Policy on

Removing the “Canadian experience” barrier

Ontario Human Rights Commission

ISBN: 978-1-4606-1720-5 (Print)
978-1-4606-1721-2 (HTML)
978-1-4606-1722-9 (PDF)

Approved by the OHRC: February 1, 2013
Available in accessible formats on request.
Also available at www.ohrc.on.ca

Disponible en français

Contents

1. Introduction

Canada is home to immigrants[1] from all over the world. Seen as a place of opportunity, peace and democratic governance, Canada has been able to attract highly-skilled immigrants. In return, Canada's culture, society and economy have been greatly enriched by their contributions.

With its aging population, shrinking birthrate, and shortage of skilled labour, Canada relies on the contributions of immigrants for its economic well-being. In the modern global economy, immigrants with foreign experience can increase Canada's international competitiveness by enhancing the country's "diversity advantage."[2]

Therefore, it is a major concern when recent immigrants to Canada face high rates of both underemployment and unemployment. Statistics Canada reported that between 1991 and 2006, "the proportion of immigrants with a university degree in jobs with low educational requirements (such as clerks, truck drivers, salespersons, cashiers, and taxi drivers) increased."[3] Even after being in Canada for fifteen years, "immigrants with a university degree are still more likely than the native-born to be in low-skilled jobs."[4]

Immigrant groups identify many barriers to finding jobs that correspond to their education, skills and experience. These include:

- employers not recognizing foreign credentials and experience
- language and communication difficulties (particularly relating to "occupational jargon"[5])
- employers not helping them integrate into the workplace and not providing job-related learning opportunities
- being rejected for positions because they are thought to be "overqualified"

[1] The Ontario Human Rights Commission (OHRC) recognizes that there are inherent challenges in finding ways to best describe people. Terminology is fluid and what is considered most appropriate will likely evolve over time. Also, people within a group may disagree on preference and may choose to use different terms to describe themselves. This policy uses the terms "immigrant" and "newcomer" broadly, to include a person who originally had citizenship in another country, but who has entered Canada permanently. This includes refugee claimants, permanent residents and people who now have Canadian citizenship. The OHRC also recognizes that the experiences of recent immigrants may be unique and different from people who have lived in Canada longer, and may also differ from the experiences of second-generation Canadians.

[2] Gail Larose and George Tillman, "Valorizing Immigrants' Non-Canadian Work Experience," Canadian Council on Learning, 2009, at 9.

[3] Statistics Canada, "Immigrants' Education and Required Job Skills," available online at: www.statcan.gc.ca/pub/75-001-x/2008112/pdf/10766-eng.pdf (date retrieved: May 24, 2012)

[4] *Ibid.*

[5] Nan Weiner, "Breaking Down Barriers to Labour Market Integration of Newcomers in Toronto," (2008) *IRPP Choices*, Vol. 14, No. 10 September 2008 at 6.

- arbitrary requirements for "Canadian experience"[6]
- outright discrimination.[7]

While the Ontario Human Rights Commission (OHRC) recognizes the significance of all of the barriers newcomers potentially face when trying to access the job market, this policy will focus on "Canadian experience" as an employment or accreditation requirement, and as a practice that raises human rights concerns. The OHRC's position is that a strict requirement for "Canadian experience" is *prima facie* discrimination (discrimination on its face) and can only be used in very limited circumstances. The onus will be on employers and regulatory bodies to show that a requirement for prior work experience in Canada is a *bona fide* requirement, based on the legal test this policy sets out.

The Ontario *Human Rights Code* (the *Code*) states that it is public policy in Ontario to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The *Code* aims to create a climate of understanding and mutual respect, so that each person feels that they belong in the community and can contribute to it.

Employers, unions, regulatory bodies, governments at all levels, social service agencies serving newcomers and newcomers themselves all have a role to play in making sure that barriers to employment are identified and removed. A number of "best practices" have emerged that can help organizations make sure that they are following the *Code* and human rights principles:

[6] Note that the phrase "Canadian experience" is used in this policy to refer to work experience obtained in Canada. This is different than the so-called "Canadian Experience Class," an immigration stream for temporary foreign workers or foreign students who graduated in Canada, speak fluent English and/or French, and would like to become permanent residents. For more information on the "Canadian Experience Class" see: www.cic.gc.ca/english/immigrate/cec/index.asp.

[7] For more detailed information on employment barriers facing newcomers, see, for example, V. Kukushkin and D. Watt, "Immigrant-Friendly Businesses: Effective Practices for Attracting, Integrating, and Retaining Immigrants in Canadian Workplaces," (2009) Conference Board of Canada at page 12, available online at: www.conferenceboard.ca/temp/e5fa823a-e869-4bbe-910b-0fa8eef12ef3/10-041_CanCompete_ImmigrantBusiness_WEB1.pdf (date retrieved: May 11, 2012); Weiner, *supra*, note 5; Ministry of Training, Colleges and Universities, *The Facts Are In! A study of the characteristics and experiences of immigrants seeking employment in regulated professions in Ontario*, (2002) at 22, available online at: www.edu.gov.on.ca/eng/document/reports/facts02.pdf (date retrieved: November 13, 2012).

Best practices

Employers, representatives of employers and regulatory bodies <u>should:</u>

- Examine their organizations as a whole to identify potential barriers for newcomers; address any barriers through organizational change initiatives, such as by forming new organizational structures, removing old practices or policies that give rise to human rights concerns, using more objective, transparent processes, and focusing on more inclusive styles of leadership and decision-making.
- Review job requirements and descriptions, recruitment/hiring practices and accreditation criteria to make sure they do not present barriers for newcomer applicants.
- Take a flexible and individualized approach to assessing an applicant's qualifications and skills.
- Give an applicant the opportunity to prove his/her qualifications through paid internships, short contracts or positions with probationary periods.
- Provide newcomers with on-the-job training, supports and resources that will enable them to close "skill gaps" (*i.e.* acquire any skills or knowledge they may be lacking).
- Use competency-based methods to assess an applicant's skill and ability to do the job.
- Consider all relevant work experience – regardless of where it was obtained.
- Frame job qualifications or criteria in terms of competencies and job-related knowledge and skills.
- Support initiatives designed to empower newcomers inside and outside of their organizations (for example, formal mentoring arrangements, internships, networking opportunities, other types of bridging programs, language training, *etc*.).
- Monitor the diversity ratios of new recruits to make sure they reflect the diversity of competent applicants overall.
- Implement special programs,[8] corrective measures or outreach initiatives to address inequity or disadvantage affecting newcomers.
- Supply newcomers and social service agencies serving newcomers with information about workplace norms, and expectations and opportunities within the organization.
- Retain outside expertise to help eliminate barriers to newcomer applicants.
- Form partnerships with other similar institutions that can help identify additional best practices.
- Provide all staff with mandatory education and training on human rights and cultural competence.[9]

[8] For more information, see the OHRC's publication, *Special Programs and the Ontario Human Rights Code: A Self-Help Guide*, 2012, available online at: www.ohrc.on.ca/en/special-programs-and-ontario-human-rights-code-self-help-guide.

[9] Wikipedia defines "cultural competence" as "an ability to interact effectively with people of different cultures, particularly in the context of human resources, non-profit organizations, and government agencies whose employees work with persons from different cultural/ethnic backgrounds. Cultural competence comprises four components: (a) Awareness of one's own cultural worldview, (b) Attitude towards cultural differences, (c) Knowledge of different cultural practices and worldviews, and (d) Cross-cultural skills. Developing cultural competence results in an ability to understand, communicate with, and effectively interact with people across cultures." See http://en.wikipedia.org/wiki/Cultural_competence (date retrieved: November 10, 2012).

Employers, representatives of employers and regulatory bodies <u>should not:</u>

- Require applicants to have prior work experience in Canada to be eligible for a particular job.
- Assume that an applicant will not succeed in a particular job because he or she lacks Canadian experience.
- Discount an applicant's foreign work experience or assign it less weight than their Canadian work experience.
- Rely on subjective notions of "fit" when considering an applicant's ability to succeed in the workplace.
- Include a requirement for prior Canadian work experience in the job posting or ad, or a requirement for qualifications that could only be obtained by working in Canada.
- Require applicants to disclose their country of origin or the location of their work experience on the job application form.
- Ask applicants questions that may directly or indirectly reveal where their work experience was obtained.
- Ask for local references only.

In a 2003 report, Statistics Canada identified a lack of Canadian experience as the most common barrier for newcomers looking for meaningful employment in Canada. This research showed that this barrier continued to exist two years after their arrival.[10] A recent University of British Columbia study found that Canadian employers value Canadian work experience over international work experience.[11]

In 2012, the OHRC did a public survey on requirements for Canadian experience in the employment sector. The OHRC received more than 1,000 responses from job seekers, regulatory body[12] applicants, employers and others. In addition, the OHRC consulted with a range of organizations and individuals, including agencies serving newcomers, employers, government and regulatory bodies. This background work showed that newcomers face Canadian experience requirements from employers at the job search

[10] Statistics Canada, "Longitudinal Survey of Immigrants to Canada: Process, Progress, and Prospects," 2003, at pages 33-34, available online at: www.statcan.gc.ca/pub/89-611-x/89-611-x2003001-eng.pdf (date retrieved: May 29, 2012)

[11] For example, employer callback rates for résumés that listed only foreign job experience was significantly lower than for those résumés that included work experience in Canada: see Philip Oreopoulos, "Why Do Skilled Immigrants Struggle in the Labor Market? A Field Experiment with Six Thousand Resumes," 2009, available online at: www.nber.org/papers/w15036 (date retrieved: May 28, 2012).

[12] The term "regulatory body" is used in this policy to describe organizations (legislated or not) that oversee a particular profession and govern their members in the public interest. Some regulatory bodies issue licences to trained professionals to enable them to practise their profession in the Province of Ontario. In this sense, they are the gatekeepers to their particular profession or trade. Other regulatory bodies do not have a "gatekeeping" function as such. Although membership in this type of regulatory body may be voluntary, it may come with certain advantages for individuals seeking to practise in that particular profession, including a professional designation, certification, or accreditation. As mentioned above, many regulatory bodies derive their authority to govern a particular profession from legislation. It is important to note that, as a quasi-constitutional document, the *Human Rights Code* has primacy over this legislation, unless the legislation states otherwise.

stage.[13] They also face these obstacles when they try to get professional accreditation, as many regulatory bodies will not admit new members without prior work experience in Canada.[14]

When facing a requirement for Canadian experience, newcomers are in a very difficult position: they can't get a job without Canadian experience and they can't get Canadian experience without a job.[15] Responses to the OHRC's survey show that many newcomers turn to unpaid work (*e.g.* volunteering or internships) or "survival jobs" – low-skill work outside of their field of expertise – to meet the requirement for Canadian experience. For example, two survey respondents wrote:

> […] It took me a very long time to find a job and the one that I finally got was due to my many, many months of continuous hard work and long hours as a volunteer. The work I do now has nothing to do with what I went to college for. It was sad, depressing and a financially-draining struggle for me.

> […] The main reason that they cited [in support of their decision not to hire me] is lack of Canadian experience. I have all the qualifications and over 12 years of experience in a multi-cultural and fast-paced work environment, and I feel that I have good communication skills too. I have even offered to work without wages for a few weeks so that they can judge me and my work. I have started getting frustrated and am planning to go back. They say they need skilled workers but don't recognize your overseas experience.

[13] Feedback from the OHRC's survey shows that while some employers ask for Canadian experience in their job ads, it appears to be more common for employers to ask about Canadian experience in more subtle ways (for example, through in-person interviews, or through recruitment agencies). Agencies serving newcomers told the OHRC that, in some cases, employers may disregard a résumé that lacks evidence of Canadian experience, without the job applicant ever knowing the reason why he or she was never contacted for the position. Employers may also form conclusions about an applicant's lack of Canadian experience based on factors such as an unfamiliar résumé or cover letter format, references in a résumé to foreign work experience or foreign educational credentials, written communication style, *etc*.

[14] The Office of the Fairness Commissioner (OFC), an arm's length agency of the Government of Ontario, was set up in 2007 to make sure that everyone who is qualified to practise in a regulated profession in Ontario can get a licence to practise here. It looks at barriers in the registration practices of some regulatory bodies. For example, the OFC asks whether international experience is sufficient to meet the objectives of a workplace or clinical experience requirement, and asks to what extent Canadian or Ontario experience is needed to practice a profession in Ontario. For more information, see: www.fairnesscommissioner.ca/en/index.php.

[15] Larose and Tillman, *supra*, note 2 at 2.

A newcomer will find it harder to integrate into Canadian society, and to contribute meaningfully to their new homeland, if they cannot earn an adequate wage.[16] Decent employment is needed for socio-economic well-being, which in turn affects health, access to education and access to services. As one British Columbia human rights tribunal observed: "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."[17]

Newcomers, employers and Canadian society at large suffer untold losses when people are not able to work to their full capacity. And, if Canada is seen as a place where it is impossible to find a good job, a job in your field, or where, as an engineer or a Ph.D. graduate you are likely to end up driving a taxi, it will no longer be a desirable destination for many of the world's most skilled immigrants. They will simply choose to go elsewhere.

2. The Ontario *Human Rights Code*

Many immigrants who have chosen Canada as their home have settled in Ontario. Statistics Canada reports that in Toronto, "almost half of the population (47.3%) is foreign born, the highest share for any major city in the developed world, including New York, Miami and Sydney."[18]

Section 5 of the *Code* states that every person in Ontario has a right to be free from discrimination in employment based on race, ancestry, colour, place of origin and ethnic origin. People should not experience barriers to employment based on characteristics that are associated with any of these grounds.

Section 6 of the *Code* states that every person in Ontario has a right to be free from discrimination with respect to membership in any trade or occupational association or self-governing profession based on race, ancestry, colour, place of origin and ethnic origin. Therefore, the bodies that govern regulated professions and compulsory trades should avoid using membership or licensing criteria that could discriminate against people based on these grounds.

---

[16] Some newcomers may find that while they are successful getting a job, their lack of Canadian experience negatively affects their compensation rates, and/or their opportunities for promotion and advancement within the organization. For example, in *Clarke Institute of Psychiatry v. Ontario Nurses' Assn,* [2001] O.L.A.A. No. 184, a grievance was upheld when the employer denied the grievors' out-of-country credit on the salary grid based on their race and place of origin. The employer's policies were discriminatory because they required that employees with African experience file verification of their out-of-country experience, yet they did not require an employee with experience from Ireland to file the same verification. See also *Re Eastern Ontario Health Unit and A.A.H.P.O.,* [1996] O.L.A.A. No. 898.

[17] *Bitonti v. British Columbia (Ministry of Health) (No. 3)* (1999), 36 C.H.R.R. D/263 at para. 381.

[18] Garnett Picot, "Immigrant Economic and Social Outcomes in Canada: Research and Data Development at Statistics Canada," Statistics Canada, 2008, available online at: www.publications.gc.ca/collections/collection_2008/statcan/11F0019M/11f0019m2008319-eng.pdf (date retrieved: May 24, 2012)

Discrimination under the *Code* can be direct: for example, an employer may refuse to grant a job to someone because of prejudices related to the person's place of origin. But the *Code* also prohibits discrimination that results from requirements, qualifications or factors that may appear neutral but which have a negative effect on people identified by the *Code.* This is often called "adverse effect" or "constructive" discrimination.[19] A job ad, hiring or accreditation process that limits the opportunity to people with Canadian experience can have an adverse impact on recent immigrants. Most newcomers to Canada will not yet have Canadian work experience, even though they may have relevant international experience and be qualified to do the job or be professionally accredited. One respondent to the OHRC's survey stated:

> The specifics of the experience outlined in the job advertisement could not possibly have been gained outside of Canada. For instance, most of the jobs in my field require that I have knowledge of the Canadian banking regulations which I obviously can't have having not worked or been educated here.

A distinction based on where a person acquired their work experience may indirectly discriminate based on *Code* grounds such as race, ancestry, colour, place of origin and ethnic origin.

Barriers in the recruitment, selection and hiring of employees, or in the accreditation processes of regulatory bodies may result in systemic discrimination. Systemic or institutional discrimination consists of patterns in an organization's behaviour, policies or practices that create or continue a position of relative disadvantage for people identified by the *Code*.[20] These appear neutral on the surface, but can exclude people identified by *Code* grounds. Systemic or institutional discrimination can be a major barrier to newcomers to Ontario who are trying to find decent employment or become accredited members of their professions.

---

[19] Section 11 of the *Code* allows the person or organization responsible for accommodation to show that the requirement, qualification or factor is reasonable and *bona fide* by showing that the needs of the group to which the complainant belongs cannot be accommodated without undue hardship. For more discussion, see the section entitled, "Legitimate employment requirements."

[20] From C. Agocs, "Surfacing Racism in the Workplace: Qualitative and Quantitative Evidence of Systemic Discrimination" " (2004) 3:3 Canadian Diversity 25 at 25. Other definitions have been offered, for example:

> *…practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics….* [from *Action Travail des Femmes v. Canadian National* (1984), 5 C.H.R.R. D/2327 (C.H.R.T.), aff'd (1987), 8 C.H.R.R. D/4210 (S.C.C.)
>
> *…systemic discrimination…results from the unintended consequences of established employment systems and practices. Its effect is to block employment opportunities and benefits for members of certain groups. Since the discrimination is not motivated by a conscious act, it is more subtle to detect and it is necessary to look at the consequences or the results of the particular employment system.* [from *National Capital Alliance on Race Relations v. Canada (Health and Welfare)* (1997), 28 C.H.R.R. D/179 (C.H.R.T.) [at para. 164.]

> **Example:** A regulatory body requires all applicants to complete a 10- month internship program in Canada as a condition of the licensing process. Even though all applicants must meet this condition, many newcomers to Canada have a harder time getting internships because of characteristics associated with race, ancestry, colour, place of origin and ethnic origin. As a result, this requirement will likely have an adverse impact on newcomers.

The courts have emphasized the importance of ensuring "substantive equality" in human rights law. 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.

Section 23(1) of the *Code* prohibits employers from publishing or displaying employment ads or invitations to apply that directly or indirectly classify or indicate qualifications by a prohibited ground of discrimination. References to Canadian experience in job ads may discourage newcomers, who would otherwise be qualified for the position, from submitting an application. An employer that publishes ads that include requirements for Canadian experience risks violating the *Code*.

Section 23(2) of the *Code* prohibits using an employment application form or asking the applicant written or oral questions that directly or indirectly classifies them based on a prohibited ground of discrimination. At the application stage, employers should not ask whether a candidate has Canadian experience. Doing so may reveal *Code*-related characteristics about the applicant. Employers should only ask about the candidate's relevant trade, professional or other qualifications and prior experience, regardless of where they got it.

Under section 23(3) of the *Code*, an employer might be able to ask about Canadian experience in a job interview or state that Canadian experience is preferred, but only if they can show that work experience in Canada is a legitimate requirement, and that providing accommodation would cause undue hardship. The legal test for such requirements is a high one and is set out below. Otherwise, employers should not ask questions about where an applicant got their experience.

Section 23(4) of the *Code* prevents an employer from using an employment agency to hire people based on preferences related to *Code* grounds. Some respondents to the OHRC's survey said that the barriers they encountered were put in place by employment agencies. For example, one person wrote: "a number of jobs to which I applied directly were also on the portals of some recruiters and the recruiters did not shy away from saying that the employer is looking for people with Canadian work experience." Section 23(4) prohibits an employer from using an employment agency to recruit, select, screen or hire people based on whether they have Canadian work experience.

Employers and regulatory bodies should assess all prior work experience, regardless of where it was obtained. Often, there are easy ways to assess a person's skills and abilities without having to contact a Canadian reference or insist on prior work experience in Canada.

> **Example:** An employer is looking for a typist/receptionist. Even if the person received their training in another country, there are several options available to verify skills, including standardized tests (typing tests, for example), letters of reference or probationary periods.

Employment requirements and duties should be reasonable, genuine and directly related to doing the job. Similarly, in the case of regulatory bodies, accreditation requirements should be reasonable, genuine and directly related to the applicant's competence. The OHRC's position is that a strict requirement for "Canadian experience" is discriminatory on its face and can only be used in limited circumstances. The onus will be on employers and regulatory bodies to show that a requirement for Canadian experience is a *bona fide* requirement, based on the legal test set out below.

3. Legitimate employment requirements

There is no common understanding of the skills employers or regulatory bodies are trying to assess when they impose a requirement that applicants have Canadian experience. This can be extremely frustrating for newcomers who may be qualified for a position or professional accreditation, but who have not yet worked in Canada, and are not given a chance to prove their qualifications. Many newcomers feel that the approach of many Canadian employers is "arbitrary and often needlessly penalizes them for their lack of Canadian experience and credentials."[21] In some cases, requiring applicants to have Canadian experience may be disguised discrimination, and a way to screen out newcomers from the hiring process.[22] One respondent to the OHRC's survey stated:

> I have worked all over Europe and I know that there [is] no problem like "European experience". I believe that Canadian experience is a self-invented barrier to stop immigrants with high education getting into highly-paid, high level jobs.

[21] Jean Lock Kunz, *et al.*, "Unequal Access: A Canadian Profile of Racial Differences in Education, Employment and Income," at 29; available online at: http://atwork.settlement.org/downloads/Unequal_Access.pdf (date retrieved: June 7, 2012).

[22] In a recent study that looked at why Canadian immigrants, allowed into Canada based on their skill, continue to struggle in the labour market, University of British Columbia researchers found that résumés of people with English-sounding names received interview requests 40% more often than applicants with Chinese, Indian or Pakistani names. The author of the study concluded that "overall, the results suggest considerable employer discrimination against applicants with ethnic names or with experience from foreign firms." See Oreopoulos, *supra*, note 11 at 1.

Some employers may mistakenly believe that the only way for a job applicant to show that they "have what it takes" to be effective or "fit" in a Canadian workplace is to show that they already have experience working in Canada.[23] These employers may think that a Canadian experience requirement can be used as a short-cut, or a proxy, to measure a person's competence and skills.[24] Similarly, some regulatory bodies may believe that an applicant can only learn the Canadian norms and standards of their particular trade or profession if they have spent time working in a Canadian environment or working under the supervision of someone who is licensed to practise that profession in Canada.

Even where employers and regulatory bodies may be acting in good faith, a candidate's Canadian experience, or lack thereof, is not a reliable way to assess a person's skills or abilities. And, imposing requirements of this nature may contravene the *Code*. Employers and regulatory bodies should be clear about the specific qualifications they are seeking, rather than using "catch-all" terms like "Canadian experience." For example, if the ability to communicate effectively is what is required, they should state this clearly and give applicants the opportunity to show this skill.

A requirement for Canadian experience, even when implemented in good faith, can be a barrier in recruiting, selecting, hiring or accrediting, and may result in discrimination. Under the *Human Rights Code*, where discrimination is found, the organization or institution the claim is made against may establish a defence to the discrimination by showing that the policy, rule or requirement that resulted in unequal treatment is a legitimate standard, or a "*bona fide*" requirement. In the *Meiorin*[25] 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 hardship.

[23] Izumi Sakamoto, *et al.*, (2010). "'Canadian Experience,' Employment Challenges, and Skilled Immigrants: A Close Look Through 'Tacit Knowledge,'" available online at: www.beyondcanadianexperience.com/sites/default/files/csw-sakamoto.pdf (date retrieved: March 19, 2013).

[24] In an age of advanced global communication, modern technology provides various ways for employers and others to quickly and easily access or verify an applicant's foreign qualifications or credentials.

[25] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* ["*Meiorin*"], [1999] 3 S.C.R. 3.

As a result of this test, the rule or standard itself must be as inclusive as possible of individual differences, rather than maintaining discriminatory standards with accommodation for those people who cannot meet them. Even then, there may still be a need to accommodate individual differences up to the point of undue hardship. This ensures that each person is assessed according to his or her own personal abilities instead of being judged against presumed group characteristics.[26]

For an employment or accreditation requirement, such as having Canadian experience, to be found to be legitimate or "*bona fide*," an organization must show that they have made the requirement as inclusive as possible and that they have taken steps to accommodate applicants covered by the *Code.* This would mean assessing people on an individual basis, and would include considering non-Canadian experience and other qualifications.

The procedure used to assess and achieve accommodation is as important as the substantive content of accommodation. Some of the questions to be considered are:

- Did the person responsible for accommodation investigate alternative approaches that do not have a discriminatory effect?
- Why were viable alternatives not implemented?
- Can there be different standards that reflect group or individual differences and capabilities?
- Can an organization's legitimate objectives be met in a less discriminatory way?
- Is the standard designed to make sure the desired qualification is met without placing undue burden on the people it applies to?
- Have all the people who are obliged to assist in the search for accommodation fulfilled their roles?[27]

Recruitment, selection, hiring and accreditation decisions should not be made based on stereotypes[28] about people or assumptions about the quality of work experience not gained in Canada. Employers and regulatory bodies should not treat a lack of work experience in Canada as equivalent to negative work experience or a bad employer reference, for example. The tendency by employers to devalue foreign work experience was a major theme throughout the responses to the OHRC's survey. One person said:

> The first question is if I have Canadian experience, or, in the worst of cases, if I have experience in Ontario. Then all my professional background goes to the garbage can… In some way, they force me to start again from zero and I have to make all my experience over here…

[26] *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* ["*Grismer*"], [1999] 3 S.C.R. 868 at para. 19.
[27] *Ibid.*
[28] Stereotyping can be described as a process where people use social categories such as race, colour, ethnic origin, place of origin, *etc.* in acquiring, processing and recalling information about others. Stereotyping typically involves attributing the same characteristics to all members of a group, regardless of their individual differences. It is often based on misconceptions, incomplete information and/or false generalizations.

Where an applicant lacks Canadian experience for reasons related to a *Code* ground, employers and regulatory bodies should look at other available information to make a reasonable and fair assessment.[29]

Applicants should be assessed on an individual basis, rather than being screened out based on general rules. When looking at the accreditation of foreign professionals, tribunals have applied the test in *Meiorin* and found evaluation standards to be *bona fide* where they are not based on assumptions about the superiority of Canadian training, but rather have used individual assessments that have regard for the actual training received.[30]

All prior work experience should be assessed, regardless of where it was obtained. Employers should seek job-related qualifications (for example, the ability to plan a project and complete it to required timelines or the ability to show familiarity with Canadian laws, industry norms or standards). Applicants should be given the opportunity to establish relevant skills and experience in a variety of ways. The essential question is whether the applicant is qualified to do the job at hand.

> **Example:** Rather than imposing a general Canadian experience requirement on job applicants, or insisting that they have established local business contacts before they are hired, an advertising agency provides job applicants with the opportunity to show their ability to generate business.
>
> **Example:** Instead of requiring all foreign-trained applicants to undergo two years of practicum training to receive a professional designation, a regulatory body provides the opportunity for applicants to show their technical skills and knowledge in a practical, competency-based test.

This approach is consistent with case law dealing with assessing the credentials of foreign-trained professionals. In *Bitonti v. British Columbia (Ministry of Health)*, a case that dealt with the qualifications of international medical school graduates, the tribunal recognized the importance of having a mechanism where graduates can 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.[31] The tribunal found it problematic that the applicants were not provided with "the ability to demonstrate the equivalency of their qualifications."[32]

---

[29] This approach is consistent with the approach taken in *Ahmed v. 177061 Canada Ltd.* (2002), 43 C.H.R.R. D/379 (Ont. Bd. Inq.) in which it was found, in the context of rental housing, that treating the lack of a rental history in the same way as a negative rental history results in discrimination where the lack of a rental history is related to a *Code* ground, as is the case with newcomers, refugees and others.
[30] *White v. National Committee on Accreditation*, 2010 HRTO 1888 (CanLII).
[31] *Bitonti v. British Columbia (Ministry of Health) (No. 3)* (1999), 36 C.H.R.R. D/263 at para. 381.
[32] *Ibid* at para. 235.

Decision-making processes related to hiring or accreditation should be as transparent as possible. Job ads, for example, should state clearly the specific skills and work experience that are required for each of the duties associated with the position, and job requirements must be related to the position. Job applicants should be given an opportunity to show their abilities during interviews and even in a simulated job setting.

Employers who routinely refuse to hire people who are identified by specific *Code* grounds may be motivated by negative attitudes, biases and/or stereotypes. In the context of employment, actions based on discriminatory stereotypes are a violation of the *Code*. Employers should rely on objective and standardized criteria when choosing applicants to minimize the chances that discrimination will play a role in the selection process. Assessments based on whether a person would "fit" into the culture of a workplace, for example, open the door for cultural biases and stereotypes to influence decision-making, and may exclude *Code*-protected people. Where an employer receives multiple job applications, they should be prepared to show how they chose the successful applicant.[33]

The onus is on the employer or the regulatory body to show that a requirement for people to have work experience in Canada is *bona fide* and reasonable. An organization will not be able to show this unless they can show that they have taken a flexible approach, assessed the individual's other types of experience, and weighed this against other requirements.

4. Organizational responsibility

Organizations and institutions have a responsibility to be aware of whether their practices, policies and programs have a negative impact or result in systemic discrimination against people or groups protected by the *Code*. It is not acceptable from a human rights perspective to choose to remain unaware of the potential existence of discrimination or harassment, to ignore or to fail to act to address human rights matters, whether or not a complaint has been made. Human rights decisions are full of findings of liability and assessments of damages that are based on, or aggravated by, an organization's failure to appropriately address discrimination.

Organizations and institutions operating in Ontario must have measures in place to prevent and respond to breaches of the *Code*. They have a duty to take steps to foster environments that respect human rights. This takes commitment and work, but is part of the cost of doing business in a province that is committed to the goal of equality, as a matter of public policy expressed through the *Code*.

[33] In *Lasani v. Ontario (Ministry of Community and Social Services) (No. 2)* (1993), 21 C.H.R.R. D/415 (Ont. Bd. Inq.), the tribunal stated at paragraph 54: "I entirely accept the view urged upon me by the Commission that where ethnic prejudice is a reality, but a secret, unadmitted reality, a board of inquiry should look very carefully at the proffered explanations for failure to hire or failure to promote members of ethnic communities who are otherwise qualified for a position, but are not hired or promoted."

A solid organizational anti-discrimination program will have the following components[34]:

(1) a comprehensive anti-discrimination statement and policy
(2) proactive, ongoing monitoring
(3) implementation strategies, and
(4) evaluation.

The Supreme Court of Canada has made it clear that systems must be designed to include all persons.[35] The ethno-racial diversity that exists in Ontario should be reflected in the structure of employment and accreditation programs and practices. An organization must make sure its practices create inclusiveness, instead of merely making exceptions to allow individuals to fit into an existing system. Barriers should be prevented at the design stage, including when developing job descriptions and/or job or accreditation requirements. In established systems, organizations should be aware of the possibility of systemic barriers and actively seek to identify and remove them.

> **Example:** A major banking institution wants to make sure that biases in favour of Canadian experience do not infiltrate the job competition process. As a precautionary measure, the bank does not include a question about "country of origin" on its job application form.

> **Example:** An accounting firm stipulates that an applicant must be a designated accountant, rather than saying that the applicant must be a member of the CA, CMA, or CGA (local designations that would exclude most foreign-trained accountants).

To make sure they are complying with their duties under the *Code*, employers and regulatory bodies should be familiar with and follow the best practices chart set out earlier in this policy. These best practices will help to make sure that newcomers do not experience discriminatory barriers in their job searches or in the accreditation process, and that they can access employment that best uses their skills and qualifications.

5. Conclusion

The OHRC's position is that a strict requirement for "Canadian experience" is discriminatory on its face and can only be used in limited circumstances. The onus will be on employers and regulatory bodies to show that a requirement for prior work experience in Canada is a *bona fide* requirement, based on the legal test set out in this policy. Employment and accreditation requirements should be clear, reasonable, genuine and directly related to performing the job.

---

[34] For more detailed information on preventing and responding to racial and race-related discrimination, see section 7 of the OHRC's *Policy and Guidelines on Racism and Racial Discrimination*, available online at: www.ohrc.on.ca/en/policy-and-guidelines-racism-and-racial-discrimination.
[35] *Meiorin*, *supra*, note 25 at 38 (in the context of gender) and *Grismer*, *supra*, note 26 at 880 (in the context of disability).

The Ontario *Human Rights Code* prohibits employment and professional association membership requirements that may have an adverse effect on people based on *Code* grounds, including race, ancestry, colour, place of origin and ethnic origin.

Newcomers should be able to access job opportunities that match their education, skills and experience, and be given the opportunity to contribute meaningfully to their new homeland. Businesses that welcome and invest in newcomers will benefit from the skills and rich experience they have to offer, and will enhance their ability to compete in the modern global economy. Canada as a nation benefits from the contributions of immigrants – and it needs these contributions to ensure its future economic growth and competitiveness.

Appendix A: Purpose of OHRC policies

Section 30 of the Ontario *Human Rights Code* authorizes the OHRC to prepare, approve and publish human rights policies to provide guidance on interpreting provisions of the *Code*. The OHRC's policies and guidelines set standards for how individuals, employers, service providers and policy-makers should act to ensure compliance with the *Code*. They are important because they represent the OHRC's interpretation of the *Code* at the time of publication. [36] Also, they advance a progressive understanding of the rights set out in the *Code.*

Section 45.5 of the *Code* states that the HRTO may consider policies approved by the OHRC in a human rights proceeding before the HRTO. Where a party or an intervenor in a proceeding requests it, the HRTO *shall* consider an OHRC policy. Where an OHRC policy is relevant to the subject-matter of a human rights application, parties and intervenors are encouraged to bring the policy to the HRTO's attention for consideration.

Section 45.6 of the *Code* states that if a final decision or order of the HRTO is not consistent with an OHRC policy, in a case where the OHRC was either a party or an intervenor, the OHRC may apply to the HRTO to have the HRTO state a case to the Divisional Court to address this inconsistency.

OHRC policies are subject to decisions of the Superior Courts interpreting the *Code*. OHRC policies have been given great deference by the courts and the HRTO,[37] applied to the facts of the case before the court or the HRTO, and quoted in the decisions of these bodies.[38]

---

[36] Note that case law developments, legislative amendments, and/or changes in the OHRC's own policy positions that took place after a document's publication date will not be reflected in that document.

[37] In *Quesnel* v. *London Educational Health Centre* (1995), 28 C.H.R.R. D/474 at para. 53 (Ont. Bd. Inq.), the tribunal applied the United States Supreme Court's decision in *Griggs* v. *Duke Power Co*., 401 U.S. 424 (4th Cir. 1971) to conclude that OHRC policy statements should be given "great deference" if they are consistent with *Code* values and are formed in a way that is consistent with the legislative history of the *Code* itself. This latter requirement was interpreted to mean that they were formed through a process of public consultation.

[38] The Ontario Superior Court of Justice has quoted at length excerpts from the OHRC's published policy work in the area of mandatory retirement and stated that the OHRC's efforts led to a "sea change" in the attitude to mandatory retirement in Ontario. The OHRC's policy work on mandatory retirement heightened public awareness of this issue and was at least partially responsible for the Ontario government's decision to pass legislation amending the *Code* to prohibit age discrimination in employment after age 65, subject to limited exceptions. This amendment, which became effective December 2006, made mandatory retirement policies illegal for most employers in Ontario: *Assn. of Justices of the Peace of Ontario* v. *Ontario (Attorney General)* (2008), 92 O.R. (3d) 16 at para. 45. See also *Eagleson Co-Operative Homes, Inc.* v. *Théberge,* [2006] O.J. No. 4584 (Sup.Ct. (Div.Ct.)) in which the Court applied the OHRC's *Policy and Guidelines on Disability and the Duty to Accommodate*, available at: www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2

Appendix B: International obligations

International human rights law recognizes the interrelationship between economic status, marginalization, social exclusion and racism. Several international instruments affirm the importance of removing barriers and taking corrective steps to achieve equal participation in all aspects of society.[39] The Supreme Court of Canada has indicated that the values and principles enshrined in international law constitute a part of the legal context in which legislation is interpreted and applied.[40] Also, human rights commissions have been identified as key institutions in implementing and protecting international human rights standards. Accordingly, the OHRC uses applicable international standards when developing policy, and to inform how it applies and interprets the *Code*.

[39] See, for example, the *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 U.N.T.S. 195 (entered into force 04 January 1969, accession by Canada 14 October 1970); the *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights, UN Doc. A/CONF. 157/23 (1993), endorsed GA Res. 48/121, UN Doc. A/RES/48/121 (1993); the *Declaration on Race and Racial Prejudice,* adopted and proclaimed by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) 27 November 1978, E/CN.4/Sub.2/1982/2/Add.1, annex V, 1982; and, the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance *Declaration and Programme of Action*, 25 January 2002, A/CONF.189/12.

[40] See *Slaight Communications Inc. v. Davidson,* [1989] 1 S.C.R. 1038 and *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 70-71.