in the assessment of a foreign graduate's credentials. It also illustrates the potential for this type of error to occur more often than a "gatekeeper" might want to acknowledge. In a future case, it could be relevant to present evidence to a human rights tribunal about the level of cultural awareness training that was provided to those who designed the current "pro Anglo-Saxon" systems to assess and classify the training of foreign medical school graduates.
- 2) a failure to provide the applicant with an opportunity to clarify concerns that arose out of the wording used in the applicant's reference letter. Those concerns were critical to determine if the applicant was employed as a teacher or primarily as a guidance counsellor. The officer did not provide that opportunity to the applicant even though

⁶⁸ *Id* at paragraph 34

⁶⁹ *Id* at paragraph 7

⁷⁰ *Id* at paragraph 13

procedural fairness required the visa officer to do so.⁷¹ Given the weight that is attributed to reference letters when assessing applications from foreign medical graduates, the possibility for such a serious omission and procedurally unfair approach clearly exists.

- 3) the immigration officer's determination that experience as a guidance counsellor did not equip the applicant with the "cultural knowledge" necessary to counsel Canadian school children. As a matter of law, the visa officer was not required to determine if the applicant's experience is equivalent to that in Canada, other than by considering the extent to which the duties performed by the applicant match those in the description in the NOC of the applicant's intended occupation. The issue before the Court was the extent to which visa officers are authorized to look behind the CCDO or NOC descriptions of education, training, and experience, or other statutory criteria, in an attempt to assess the relevance of an applicant's credentials for becoming successfully established in Canada.⁷² The court adopted the view that it is not normally appropriate for visa officers to assess the Canadian relevance of an applicant's education, training and experience if they are consistent with the statutory requirements. The court concluded that the task of assessing Canadian "equivalency" is best left to "national accreditation committees" and that the immigration officer was ill equipped to make this type of assessment.⁷³
- 4) the officer did not exercise his discretion reasonably by concluding that Canadian students come from different backgrounds than the applicant. Mr. Justice Evans noted that this view was "*quite at odds with the realities of today's Canada*".⁷⁴ He accepted counsel's argument that:

...the visa officer seemed quite impervious to the possibility that many boards of education might well regard Ms. Dogra's national origin and her experience in Indian schools as valuable assets in assisting children, particularly of South Asian background, to flourish in a setting where tensions between the values and expectations of parents and their ethnic community on the one hand, and the norms prevalent at school and in North American society at large on the other, may be felt particularly keenly.⁷⁵

⁷¹ *Id* at paragraph 17

⁷² *Id* at paragraph 26

⁷³ *Id* at paragraph 29

⁷⁴ *Id* at paragraph 32

⁷⁵ *Id* at paragraph 33

This “value added” approach could certainly be applied in the case of foreign medical graduates and their ability to interact effectively with Canada’s increasingly multicultural patient population.

- 5) the questions used by the immigration officer designed to elicit knowledge of “Canadian customs and culture” were suspect by their very nature, because they may assume that “Canadian culture and customs” are monolithic.⁷⁶ This view was regarded by the Court as “*contrary to the theory and practice of multiculturalism in Canada. The danger is that visa officers may identify as “Canadian culture and customs” those of the oldest established groups, and regard others as outside the mainstream of Canadian society.*”⁷⁷ The Court’s strong language regarding the dangers of imposing assumptions about the ability of foreign graduates to demonstrate their knowledge of “Canadian culture”, should wave red flags for those who may seek to impose this type of requirement on foreign medical school graduates.

Conclusion

An extensive review of the law indicates that to date, applicants have experienced modest success in challenging assessment requirements and systems to integrate graduates of foreign medical schools in Canada. On an individual level, these cases appear to be very fact driven. Some of the cases to date have not focused on arguments that, had they been pursued, might have been successful if supported by objective expert evidence. On a cumulative level, these cases illustrate the overwhelming recognition by the courts that diversity has value and that assumptions about the equivalency of Anglo-Saxon educational models vs non Anglo-Saxon educational models are no longer justifiable from a human rights point of view. These cases also illustrate that assumptions about an applicant’s ability to fit into “Canadian culture” may no longer be supportable in the context of a multicultural society.

Based on this review of cases to date, there are four steps that stakeholders can take to prevent future human rights litigation. Those are:

1. Eliminate systems that classify medical school graduates based on place of training i.e. Anglo–Saxon schools vs. non Anglo-Saxon schools. Instead, assess applicants based on their actual educational achievements and competencies. Ensure that the assessment process includes opportunities for applicants to provide input, or have others provide clarification, regarding their credentials rather than operating on assumptions relating to those credentials. Assessment opportunities must be created to ensure that graduates of foreign medical schools are not discriminated against on the basis of place of

⁷⁶ *Id* at paragraph 36

⁷⁷ *Id*

origin. Assessment officers must receive adequate cultural sensitivity training to perform their assessment functions. Failing which, more court challenges will occur and the results will be costly to all and reflect poorly on Alberta's respect for the human dignity of all people.

2. Re-examine the notion that a medical education that is equivalent to a Canadian medical education is required to advance. Is it really necessary that graduates of foreign medical schools have a medical education that is "equivalent" to that of students from Canadian medical schools in order to successfully demonstrate the competencies required of interns? Or, is it more likely that a medical education, with an appropriate assessment and pre-internship period of training designed to address competency shortcomings, is more appropriate? If the notion of "equivalency" is eliminated, foreign graduates might find that their education and experience is given more weight than it currently receives because the foreign medical graduate offers different ideas and learning – all of which may compliment existing medical practices.
3. Permit graduates of foreign medical schools to compete for internship positions with graduates of Canadian medical schools. The existing two-tiered Canadian Intern Matching Process system appears difficult to justify in light of the foregoing case law.
4. Cease reliance on reference letters for all graduates. Reference letters are inherently problematic as they are best suited to empower those people who have access to individuals in positions of power; this barrier is also problematic for graduates of Canadian medical schools who are not "well connected". It is particularly problematic for graduates of foreign medical schools. Current reference letter requirements for Alberta internships in family medicine require the referee to comment on the applicant's "intellect, stability and emotional maturity". It is submitted that this type of an assessment, by a layperson rather than a trained professional retained for that specific purpose and who uses objective testing instruments, is simply inviting stereotyping, inaccuracy and possibly a tort action in defamation.

Just in the same way that the law is meant to be bent like a willow, instead of snapping in two like a rigid tree; so should Alberta's integration system for foreign medical graduates demonstrate its ability to respond to the needs of all individuals, regardless of place of origin or training. To continue to operate based on outdated assumptions and stereotypes is not in keeping with the requirements of *Meiorin* or basic human dignity. The status quo is an invitation for the system currently used to integrate graduates of foreign medical schools to "snap" under the weight of litigation. Stakeholders are urged to adhere to the legal principles recognized by the courts and tribunals to create an Alberta system that is

equitable and respectful of the needs of Alberta's foreign trained medical graduates.

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