

Foreign Trained Teachers: The Emergence of the Right to Practise their Profession in
Ontario

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Abstract

The purpose of this thesis is to examine the impact of 2 recent legal events, specifically the Fair Access to Regulated Professions Act (2006) and *Siadat v. Ontario College of Teachers* (2007) decision, with regards to the opportunity of foreign trained teachers to practice their profession in Ontario. The emphasis is on the case of Fatima Siadat, who was a teacher in Iran but was unable to satisfy all the licensing requirements of the Ontario College of Teachers and consequently was unable to practise her profession in Ontario. When the Ontario College of Teachers Appeals Committee upheld the previous decision of the Ontario College of Teachers Registrar to refuse to issue her a teacher's certificate, Ms. Fatima Siadat decided to initiate a lawsuit. Ms. Fatima Siadat challenged the decision of the Ontario College of Teachers Appeals Committee by raising a question of applicability of human rights legislation (i.e., The Ontario Human Rights Code, 1990) on the Ontario College of Teachers' decisions. The Ontario Superior Court of Justice decided in January of 2007 in favour of Ms. Fatima Siadat (*Siadat v. Ontario College of Teachers*, 2007) and ordered that her licensing application be reconsidered by the Ontario College of Teachers Appeals Committee. In this thesis the author argues that the Fatima Siadat decision, together with the Fair Access to Regulated Professions Act, 2006, will likely make a significant contribution to enhancing the access of foreign trained teachers and other professionals to practice their regulated professions in Ontario.

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CHAPTER ONE: INTRODUCTION

This chapter begins with a personal anecdote which illustrates common barriers experienced by foreign trained professionals in their attempts to integrate into Canada's workforce.

Savo's Story

Savo came to Canada in 2005 as a landed immigrant under the skilled worker class category. As a music teacher from Serbia, he received a high number of points through the federal government's selection system based on his attained level of education (i.e., an undergraduate degree in history of music), working experience in the field (i.e., 5 years), language proficiency, and age (i.e., 30 years).

Upon his arrival in Canada, Savo was amazed by the hospitality and the multicultural spirit of his host country. His friend advised him to submit his academic credentials for an evaluation to World Educational Services (WES), which is the Ontario government's mandated credential service provider. Savo's excitement at being in Canada was furthered when he received the official letter from WES indicating that his undergraduate degree from Serbia was equivalent to a Canadian 4 year Bachelor degree in music. However, his frustrations began when he first learned that even though the assessment of foreign credentials by WES is recognized by many educational institutions, regulatory bodies, and employers in Ontario, the only acceptable assessment of foreign credentials for a person who wishes to pursue a teaching career in Ontario is the one conducted by the Ontario College of Teachers (hereinafter College). Considering that he wanted to pursue a teaching career in Ontario, Savo decided to apply to the College for a teaching certificate.

The College returned Savo's application as invalid since he could not satisfy one of the requirements; specifically his original academic credentials could not be sent directly from the granting institution. He graduated from high school in Sarajevo (Bosnia and Herzegovina) and, unfortunately, the official documents of his graduation were destroyed during the 1990s civil war. Furthermore, Savo graduated from the Academy of Music at the University of Belgrade; however, his original credentials could not be sent directly since this was not in accordance with the university policy. Savo's personal request to have his original credentials sent was also unsuccessful. He had his original secondary school and university degree, as well as the certificate of Canadian equivalency issued by WES, but according to the College's strict requirements, these documents were not considered valid. Savo experienced further disappointment when he recently applied for a position (i.e., instructor of piano) in one of the private schools of music in Toronto. He was advised by his potential employer to complete at least grade 12 of the music school in Toronto before applying again, mainly because parents of the children attending that school prefer someone who has a diploma from Canada.

After all the barriers Savo has encountered in his attempts to enter the teaching profession in Ontario, he feels a great deal of disappointment. Currently, he supports himself and his family by working as a waiter, and he does not see any plausible possibilities of being able to practise his profession in Ontario in the near future (Savo, personal communication, September 20, 2006).

Background of the Problem

Canada is internationally recognized as a democratic and tolerant society that supports principles of equality and human rights. In 1971 the government of Pierre

Trudeau declared *multiculturalism* to be official federal policy. In 1988 Bill-C-93, the Canadian Multicultural Act, was passed with the aim of preserving and enhancing multiculturalism in Canada. Canada thus became one of the first countries in the world proclaiming multiculturalism as an official policy. The main principles of multiculturalism in Canada are defined in terms of equality of opportunity, full and equal participation in society, and respect for diversity of all members of the Canadian society regardless of their culture, language, religion, political and social views, or national origins (Foster, 1994).

Furthermore, the incorporation of the *Canadian Charter of Rights and Freedoms* (hereinafter *Charter*) into the Constitution Act in 1982 has had a major impact on the promotion and protection of human rights in Canada. Section 27 of the *Charter* specifies that the *Charter* be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians (Black & Smith, 2005; Canadian Charter of Rights and Freedoms, 1982). In addition, the *Charter* recognizes equality as one of Canada's fundamental values. More specifically, Section 15 (1) of the *Charter* establishes that:

Every individual is equal before and under the law, and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. (Canadian Charter of Rights and Freedoms, 1982, Equality Rights section, para. 1)

Section 15 (1) thus protects every individual in Canada, including noncitizens (i.e., landed immigrants or refugees) from discrimination based on the above listed criteria.

The Supreme Court of Canada, however, has held that section 15 (1) also protects equality on the basis of other characteristics that are not specifically set out in section 15 (1). Such “analogous grounds”, which are similar to those already listed in section 15 (1), include grounds such as citizenship, sexual orientation, and marital status. However, the list of “analogous grounds” has not been finalized; thus it is possible that it can be further expanded by the interpretation of the Supreme Court of Canada. Complementary to the federal legislation, provincial human rights legislation also directly prohibits discrimination with respect to employment, services, and membership in an occupational association or self-governing profession (Cornish, McIntyre, & Pask, 2000; Janzen, Tokaci, Case, Vinograd, & Bertao, 2004). For example, in Ontario, Section 6 of the Human Rights Code (herein after *Code*) states that:

Every person has a right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap. (The Ontario Human Rights Code, 1990, Freedom from Discrimination section, para. 1)

In addition to equality and human rights legislation, Canada is known as a country that supports and welcomes immigrants and refugees from all parts of the world. One of Canada’s strategies to modernize its workforce can be seen in the number of professionally qualified people that enter Canada each year (Bambrah & Fernandez, 2004). For example, recent estimates suggest that over 200,000 people arrive in Canada each year (Canadian Labour and Business Centre, 2004). Canada also ranks third in the

world in the total number of immigrants that it has accepted (i.e., 5.5 million), and these individuals comprise approximately 18% of the total Canadian population (Canadian Labour and Business Centre). Additionally, current Canadian immigration policy (i.e., Immigration and Refugee Protection Act, 2002) is designed to attract skilled worker class immigrants.

In spite of the fact that about 90% of recent skilled immigrants have postsecondary education or training (Ontario Ministry of Education, cited in Taraban, 2004), research has shown that about 70% of such immigrants experience problems finding employment in their field of expertise (Canadian Labour and Business Centre, 2004). A lack of credential recognition and Canadian work experience are allegedly the major reasons for these barriers (Basran & Zong, 1998; Bloom & Grant, 2001; Brouwer, 1999; Goldberg, 2000; Guo, 2005; Li, 2001; Mata, 1999; Mojab, 1999; Reitz, 2001). Of these two factors, many scholars and commentators agree with Bloom and Grant that the “nonrecognition of immigrants’ foreign credentials is the biggest single learning recognition problem in Canada today” (p. 29). The nonrecognition of foreign credentials is a major challenge, especially for immigrants whose profession is regulated in Canada. While an immigrant’s credentials gain points at the federal level in the assessment of the potential immigrant’s profile by immigration officials, provincial authorities responsible for licensing such immigrants after they arrive in Canada often do not recognize such credentials.

Research suggests that institutional, rather than individual, barriers are the main reasons for nonrecognition of foreign academic credentials (Bauder, 2003; Brouwer, 1999; Couton, 2002; Government of Alberta, 1992; McDade, 1988). Most important, lack

of institutional capacity to recognize and appreciate different personal, social, and intellectual abilities challenges the notion of respect for diversity in a multicultural society such as Canada. It can also be argued, however, that foreign trained individuals face systemic discrimination based on their place of origin in addition to that of ethnic origin, ancestry, race, colour, and/or gender (Cornish et al., 2000).

Statement of the Problem

Even though Acts such as the *Charter* and the *Code* have been developed with an aim to explicitly prohibit discrimination, recent empirical literature supports the view that discriminatory practices are common in the evaluation of foreign credentials. The evidence from these empirical research studies, however, has not been supported by the Canadian judicial decisions until January of 2007 when the Ontario Superior Court of Justice ruled in favour of Fatima Siadat. In this thesis it will be argued that the Siadat decision (*Siadat v. Ontario College of Teachers*, 2007; hereinafter *Siadat*), together with recent provincial legislation, Fair Access to Regulated Professions Act, 2006, will likely make a significant contribution in the elimination of discriminatory practices related to the assessment of foreign credentials.

Siadat is of particular importance because it generates a number of questions addressed in this thesis, namely: Does this decision demonstrate that discrimination in evaluation of teachers' foreign credentials exists; whether the place of origin is justifiable reason in claims of discrimination, how to define and protect the public interest; whether regulatory bodies such as the *College* have a duty to accommodate; and whether a substantive approach to equality should have primacy over a formal equality approach.

Method of the Investigation

The method of investigation used in this thesis is the case study. A case study, as a qualitative research design, is an in-depth exploration of a person, event, activity, or the process based on an extensive data collection (Creswell, 2005). The main difference between the case study and other research approaches is that the focus of attention is on the specific case or the event and not the whole population of cases or number of events. The emphasis in the case study is thus not on generalizations but on understanding the particulars of that case or event in its complexity. The case study approach is preferred “when ‘how’ or ‘why’ questions are being posed, when the investigator has little control over events, and when the focus is on a contemporary phenomenon within some real-life context” (Yin, 1994, p. 3). For the purposes of this thesis an instrumental case study was used; this is a form of a case study research design in which the chosen event serves the purpose of illuminating a particular issue (Creswell).

The event analyzed in this thesis is *Siadat*. As a foreign trained teacher from Iran, Ms. Fatima Siadat challenged the *College*’s practices related to the assessment of foreign academic credentials. Data collection involved doing a comprehensive search of empirical literature, relevant legal acts, and judicial decisions related to the assessment of foreign credentials, as well as the media sources (i.e., newspaper articles and radio interviews) that were conducted with Ms. Fatima Siadat in response to the decision by the Ontario Superior Court of Justice on January 10th, 2007 (i.e., *Siadat*). These documents are public records which can “provide valuable information in helping researchers understand central phenomena” (Creswell, 2005, p. 219). Public documents are advantageous since they are “ready for analysis without the necessary transcription that is

required with observational or interview data” (Creswell, p. 219). One disadvantage of public document data, however, is that it can be “difficult to locate and obtain” and possibly “incomplete, inauthentic, or inaccurate” (Creswell, p. 220). The data analysis procedures followed the recommendations outlined by Creswell for analyzing the case in terms of the salient issues that emerge from the case.

Definition of Key Terms

For the purposes of this study, the main terms are defined as follows:

- *Assessment* is the identification and measurement of learning, credentials, and other forms of qualifications required for entry into programs of study or occupations (The Canadian Alliance of Education and Training Organizations, 2004; CICIC, 2003).
- *Credential* is documented evidence of learning based on completion of a recognized program of study, training, work experience, or prior learning assessment (The Canadian Alliance of Education and Training Organizations, 2004; CICIC, 2003).
- *Discrimination* is a distinction, intentional or not, based on grounds relating to the personal characteristics of the individual or group concerned and that has the effect of imposing disadvantages or burdens not imposed on others or of withholding access to advantages or benefits available to others (*Andrews v. Law Society of British Columbia*, 1989).
- *Equality* under the *Charter* means that every individual is equal before and under the law and he/she has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination

based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability (Canadian Charter of Rights and Freedoms, 1982).

- *Systemic discrimination* includes policies and practices which appear neutral and which were implemented for a legitimate purpose but which disproportionately impact on disadvantaged groups (Cornish et al., 2000).

Limitations

It is important to note that the method to be used in this study, case study analysis, will lack the empirical evidence since the data that were collected and analyzed came from the secondary sources such as court decisions and proceedings, legal acts, newspaper articles, and radio shows. I am aware that some of the data may be biased to the perspective expressed of the writer, speaker, and/or the publishing company; however, an attempt was made to interpret and analyze the data independently and critically. It should also be noted that the data included in this thesis may not be exhaustive as it was limited to the data that were found until May of 2007. Furthermore, the data used in this thesis are limited to the context of the teaching profession and thus may not be generalizable to professions other than teaching or to provinces other than Ontario. Finally, as a recent immigrant to Canada and someone who has gone through the process of assessment of foreign credentials, I have a personal interest in the topic. However, I was not a teacher in my country of origin and accordingly my credentials were not assessed by the *College*. I would like to note, though, that a number of my close friends and colleagues from English as a Second Language School went through the process of assessment of foreign credentials with the *College*, and thus some of my opinions may have been influenced by their experiences.

Organization of the Thesis

This thesis consists of five chapters. Chapter One introduces the main problem and the method of investigation. Additionally, the chapter includes the definition of the key terms followed by the acknowledgement of the author's personal limitations. Chapter Two provides an overview of policies and practices within the Canadian society including immigration policies, foreign credential assessment practices, barriers to recognition of foreign academic credentials, and the discretionary decision-making. The description of how the teaching profession is regulated in Ontario is reviewed in Chapter Three. Chapter Four examines the questions relating to the discrimination in an evaluation of teachers' foreign credentials through an examination of the Fair Access to Regulated Professions Act, 2006 and *Siadat*. Chapter Five provides the summary of main human rights issues raised in *Siadat* followed by an in-depth analysis of each issue. Finally, Chapter Five concludes with potential implications of *Siadat* for public policy in Ontario and Canada.

CHAPTER TWO: THE CANADIAN CONTEXT

This chapter provides a detailed review of the literature on the assessment of foreign credentials within the Canadian context. In the first section, I provide a historical background of the immigration policies and the current regulations governing such practices. The second section discusses the foreign credential assessment practices within the Canadian employment and academic contexts. The third section examines the barriers to the recognition of foreign academic credentials in Canada by critically evaluating the major empirical research literature and relevant legal cases. Finally, the fourth section considers the notion of discretion and its relationship with rules in the context of foreign credential recognition.

Immigration Policies

Immigration has always been vitally important to Canada in terms of its economic and demographic interests. The attractiveness of Canada to many immigrants from around the world has been attributed to its social and economic opportunities, freedom, refugee protection programs, and its recognition as a country that respects diversity and human rights (Government of Alberta, 1992). Consequently, Canadian immigration policies have had an enormous impact on “Canadian society and are likely to have an even greater impact in the future” (Collacott, 2002, p. 6).

According to the Constitution Act, 1867, immigration is a shared responsibility between the Canadian federal government and provincial governments, with the federal legislation prevailing (Government of Canada, 2006). Specifically, section 8 (1) of the Act provided the basis for the federal-provincial agreements on immigration, whereas section 10 (2) of the Act provided a legal basis for the federal government to consult the

provinces regarding the number, distribution, and settlement of permanent residents. To this point in time, the Canadian federal government has immigration-related agreements with eight provinces and one territory. These agreements cover a range of issues including settlement and integration services, language training, labour market access, and programs which allow provinces to nominate skilled workers to settle in their jurisdiction (Government of Canada). Research has supported the utility of these programs by suggesting that these agreements have played a crucial role in promoting standards that ensure that the federal government considers regional requirements when developing or modifying immigration and settlement policies (Government of Canada). The research evidence also suggests, however, that many immigrants experience various sociopsychological and economic barriers during their settlement years (Guo, 2006). For example, studies have found that immigration service organizations were not responding adequately to the needs expressed by many immigrants with respect to the extensive barriers that they faced (e.g., Henry, Tator, Mattis, & Rees, 2005).

Canadian immigration policy has created two distinct streams of immigrants, one based on social and humanitarian objectives, and the second based on economic objectives. The Immigration and Refugee Protection Act is federal legislation established in 2002 with objectives to reunite families, protect refugees, and contribute to economic development (Government of Canada, 2006). The three major immigrant categories covered by this Act include the family class, the refugee class, and the economic class. *Family class* immigrants include those individuals who have a close family member, such as a spouse, fiancé, unmarried children, parents, or grandparents, who sponsored them to come to Canada. *Refugee class* immigrants are accepted into Canada based on their need

for protection or survival (Government of Alberta, 1992). Finally, *economic class* immigrants consist of two subcategories including business class and skilled workers class immigrants. *Business class* immigrants include those who are selected to support the development of a strong and prosperous Canadian economy through their potential for either direct investment, commercial activity, or self-employment. *Skilled worker class* immigrants are those who are chosen based on the “point system”.

Prior to 2002, the “point system” was based on nine criteria, three of which were related to an individual’s occupation. Most points were awarded for occupations that appeared on the General Occupations List which was compiled based on the demand for a given occupation in the Canadian economy. A major concern with this system was that the mechanisms for updating the list were revised only sporadically, and as such, the system was inadequate in serving its intended purpose. Accordingly, Immigration Canada decided that the list was ineffective as a mechanism since it could not keep up with the changes in occupational demand. Thus, in 2002, new legislation, entitled the Immigration and Refugee Protection Act, was introduced to replace the former Immigration Act. The new Act awards points on a number of criteria, including education (maximum of 25 points), knowledge of official languages (24 points), experience (21 points), age (10 points), arranged employment in Canada (10 points), and adaptability (10 points). The major difference between the two acts is that the new Act does not award any points based on specific professions (Government of Canada, 2006). A common theme that remains between the two acts is that the maximal number of points is still awarded for the high level of attained education.

Assessment of Foreign Credentials

In the Canadian context, the assessment of educational and occupational credentials is essential for individuals who are seeking recognition of their foreign qualifications because it is a basic requirement needed to enter the labour market or pursue postsecondary education. In Canada, however, there is no central national governmental agency responsible for the assessment of academic or professional credentials, regardless of whether they are Canadian or international. Nevertheless, several federal government departments (i.e., Citizenship and Immigration Canada, Human Resources and Development Canada) are committed to develop the capacity to recognize foreign credentials and foreign working experience. In addition, the Canadian Information Centre for International Credentials (CICIC) was established in 1990 in association with the secretariat of the Council of Ministers of Education Canada as part of the country's obligation under the UNESCO Convention on the "Recognition of Studies, Diplomas, and Degrees concerning Higher Education" (CICIC, 2006). Although, the CICIC is not responsible for credential assessment, it acts as a "national clearing house and referral service to support the recognition and portability of Canadian and international educational and occupational qualifications" (CICIC, About Us section, para. 1).

The assessment of academic credentials in Canada is regulated at the provincial level by individual academic institutions, credential assessment service providers, professional regulatory bodies, and employers. The procedures and guidelines used for evaluating foreign credentials are generally dependent on the following three factors: whether the individual wishes to enter the profession/trade or pursue further study,

whether the chosen profession is regulated or nonregulated, and the province/territory where the person is intending to settle and reside (Knight). Recognition of educational credentials for the purposes of admission to postsecondary education is granted at the discretion of each educational institution (Knight). Furthermore, in the case of regulated professions, each regulatory body has an authority to assess applicants' credentials as well as to certify, register, or license qualified applicants (Knight, 2003). For some professions (e.g., engineering), however, a national association has been mandated to assess credentials, but even in those cases, the provincial/territorial bodies retain the right to determine licensing and certification requirements. In the case of nonregulated professions (e.g., computer analyst, biologist), recognition of credentials is granted mostly at the discretion of the employer.

The five provincial government mandated academic credential assessment service providers include the International Credential Evaluation Service (in British Columbia), the International Qualifications Assessment Service of Alberta (in Alberta and in Saskatchewan), the Academic Credentials Assessment Service (in Manitoba), the World Education Services-Canada (in Ontario), and the Service des Evaluations Comparatives (in Quebec, Knight, 2003). The main objective of these credential assessment providers is to assist students, licensing bodies, employers, and educational institutions in determining whether specific out-of-province and foreign academic credentials meet requirements for admission, licensure, employment, or continuing education.

Representatives of these groups have also been involved in the development of the "General Guiding Principles for Good Practice in the Assessment of Foreign Credentials" with the aim of establishing codes of good practice in the assessment

process. Thirty-six guiding principles were developed that address issues related to information requirements, fees, translation, document requirements, level of study, assessment criteria, duration of study program, and appeal processes. These principles are complementary to and support the “Criteria and Procedures for the Assessment of Foreign Qualifications” of the Lisbon Convention (Knight, 2003, p. 14). Given that the highest number of immigrants comes to the province of Ontario, there are three organizations that provide additional credential evaluation services for employment purposes in that province and these include: the Academic Credentials Evaluation Service at York University, the Comparative Education Service at University of Toronto, and the International Credential Assessment Service of Canada (Knight). On the other hand, provinces/territories with a low level of immigration (e.g., Nova Scotia) do not require an official provincial academic credential service provider. Accordingly, the credentials of immigrants who reside in such provinces are generally evaluated by individual professional regulating bodies or academic institutions.

Barriers to the Recognition of Foreign Academic Credentials

The purpose of this section is to examine the barriers to the recognition of foreign academic credentials in Canada through a review of empirical literature and relevant legal cases.

Research Trends

Research studies have shown that the level of education obtained by immigrants, regardless of their immigrant category, is significantly higher than that of comparable Canadian-born individuals (Statistics Canada, 2001, 2003, 2005). For example, 36% of immigrant men have a university degree in comparison to 18% of Canadian-born men,

and 31% of immigrant women have a university degree in comparison to 20% of Canadian-born women (Statistics Canada, 2001). The difference in the attained level of education is even higher when only skilled worker class immigrants are compared to the Canadian-born population. According to the results obtained by Statistics Canada (2001), 72% of the principal applicants from the skilled worker class had a university degree, which is more than three times higher than figures for the Canadian-born population. It is also important to note that the percentage of university-educated immigrants who came to Canada has progressively increased since 1999. For instance, 41% of immigrants who arrived in 1999 had a university degree, compared to 44% in 2000, and 46% from 2001 to 2004. Overall, these results demonstrate that the immigrant selection policies have been effective in achieving their intended goal of attracting individuals with higher levels of education.

In spite of the federal government's preference for highly educated immigrant professionals, many immigrants, especially the skilled worker class immigrants who comprise the largest immigrant category in Canada (Couton, 2002; Li, 2003), seem to experience many difficulties during their transition into the Canadian labour market. This is problematic in that the human capital of skilled immigrants to Canada is not being optimized (Badets & Howatson-Lee, 1999; Reitz, 2001). Studies have demonstrated that, in comparison to the Canadian-born population, immigrants are more likely to be underemployed and unemployed (Couton; Li; Reitz; Watt & Bloom, 2001). For example, even though immigrants who have a university degree earn more than those who do not, their earnings, one year after their arrival in Canada, are still 30% lower than the Canadian average (Statistics Canada, 2005). This wage gap is even higher when

university educated immigrants are compared to the university educated individuals born in Canada. Data indicate that university educated immigrants on average made \$49,000 (men) and \$35,500 (women) per year compared to \$79,300 (men) and \$54,200 (women) per year earned by the university educated Canadian-born individuals (Statistics Canada, 2003). Research also shows that immigrants with a university degree who arrived in Canada during the past 20 years were more likely than their nonimmigrant peers to be in a job that does not fully utilize their qualifications and to report that they possessed skills that were not being used in their present job (Goldberg, 2000; Statistics Canada, 2001; Watt & Bloom). For example, a study by Goldberg found that less than 25% of immigrant professionals who came to Ontario between 1994 and 1995 were actually employed in their professions. Goldberg also found that the first job a foreign trained professional takes has a significant impact on their future employment. It was demonstrated that those whose first job was in their field had an 83-89% likelihood of still working in their field 5 years later, whereas those whose first job was not in their field of expertise had only a 39-43% chance of being employed in their field 5 years after their arrival (Goldberg). Finally, data from Ontario also indicate that immigrants (18%) have significantly higher unemployment rates than the average educated individuals (5%; Goldberg).

Even though the economic disadvantage of foreign trained immigrants has been attributed to their inability to meet occupational entry requirements (i.e., licensing) and inadequate language skills (Ornstein & Sharma, as cited in Basran & Zong, 1998), the most important and most frequently mentioned factors that contribute to this inequality are lack of Canadian experience and nonrecognition of their academic credentials (Basran

& Zong; Bloom & Grant, 2001; Brouwer, 1999; Goldberg, 2000; Guo, 2005; Henry et al., 2005; Krahn, Derwing, Mulder, & Wilkinson, 2000; Li, 2001; Mata, 1999; Mojab, 1999; Reitz, 2001). Basran and Zong interviewed 404 foreign trained professionals from the Vancouver area and found that for 84% of them, nonrecognition of their credentials was a major problem in not being able to participate in their chosen profession. In addition to the problems of nonrecognition, Basran and Zong also found that 79% of respondents reported having difficulties obtaining professional work experience in Canada. Similarly, Krahn et al. studied 525 immigrants and found that lack of recognition of prior learning and work experience were identified as the major contributing factors to their downward occupational mobility after their arrival in Canada. Furthermore, a study conducted by Bloom and Grant found that more than 340,000 foreign trained professionals possessed unrecognized foreign credentials and concluded that those who do not have their learning recognized with a Canadian credential document were at a disadvantage. Additionally, Bauder (2003) interviewed 39 foreign trained professionals and concluded that the “non-recognition of foreign credentials and dismissal of foreign work experience systematically excludes immigrant workers from the upper segment of the labour market” (p. 699). Finally, it should be acknowledged that even though lack of Canadian experience and nonrecognition of foreign credentials have been found to contribute uniquely to the underutilization of immigrants’ skills, it has also been proposed that these two factors have a cyclical effect (Basran & Zong; Government of Alberta, 1992; Mata). As noted by Mata, “employers do not hire foreign trained people unless they have attained membership in appropriate professional associations while professional associations do not grant membership unless the individual applicant has some proven

amount of Canadian work experience” (What is the Immigrant Accreditation Picture in Canada section, para. 11). All in all, the mounting evidence from these studies points to the negative impact that nonrecognition of foreign credentials and lack of prior Canadian work experience have on foreign trained immigrants.

Nonrecognition of foreign academic credentials has been shown to have several overwhelming economic and psychological consequences. For instance, Grant and Nadin (2006) found that credentialing problems of highly skilled immigrants resulted in psychological problems such as feelings of self-doubt, sadness, distress, anger, bitterness, and resentment. In addition, Grant and Nadin demonstrated that the largest negative psychological impact of credentialing problems was the perception that Canadian employers and professional bodies were acting in a discriminatory manner toward all immigrants. From an economic perspective, Reitz (2001) estimated that the underutilization of foreign trained immigrants’ skills related to their qualifications not being recognized in the workforce costs the Canadian economy \$2.4 billion per year. In a more recent study conducted by The Conference Board of Canada (2004), it was estimated that un- and underemployment of immigrants costs the Canadian economy between \$3.4 and 5 billion per year. Furthermore, based on the longitudinal study by Picot, Hou, and Coulombe (2007) which examined the incomes of 280,000 immigrants over 15 years, it was estimated that about one in five immigrants who arrived between 1992 and 2000 were living in a state of chronic low income (i.e., low income was defined as \$26,800 for a family of four; therefore, immigrants who fell in that category for at least 4 of their 5 years in Canada were considered to be chronic low income). As suggested by

Dr. Jain, “it is not just the cost of the economy, but the demoralizing effect on immigrants, which can result in social upheaval” (as cited in Jimenez, 2007. p. A5).

Several possible explanations have been proposed as to why foreign credentials are not being recognized in Canada. One reason pertains to the poor transferability of some foreign credentials, specifically the disparities related to the quality and relevance of the subject matter (Couton, 2002). The second reason why only a small number of immigrants obtain Canadian credential recognition can be explained by the results of the studies conducted by McDade (1988) and the Government of Alberta (1992). These studies demonstrated that low recognition from employers and educational institutions as well as prejudicial opinions and subjective evaluations of non-Canadian training and experience were the major causes of poor credential recognition. Finally, the third reason why foreign academic credentials have not been recognized in Canada has been attributed to the regulatory bodies’ discriminatory practices. According to Brouwer (1999), these discriminatory practices may not be intentional in nature. Rather, Brouwer found that the regulatory bodies conducting these assessments often report that they do not have the required expertise in comparative education, adequate resource materials, and an ongoing contact with international educational systems. On the other hand, Bauder (2003) suggested that discriminatory practices may be intentional in nature since some professional groups such as medicine, law, and engineering have been found to engage in practices of cultural inclusion and exclusion to ensure their own reproduction by defining the entry requirements in a manner that excludes newly arriving immigrants. Overall, the results of these studies seem to suggest that institutional, rather than individual, barriers are the main reasons for nonrecognition of foreign academic credentials.

Relevant Judicial Decisions

Five particularly relevant legal cases were selected because each has made an important contribution to the development of the legal framework whose aim is to eliminate or minimize discriminatory practices in Canada. Considering that most of these cases relied upon Section 15 (1) of the *Charter*, it will be reviewed initially.

The *Charter* is a statement of basic human rights and freedoms in Canadian society. The *Charter* became part of Canada's Constitution in 1982 and as such is the supreme law of Canada. Thus, the common law and the statutes in Canada must be interpreted and applied in compliance with the fundamental values stated within the *Charter* (Canadian Charter of Rights and Freedoms, 1982). One of the fundamental values of the *Charter* is that of equality. Section 15 (1) of the *Charter* establishes equality right as follows:

Every individual is equal before and under the law, and has the right to the equal protection and equal benefit of the law *without discrimination* and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (Canadian Charter of Rights and Freedoms, 1982, Equality Rights section, para. 1)

The elaboration of the meaning of equality was greatly influenced by Justice McIntyre who wrote the reasons for the decision in *Andrews v. Law Society of British Columbia* (1989; hereinafter *Andrews*). He suggested that every distinction which the law makes between individuals and groups cannot be considered the basis for claims of inequity. In other words, not every distinction or differentiation made in the law violates the equality

guarantees of Section 15 (1) of the *Charter*. Thus, according to Justice McIntyre, discrimination, for the purposes of Section 15 (1), is defined as

a distinction, whether intentional or not but based on grounds relating to the personal characteristics of the individual or group concerned, and that has the effect of imposing disadvantages or burdens not imposed on others, or of withholding access to advantages or benefits available to others. (*Andrews v. Law Society of British Columbia*, 1989, Discrimination section, para. 9)

Section 15 (1) thus protects every individual in Canada, including noncitizens such as landed immigrants and refugees, from discrimination based on listed criteria. However, the Supreme Court of Canada interpreted “Section 15 as applying not only to the listed grounds, but to other grounds analogous to those listed” (Black & Smith, 1996, p. 14-61). For example, in more than 20 years of application of the *Charter*, the Supreme Court of Canada has also identified citizenship, sexual orientation, and marital and family status as “analogous grounds” (Black & Smith, 2005).

Andrews was the first equality case to reach the Supreme Court of Canada. Mark Andrews, who was a citizen of the United Kingdom, obtained a law degree from Oxford University in the United Kingdom and had fulfilled all of the requirements for admission to the practice of law in British Columbia except that of having Canadian citizenship. Mr. Andrews claimed that Section 42 of the Barristers and Solicitors Act violated Section 15 of the *Charter*. *Andrews* was based on the argument that the enumerated grounds of Section 15 included groups traditionally disempowered in Canadian society. In addition, Mr. Andrews argued that immigrants are analogous to traditionally disadvantaged groups in Canadian society based on the fact that Canadian immigrants have been consistently

discriminated against based on their race, colour, and/or national origin. Although citizenship is not specifically listed as the enumerated ground within Section 15 (1), the Supreme Court decided that it fell into a similar category, and as such, discrimination on the basis of citizenship was prohibited under this Section as an “analogous ground”.

The importance of *Andrews* can be seen mostly in the Supreme Court’s elaboration of constitutional equality and in the development of the legal framework for the protection of equality rights to be used as a guide for making future decisions. Accordingly, the Supreme Court established a three-step approach to analyzing Section 15 claims. The first step involves determining whether denial of equality (before or under the law, or equal protection or benefit of the law) exists (Black & Smith, 1996). When the denial of equality is established, the second step requires establishing whether discrimination had occurred. Based on *Andrews*, the Supreme Court identified two requirements for the identification of discrimination. The first requirement is that the claimant must demonstrate that the distinction was made on the basis of an enumerated or analogous ground, and the second requirement is that the claimant must demonstrate that the legislative impact or the effect of the law was discriminatory. Finally, once the denial of equality and discrimination are established, the third step to analyzing Section 15 claims requires that the Supreme Court of Canada determine whether “denial of equality with discrimination can be justified in a free and democratic society, under Section 1 of the *Charter*” (Black & Smith, pp. 14-18).

Andrews also has a number of important implications in the context of the recognition of foreign credentials. First of all, the Supreme Court of Canada rejected the “similarly situated test” adopted by lower courts which was based on Aristotle’s concept

of formal equality. The Supreme Court of Canada recognized that identical treatment does not necessarily result in equality; rather that it often produces serious inequality through disproportionate adverse effects (Black & Smith, 1996). Thus, with the endorsement of a substantive approach to equality, the emphasis focuses on the impact or the effect of the law on individuals or group members. Black and Smith have also acknowledged that the “similarly situated test” was greatly limited because it was not designed to deal with situations in which identical treatment causes a disadvantage to a specific group. An additional implication of *Andrews* relates to the acknowledgment of the existence of *group-based disadvantage* with the emphasis on the particular context in an examination of inequalities. In particular, the basis of *Andrews* established the requirement for courts to examine the operation of discrimination and inequality in a wider social context, acknowledging that certain groups have been subjected to historical disadvantage, stereotyping, and prejudice (Hurley, 2007). This point was exemplified by Frankfurter J. who said, “it was a wise man who said that there is no greater inequality than the equal treatment of unequals” (*Andrews v. Law Society of British Columbia*, 1989, The Concept of Equality section, para. 5). The final implication of *Andrews* relates to the acknowledgment of the duty to accommodate to individuals’ or groups’ social, political, and economic differences as an essential part of equality (Black & Smith).

Andrews is of particular importance within the contexts of foreign credential recognition since, according to Mr. Andrews, immigrants could be considered analogous to the traditionally disadvantaged groups within the Canadian society because they have been consistently discriminated against based on their race, colour, and/or national origin. Thus, it can be argued that the inability of Canadian immigrants to get their formal

education and training recognized in Canada adds a new dimension to their already existing disadvantage.

Law v. Canada (Minister of Employment and Immigration; 1999; hereinafter Law) was a case in which the claimant was denied survivor's benefits under the Canada Pension Plan because she was under the age of 35 at the time of her husband's death in spite of the fact that she was neither disabled nor did she have any dependent children. The claimant argued that the Canada Pension Plan regulations violated Section 15 (1) of the *Charter*. Supreme Court concluded that although the Canada Pension Plan regulations created a distinction that was based on her age, this distinction did not reflect the stereotype that violated her human dignity, and as such, did not infringe her equality rights. Even though the Supreme Court unanimously dismissed the claim, the most important aspect of this case was not related to the decision *per se*; rather what was significant was the fact that the basis for decision had since been used as the guidelines or the framework for the assessment of future equality claims. Accordingly, the Supreme Court of Canada specified that future courts evaluating a discrimination claim should determine whether the impugned law or program does either:

1. a) Draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or
- b) Fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristic?

2. Is the claimant subject to differential treatment on one or more enumerated and analogous grounds?
3. Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or values as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration? (Black & Smith, 2005, p. 933)

Furthermore, the Supreme Court identified that human dignity is the central part of equality rights.

Human dignity means that an individual or group feels self-respect and self-worth.

It is concerned with physical and psychological integrity and empowerment.

Human dignity is harmed by unfair treatment premised upon personal trait or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences.

Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. (*Law v. Canada*, 1999, The Purpose of s. 15 (1) section, para. 14)

Each of the above stated criteria has implications with regards to the context of foreign credential recognition. Thus, it can be argued that applicants with foreign

credentials may be discriminated against (a) when requirements for entering regulated professions distinguish between the claimant and others on the grounds of one or more personal characteristics such as one's place of training or (b) when requirements for entering regulated professions fail to take account of immigrants' already disadvantaged position within the Canadian society. Second, the differential treatment of applicants with foreign credentials is based on one or more enumerated or analogous grounds protected by Section 15 (1), such as place of training as analogous to place of origin (*Bitonti v. College of Physicians & Surgeons of British Columbia*, 1999, cited in Cornish et al., 2000). Third, the treatment of applicants with foreign credentials discriminates substantively by imposing a burden or by withholding benefits which can be evidenced by the existence of various systemic barriers that foreign trained applicants experience during their attempts to enter regulated professions in Canada and by the evidence that suggests that foreign academic credentials and working experience are often treated as suspicious and inferior to the Canadian one (Guo, 2005). Finally, it can be argued that human dignity of skilled worker class immigrants may be harmed when there is an "unfair treatment premised upon personal trait or circumstances which do not relate to individual needs, capacities, or merits" (cited in Black & Smith, 2005, p. 935). Therefore, it can be concluded that the discrimination of foreign trained applicants exists and is based on the previously mentioned requirements (based on *Law*) which seem to have "demeaning or devaluing effects" on the individual or a group.

In *Jamorski v. Ontario* (Ministry of Health; 1988; hereinafter *Jamorski*), the appellants argued that they were discriminated against by being forced to compete for 24 internships which also required a one-year preinternship program instead of being able to

compete for 600 internships available only to the graduates of accredited medical schools (Cornish et al., 2000). On the other hand, the respondents argued that Ontario authorities were unfamiliar with the evaluation processes of the unaccredited schools and that Ontario citizens educated at public expense should have priority. Even though the Supreme Court found that the graduates of accredited and unaccredited schools were treated differently, the Court declared that the distinction was not discriminatory because “the person educated in unaccredited schools were not similarly situated to those educated in accredited schools and could not be treated the same way”, concluding that “different treatment based on different educational qualifications was not discriminatory” (Cornish et al., p. 16). However, Cornish et al. were of the opinion that *Jamorski* would have been decided differently by the Supreme Court of Canada had it occurred subsequent to *Andrews*, mainly because the “similarly situated test” argument would have been rejected.

The British Columbia Government and Service Employees’ Union v. The Government of the Province of British Columbia (1999; hereinafter *Meiorin*) established principles which can be used by foreign trained individuals to eliminate existing foreign credential discrimination and prevent future discrimination (Cornish et al., 2000). In *Meiorin*, an appellant was a woman who challenged the aerobic test standards for forest fire fighting, which traditionally has been considered a male occupation. The Court decided in the favour of the appellant based on the reason that the government could not show the standard was reasonably necessary in order to identify those persons who are able to perform the tasks of a forest fire fighter in a safe and efficient manner. The Court further concluded that an individual “must be tested against a realistic standard that

reflects his or her capacities and potential contributions” (cited in Cornish, p. 14). Finally, based on *Meiorin*, the Supreme Court of Canada concluded that there is a “positive obligation” to avoid discriminatory practices in the development of standards by stating that

Employers designing workplace standards owe an obligation to be aware of both the differences between individuals and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards. By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, in so far as this is reasonably possible. (*The British Columbia Government and Service Employees’ Union v. The Government of the Province of British Columbia*, 1999, p. 38)

This suggests that the Supreme Court’s approach in *Meiorin* emphasized the need for systemic responses to structures that exclude individuals and groups from practising their professions to ensure that the standards are inclusive and that they better reflect the diversity in the Canadian society. Cornish et al. suggested that *Meiorin* can be used as a legal basis for requiring licensing bodies and employers to develop professional standards that work for foreign trained as well as Canadian trained individuals, as well as to develop and conduct employment equity reviews.

Finally, the *Bitonti v. College of Physicians & Surgeons of British Columbia* (1999; hereinafter *Bitonti*) case differs from other cases reviewed to this point because it is the only case that was decided under the scope of provincial human rights legislation

(i.e., British Columbia Council of Human Rights). However, this case is of particular relevance because it could be used to justify an enhancement of the listed grounds of discrimination under Section 15 (1) of the *Charter*. In *Bitonti*, a group of doctors claimed that the British Columbia College of Physicians and Surgeons had discriminated against them through the requirements placed on foreign trained doctors in the period before 1993. They claimed that the system that distinguished between applicants who were trained in Category I countries (i.e., North America and the Commonwealth) versus those trained in Category II countries was discriminatory in nature. Under such a system, Category II applicants applying for the membership to allow them to practise their profession in Canada had to do a mandatory 2 years of an internship in a Category I country hospital, whereas Category I applicants had to do only 1 year of internship. The British Columbia Council of Human Rights found that the distinction between Category I and Category II applicants “was based on assumptions about the merits of the British education system” and that the College had failed over a period of previous 40 or more years “to have made any effort to obtain an understanding of the medical education system anywhere else in the world” (cited in Cornish et al., 2000, p. 20). Furthermore, it was stated that the British Columbia College of Physicians and Surgeons was not providing applicants with any opportunity to demonstrate the equivalency of their qualifications, concluding that the distinction based on one’s place of training indirectly discriminated on the basis of place of origin.

Bitonti is significant with regards to the contexts of foreign credential recognition for several reasons. It can be argued that the current foreign credential assessment processes of regulatory bodies are based on the assumptions about the merits of the

British educational system which legitimizes certain forms of knowledge as valid (e.g., American, Australian, British, and Canadian). In addition, as concluded in the literature, very often regulatory bodies report that they do not have required expertise in comparative education, adequate resource materials, and an ongoing contact with international educational systems (Brouwer, 1999). According to the Lisbon Convention (of which Canada is a signatory), it is the regulatory bodies, not the applicants, who have a duty to learn about other educational systems (Janzen et al., 2004). Thus, the question remains to what extent regulatory bodies invest in attempting to better understand educational systems from different parts of world, especially those that appear to be significantly different from the merits of the British educational system. Also, the extent to which regulatory bodies believe that an understanding of educational systems from different parts of the world is essential in eliminating barriers that foreign trained applicants experience in entering regulated professions in Canada remains unknown at this time.

Discretionary Decision-Making

The literature has identified that systemic barriers (Bloom & Grant, 2001; Cornish et al., 2000; McDade, 1988; Walters, 2006) such as policies and procedures of regulatory bodies are mostly responsible for difficulties experienced by foreign trained immigrants who seek to enter regulated professions in Canada. On the other hand, Pal and Maxwell (2004) noted that “regulatory authorities typically make decisions on specific cases that, while guided by law and precedent, involve a *substantial degree of discretion* [italics added]” (p. 2). Thus, it may be important to consider the notion of discretion and its relationship with rules.

Discretion has been commonly defined as a legitimate right to make choices among alternative courses of action (Manley-Casimir, 1977). Davis (1976) further suggested that discretion is exercised in situations when effective limits of decision-makers' power "leave them free to make a choice among possible courses of action or inaction" (cited in Sainsbury, 1995, p. 297). In addition, Davis recommended that discretion is not limited to substantive choices but also involves many other subsidiary factors such as procedures, methods, forms, timing, and degrees of emphasis.

An essential aspect of discretion also involves understanding its relationship to the rules. According to Dworkin (1977), "discretion, like the hole in a doughnut, does not exist except as an area left open by surrounding belt of restriction" (cited in Bell, 1995, p. 97). On the other hand, Schneider (1995) did not believe in the existence of a strict line between rules and discretion, but rather used a continuum of directedness to clarify their relationship. According to Schneider, rules are the most directive and are defined as authoritative, mandatory, binding, specific, and precise direction imparted to an individual on how to make a decision. Next on Schneider's continuum are policies which refer to the standards that set out a goal to be reached. Principles are next on the continuum and refer to a standard that is to be observed because it is a requirement of justice, fairness, and morality. The final and least directive point of the continuum is discretion. It refers to those cases in which an individual, after consulting all relevant sources, is allowed to make a decision on his or her own. Thus, even though decision-making can be situated at any point on the continuum (Sainsbury, 1995, p. 298), Schneider suggested that "there is rarely such a thing as pure rule or pure discretion and that most cases are resolved through a complex mix of rules and discretion" (p. 50).

Feldman (1995) added that creating rules to cover all possible contingencies may be counterproductive since “a profusion of rules can lead to greater freedom because several rules may apply to any situation and the bureaucrat must choose which rules are appropriate in the present one” (p. 166). In addition, Dworkin (1977) considered the fact that discretion can be exercised in the interpretation and implementation of existing rules as well as making the final decision, which he defined as weak discretion. On the other hand, strong discretion is observed when an individual, after consulting all the existing relevant written acts, is allowed to make a decision by using his or her own “best judgment” (Dworkin)

Manley-Casimir (1977) emphasized the importance of discretion in the decision-making process by stating the following:

Discretion is vital to administrative decisions, especially when occasions for decision arise where the precedents of experience together with existing policy and rules are inadequate or inappropriate guides to action. In these situations the exercise of discretion is both necessary and desirable; it is necessary because new and different circumstances often require new and different administrative responses—discretion enables the administrator to choose between alternative courses of action; and it is desirable because only by considering the unique facts of a particular problem can an administrator select a course of action compatible with those facts—discretion allows administrative flexibility and responsiveness.

Discretion is, in fact, the creative dimension of administrative action. (p. 3)

In addition, Schneider (1995) claimed that discretion gives flexibility to decision-makers to effect justice because it (a) allows them to consider all the individual circumstances

that ought to affect a decision but that could not be anticipated by rules, (b) allows them to watch how well their decisions work, (c) allows them to adjust future decisions to respond to the new information, (d) discourages overly bureaucratic ways of thinking, and (e) makes the decision-maker's job attractive to able people.

Even though Weber (cited in Feldman, 1995) did not recognize the importance of discretion within bureaucracy, Lipsky (1980) established that discretion is an inevitable part of a bureaucratic action. According to Lipsky, public service workers (e.g., teachers, police staff, and administrative assistants), whom he referred to as the street-level bureaucrats, exercise considerable discretion in implementing public policy because of the fact that they are the ones who mostly interact with citizens or clients. In agreement with Lipsky, Feldman suggested that the main reasons why discretion is inevitable is because (a) it is a necessary part of many bureaucratic jobs, (b) bureaucrats do not work under the direct observation of their supervisors, (c) general rules give little guidance due to the complexity of work situations, (d) of the expectations to respond to the human dimension of situation, and (e) professionals are expected to make choices on the basis of their professional training and experience. Thus, Feldman concluded that professionals tend to value their professional judgment over their duties.

Currently there is a lack of research on the exercise of discretion of the regulatory bodies' administrators. One of the issues that poses a challenge is whether and how decision makers within the regulatory bodies use their discretion during the licensing process and, more specifically, during the process of foreign academic credential assessment.

In summary, research has shown that the academic credentials of immigrants are highly valued at the federal level when they are assessed by the immigration officials in determining the potential immigrant's profile. It is evident, however, that upon the immigrants' arrival in Canada, provincial authorities such as academic institutions, credential assessment service providers, professional regulatory bodies, and employers often do not recognize such credentials. The evidence is strongly suggestive that institutional or systemic barriers such as policies and procedures of regulatory bodies are mostly responsible for the difficulties experienced by foreign trained immigrants who seek to enter regulated professions in Canada. At the same time, regulatory bodies' decision-makers have considerable discretion in the assessment of foreign credentials as well as the licensing process. Thus, considering that "most cases are resolved through complex mix of rules and discretion" (Schneider, 1995, p. 50), it seems that reflecting on the relationship between rules and discretion is crucial in order to better understand the nature of institutional or systemic barriers. In the next chapter, I provide a general overview of regulated professions, with the primary emphasis on the teaching profession.

CHAPTER THREE: THE REGULATION OF THE TEACHING PROFESSION IN ONTARIO

This chapter provides an overview of how the teaching profession is regulated in Ontario. I first provide an overview of how professions are regulated in Ontario. Next, I describe how the teaching profession is regulated in Ontario with the emphasis on the responsibilities of the *College*. Finally, the chapter concludes with the summary of research studies conducted with foreign trained teachers from Ontario.

Regulated Professions

In Ontario, there are three methods through which professions are regulated. These include: self-regulated professions under public statute, self-regulated professions under private statute, and direct government-regulated professions (Janzen et al., 2004). However, for the purpose of this thesis, the emphasis will be on the self-regulated professions under public statute, which will be defined in line with a definition provided by the Ontario Regulators for Access (2003) research study. Therefore, regulated professions are those which have the following characteristics:

- The authority of the regulatory body comes from an Ontario statute
- Professionals need the authority of the regulatory body to practise their profession in Ontario, to use a professional designation, or both. (Ontario Regulators for Access, 2003, p. 10)

In Ontario, 38 professions are regulated by self-governing bodies established under the provincial laws, with the main objective to protect the public interest by setting standards of practice and competence. Furthermore, most regulated professions require that practitioners be registered with the profession's self-governing body to work in that

field (Goldberg, 2000). For example, to teach in the publicly funded schools in Ontario, one must be registered with the *College*. On the other hand, some regulated professions allow practitioners to do some or all of the work of the profession without being registered with the self-governing body; however they require practitioners to be registered if they want to use the specific title of the profession. For example, engineers who are not registered can work in their field, but they cannot sign their name to plans or specifications.

The Teaching Profession: The Responsibilities of the Ontario College of Teachers

The teaching profession in Ontario is a self-regulated profession governed by a public statute. The *College* was established in 1996 under the Ontario College of Teachers Act (Ontario College of Teachers Act, 1996) and represents the governing body of the profession. According to the 1996 Ontario College of Teachers Act, the *College* has the following objectives:

1. To regulate the profession of teaching and to govern its members.
2. To develop, establish and maintain qualifications for membership in the *College*.
3. To accredit professional teacher education programs offered by post-secondary educational institutions.
4. To accredit ongoing education programs for teachers offered by post-secondary educational institutions and other bodies.
5. To issue, renew, amend, suspend, cancel, revoke and reinstate certificates of qualification and registration.
6. To provide for the ongoing education of members of the *College*.

7. To establish and enforce professional standards and ethical standards applicable to members of the *College*.
 8. To receive and investigate complaints against members of the College and to deal with discipline and fitness to practise issues.
 9. To develop, provide and accredit educational programs leading to certificates of qualification additional to the certificate required for membership, including but not limited to certificates of qualification as a supervisory officer, and to issue, renew, amend, suspend, cancel, revoke and reinstate such additional certificates.
 10. To communicate with the public on behalf of the members of the *College*.
 11. To perform such additional functions as are prescribed by the regulations.
- (Ontario College of Teachers Act, 1996, College section, para. 4)

In operationalizing these objectives, the *College* also has a duty to serve and protect the public interest with respect to the profession (Ontario College of Teachers Act).

Therefore, in order to work in publicly funded schools in Ontario, a person must be certified to teach in the province and be a member of the *College*. Section 262 of the Education Act indicates that:

Except as otherwise provided in or under this Act, no person shall be employed in an elementary or secondary school to teach or to perform any duty for which membership in the College is required under this Act unless the person is a member of the Ontario College of Teachers. (Government of Ontario, 1990, Teachers, Pupil Records and Education Numbers section, para. 2)

In order to become a certified teacher in Ontario, individuals, educated in Ontario or elsewhere, are required to submit an application to the *College*. The Ontario College of Teachers Act (1996), Regulation 184/97 outlines major requirements for teacher certification. According to Section 12 (1) of this regulation, applicants who are trained outside Ontario are required to submit documents such as: evidence of the academic or technological qualifications, the teaching certificate and the transcript of teaching education program, the statement from the issuing authority that the teaching certificate has not been suspended or cancelled, and proof of proficiency in English or French if the program of study was not completed in one of Canada's official languages (Ontario College of Teachers, 2007; Ontario College of Teachers Act, 1996). Furthermore, Section 18 (1) of the Ontario College of Teachers Act requires that the Registrar shall issue a certification of qualification and registration to a person who fulfills all the requirements specified in Regulation 184/97. In the case when the Certificate is refused, an applicant may request a review by the *College* Registration Appeals Committee. However, according to Section 21(9) of the Ontario College of Teachers Act, the *College* Registration Appeals Committee has the power to order the issuance of a Certificate even if all the requirements stated within the Regulation 184/97 have not been fulfilled. Finally, it is important to note that the *College* has a policy requiring only original documents that are signed and sealed and sent directly from the granting institution. In cases when applications contain documents that do not fit these policies, such applications are considered incomplete and are returned to the applicant.

Foreign Trained Teachers: Research Trends

According to a recent study conducted by Goldberg (2000), about 72% (or 72,000) of the working-age immigrants that reside in Ontario are highly educated and trained. Of these, about 25% (or about 18,000 of them) have made an attempt to enter one of the regulated professions in Ontario (Goldberg). Janzen et al. (2004) found that there were “more internationally educated applicants to regulatory bodies in some professions, than Canadian-educated” (p. 40). These trends are of particular interest because previous research has also shown that large numbers of foreign trained professionals experience barriers in their attempt to enter regulated professions. According to a number of previous empirical studies, recognition of foreign credentials by regulatory bodies has been identified as the major barrier for foreign trained professionals in practising their profession (e.g., Basran & Zong, 1998; Bloom & Grant, 2001; Brouwer, 1999; Goldberg, 2000; Guo, 2005; Henry et al., 2005; Krahn et al., 2000; Li, 2001; Mata, 1999; Mojab, 1999; Reitz, 2001; Walters, 2006). Considering that the *College* represents the largest regulatory body in Ontario with over 204,000 members (Ontario College of Teachers, 2006) and that foreign trained teachers represent one of the top four professions by immigrant entry status (Ontario Ministry of Citizenship and Immigration, 2006), it would be worthwhile to examine the challenges that foreign trained teachers from Ontario face (a) in obtaining their teaching certificate, (b) in attempting to enter the public school system, and (c) during their transition years into the teaching profession.

Mounting evidence indicates that the student population in Ontario is becoming increasingly diverse, suggesting the necessity of a teaching force that needs to reflect the multicultural student body (e.g., Dei, 2002; Fenwick, 2001; Quiocho & Rios, 2000;

Solomon, 1997). Given that recent reports have shown that Ontario has been experiencing a shortage of teachers for some time and the fact that this trend is expected to continue through 2009 (Ontario Regulators for Access, 2003), it is surprising why foreign trained teachers still experience many challenges in obtaining their teaching certificate and gaining entry into Ontario's public school system. For example, Phillion (2003), Taraban (2004), and Myles, Cheng, and Wang (2006) all found that foreign trained teachers believed that in order to maximize their chances of obtaining future teaching positions, they had to adopt or modify their teaching style and practices in order to be more "Canadian" and less "foreign". This suggests that some international teaching experience may not be valued to the same extent as the Canadian one. Similarly, Cruickshank (2004) conducted semistructured interviews (44 participants) and focus groups (36 participants) with foreign trained teachers in Australia and identified the following as the main barriers: access to reliable information on the formal procedures on the recognition of qualifications, obtaining advice and finding appropriate courses, dealing with possible risks and financial, family, and work burdens associated with the decision to return to study, and dealing with different approaches to teaching and learning in the home country and the host society. Finally, studies (F. McIntyre, 2004; Pollock, 2006) have shown that even after obtaining the teaching certificate in Ontario, foreign trained teachers still experience difficulties in securing permanent employment as teachers and have the impression of being less valued. Particularly, McIntyre surveyed Ontario graduates and certified teachers from Ontario trained outside Canada and found that even when foreign trained teachers obtained their teaching certificates, they still had a significantly lower chance (72%) of obtaining employment in comparison to those who

graduated from an Ontario program of teaching (89%). A similar finding emerged from a study conducted by Pollock, who interviewed 13 occasional/supply teachers in Ontario. Pollock found that foreign trained teachers believed that they were unsuccessful in securing full-time employment as a teacher because they were perceived to be less valued and perceived to be both “on the periphery and at the bottom of the internal teacher workforce hierarchy” (p. 1).

Altogether, the literature conducted with foreign trained teachers in Ontario suggests that they experience many difficulties either when attempting to enter the teaching profession or during their transition years into the profession. However, it should also be acknowledged that several initiatives targeted at the integration of foreign trained professionals, including teachers, into Ontario’s workforce have been developed and implemented with some success. For instance, 618 foreign trained teachers obtained an interim certificate of qualification from June 2004 to December 2005 as a result of the Bridge to Employment in Teaching for Internationally Trained Teachers program (Ontario Ministry of Citizenship and Immigration, 2006). Also, the Alternative Teacher Accreditation Program for Internationally Trained Teachers (ATAPITT) program was established in Ottawa and Kingston in 2001 for foreign trained teachers, who were required to complete an additional year of teacher training in Ontario in order to meet the requirements for a teacher’s certificate (Ontario Ministry of Citizenship and Immigration). The program has had a significant employment success rate of nearly 70% such that by 2004, 51 foreign trained teachers had completed the program, 33 had been certified by the *College*, and 35 were working in the profession. As a response to the ATAPITT program’s success, the faculties of education in four Ontario universities are now

providing spaces for up to 15 foreign trained teachers who are required to complete an additional year of teacher training in Ontario (Ontario Ministry of Citizenship and Immigration).

Based on these initiatives and the empirical literature that has examined access to regulated professions in Ontario, and to the teaching profession in particular, it seems that while some progress has been made, there is mounting evidence for the necessity of change (Cornish et al., 2000; Janzen et al., 2004; Ontario Ministry of Citizenship and Immigration, 2006; Ontario Regulators for Access, 2003; Pollock, 2006; Walters, 2006). Two recent legal events, the legislation by the Ontario Government (i.e., Fair Access to Regulated Professions Act, 2006) and the decision by the Ontario Superior Court of Justice (i.e., *Siadat*), are of particular significance because they could bring a long-awaited change to the teaching profession in Ontario. These events are discussed in the following chapter.

CHAPTER FOUR: DISCRIMINATION AND THE EVALUATION OF TEACHERS' FOREIGN CREDENTIALS

This chapter provides a summary of two recent legal events that could make a significant difference to the evaluation of the credentials of foreign trained teachers and thereby establish the right of such teachers to practise their profession in Ontario. The discussion turns first to the Fair Access to Regulated Professions Act, 2006 and is followed by the *College's* response to this Act. The chapter will consider the recent and potentially influential decision by the Ontario Superior Court of Justice in *Siadat*.

Fair Access to Regulated Professions Act, 2006

It has been suggested that the federal and provincial governments in Canada must take the leadership role in achieving equality (Cornish, 1992). Accordingly, an active involvement of the Ontario government in initiatives aimed at promoting access of foreign trained professionals to regulated professions has been evident. For instance, one such initiative involved an appointment of Justice George Thomson to review the Ontario regulatory bodies' appeals processes and develop a set of common principles and best practices for a fair registration and appeals process. The Thomson report (2005) recommended the development of a "Fair Practices Code" in order to provide applicants with fair registration practices, available information and support, uniform criteria for decision-making, and access to documents.

The most recent initiative of the Ontario government, based on the Thomson report (2005), is the Fair Access to Regulated Professions Act, 2006. This Act passed final reading on December 13, 2006 and came into force on December 20, 2006 when it received royal assent. The main purpose of this Act is "to help ensure that regulated

professions and individuals applying for registration by regulated professions are governed by registration practices that are transparent, objective, impartial and fair” (Fair Access to Regulated Professions Act, 2006, Purpose of Act section, para. 1). Even though the terms such as transparent, objective, impartial, and fair were not specifically defined within the Act, the Thomson report defined those terms in the following manner:

- Fairness - Candidates should have access to an independent appeal of registration decisions based on established grounds.
- Accountability - Regulators are responsible for protecting the public interest by ensuring a high standard of professional practice.
- Objectivity - Competence to practise a profession should be determined according to merit-based criteria.
- Transparency - Candidates should have access to clear and well-defined registration and appeal mechanisms. (p. 9)

The principal areas of regulatory concern included requirements about registration practices, the establishment of the role of the Fairness Commissioner, and the issue of penalties. More precisely, with respect to registration practices, the Fair Access to Regulated Professions Act, 2006 requires that regulatory bodies provide all applicants with comprehensive information regarding how the registration process works, the approximate amount of time it will take to make a decision, the fees that are required, and the criteria for acceptance into the profession. Regulatory bodies are now also required to review their existing registration requirements related to academic courses and work experience, to provide information about documents and credentials required to support an application, and to work on developing alternative approaches in cases when

applicants cannot obtain specific documentation for reasons that are beyond their control. Furthermore, regulatory bodies now have to ensure that officials making decisions on registration, internal reviews, or appeals are well trained and have expert knowledge of the processes. Finally, regulatory bodies have to ensure that their decision about licensing is made within a reasonable time frame, that the written reasons of the decision are provided to applicants, and that applicants are entitled to the right of an internal review or an appeal.

With respect to the Fairness Commissioner's practices, the Fair Access to Regulated Professions Act, 2006 requires that the Ontario government appoint a Fairness Commissioner who will be responsible for assessing the registration practices of regulated professions and will supervise the regulatory bodies' compliance with the legislation in order to ensure that all applicants have been treated fairly. The Fairness Commissioner also will have a duty to advise regulated professions, government agencies, community agencies, and colleges and universities how to assess applicants' credentials.

Finally, the Fair Access to Regulated Professions Act, 2006 empowers the courts to impose penalties for individuals and agencies that are found guilty of an offence under this Act. Specifically, in cases when there is a "failure to comply with an order", a court can impose fines up to \$50,000 for an individual and up to \$100,000 for a corporation.

Taken as a whole, under this new Act, the regulatory agencies associated with Ontario's regulated professions are now required to ensure that their licensing processes follow these requirements and that the assessment of foreign credentials is not only accomplished more efficiently but is also fundamentally fair to the applicant. Even though many of the measures introduced by the Act have been welcomed by the

advocates for foreign trained professionals, Pickel (2006) has suggested that a number of amendments will likely be required to the Act. Nevertheless, the Fair Access to Regulated Professions Act, 2006 seems to have provided an important step forward in achieving its ultimate goal of eliminating the barriers faced by foreign trained professionals who are seeking to practise their professions in Ontario.

The Ontario College of Teachers' Response to the Ontario Government's Bill 124-Fair Access to Regulated Professions Act, 2006

In October of 2006, after Bill 124 passed second reading, the *College* released their official response to the proposed legislation. In general, the *College* supported the main principles and objectives of Bill 124. For example, the *College* expressed the view that they had “been a strong advocate for those applicants who have been educated outside Canada,” that they already have “many registration processes in place that are designed specifically to assist internationally educated applicants,” that they “actively encourage internationally educated applicants to ensure that the teachers in Ontario public school classrooms reflect the reality of Canada’s multiculturalism,” and that they have been “working in partnerships in a bridging program—Teach-in-Ontario—to assist in achieving this reality” (Ontario College of Teachers, 2006, p. 3).

In spite of this, the *College* also expressed a number of concerns with Bill 124. One of their main areas of concern was that many of the terms used within the proposed legislation were not explicitly or clearly defined. For example, the *College* argued that the term “fairness” was not defined within the proposed legislation and thus recommended that the term “fairness” be defined in a way that would reflect the existence of differences in the registration practices. The *College* rationalized their

current practices of different treatment between applicants by commenting that differential treatment for foreign trained teachers, related to the criteria for admission and support in completing the application process, were originally intended to address the barriers that foreign trained teachers are likely to encounter.

The second area of concern for the *College* was that Bill 124 seemed to violate the autonomy of the *College* as a regulatory body, especially with respect to their power to govern the teaching profession and their duty to protect the public interest. For instance, this concern was held to be evident in section 30 of the proposed legislation, which stated that “in the event of a conflict between its [the Bill’s] requirements and the requirements of other legislation, the Bill’s requirements would prevail” (Ontario College of Teachers, 2006, p. 6). Additionally, section 9 of Bill 124 recommended that regulatory bodies “shall make information publicly available on what documentation must accompany an application and what alternatives to the documentation may be acceptable to the regulated profession if an applicant cannot obtain the required documentation for reasons beyond his or her control” (Ontario College of Teachers, p. 7). In this respect, the *College* was concerned whether alternatives must be available and what types of alternatives are considered appropriate. Furthermore, according to the Ontario College of Teachers, the principle of self-regulation and their legislatively ascribed duty to protect the public interest would be infringed because Bill 124 seems to regulate questions related to certification requirements, which is one of the main objectives of the *College*. Finally, the *College* was concerned that Bill 124 had the effect of vitiating their professional expertise as a regulating body on a number of issues, thus undermining their autonomy.

The third area of concern for the *College* (2006) was the empowerment of the Fairness Commissioner proposed under Bill 124. For example, section 12 of Bill 124 states that the Fairness Commissioner would be entitled to assess the registration practices of regulated professions based on their obligations under Bill 124. The *College* argued that it was unclear and hence uncertain whether the focus of these assessments would be restricted to procedural aspects or would also include substantive issues on the academic and professional entry requirements. The *College* thus recommended limiting the Fairness Commissioner's responsibilities related to the procedural aspects of the registration practices. Finally, the *College* claimed that if regulatory bodies face orders by the Fairness Commissioner, they should be provided with the procedural protection, including a full right of appeal of such a decision.

In sum, it should be noted that after examining the similarities between the proposed and the passed legislation, it seems that the recommendations made by the *College* were not implemented within the Fair Access to Regulated Professions Act, 2006. For example, the term "fairness" remained undefined, the sections limiting the autonomy of the regulatory bodies remained unchanged, as did the role of the Fairness Commissioner. In fact, in March of 2007 former federal cabinet minister Jean Augustine was nominated by the Ontario government as the first Fairness Commissioner (CTV Toronto, 2007).

The Judicial Decision: *Siadat v. Ontario College of Teachers*

The purpose of this section is to provide a review of *Siadat*. First, major facts of the case are reviewed. Second, the decision by the Ontario Superior Court of Justice is summarized. Finally, responses to *Siadat* provided by the *College* and Ms. Siadat are examined.

The Facts of the Case

Ms. Fatima Siadat was a secondary school teacher who had 16 years of teaching experience in Iran. As an advocate of freedom of speech, she was teaching her students that authors had a right to freedom of expression. Her personal opinion, however, contradicted the policy and position of the Iranian government; consequently she experienced harassment by governmental officials, particularly from the Iranian Ministry of Education. The harassment eventually led to Ms. Siadat's loss of employment as a teacher. She also received threats to her life. Fortuitously, she qualified for convention refugee status from Canada and left Iran.

Upon her arrival in Canada, Ms. Siadat obtained a Community College Certificate in early childhood learning and started working in day-care centres. Ms. Siadat's primary goal, however, was to pursue her teaching career in Canada, which meant that she still had to obtain a teaching certificate (see Table 1). Ms. Siadat first applied for a teaching certificate to the Ontario Ministry of Education but was unable to supply all the required documents, and thus her application was not successful. Several years later, Ms. Siadat applied for a teaching certificate again, but this time to the *College*. One of the policies of the *College* was that the qualification papers must come directly from the issuing authority. Ms. Siadat's original documents including her university degree, her university transcripts, and her Iranian teacher's certification were all held by the Iranian Ministry of Education. She claimed that the Iranian Ministry of Education, as her persecutor in Iran, was unlikely to respond to her requests of providing her or the *College* with the original documents, and she was even worried that if she requested these documents from them, they would harm some members of her family who were still in Iran. Considering that Ms.

Table 1

Chronology of Events Related to Ms. Siadat's Attempts to Obtain Ontario Teaching Certificate

Year	Chronology of the events
1989	Ms. Siadat left Iran and came to Canada as a Conventional Refugee.
1993	Ms. Siadat originally applied to the Ontario Ministry of Education for a teaching certificate. She was unable to supply all the documents to meet the certification requirements, and the Ministry refused to grant her a teaching certificate.
1997	The Ontario College of Teachers assumed the responsibility of the Ministry of Education for teacher certification, and for the second time, Ms. Siadat was denied a teaching certificate.
2002	Ms. Siadat appealed the decision of the Ontario College of Teachers Registrar to the Ontario College of Teachers Appeals Committee. The Committee confirmed the previous decisions by both the Ministry of Education and the <i>College</i> , thus refusing to issue a teaching certificate to Ms. Siadat.
2004	Ms. Siadat appealed the decision of the Ontario College of Teachers Registrar to the Ontario College of Teachers Appeals Committee. The Committee refused to issue a teacher's certification.
2005	Ms. Siadat pursued her claim with a lawsuit to the Ontario Superior Court of Justice.
2006	The hearing was held by the Ontario Superior Court of Justice.
2007	The Ontario Superior Court of Justice decided in favour of Ms. Siadat, stating that the Ontario College of Teachers had violated the Human Rights Code of Ontario by requiring Ms. Siadat to establish her teaching qualifications by providing the original documents.

Siadat was unable to satisfy this specific requirement of the *College*, she provided the following documents as an alternate within her application:

- An identification card issued by the Iranian Ministry of Education. This was the only original government document submitted with her application. This document indicated that she was a teacher in Iran.
- A handwritten copy of her university transcripts including all the courses that she completed and the grades she received. This document was copied from a computer by a relative of her friend who worked in the Iranian Ministry of Education. The computer records were “blocked”, which meant that they could not be printed out.
- Photocopies of her Bachelor of Arts degree in teaching and her employment order from the Iranian Ministry of Education. The certified translations of these documents were also provided.
- An opinion of the Comparative Education Service provider from the University of Toronto that her foreign credentials are comparable to a Bachelor of Arts degree, specializing in education, from a reputable Canadian University which offers a similar program (*Siadat v. Ontario College of Teachers*, 2007).

The *College* Registrar, however, found these documents submitted by Ms. Siadat unacceptable and returned her application as incomplete. Since Ms. Siadat was not satisfied with the *College* Registrar’s decision, she appealed the decision to the *College* Appeals Committee. The *College* Appeals Committee upheld the previous decision of the *College* Registrar for a second time. Ms. Siadat decided to pursue a lawsuit to the Ontario

Superior Court of Justice. Ms. Siadat challenged the decision of the *College Appeals Committee* by raising a question of applicability of the *Code* on the *College's* deliberations and decisions.

The Decision of the Superior Court of Ontario

The Ontario Superior Court of Justice decided on January 13, 2007 in favour of Ms. Siadat (see Appendix). Justice John Brockenshire of the Ontario Superior Court of Justice, stated in the decision that:

The Ontario College of Teachers Committee has failed to meet both the obligation to properly interpret and apply the relevant law, and the obligation to provide adequate reasons for its decision, that its decision must be rescinded, and the application of Ms. Siadat must be referred back to the Committee for re-hearing, in the context of the statute and case law referred to in these reasons. (p. 18)

Two areas that form the basis of Justice Brockenshire's decision include the application and interpretation of (a) the *Code* and public policy relating to Convention refugees and (b) the sufficiency of reasons.

In determining whether specific statutes and legal decisions were applicable to the decisions of administrative tribunals such as the *College Appeals Committee*, Justice Brockenshire reasoned, based on common law (i.e., *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003; *Pushpanathan v. Canada*, 1998) that the standard to be used should be correctness. Based on the standard of correctness, Justice Brockenshire concluded that the *Code* and the Lisbon Convention were applicable to the deliberations and decisions of the *College Appeals Committee*. The *Code*, precisely section 6, explicitly reinforces the right of every person to equal treatment with respect to

membership in any self-governing profession without discrimination based on the place of origin. According to the evidence provided by Ms. Siadat, all her original professional records were held by the Iranian Ministry of Education. Since the Iranian Ministry of Education was in fact her persecutor in Iran, Justice Brockenshire concluded that her problems with her application to the *College* directly related to her place of origin. Nonoriginal documents that Ms. Siadat had managed to provide were considered unacceptable by the *College*. Based on the above, Justice Brockenshire stated: “It is plain and obvious to me that to insist on original or government certified documents from her place of origin is *prima facie* discriminatory against her, in view of the evidence she has provided” (*Siadat v. Ontario College of Teachers*, 2007, The Human Rights Code, and Public Policy section, para. 4). Finally, Justice Brockenshire concluded that the *College* Appeals Committee did not consider Ms. Siadat’s request for accommodation, thus failing to properly interpret and apply the *Code*.

With respect to the sufficiency of reasons, Justice Brockenshire also considered the decision of the *College* Appeals Committee in terms of the demands for procedural fairness. Based on common law (i.e., *Cardinal v. Kent Institution*, 1985), procedural fairness was interpreted as the requirement imposed on administrative tribunals (i.e., *College* Appeals Committee) to give sufficient reasons for their decision. More specifically, based on the *Baker v. Canada* (1999) decision, the duty of procedural fairness in situations such as statutory right to appeal requires a written explanation for a decision. In Ontario, the requirement to give adequate reasons has been evident both when the empowering statute requires written reasons (i.e., *Gray v. Ontario*, 2002; herein after *Gray*), as well as when that requirement arises from the common law practice (i.e.,

Baker v. Canada, 1999). Furthermore, in *Gray*, Chief Justice McMurtry elaborated on the requirements for administrative tribunals to provide adequate reasons by stating the following:

The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points at issue. The reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors. (cited in *Siadat v. Ontario College of Teachers*, 2007, Sufficiency of Reasons section, para. 6)

Finally, Justice Brockenshire concluded that the “reasons provided by the *College Appeals Committee* do not meet the above criteria at all” (*Siadat v. Ontario College of Teachers*, 2007, Sufficiency of Reasons section, para. 7). He justified this conclusion by pointing to the fact that the point at issue before the *College Appeals Committee* was appropriate accommodation for Ms. Siadat, as a Convention refugee, from a place of origin (i.e., Iran) that would not provide her with formally certified documents. The *College Appeals Committee*’s reasoning that Ms. Siadat should not “be treated any differently from other applicants because other applicants with similar backgrounds and experiences have successfully met the requirements for Ontario certification” (*Siadat v. Ontario College of Teachers*, 2007, The Committee Decision section, para. 8), according to Justice Brockenshire, did not address or answer the issue of accommodation. Even though issues concerning the procedural fairness have been acknowledged, the emphasis in this thesis is on the human rights issues.

The Response to the Decision

The *College* decided not to appeal the decision and thus accepted the judgement of Ontario's Divisional Court. It has been reported that in the months following the decision, the *College* was working with Ms. Siadat to develop innovative ways to assess her teaching credentials (Professionally Speaking News, 2007). Furthermore, the *College* Registrar, Brian McGowan, stated in a response to the decision that:

Over the years, we have developed a number of flexible approaches to evaluating international teaching credentials. So far, we have not been able to apply any of these to Ms. Siadat's case. The court has told us to try harder and we will ... Regulations governing teacher qualifications in Ontario have not changed substantially in more than 25 years but, over the last two years, we have developed sweeping recommendations for changes to bring requirements into the 21st century. (Professionally Speaking News, para. 6)

Ms. Siadat, who has been waiting for a chance to be a certified teacher for the past 13 years, expressed her excitement with the decision by stating:

I can not believe it happened after all these years ... I hope it will open doors for others so that they will not have to go through this struggle It makes me feel so good and inspired to help others. (Hughes, 2007, para. 3)

Furthermore, Ms. Siadat's lawyer, Jen Lash, commented upon the decision as follows:

This is a significant decision because it is telling all professional self-regulatory bodies that they have to be more flexible and adjust their assessment processes, depending on the applicants' situation, because not everyone can meet their rigid

requirements. My client is the first to challenge that kind of treatment. This is a significant test case. This decision is precedent-setting. (Keung, 2007, para. 13)

Ms. Siadat also commented that she is looking forward to her meeting with the *College* officials and that after she receives the teaching certificate, she is planning to “work as a teacher ... until she dies” (Hughes, para. 8). Ms. Siadat explained her passion for teaching in the following way:

I have been working with children all of my life and the older I get, the more I enjoy it ... all the experience builds up and I think I am better at it now than I was ten years ago ... teaching is a job where experience is more important than anything else. (Hughes, para. 9)

With all the excitement about the decision, it remains to be seen how successful Ms. Siadat will be in securing employment, since studies have demonstrated that foreign trained teachers who obtained certification in Ontario still have a lower chance of obtaining full-time employment and are more likely to work as supply teachers (F. McIntyre, 2004; Pollock, 2006). For example, McIntyre surveyed Ontario graduates and certified teachers from Ontario trained outside Canada and found that even when foreign trained teachers obtained their teaching certificates, they still had a significantly lower chance (72%) of obtaining employment in comparison to those who graduated from an Ontario program of teaching (89%). Furthermore, Ms. Siadat will most likely be ineligible to teach in one third of Ontario’s publicly funded schools because she is not a Roman Catholic (Jones, 2007). Specifically, separate schools have the right to refuse employment to non-Catholic applicants (Jones). In spite of these discouraging statistics, Ms. Siadat remains positive in her pursuit of working as an elementary school teacher;

she stated: “Of course, I will find something. Nothing discourages me” (Alphonso, 2007, para. 4).

CHAPTER FIVE: HUMAN RIGHTS ISSUES: FATIMA SIADAT CASE

This chapter provides an in-depth analysis of the major issues in *Siadat* in order to address the main research questions raised in this thesis. Issues concerning discrimination by reason of place of origin are discussed initially. The difficulties of defining the concept of the public interest are addressed in the following section. Third, the obligation of the *College* to accommodate special circumstances is discussed afterwards. Fourth, the primacy of a substantive approach to equality over a formal equality approach is examined last. Finally, the chapter concludes with anticipated implications of *Siadat* for the *College* as a regulatory body in Ontario, foreign trained teachers, and public policy in Ontario and Canada.

Discrimination by Reason of Place of Origin

The governing bodies of the regulated professions in Ontario, including teaching, recognize that assessing the diversity of immigrants' foreign training and work experiences is one of their main challenges (Janzen et al., 2004). According to the empirical literature, these difficulties occur partly because the regulatory bodies lack the required expertise in comparative education, lack adequate resource materials, and lack ongoing contact with international educational systems (Brouwer, 1999). These challenges are also attributed to the fact that immigration policies based on the "point system" reversed the pattern of immigration to Canada from Europe towards Asia and other "third world" countries (Whitaker, cited in Guo, 2005). Consequently, within the last few decades, the majority of foreign trained professionals came from the countries with diverse educational and regulatory systems including Asia, Central and South America, Eastern Europe, and Africa (Janzen et al.). According to the Lisbon Convention

(of which Canada is a signatory), however, the regulatory bodies have a duty to learn about other educational systems (Janzen et al.). Thus, the question which remains is to what extent regulatory bodies in Ontario have invested in attempting to better understand educational systems from different parts of the world, especially those which appear to be significantly different from the current educational and regulatory system in Ontario.

Janzen et al. (2004) studied the perceptions of the representatives of over 20 immigrant associations and community groups and found that entry to the registration process is more difficult for foreign trained applicants than those who completed their education in Ontario. The participants in Janzen et al.'s study reported that "suspicion and confusion" towards foreign trained professionals was "evident and relatively common" (p. 40). Many participants also believed that foreign trained professionals were regarded as an "add-on" to the existing regulatory system in Ontario (p. 40). Participants also expressed the concern that some regulatory bodies demonstrated an "attitudinal issue" towards certain countries, suggesting that educational and regulatory systems in those countries are inferior in comparison to the ones in Ontario (p. 40) as evidenced by the fact that most regulatory bodies have incorporated "recognition agreements" with certain countries but not with others. Janzen et al. (2004) argued that, based on the existence of the "recognition agreements," immigrants from traditional immigration source countries are likely to have increased access to regulated professions, whereas immigrants from the nontraditional source countries are likely to experience systemic barriers in the registration process. Within the same line of argument, Guo (2005) stated that while immigrants from "advanced" countries (e.g., the United States, Britain, Australia, or New Zealand) have been relatively successful with the recognition of their

foreign credentials and work experience in Ontario, it is those from the “third world” countries that have encountered most difficulties. Based on this, Guo speculated that “knowledge has been racialized in Canada” and that “hierarchy of knowledge and power is rooted in Canada’s ethnocentric past, where immigrants from Europe and the United States were viewed as the most desirable, and those from the ‘third world’ countries as undesirable” (p. 5).

The report by the Ontario Ministry of Citizenship and Immigration (2006) examined the recent initiatives by the regulatory bodies and the Government of Ontario with regards to the integration of foreign trained professionals into Ontario workforce. In the context of the teaching profession, the study reported that one of the *College’s* recent initiatives, whose aim is a faster integration of foreign trained teachers into the Ontario’s workforce, is the “Interim Certificate of Qualification” (Ontario Ministry of Citizenship and Immigration). The *College* issues “Interim Certificates of Qualification” to those applicants who have completed a recognized teacher education program outside Ontario and who are able to satisfy all the certification requirements in order to gain working experience in Ontario. This initiative by the *College* has been welcomed by the proponents of faster integration of foreign trained professionals into Ontario’s economy and should be applauded since it aims at improving an important aspect of the problem related to foreign trained professionals’ licensing, in particular, their lack of Canadian experience. This initiative, however, does not target directly the problem of foreign credential assessment and recognition, identified as the major barrier for foreign trained professionals in gaining access to regulated professions in Ontario.

The report by the Ontario Ministry of Citizenship and Immigration (2006) also reported licensing statistics for foreign trained teachers for 2004. Based on the data provided by the *College*, it found that in 2004, 3,150 foreign trained teachers applied for teaching certification; that 2,221 foreign trained applicants were granted an “Interim Certificate of Qualification”; and that 1,777 foreign trained teachers were granted the full certificates. Considering that the average length of time to complete the requirements from application to full licensure (specifically the 194 days of Ontario teaching experience) is 3 years, most applicants who received a full teaching certificate in 2004 were most likely to have applied prior to 2004, thus not being counted as a 2004 applicant. The study also identified the United States, India, Australia, England, and Scotland as countries that were most represented by applicants for teaching certification in 2004. These statistics, however, are far less impressive if we consider that except for India, none of these countries comprise the primary source of immigration to Canada. Rather, according to the report by Citizenship and Immigration Canada, the primary sources of immigration to Canada in 2005 were: China (16% of all immigrants or 42,291 individuals), India (13% of all immigrants or 33,146 individuals), Philippines (7% of all immigrants or 17,525 individuals), and Pakistan (6% of all immigrants or 13,576 individuals). As Guo (2005) and Janzen et al. (2004) argue, it is the applicants from nontraditional country sources (i.e. mainly the “third world” countries) who are most likely to experience difficulties with the recognition of their foreign credentials. Given that it is a practice of the *College* to return as incomplete all the applications which do not contain all the required documents, the number of applications deemed incomplete has not been reported or researched by the *College* or any other research study to date. This

suggests that the exact number of foreign trained teachers who do not meet the requirements for licensure by the *College* remains unknown. This issue was also identified as a problem by Justice John Brockenshire of the Ontario Superior Court of Justice in *Siadat*, suggesting that this issue should be considered in future studies. It is also crucial that future studies examine the source countries of those applicants who could not meet the *College's* requirements for certification in order to examine whether the number of incomplete applications differs between applicants from “third world” countries and those from “advanced” countries.

The *College*, as a regulatory body of the teaching profession in Ontario, has expressed an opinion that even though some educational programs from different countries may appear to be congruent with the current educational system in Ontario, the minimal amount of teacher education course work completed by applicants from some countries often does not meet Ontario certification requirements (Ontario College of Teachers). For instance, the *College* listed countries such as Romania, Albania, and Poland as examples of international jurisdictions where graduates complete a specific level of education with very limited teacher education or pedagogical content and who are allowed to work as teachers in those countries. Accordingly, in cases when applicants have completed less than half a year of course work in education, it is the practice of the *College* to require those applicants to complete a teacher education program in Ontario (Ontario College of Teachers). Therefore, if the applicants from certain countries are not successful in obtaining the Ontario teaching certificate, the *College* takes the position that this should not be interpreted as a “systemic barrier” but rather as “a natural incongruence between a certain education system and that of Ontario” (Ontario College of Teachers,

2006, p. 14). This argument is also in line with Couton (2002), who proposed that foreign credentials are not being recognized in Canada because of their poor transferability, specifically the disparities related to the quality and relevance of the subject matter.

Equality and human rights legislation in Ontario and Canada can also be used as the basis for examining whether the failure of the regulatory bodies to recognize qualifications and skills of foreign trained professionals constitutes discrimination on the reason of “place of origin”. According to the *Code* (1990), everyone, including foreign trained professionals, should have equal rights and opportunities in the areas such as employment, services, and memberships (Cornish et al., 2000; Janzen et al., 2004). Discrimination in membership in any self-governing profession has been explicitly forbidden by the *Code*, in particular section 6 of the *Code* (1990) that requires:

Every person has the right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap. (Freedom from Discrimination section, para. 6)

Furthermore, professional regulatory bodies have a legal obligation based on the *Charter* and the *Code* to ensure that their requirements for licensing comply with the norms of equality and nondiscrimination (Cornish et al.; Faraday et al., 2001; Grandan et al., 2006). For example, Faraday et al. stated that the equality and human rights legislation applies to foreign trained professionals in that:

- Foreign trained workers have the right to be treated without discrimination in respect to the services they receive from colleges and professional

organizations, without discrimination in employment, and without discrimination in membership in professional associations.

- Government, employers, and professional colleges have a proactive legal obligation to ensure that the standards that they are setting are not discriminatory, that their practices do, in fact, properly recognize the skills and qualifications that foreign workers bring. (p. 3-4)

Cornish et al. (2000) argued, based on both the empirical literature and Canadian judicial decisions, that the licensing barriers experienced by foreign trained professionals may be seen as “systemic discrimination” on the basis of “at least their place of origin and arguably also, depending on the facts, on the basis of their ethnic origin, ancestry, race, colour and/or gender” (p. 2).

Siadat is the first decision of this kind in Ontario confirming Cornish et al.’s (2000) position by demonstrating that discrimination on the basis of place of origin is a valid reason for contending that discrimination exists in the evaluation of foreign credentials in Ontario. Specifically, Ms. Tie (who represented Ms. Siadat) argued that the failure to accommodate Ms. Siadat’s problems with documents from Iran constituted a violation of section 6 of the *Code*, which explicitly reinforces the right of every person to equal treatment with respect to membership in any self-governing profession without discrimination based on the place of origin. Furthermore, Justice John Brockenshire agreed by stating that teaching is a self-governing profession and that membership in the *College* is a requirement for practicing that profession in the publicly funded schools in Ontario and concluded that section 6 of the *Code* was applicable to the *College*’s deliberations and decisions. Justice Brockenshire also acknowledged Ms. Siadat’s

evidence that she was a political dissident from Iran who fled the country and was accepted as a convention refugee in Canada and that her original professional records held by the Iranian Ministry of Education could not be provided to the *College* under reasonable circumstances. Based on that evidence, Justice Brockenshire decided that Ms. Siadat's problems with her application for a teaching licence to the *College* directly related to her place of origin and that "insisting on such records in the circumstances constitutes discrimination by reason of place of origin" (*Siadat v. Ontario College of Teachers*, 2007, Position of the Appellant section, para 5).

Duty to Serve and Protect the Public Interest

One of the main reasons for the existence of professional regulatory bodies is to act in the public interest (Janzen et al., 2004). It has been evident from the literature, however, that the term "public interest" is very difficult to define (Grandan et al., 2006; Janzen et al., 2004; Pal & Maxwell, 2004). In order to provide a clearer definition of the term "public interest," Pal and Maxwell examined the philosophical literature, practices of the regulatory bodies in Ontario, and the views of Canadian citizens. The philosophical literature illustrated the existence of five distinctive approaches to understanding the term "public interest"; that is, it has been defined either as a process, as a majority opinion, as a utilitarian notion, as a common interest, or as a shared value. A procedural definition of the public interest assumes that decisions and outcomes will be in the public interest as long as they arise from fair, inclusive, and transparent decision-making procedures. The majoritarian concept of the public interest is defined by the opinion of a significant majority of the population on the issue. The utilitarian definition of the public interest would include a balancing of different interests through negotiations and compromise.

Within a common interest approach, the public interest is defined as a set of pragmatic interests that people share. Finally, the shared values concept of public interest considers the normative principles and shared values in defining the term.

Upon reviewing the practices of the regulatory bodies in Ontario, Pal and Maxwell (2004) concluded that most regulatory bodies have interpreted “public interest” by considering that the decision-making is fair, open, and transparent while at the same time ensuring the balance of costs and benefits and the health and safety requirements. Similar to the regulatory bodies’ interpretation of the term “public interest”, Pal and Maxwell further found that the Canadian public also expressed the view that interests of different actors in society must be balanced. The Canadian public, however, was also of an opinion that transparency and fairness, as well as the high standards with respect to health, safety, and environment, are preferable.

Acknowledging the difficulties of defining the term “public interest,” Janzen et al. (2004) emphasized the specific social, political, and economic context of each profession within which it operates and suggested that the term “public interest” be defined for each profession. Considering that the *College* has a duty “to protect and serve the public interest” (Ontario College of Teachers Act, 1996, College section, para. 5), the question that arises is how has “public interest” been defined within the context of the teaching profession in Ontario? In attempting to address this question, we need to first consider provincial statutes that delegated power to regulatory bodies as well as the internal regulations of regulatory bodies. With respect to the provincial statutes which delegated power to regulatory bodies, Grandan et al. (2006) found that those statutes do not define the term “public interest.” Within the context of the teaching profession, neither the

Ontario College of Teachers Act, 1996, nor the *College's* regulations, define specifically what the term “to serve and protect the public interest” means. The *College*, however, does provide a general description of the term “public interest” as following:

The College of Teachers serves the public interest. Students, parents and taxpayers benefit from a publicly accountable profession. People from all walks of life participate in decision-making on the College Council and College committees. They work closely with teachers who are elected by their peers to develop standards of practice and ethical standards for the profession, accredit professional learning programs and conduct disciplinary hearing. (Ontario College of Teachers, 2001, p. 3)

Thus, it may be concluded that the *College* serves and protects the public interest by developing the standards of practice as well as the ethical standards for the teaching profession, accrediting the teacher education programs, or preservice training, and conducting disciplinary hearing of its members.

Recent amendments to the Ontario College of Teachers Act, 1996 have made an attempt to clarify the term “public interest.” Based on those amendments, the ‘Public Interest Committee’ was established in 2006 (Ontario College of Teachers Act, 1996). Members of the “Public Interest Committee” are appointed by the Minister and may not be members of the *College*. The “Public Interest Committee” has the following duties:

- To advise the Council with respect to the duty of the *College* and the members of the Council to serve and protect the public interest in carrying out the *College's* objectives.

- To perform such other duties as may be prescribed by the regulations.

(Ontario College of Teachers Act, 1996, Public Interest Committee section, para. 6)

The introduction of these amendments suggests that government involvement has been increasing because the members of the “Public Interest Committee” are appointed by the government (i.e., the Minister), as well as because of the introduction of recent legislation (i.e., Fair Access to Regulated Professions Act, 2006). The *College* has expressed an opinion that these new initiatives violate the autonomy of the *College* as a regulatory body, especially with respect to the questions related to certification requirements and their duty to protect the public interest. On the other hand, these new amendments have increased the number of teachers in the governing body of the *College* (i.e., the Council) from 17 to 23, while the number of those members appointed by the government (i.e., the Lieutenant Governor) remained the same (Ontario College of Teachers Act, 1996, College section, para. 7). This suggests that even though government involvement has increased in specific matters (e.g., in determining the “public interest”), at the same time it seems that the *College* (i.e., teachers) gained even more power in governing the teaching profession in Ontario.

Considering that the term “public interest” has not been defined through either provincial acts or the *College’s* internal act or regulations, it appears that the members of the “Public Interest Committee” have the discretion in interpreting this term on a case by case basis. This is in line with Dworkin (1977), who suggested that “discretion, like the hole in a doughnut, does not exist except as an area left open by surrounding belt of restriction” (cited in Bell, 1995, p. 97). Specifically, by acknowledging the difference

between strong and weak discretion, Dworkin stated that strong discretion is observed when an individual who, after consulting all the existing relevant written acts which do not contain the particular guidelines, is allowed to make a decision by using his or her own “best judgment”. According to Dworkin’s definition, it may be argued that the “Public Interest Committee” will most likely exercise strong discretion when determining the meaning of the term public interest. The discretion given to the “Public Interest Committee,” however, is most likely not unlimited since the literature suggests that cultural, social, political, psychological, and institutional factors may also be perceived as constraints when discretion is exercised (Schneider, 1995). Thus, it seems as important to acknowledge that in defining the public interest, the “Public Interest Committee” needs to consider those constraints as potential modifiers of discretion within the context of the teaching profession in Ontario.

Professional regulatory bodies have a duty to act in the public interest and to ensure that entrance into the profession is governed by standards that will protect the public interest (Grandan et al., 2006). Accordingly, the duty to ensure the competency of practitioners is an important component of the duty of self-regulated professions to act in the public interest. With respect to the registration component of regulatory bodies’ decision-making processes, the public interest has been defined as the registration process that licenses all qualified and competent professional applicants while ensuring the safety, health, and welfare of the public (Janzen et al., 2004). It should also be acknowledged that this definition varies from regulator to regulator, but the common theme between professions with respect to licensing is:

- To exclude from a licensing regime any practitioner who cannot provide the service to the public competently and ethically.
- To ensure that practitioners who can provide the service to the public competently and ethically are not excluded. (Law Reform Commission of Manitoba, cited in Grandan et al., p. 21)

Several authors have suggested that the duty to protect the public interest has often been interpreted by regulatory bodies as an explanation for the decisions that do not consider or respond to the existence of systemic barriers experienced by the foreign trained applicants to enter regulated professions in Ontario (e.g., Pal & Maxwell, 2004). According to Janzen et al. (2004), interpretation of the term “public interest” in this way has contributed to some extent to a great number of foreign trained professionals who are not able to practice their profession in Ontario. Accordingly, this raises a question whether the regulatory process and licensing process in particular have adequately and fairly responded to the new reality of Ontario where over 130,000 immigrants enter the province each year and where about 18,000 of them are attempting to find employment in regulated professions (Goldberg, 2000; Janzen et al., 2004).

The literature suggests that three recent changes taking place in Ontario are the changing demographics related to the increasing number of newly arriving immigrants, evolving equity and human rights legislation, and the emphasis on promoting access to professions and trades for foreign trained professionals (Janzen et al., 2004). Based on these changes, Janzen et al. argued that the term public interest needs to be defined in a way that would incorporate the fact that today’s public is significantly different from the

public that existed when most regulatory bodies were established (in late 18th and early 19th centuries). Janzen et al., for example, claimed that:

Regulating in the public interest has been interpreted too narrowly and interpreted inconsistently across professions, which has contributed, in part, in thousands of immigrant professionals being unable to meet licensing requirements. Yet the fact is the public in whose interest regulation takes place looks very different from the public that existed when most regulatory bodies were formed. This public includes immigrant professionals. The regulation of today must take into account this more diverse public. By law, the public interest requires a system which is non-discriminatory and has *inclusive standards* [italics added] that apply both to applicants for professional licenses as well as consumers of professional services. The notion of regulation must be broadened to expand public interest from a strictly safety-based and exclusionary definition to one that is *inclusive* [italics added] and considers it in the public interest to ensure that all qualified and competent professionals be licensed. (p. 42)

Thus, it may be concluded that a system of registration should regulate professions in the interest of “today’s public” as an inclusive one which is made up of both Canadian educated and professionals educated in different countries.

As acknowledged by a number of authors (e.g., Grandan et al., 2006; Janzen et al., 2004; Pal & Maxwell, 2004), regulatory bodies have a statutory duty to protect the public interest; however, the literature recognizes that regulatory bodies are also governed by the equity and human rights legislation such as the *Charter* and the *Code* (Cornish et al., 2000; Faraday et al., 2001; Grandan et al.; Janzen et al.). These legislations require that

everyone has equal rights and opportunities without discrimination in specific areas including employment, services, and membership; as well as that services provided by the regulatory bodies are nondiscriminatory (Cornish et al.; Faraday et al.; Grandan et al.; Janzen et al.). One of the uncertainties that arises is the relationship between regulatory bodies' duty to act in the public interest and their obligation to uphold human rights legislation. Grandan et al. acknowledged the complexity of regulatory bodies' duty to act in the public interest and stated that duty to act in the public interest includes a duty both to ensure competence of practitioners and to uphold human rights norms. Grandan et al. claimed that a duty to ensure competence of practitioners and to uphold human rights norms should not be read as contradictory, because discrimination is contrary to the public interest. In cases when the conflict arises, Grandan et al. suggested that it must be resolved within the human rights framework, which takes into account the meaning of the legal principles such as discrimination, the duty to accommodate, and undue hardship.

The duty to protect the public interest arose as one of the important issues in *Siadat*. For example, Ms. Zayid, a lawyer who represented the *College*, argued that the *College Appeals Committee's* decision, which denied the certification to Ms. Siadat, should be respected based on the expertise of the *College Appeals Committee's* members in the area and the *College's* duty to serve and protect the public interest. This is in line with Lipsky (1980) and Feldman (1995), who believed that the public service workers perform their work duties by exercising discretion because, as professionals, they are expected to make choices on the basis of their professional training and experience. Ms. Zayid further stated that:

In this case the applicant had failed to supply adequate evidence of her professional training and suitability to teach and in the absence of that, it would not be consistent with the public interest for the *College* to certify her as a qualified teacher in Ontario (*Siadat v. Ontario College of Teachers*, 2007, Position of the Respondent section, para. 1).

Considering that the definition of the term “public interest” with respect to registration is “to exclude from a licensing regime any practitioner who cannot provide the service to the public competently and ethically” (Law Reform Commission of Manitoba, cited in Grandan et al., 2006, p. 21), it would be inconsistent with that definition to license the person who is not competent. In determining applicant competence, based on the evidence provided by both parties in *Siadat* and based on the *College’s* regulations, it may be concluded that the *College* determines applicants’ competence based only on credential-based assessment. Ms. Tie, Ms. Siadat’s lawyer, requested from the *College* that the competence of Ms. Siadat be assessed in alternative ways (e.g., through the examination and cross-examination of Ms. Siadat before the *College Appeals Committee*). The *College* officials, however, refused Ms. Tie’s request and concluded that it would be against the public interest to certify her as a teacher in Ontario.

The question that arises from this is why certification of Ms. Siadat would be against the public interest, especially if we consider the second part of the definition of public interest as a requirement for regulatory bodies “to ensure that practitioners who can provide the service to the public competently and ethically are not excluded” (Law Reform Commission of Manitoba, cited in Grandan et al., 2006, p. 21). Considering that the *College* provided Ms. Siadat with only one way of assessing her competence (i.e.,

credential assessment) and that the results obtained were not satisfactory from the *College's* perspective, the *College* assumed the noncompetence of Ms. Siadat without providing her an opportunity to prove in an alternate way that she is competent.

Janzen et al. (2004) argued that “the public interest requires a system which is non-discriminatory and has inclusive standards that apply both to applicants for professional licenses as well as consumers of professional services” (p. 42). If we consider the fact that the student population in Ontario is becoming increasingly diverse and that a number of empirical studies have suggested the necessity of a teaching force that needs to reflect the multicultural student body (e.g., Dei, 2002; Fenwick, 2001; Quirocho & Rios, 2000; Solomon, 1997), there is a related question whether over the years the *College* had provided inclusive standards that would fairly represent both the applicants for teaching licenses as well as the increasingly diverse Ontario student population. Finally, based on the evidence from *Siadat*, it seems that over the years the *College* had failed to respond to the legal requirement of resolving conflict between a duty to ensure competence of practitioners and upholding human rights norms within the human rights framework by considering the legal principles such as discrimination, the duty to accommodate, and undue hardship (Grandan et al., 2006).

Duty to Accommodate

According to Day and Brodsky (1996), accommodation is the “adjustment of a rule, practice, condition or requirement to take into account the specific needs of an individual or group” (p. 435). Thus, accommodation can be interpreted as making alternative arrangements or adjusting a requirement in order to remove the discriminatory effects on an individual or a group (Grandan et al., 2006). Considering that each

individual's needs are unique, Humphrey (2002) recommended that each person with a need for an accommodation ought to be assessed and accommodated individually.

The duty to accommodate exists in the context of the Canadian human rights law. On the federal level, acts such as the Canadian Human Rights Act and the Employment Equality Act recognize the duty to accommodate (Canadian Human Rights Commission, 2000). In addition, all Canadian provincial human rights acts identify duty to accommodate. Furthermore, the duty to accommodate has been actively affirmed by the Canadian courts. The Supreme Court of Canada in *Meiorin* (reviewed earlier) set out the elements of a *bona fide* occupational requirement where the employer's duty to accommodate was identified (Canadian Human Rights Commission). Accordingly, all Canadian human rights acts now contain a *bona fide* occupational requirement as the major exception to the general rule of nondiscrimination (Canadian Human Rights Commission).

In *Meiorin*, Chief Justice McLachlin recommended a three-step test for determining whether a "prima facie" discriminatory standard is a *bona fide* occupational requirement. Justice McLachlin stated that, in order to justify a standard that disadvantages certain individuals because of their membership in a protected group, it must be established that:

- The employer adopted the standard for a purpose rationally connected to the performance of the job;
- 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

- The standard was reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is *impossible to accommodate* [italics added] individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer. (*The British Columbia Government and Service Employees' Union v. The Government of the Province of British Columbia*, 1999, p. 31).

Thus, the purpose of the *bona fide* occupational requirement test, also known as the Meiorin test, is to develop standards that accommodate the potential contributions of all employees but without causing undue hardship to the employer. Accommodation as a positive obligation of all employers and service providers is, however, not unlimited. The Supreme Court of Canada has accepted that failure to accommodate may be justified only where it would be impossible to do so without incurring undue hardship. This aspect is also specified within the *Code* in section 18 and is referred to as “reasonable accommodation” as follows:

The Commission, the Tribunal or a court shall not find that a qualification under clause (1) (b) is reasonable and *bona fide* unless it is satisfied that the circumstances of the person cannot be accommodated without undue hardship on the person responsible for accommodating those circumstances considering the cost, outside sources of funding, if any, and health and safety requirements, if any. (The Ontario Human Rights Code, 1990, Interpretation and Application section, para. 54).

This suggests that undue hardship is assessed based on the following factors: cost, outside sources of funding, and health and safety. Thus, a cost may be considered as undue hardship if it is so high that it affects the survival of the organization or business or changes its essential nature (Ontario Human Rights Commissioner, 2007). Furthermore, outside sources of funding such as accommodation funds available in the public sector and government grants or loans which can compensate some costs should be also considered in the assessment of undue hardship (Ontario Human Rights Commissioner). For example, if the cost of an accommodation is too costly to do all at once, it may be possible to do it in stages or to create a reserve fund. Finally, health and safety factors may be considered as undue hardship if it is decided that health and safety requirements can not be modified or that alternatives cannot be found to protect the health and safety of the organization (Ontario Human Rights Commissioner).

Even though the duty to accommodate recognizes that equality means respect for people's different needs such as disability, sex, age, family status, ethnic or national origin, and religious belief, Day and Brodsky (1996), however, noted that the "reasonable accommodation framework lacks the capacity to effectively address inequality and foster truly *inclusive institutions* [italics added]" (p. 435). Day and Brodsky argued that accommodation could be reconsidered as entitling all groups to participate as equals in the negotiation of social norms instead of accepting that the social norms are determined by the most powerful groups in the society with controllable compromise to those that are "different." According to this position, it may be argued that a registration system for regulated professions should have inclusive standards for both Canadian educated and foreign trained professionals. For example, Grandan et al. (2006) recommended that

regulatory bodies should first undertake a systemic review of their licensing requirements in order to determine whether they have discriminatory effects on foreign trained professionals. In cases when a licensing requirement has discriminatory effects, Grandan et al. suggested that the regulatory body has “a duty to accommodate up to the point of undue hardship” (p. 33).

Accommodation was also the main request by Ms. Siadat (*Siadat v. Ontario College of Teachers*, 2007). Specifically, Ms. Siadat’s demand that the *College* develop an individualized method of determining her qualifications for teacher certification was the request for accommodation. Ms. Tie, Ms. Siadat’s lawyer, referred to the efforts of the British Columbia College of Education to accommodate exceptional circumstances by writing “challenge examinations” at the British Columbia universities or by completing a familiarization program and practicum in order to satisfy their requirements. Additionally, Ms. Tie suggested several ways in which Ms. Siadat’s accommodation may also have been achieved including:

- Examination and cross-examination of Ms. Siadat before the Committee.
- Review of Ms. Siadat’s documents and perhaps an interview with her by persons knowledgeable of the educational system in Iran (perhaps some or all of the 12 Iranians now, per the *College*, licensed as teachers in Ontario).
- Independent proficiency testing as authorized by the British Columbia College of Education. (*Siadat v. Ontario College of Teachers*, 2007, Reply section, para. 1).

The request for accommodation in *Siadat* was based on *Meiorin*. Cornish et al. (2000) also recommended using *Meiorin* as a legal basis for requiring licensing bodies

and employers to develop professional standards that work for foreign trained professionals as well as Canadian trained individuals. Justice Brockenshire used *Meiorin* as part of the reasoning in reaching the decision in *Siadat*. Justice Brockenshire found that the *College Appeals Committee* neglected the recommendation by the Supreme Court of Canada from *Meiorin* by stating that “with the issues of discrimination and treaty compliance before it, the obligation was upon the *College Appeals Committee* to provide individual accommodation, unless it could establish that accommodation was impossible without imposing undue hardship on the *College*” (*Siadat v. Ontario College of Teachers*, 2007, Sufficiency of Reasons section, para. 8). Justice Brockenshire concluded that by insisting on the original documents from Iran, the *College Appeals Committee* neither considered Ms. Siadat’s request for accommodation nor examined whether the accommodation was possible without undue hardship on the *College*, thus failing to properly interpret and apply the *Code*. By neglecting to consider a request for accommodation, the *College* overlooked that some of their policies (i.e., their request for an original document) may be in fact discriminatory since they had adverse effects on certain individuals and groups, imposing additional burdens on them. By insisting on such policies without attempting to justify them as a *bona fide* occupational requirement and by failing to examine whether the accommodation of Ms. Siadat would affect the *College* up to the point of undue hardship, it is evident that the *College* did not consider accommodating Ms. Siadat in terms of cost, outside sources of funding, and health and safety requirements as suggested by section 18 of the *Code*.

Ms. Siadat’s request for accommodation may also be analyzed in terms of the discretionary decision-making by the *College*’s officials. As suggested in the literature

(e.g., Grandan et al., 2006; Pal & Maxwell, 2004), the regulatory bodies' decision-makers, even though guided by law and precedent, also use a substantial degree of discretion, mainly because their members are selected based on their expertise in the field. The literature also indicates that the abuses of discretion have often been interpreted as one of the main limitations of discretionary decision making, giving supremacy to the decision making guided by rules (Bell, 1995; Schneider, 1995). Lempert (1995), however, emphasised that the problem of injustice may occur, not just if the decision-maker uses discretion, but also if the person granted discretion fails to use it. According to Lempert, the reason that discretion is granted is based on their expertise in the field and their ability to "consider each case on its peculiar facts and reach an appropriate decision" (p. 228). In the cases when the decision-maker avoids using discretion and consequently avoids responding to the specifics of a particular case, the problem of discretionary abuse may be evident. Thus, based on Lempert's propositions, it may be argued that by not responding to Ms. Siadat's request for accommodation in terms of providing her with an individual method of determining her qualifications, the *College's* officials may have abused their discretionary power by declining to use discretion in considering Ms. Siadat's request.

Formal Equality Versus Substantive Equality

The importance of the concept of equality is evident in the efforts of political and legal scholars both to define the conceptual dimensions of the notion of equality and the conditions under which it may be achieved and maintained. For example, Aristotle defined justice as "a sort of equality in which individuals of equal merit are entitled to equal shares of the good" (as cited in Manfredi, 2001, p. 104). Contemporary political

and legal doctrine uses the term *formal equality* to describe Aristotle's proposition that "things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unlikeness" (Black & Smith, 1996, p. 14-7). This is also known as a "similarly situated test" because the emphasis in the formal equality approach is on the neutral application of formal rules to similarly situated individuals.

The critics of the formal equality approach, however, raise the concern that "similarly situated test" is incomplete since (a) it does not contain any criteria for determining the legitimacy of the law's purpose, (b) it is not designed to deal with situations in which identical treatment causes disadvantage to a group, and (c) it does not determine whether the way the law treats difference is justifiable since it does nothing to compensate for the accumulated disadvantages of past exclusion of certain groups (Black & Smith; Manfredi). In order to address these limitations of the formal equality approach, the *substantive equality* approach has been proposed. The substantive equality approach places the emphasis on the outcomes of the law by acknowledging potential differences in the social and political conditions of various groups within a society (Black & Smith, 2005; Manfredi, 2001). Thus, substantive equality approach aims at achieving equality of people who are factually unequal.

Given that the Supreme Court of Canada initially employed the formal equality approach in the interpretation of the Canadian Bill of Rights (1960) during the 1970s (Grabham, 2000), the supremacy of the substantive equality approach has been evident in the interpretation of the *Charter* (Faraday, Denike, & Stephenson, 2006; L'Heureux-Dubé, 2006). The Canadian approach to substantive equality was adopted by the Supreme Court of Canada in a first equality decision under the *Charter*, specifically *Andrews*

(Buckley, 2006; Faraday et al.; L’Heureux-Dubé). In *Andrews* (reviewed earlier), the Supreme Court of Canada acknowledged that the “similarly situated test” cannot be accepted as “a fixed rule or formula for the resolution of equality questions arising under the *Charter*” and referred to the formal equality approach as “seriously deficient” (*Andrews v. Law Society of British Columbia*, 1989, The Concept of Equality section, para. 5). In *Andrews*, Justice McIntyre stated that:

Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application. The issues which will arise from case to case are such that it would be wrong to attempt to confine these considerations within such a fixed and limited formula. (*Andrews v. Law Society of British Columbia*, 1989, The Concept of Equality section, para. 5)

Furthermore, Justice McIntyre emphasized that “a bad law will not be saved merely because it operates equally upon those to whom it has application ... nor will a law necessarily be bad because it makes distinctions” (*Andrews v. Law Society of British Columbia*, The Concept of Equality section, para. 4). Justice McIntyre also emphasised that only by examining the larger context can it be determined whether differential treatment results in inequality or whether an identical treatment in the particular context results in an inequality. Therefore, in *Andrews*, the Supreme Court of Canada recognized the importance of examining the larger social, political, and legal context in determining the presence of discrimination on grounds relating to the personal characteristics of the individual or a group.

The Supreme Court of Canada's current analytical framework for equality claims is based on *Law* (reviewed earlier). In *Law*, the definition of equality was expanded by the concept of "human dignity." The Supreme Court of Canada stated that "human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society" (*Law v. Canada*, 1999, The Purpose of s. 15 (1) section, para. 14). *Law* also confirmed the supremacy of the substantive equality over the formal equality approach in terms of determining whether laws, policies, and practices promote and enhance equal human dignity and full membership in society by all members of the society (L'Heureux-Dubé, 2006).

Even though the terms formal and substantive equality have not been used explicitly within the decision of the *College Appeals Committee* or the Ontario Superior Court of Justice in *Siadat*, arguments used by each of the parties may be interpreted in terms of substantive or formal approach to equality. For example, when appealing the *College Registrar's* decision to the *College Appeals Committee*, Ms. Siadat argued that the *College* ought to provide an individualized approach to considering her credentials which would involve considering the social context of the law and its impact on certain groups. Thus, the emphasis on the particular social context in determining the impact of the law on individuals or groups is in line with the main objectives of the substantive equality approach. On the other hand, the *College Appeals Committee* upheld the decision of the *College Registrar* who refused to issue certification to Ms. Siadat based on the following reason: "The material presented as 'social context' does not convince the Committee that Ms. Siadat should be treated any differently from other applicants

because other applicants with similar backgrounds and experiences have successfully met the requirements for Ontario Certification” (*Siadat v. Ontario College of Teachers*, The Committee Decision section, para. 8). Furthermore, when Ms. Siadat challenged the decision of the *College* Appeals Committee in front of the Ontario Superior Court of Justice, the *College*’s lawyer argued that the *College*’s “regulations on their face are not discriminatory as they apply equally to every applicant” including Ms. Siadat (*Siadat v. Ontario College of Teachers*, 2007, Position of the Respondent section, para. 3).

Therefore, the emphasis on the equality of treatment regardless of personal circumstances that was used by the *College* Appeals Committee in reaching its decision as well as a basis for the *College*’s argument in front of the Ontario Superior Court of Justice is reflective of the main objectives of the formal equality approach.

The basis for the *College* Appeals Committee decision and *College*’s argument in *Siadat* was *Jamorski* (reviewed earlier). In *Jamorski*, the Supreme Court of Canada reasoned that treating graduates of accredited and unaccredited schools differently was not discriminatory because “the persons educated in unaccredited schools were not similarly situated to those educated in accredited schools and could not be treated the same way” (cited in Cornish et al., 2000, p. 16). As such, the Supreme Court of Canada in *Jamorski* supported the formal equality approach by using the “similarly situated test” as a valid foundation for its decision. However, considering that *Jamorski* occurred prior to *Andrews* when the supremacy of substantive equality approach had been confirmed, Cornish et al. pointed out that *Jamorski* would have been decided differently had it occurred subsequent to *Andrews* mainly because the “similarly situated test” argument would have been rejected. Therefore, both the Supreme Court of Canada in its

interpretation of the *Charter*, as well as the Ontario Superior Court of Justice in its interpretation of the *Code* in *Siadat*, have acknowledged the supremacy of the substantive equality approach. On the other hand, the *College* seems to have interpreted their regulations and policies in line with the formal equality approach. This suggests that weak discretion as described by Dworkin (1977) as an interpretation of the rules is a central and pervasive element of the decision-making process used by the *College*.

The Supreme Court of Canada has recognized that the purpose of section 15 of the *Charter* is not only to protect against discriminatory laws but also to promote equality in the Canadian society (Buckley, 2006; Faraday et al., 2006; L’Heureux-Dubé, 2006). The promotion of equality is evident by acknowledgement of “the accommodation of differences” as the essence of “true equality” (Buckley; Faraday et al.; L’Heureux-Dubé). Buckley, for example, claimed that the concept of accommodation goes beyond the duty to avoid discrimination to a responsibility to change the situation of those who are disadvantaged within the society. This is consistent with the current interpretation of the *Code* in Ontario, as evidenced in *Siadat* when Justice Brockenshire concluded that the *College* Appeals Committee did not consider Ms. Siadat’s request for accommodation nor did it examine whether the accommodation was possible without undue hardship on the *College* and thus failed to properly interpret and apply the *Code*.

The Supreme Court of Canada acknowledged in *Andrews* that section 15 of the *Charter* protects not just from direct or intentional discrimination but also from adverse impact discrimination (Black & Smith, 1996; Government of Canada, 2005). Direct discrimination involves a law, rule, or practice which on its face discriminates individuals or groups on prohibited grounds (Government of Canada). Adverse effect discrimination,

on the other hand, occurs when a law, rule, or practice is factually neutral but has a disproportionate impact or effect on a group because of a particular characteristic of that group (Government of Canada). While direct discrimination is generally not hard to identify, adverse effect discrimination occurs more often and is more difficult to identify (Government of Canada). The Supreme Court of Canada, in over 20 years of *Charter* interpretation, confirmed that “discrimination is primarily systemic and includes policies and practices which appear neutral, and which were implemented for a legitimate purpose, but which disproportionately impact on disadvantaged groups” (cited in Cornish et al., 2000, p. 12).

The debate evidenced in the literature with regards to whether discrimination faced by foreign trained professionals in attempting to enter regulated professions in Ontario is intentional (i.e. Bauder, 2003) or unintentional (i.e. Brouwer, 1999) in nature seems less significant if we consider that the Supreme Court of Canada held in *Andrews* that *intent* was not the only requirement to establish discrimination; the actual *effect* on an individual or a group was materially relevant in determining discrimination. This is consistent with Cornish et al. (2000), who argued that the problems faced by foreign trained professionals represent one such example of the systemic or adverse effect discrimination. In line with the substantive equality approach, it has also been suggested in the literature that in order to overcome barriers faced by foreign trained professionals, the emphasis should be on identifying whether the effect of the regulatory bodies’ policies and/or practices which appear neutral is discriminatory (Cornish et al.; Ontario Regulators for Access, 2004). Janzen et al. (2004), for example, acknowledged the existence of systemic or adverse effect discrimination faced by foreign trained

professionals in their attempt to enter regulated professions in Ontario and proposed that the following practices be assessed for their discriminatory impact:

- Academic qualifications and practical training that are only recognized from specific educational programs, usually only programs in the U.S., England, Ireland, Australia, New Zealand and occasionally South Africa.
- Requirement that the person has Canadian work experience in their field.
- Insistence on providing original academic documents and transcripts is a particular barrier to refugees whose documents may have been destroyed or who, because of political upheaval in their homelands have nowhere to apply to get replacement documents.
- Additional licensing tests that are required only of foreign trained applicants—the tests are demanding, very expensive, and are typically required only because there is a lack of proper systemic assessment of prior learning.
- Even tests that are required of everyone may contain cultural biases that unfairly exclude particular groups of applicants.
- Even where additional training is required, the lack of a process to properly assess prior learning means foreign trained applicants often need to do unnecessarily lengthy or onerous retraining and retrain on material they already know.
- Scarcity of training programs, facilities and funding for foreign trained workers. For example, the very restricted number of funded post-graduate positions for foreign trained doctors is a barrier that has been challenged.

- One other factor to add into this is the deregulation of tuition in educational programs for various professions. To the extent that foreign trained professionals need to retake their educational qualifications, they will be facing prohibitive costs, apart from any other costs of settlement.
- The requirement that applicants attend retraining programs on a full time basis—is particularly a problem where applicants have families to support and may be the only family member who has legal status to work in Canada.
- Existing standardized language tests may not be appropriate because they do not focus on occupation-specific language proficiency. (p. 29)

Siadat confirmed Janzen et al.'s (2004) proposition that insistence on providing original documents and transcripts, sealed and stamped, from the granting institution had a discriminatory effect on Ms. Siadat as a conventional refugee to Canada. The problem with providing original documentation, however, is not unique to the experiences of Canadian refugees since the same problem may be experienced by other classes of immigrants (e.g., economic class immigrants). This is because many foreign universities have a policy of issuing documentation only to graduates (or to a person legally authorized by the graduate) and not to institutions, whether domestic or foreign. Thus in Canada, in cases when an individual who graduated from a foreign institution has only an original copy of the document, such document may not be accepted as valid when applying for a certification or to continue education. Thus, the common policy of Canadian universities or licensing bodies which requires that the original documents be sent directly from the issuing institution seems to contradict the policy of many foreign universities. In the case when administrators of either one of the institutions, Canadian or

foreign, are able and willing to respond to the human dimension of the applicant's/graduate's situation, the consequence may be overwhelming for the foreign trained professionals. For example, a personal anecdote by Savo exemplified that, as an immigrant to Canada, he felt "trapped between these two strict policies," the policy of the *College* and the policy of his university in Serbia (Savo, personal communication, September 20, 2006). Even though these policies appear neutral, their *effect* may be significantly different for Canadian trained applicants in comparison to the foreign trained applicants. Thus, based on section 15 of the *Charter* and the supremacy of the substantive equality approach, it can be argued that some foreign trained applicants may have experienced adverse effect discrimination because of such policies. This proposition is in line with the goal of the Canadian equality law over the last 20 years whose aim has been to achieve substantive equality by ensuring that the laws and practices are not discriminatory in their effect. Accordingly, the principle of substantive equality should be applied when examining the policies and practices of regulatory bodies in Canada in order to eliminate adverse effect discrimination that foreign trained professionals may experience. This is in line with Buckley (2006), who stated that it is crucial that we find "effective means to ensure that *Charter* values are incorporated into administrative decision-making" in our "efforts to realize substantive equality" in Canada (p. 183).

In summary, this thesis was designed to address the following questions: (a) does *Siadat* demonstrate that discrimination in evaluation of teachers' foreign credentials exists, (b) whether the place of origin is justifiable reason in claims of discrimination, (c) how to define and protect the public interest, (d) whether regulatory bodies such as the *College* have a duty to accommodate, and (e) whether a substantive approach to equality

should have primacy over a formal equality approach. The most significant findings that emerged from this thesis are:

1. *Siadat* was a first decision in Ontario and Canada which has exemplified that discrimination in evaluation of foreign credentials exists.
2. The place of origin is justifiable and valid reason for contending that discrimination exists in the evaluation of foreign credentials in Ontario.
3. Regulatory bodies have a duty to protect the public interest, to ensure competence of practitioners, and to uphold human rights norms. Regulatory bodies ought to regulate professions in the interest of today's public which is made up of both Canadian educated and professionals educated in different countries.
4. The *College* as well as other regulatory bodies in Ontario have a duty to accommodate applicants' special circumstances up to the point of undue hardship by considering the cost, outside sources of funding, and health and safety requirements as suggested by the *Code*.
5. In line with the Supreme Court of Canada's interpretation of the *Charter*, substantive equality approach should be applied in the examination of policies and practices of regulatory bodies in order to eliminate adverse effect discrimination that foreign trained professionals experience in Canada.

Conclusion: Potential Implications of the Fatima Siadat Case

The purpose of this section is to outline the potential implications of *Siadat* to the *College*, foreign trained teachers, and public policy in Ontario and Canada.

Implications for the College as a Regulatory Body

Based on the fact that the *College* has decided not to appeal the decision of the Ontario Divisional Court, the *College* will have to reconsider Ms. Siadat's request for accommodation in terms of developing innovative ways to assess her teaching credentials from Iran. *Siadat*, however, will most likely "open the doors" to other foreign trained teachers and applicants who may have specific needs related to their credentials in seeking an individualized method of assessing and determining their qualifications. Consequently, the *College* will likely experience further requests to accommodate applicants' special circumstances. Furthermore, *Siadat*, as a precedent, will most likely be considered by the *College's* officials as a guide for future actions. Thus, the *College's* officials will eventually have to assess the particular requests for accommodation, especially the problems with original documents, based on the facts presented in *Siadat*. On the other hand, in considering eventual requests for accommodation, the *College's* officials ought to examine each request based on its particularities as suggested by Humphrey (2002), who recommended that each person with a need for an accommodation ought to be assessed and accommodated individually. In considering future applications for licensing in terms of similarities to the facts presented in *Siadat* and the necessity of considering the particularities of each case, the *College's* officials will most likely have considerable discretion. Thus, the use of discretion as a central element in the administrative decision-making process may eventually be even expanded in the practices of the *College's* officials subsequent to *Siadat*.

Over more than 20 years, the Supreme Court of Canada has interpreted the *Charter* in line with the substantive equality approach. Furthermore, the supremacy of the

substantive equality approach over the formal equality approach in the interpretation of the *Code* has also been confirmed in *Siadat*. Accordingly, in order to prevent systemic or adverse effect discrimination, it may be suggested that acts, regulations, and policies of the *College*, as well as other regulatory bodies in Ontario, be reassessed in terms of their impact. Specifically, the effect of the *College*'s acts, regulations, and policies relating to foreign trained applicants and possibly applicants with specific needs relating to their credentials have to be considered in determining the existence of adverse effect discrimination. This is a crucial step because the requirement of nondiscrimination is considered one of the founding principles of a democratic society such as Canada, and accordingly, it is one of the main principles advanced by the *Code* and the *Charter*. Thus, if the effect of the specific regulatory body's current rules and policies are determined to have a discriminatory effect on certain individuals or groups, then those rules and policies ought to be adjusted accordingly such that they are in line with the main objectives of human rights legislation in Canada. Finally, considering that Dworkin (1977) acknowledged that rules have to be interpreted and that discretion is an inevitable part in the interpretation of the rules and that Manley-Casimir (1999) referred to the policies as a guideline for the discretionary action, the regulations and policies of the regulatory bodies need to be interpreted in line with the current interpretation of the *Charter*, as a supreme law in Canada (Buckley, 2006).

Implications for Foreign Trained Teachers

From the standpoint of the foreign trained teachers, *Siadat* is likely to have a number of important implications, especially related to their rights to practice the teaching profession in Ontario. The degree to which *Siadat* will impact foreign trained

teachers, however, may vary depending on its interpretation by the *College's* officials. Specifically, if *Siadat* is interpreted “narrowly,” its impact will be limited only to the issues of providing the original documents and will be restricted only to the challenges experienced by applicants with a refugee class status. On the other hand, if *Siadat* is interpreted more “broadly,” then the impact of the decision will be extended to address other barriers rather than only the problems associated with the submission of original documentation commonly experienced by foreign trained teachers in their attempts to become licensed by the *College*. Additionally, the broader interpretation of *Siadat* will most likely impact the requests of not merely refugees but those of immigrants as well. The broader interpretation of *Siadat* is of special importance because skilled worker class immigrants, as is the case with Savo, comprise the largest immigrant category in Canada. In general, it seems that regardless of whether *Siadat* is interpreted “narrowly” or “broadly,” it seems unlikely that *Siadat* on its own will result in the elimination of all barriers that foreign trained teachers experience in their attempts to become licensed to teach in Ontario. For example, foreign trained teachers may still experience problems associated with the knowledge of the profession-specific language or lack of Canadian experience. *Siadat*, however, should be regarded as an important step in the emergence of the right of foreign trained teachers to practise their profession in Ontario mainly because of its potential to eliminate or reduce the major barrier identified in the literature (i.e., recognition of foreign credentials).

Implications for Public Policy in Ontario and Canada

The Fair Access to Regulated Professions Act, 2006, as the first legislation of its kind in Canada, serves already as an inspiration and a legal framework to other Canadian

provinces. For example, Saskatchewan is currently working on a bill that is based on Ontario's Fair Access to Regulated Professions Act (Segal, 2007). The Fair Access to Regulated Professions Act is an important step in promoting access for foreign trained professionals because the Fairness Commissioner will examine the practices of the regulatory bodies in Ontario in order to assure their compliance with the new legislation. Furthermore, even though in Canada there is a strong judicial tendency not to intervene in areas where an "expert tribunal" is operating, the experience with regulatory bodies, however, suggests that "courts will be deferential toward decisions of the Registration Appeals Committee and will hesitate to interfere except where the Committee has made a blatant error" (E. J. McIntyre & Bloom, 2002, p. 24). Thus, if the practices of Ontario's regulatory bodies are to be challenged in front of the Court, *Siadat* will most likely be used as persuasive in reaching the final decision. Thus, it is probable that in combination with *Siadat*, the Fair Access to Regulated Professions Act will have further impact. Consequently, foreign trained professionals may now have double protection in Ontario, both by legislation (i.e., Fair Access to Regulated Professions Act) and by common law (i.e., *Siadat*).

Considering that licensing in Canada has been regulated by the provincial governments that delegated power to regulatory bodies, as well as the fact that provincial courts in each of the provinces are independent and do not have a legal obligation to consider the decisions of the courts of other Canadian provinces, it follows that neither the regulatory bodies nor the courts in Canadian provinces other than Ontario are legally bound by *Siadat*. Regulatory bodies in other Canadian provinces, however, may be subject to legal challenge similar to the one initiated by Ms. Siadat. Accordingly,

regulatory bodies throughout Canada may appreciate *Siadat* as a “call for action” and accordingly begin developing initiatives that assess whether their existing policies and practices, which may appear to be neutral, actually have a discriminatory effect on foreign trained professionals. With the current legal and common law protection for foreign trained professionals, Ontario may be a model for other Canadian provinces. In particular, the provinces that have a significant number of immigrants, such as British Columbia, may be the ones with the most emergent need to consider *Siadat* and the Fair Access to Regulated Professions Act in order to address systemic barriers faced by foreign trained professionals in their province.

In conclusion, *Siadat* and the Fair Access to Regulated Professions Act are important milestones which could have significant implications in the elimination of barriers related to recognition of foreign credentials in Ontario. With such dual protection of foreign trained professionals’ right to practice their profession, Ontario may serve as a model to other Canadian provinces. Furthermore, in order to promote the integration of foreign trained professionals in the Canadian workforce, future efforts should be directed at the programs which have been very successful (e.g., mentorship programs). Finally, it is crucial that both levels of government, federal and provincial, be involved in further initiatives and development of strategies that will enhance the legal protection of foreign trained professionals in Canada.

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Appendix

Siadat v. Ontario College of Teachers, 2007

COURT FILE NO.: 561-04

DATE: January 10, 2007

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT - Toronto

Brockenshire, e. Macdonald, and Cameron JJ.

BETWEEN: FATIMA SIADAT (represented by Chantel Tie and Jean Lash, for the Appellant)

- and - ONTARIO COLLEGE OF TEACHERS (represented by Caroline R. Zayid and Keary Grace, for the Respondent)

HEARD: September 13th & 14, 2006

BROCKENSHIRE J.:

[1] This is an appeal from a decision of the Ontario College of Teachers, Registration Appeals Committee (the Committee). That decision denied the request to the Committee by Ms. Siadat to waive the College requirement of producing official documentation, in this case, from Iran, and to devise an individualized method of determining her qualifications for certification as a teacher. The decision went on to uphold the previous decision of the Registrar to refuse to issue her a Certificate. The principal issue raised by the Appellant before us was the applicability of the Ontario Human Rights Code, R.S.O. 1990, c. H.19 to the deliberations and decisions of the Committee, when dealing with a Convention refugee. I have concluded that the appeal should be granted for the following reasons.

Background

[2] The Ontario College of Teachers (the College) is a self-regulatory body with a statutory mandate to licence, govern and regulate the practice of teaching in Ontario. It was created and is governed by the Ontario College of Teachers Act, S.O. 1996, c.12, (the Act).

[3] To teach in Ontario's publicly funded education system, a teacher must have a Certificate of Qualification from the College.

[4] The College has the power to make regulations. Regulation 184/97 (the regulation) covers the requirements for Certification. For an Applicant who trained

outside of Ontario the requirements are proof of proficiency in English or French and then:

- (b) Evidence of his/her academic or technological qualifications;
- (c) His/her teaching certificate and a transcript of his/her teaching education program;
- (d) A statement from the issuing authority that his/her teaching certificate has not been suspended or cancelled. (O.R.184/97) s.12(1).

[5] Section 18(1) of the Act provides that the Registrar shall issue a certification of qualification and registration to a person who applies for it in accordance with the regulations and who fulfills the requirements specified in the regulations for the issuance of the Certificate.

[6] If a Certificate is refused, an applicant may request a review by the Committee. It was agreed before us that, as per s. 21(9) of the Act, the Committee has the power to order the issue of a Certificate even if the requirements, *supra*, of the regulation have not been met, and also has the power to impose conditions or limitations on the Certificate that might not be found in the regulation.

[7] Outside of the Act and the regulation, it has been the policy of the College, and the Ministry of Education before it, to require the production of only original documents, with official documents, duly signed and sealed, to be sent directly from the granting institution.

[8] We were advised that the practice of the College is to simply return an application containing documents that do not fit that policy, advising that the application is incomplete.

[9] The evidence filed shows that Fatima Siadat was born, raised, educated, and worked for some 16 years as a teacher in Iran. When teaching literature classes at the High School level, she made comments about the right of authors to freedom of expression. This resulted in harassment of her by the governing regime, particularly the Ministry of Education, leading to loss of her employment, and threats to her life. She fled Iran in advance of a "political trial" and was accepted as a Convention refugee in Canada. Her teaching career in Iran was perhaps unconventional by our standards, in that she indicates that after she graduated from High School, she commenced teaching in Iranian Grade Schools, and did this for several years. Then, with the support of the Iranian Government, she attended University while still teaching part-time and graduated with the equivalent of a Canadian undergraduate University Degree plus a Bachelor of Education. Thereafter, she was accepted by the Iranian Ministry of Education as a teacher qualified to teach in High School, and did just that for some years before having to flee.

[10] In Canada, she has continued her involvement in education by obtaining a Community College Certificate in early childhood learning, and being involved in or operating day-care facilities and working in assistant or administrative positions in grade schools. She has been attempting to gain recognition from firstly, the Ministry of Education, and then, after its creation, from the College of Education, without success.

[11] Her problem is that the originals of her University Degree, her transcript from the University and the equivalent of her Teacher's certification in Iran are all held by the Ministry of Education there, which is, in effect her prosecutor as a political dissident, for which she fled the country. In her view, supported by some other evidence, not only would Iran not respond to requests to provide the originals or certified copies, but might well, if it receives such request, respond by searching out and harming members of Ms. Siadat's family still in Iran.

[12] The one original governmental document she has is an identification card issued by the Ministry of Education with her name and photograph on it indicating her to be a teacher.

[13] She did obtain, through a relative of a friend who works in the Ministry of Education, a handwritten copy of what purports to be the transcript of her courses and marks at the Iranian University she attended. The explanation given about this was that the computer records were "blocked" so they could not be printed out, that the person who copied them from the computer screen was performing an illegal act in Iran, and did not dare go to a lawyer or notary in Iran to prepare and swear a formal affidavit as to the source and accuracy of this document.

[14] She did have photocopies of her Bachelor's Degree in teaching and of her employment order from the Ministry of Education in Iran and has provided Certified Translations of those. She also filed a personal resume outlining 16 years of teaching experience in Iran, with some support from affidavits from a friend and relative.

[15] She had obtained, and filed, an opinion from the Comparative Education Service at the University of Toronto, to the effect that the copies of her Bachelor's Degree and handwritten copy of her University transcript would indicate an education comparable in level to a Bachelor's Degree, specializing in education, from a reputable Canadian University offering a similar program.

[16] Before the Committee, she relied upon the foregoing materials to show her background, education, certification, and teaching experience, and to explain why she could not obtain the original documents the College was requesting, and to request that alternate ways of further showing her qualifications be permitted. The hearing was a "paper hearing" – Ms. Siadat was not called to testify and be cross-examined.

The Committee Decision

[17] The reasons for the decision of the Committee are found at Tab C of the Appeal Book. At the start of the decision, it is noted that what was requested was that the Committee "... re-evaluate her application and devise an individualized method of determining her current qualifications, so that their equivalency could be evaluated."

[18] The Committee decision, in some 3 pages reviews the previous history of applications to the College, and the Ministry before that, which were unsuccessful. This includes the 2002 application to the Committee, when arguments had been made that the usual documents required could not be obtained from Iran, that the "satisfactory evidence" required by the College should be read to include more than "official documents," as to not so consider them would cause her to suffer discrimination on the basis of national origin, and that the College had an obligation to accommodate Ms. Siadat. The Committee simply refused certification in 2002.

[19] The Committee decision then recites that in 2004 this further Application was brought, including all the previous material plus arguments that the College ought to provide an individualized inclusive approach to considering her credentials, which would involve looking to the social context of the law, so that 6 further affidavits were submitted relating generally to the impact of laws on certain groups of people. Four additional volumes of social context materials were also provided. With all of that before it, the Committee met July 15th, 2004. The decision then lists all of the materials received by it, which took some 4 pages.

[20] The actual decision of the Committee is contained in the last one and one-third pages of the document. Therein, the Committee notes it has the power to consider any document it considers relevant and says that it had examined all of the documents submitted by the Appellant. However there is no discussion of the content of these documents, except to say that they are not satisfactory evidence of a previous teaching certificate, an undergraduate degree, completion of a teacher education program, and/or professional standing. The Committee states that the College requires official documents supporting those items be submitted directly by the appropriate issuing authority to the College, and adds that in exceptional circumstances these documents can be provided by the Appellant and then verified by the College. However, the decision notes, the alternative documents provided by the Appellant cannot be verified by the College.

[21] The decision goes on to detail that the College cannot verify the handwritten list of courses taken and marks achieved that were submitted by Ms. Siadat and supported by her affidavit. The College makes the same point about the translation of an educational certificate provided by her, and notes that the affidavits filed by her from a friend and her brother do not attest to the courses completed by the Appellant, her professional qualifications, or her teaching record, nor are they supported by any original documents.

[22] The decision notes that the Committee had received photocopies of an employment order and an identification card but simply states that these documents did not constitute acceptable evidence.

[23] The decision notes that Ms. Siadat's Application included material about the difficulties experienced by internationally trained individuals and that she argued these difficulties should exempt her from the requirements of providing evidence acceptable to the College. The decision states that the College recognizes these difficulties and "intervenes on behalf of Applicants who have requested assistance in obtaining documents."

[24] The Committee decided that "the material presented as 'social context' does not convince the Committee that this Appellant should be treated any differently from other Applicants because other Applicants with similar backgrounds and experiences have successfully met the requirements for Ontario Certification." This is the extent of the decision on the requested accommodation. The Committee, based on this, upheld the decision of the Registrar to refuse certification.

Position of the Appellant

[25] Ms. Tie acknowledged that the College would have vast experience in reviewing the qualifications of teachers and that in most cases, original documents can be provided to the College by the issuers of such documents, which is the most certain way of assuring their authenticity.

[26] Her argument was that in this case, because Ms. Siadat fled Iran, and would be regarded there as a dissident and enemy of the State, such documents were not available. She is a Convention refugee to Canada and as such is entitled to the protection and assistance offered by Canada to Convention refugees. She points particularly to the Lisbon Convention on recognition of higher education qualifications, which Canada signed. This Convention calls upon the evaluators of qualifications of refugees to develop alternate methods of evaluation, which could include interviews, competence examinations, use of sworn statements, and giving provisional recognition while waiving the usual documentation. (Tab 62N, Certified Record of Proceedings).

[27] Ms. Tie points to the efforts of the British Columbia College of Education to accommodate exceptional circumstances, where academic requirements may be satisfied by writing "challenge examinations" at a B.C. University or by completing a familiarization program and practicum (see pgs. 1408-10, Tab 68D Certified Record of Proceedings).

[28] Ms. Tie's principle thrust was that the failure to accommodate Ms. Siadat's problems with documents from Iran constitutes a breach of s.6 of the Human Rights Code, R.S.O. 1990, c. H.19, which provides as follows:

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

[29] The particular position taken was that Ms. Siadat has been accepted in Canada as a Convention refugee from Iran, and that she has established by her affidavits and other evidence that she fled from Iran because the Ministry of Education there was persecuting her for teaching students about freedom of thought, that the Iranian Ministry of Education holds all of the records the College of Education in Ontario is seeking, and would not only not release them to her, but if inquiries were made, would likely seek out and do harm to relatives of her still in Iran. Therefore, insisting on such records in the circumstances constitutes discrimination by reason of place of origin. *Canada (Secretary of State for External Affairs) v. Menghani (T.D.)* (1993), 24 Imm. L.R. (2nd) 250 (F.C.T.D.) was cited.

[30] For the details of the duty to accommodate, Ms. Tai looked to what is popularly known as the B.C. Firefighters case – *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.U.* 1999 CanLII 652 (S.C.C.), (1999), 176 D.L.R. (4th) 1 (S.C.C.). She also relied upon *British Columbia (Superintendent Motor Vehicles) v. British Columbia (Council of Human Rights)*, 1999 CanLII 646 (S.C.C.), [1999] 3 S.C.R. 868 (the Grismer case).

[31] Ms. Tie also raised a number of other points, including the differences between College policy and the regulations, the broad meaning of the word “transcript,” and that the tribunal has the power to admit into evidence any oral testimony and any document or other thing, with limited exceptions, pursuant to the Statutory Powers Procedure Act, R.S.O. 1990 c. S.22. She also argued that the Committee denied the appellant procedural fairness and natural justice. Ms. Tie, in her factum, had developed a full argument on breach of the s. 15 of the Charter, and simply relied on that without repeating the arguments orally.

Position of the Respondent

[32] Ms. Zayid summarized her position in paras. 5 and 6 of her factum where she submitted that deference should be given to the Committee’s decision in light of the Committee’s expertise in the area and its statutorily mandated duty to serve and protect the public interest. She stated that in this case the Applicant had failed to supply adequate evidence of her professional training and suitability to teach and in the absence of that, it would not be consistent with the public interest for the College to certify her as a qualified teacher in Ontario.

[33] She relied upon the affidavit of Registrar Wilson at Tab 1 in her Compendium. She argued that the regulations set out fair requirements to become an Ontario teacher, and it is up to the College, per s. 3(1)(2): “To develop, establish and maintain

qualifications for membership in the College.” Further, pursuant to s. 3(2) of the Act, the College “...has a duty to serve and protect the public interest.”

[34] Ms. Zayid recognized that the Human Rights Code is part of public policy binding on the Committee. However, she argued that the Regulations on their face are not discriminatory as they apply equally to every applicant. Therefore, there had to be evidence before the Committee that the literal application of the Regulations to Ms. Siadat would result in discrimination. Her argument was that the evidence presented by Ms. Siadat did not persuade the Committee that a case of constructive discrimination had been made out. She referred to *Jamorski v. Ontario (Minister of Health) reflex*, (1988), 64 O.R. (2d) 161 (Ont. C.A.) a case in which the different requirements for internships for foreign educated doctors as against those educated in Canada was attacked under the Charter of Rights and Freedoms. Zuber J.A. for the Court observed that there was no question of a differential treatment, but this would not infringe s. 15 of the Charter unless the unequal treatment was the result of discrimination.

[35] She summarized the point of this case as being whether or not the College was being reasonable in saying that the material supplied by Ms. Siadat was not sufficient.

[36] She argued that despite the lack of a privative clause, and the full right of appeal on fact and or law to the Divisional Court, this Court should give deference to the Committee in view of its expertise, so that the standard of review of its decision would be that of reasonableness.

Reply

[37] In reply, Ms. Tie argued that the issue before the hearing had been whether or not Ms. Siadat should be accommodated, allowed to explain the problem, and given a reasonable way to prove that she had completed a Teacher Education Program and had been certified as a teacher in her homeland. She suggested several ways in which this could be done, including:

- 1) examination and cross-examination of Ms. Siadat before the Committee;
- 2) review of Ms. Siadat’s documents, and perhaps an interview with her by persons knowledgeable of the educational system in Iran (perhaps some or all of the 12 Iranians now, per the College, licensed as teachers in Ontario); or
- 3) independent proficiency testing as authorized by the B.C. College of Education.

[38] She argued that the purported justification given by the Committee for its decision – that it was treating everyone the same – in fact, resulted in discrimination against some, as was found in *B.C. Firefighters*, *supra*.

[39] She argued that refugees are different, and the College should recognize that fact, and be prepared to work on an individual basis with Convention refugees who are applicants to the College, to develop alternate ways of obtaining evidence of education and prior certification. This would have the effect of achieving the broad overreaching objects of the College of determining whether qualifications for a membership in the College had been met by the applicant, while serving and protecting the public interest.

Discussion

[40] Firstly, the power of this Court is found in s. 35(4) of the Act:

An appeal under this section may be made on questions of law or fact or both and the Court may affirm or may rescind the decision of the Committee appealed from and may exercise all powers of the Committee and may direct the Committee to take any action which the Committee may take and that the Court considers appropriate and, for that purpose, the Court may substitute its opinion for that of the Committee or the Court may refer the matter back to the Committee for re-hearing, in whole or in part, in accordance with such direction as the Court considers appropriate.

[41] Second, the requirement for certified copies of teaching certificates and college transcripts, sent direct from the issuing institution to the College is an internal administrative practice, not called for under the Regulations. The Regulations limit the authority of the Registrar to issue a certificate to cases where a teaching certificate and a transcript have been produced. But the Committee, under s. 21 (9) of the Act, may, on the basis of “the submissions and any documents that the Committee considers relevant” simply direct the Registrar to issue a certificate.

[42] Third, the certificate in issue for all foreign educated applicants is not a final unlimited certificate, but is instead an interim certificate limited in time, during which time the teacher teaches under the supervision of others. It is subject to cancellation if the teacher does not perform satisfactorily.

[43] The issue before the Committee was not whether Ms. Siadat had satisfied the requirements of the College for certificate. The opening paragraph of its decision defined the issue as a request to the Committee to “re-evaluate her application and devise an individualized method of determining her current qualifications so that their equivalency can be evaluated.” The re-evaluation sought was clearly to be made in light of the Ontario Human Rights Code, and public policy relating to Convention refugees.

[44] In my view, the two issues before us that are determinative of this appeal are first, whether or not the Committee properly interpreted and applied the provisions of the Ontario Human Rights Code, and public policy relating to Convention refugees; and second, whether or not the Committee gave sufficient and proper reasons to support its decision on that issue.

The Human Rights Code, and Public Policy

[45] On the first issue, Ms. Zayid, in argument, recognized that public policy is binding on the Committee, as is the Ontario Human Rights Code. The public policy here is expressed in statute supported treaties, particularly the Lisbon Convention. The Ontario Human Rights Code is of course a statute. In my view, when an administrative tribunal is called upon to decide whether statutes and legal decisions thereunder are applicable, and if so, what is required of the tribunal, the standard of review is correctness: See *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (S.C.C.), [1998] 1 S.C.R. 982 (generally and particularly para. 50), and *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 (CanLII), [2003] 1 S.C.R. 226 (also generally, and particularly para. 28).

[46] Section 6 of the Ontario Human Rights Code explicitly confirms the right of every person to equal treatment with respect to membership in any self-governing profession without discrimination because of place of origin. Teaching is a self-governing profession, and membership in the College is a pre-requisite of practicing that profession in the publicly funded grade and high schools of Ontario. Ms. Siadat's problems with her application to the College directly relate to her place of origin. The evidence placed by her before the Committee clearly indicates that Iran found her to be a political dissident, that she fled the country and was accepted by Canada as a Convention refugee, that her original professional records were all held by the Iranian Ministry of Education, and that it would not only refuse to supply them, but if asked, would seek out and harm Ms. Siadat's relatives still in Iran. There is no evidence contrary to this before the Committee.

[47] Her original professional records, or duly certified copies from her place of origin, would be the normal requirement of the College. Ms. Siadat sought to provide alternative evidence, which the College had found unacceptable. Ms. Siadat, in the application under review, was seeking a ruling by the Committee on what it would accept, in addition to what she had already provided. That application, in essence was one for accommodation from the usual requirements, because of difficulties tied to her place of origin, to a Committee empowered by statute to make accommodations.

[48] It is plain and obvious to me that to insist on original, or government certified documents from her place of origin, is *prima facie* discriminatory against her, in view of the evidence she has provided. It is no answer for the Committee, or the College Registrar to say that 17,414 other applicants had succeeded in providing these documents, and she is the first one who cannot, especially in view of the evidence that others, who did not provide all the documents, simply had their applications returned to them as incomplete, and were not counted among the 17, 414. It appears Ms. Siadat is the first person to protest that treatment, and appeal to the Committee, and then to this Court as a test case.

[49] In *B.C. Firefighters*, *supra* McLachlin J. (as she then was) put forth at para. 54, a three-step test for determining whether a *prima facie* discriminatory standard is a bona fide occupational requirement. She places the onus on the person or organization

imposing the requirement to show first, that the standard was adopted for a purpose rationally connected to the performance of the job; second, that the standard was adopted in an honest and good faith belief that it was necessary, and third, that the standard actually is reasonably necessary to the accomplishment of that legitimate work related purpose. In showing that third element, it “must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer (at para. 54).”

[50] McLachlin J., at para. 62, amplified the meaning of “undue” by quoting Sopinka J. who said “the term ‘undue’ infers that some hardship is acceptable; it is only ‘undue hardship’ that satisfied this test.” She continued on by saying,

It may be ideal from the employer’s perspective to choose a standard that is uncompromisingly stringent. Yet the standard, if it is to be justified under the human rights legislation, must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship.

[51] At para. 65 of her decision, McLachlin J. posed a series of questions to be asked in the course of the analysis as follows:

- (a) Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?
- (b) If alternative standards were investigated and found to be capable of fulfilling the employer’s purpose, why were they not implemented?
- (c) Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?
- (d) Is there a way to do the job that is less discriminatory while still accomplishing the employer’s legitimate purpose?
- (e) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?

[52] Further, at para. 68 she says:

Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards. By enacting human right statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, insofar

as this is reasonably possible. Courts and tribunals must bear this in mind when confronted with a claim of employment-related discrimination. To the extent that a standard unnecessarily fails to reflect the differences among individuals, it runs afoul of the prohibitions contained in the various human rights statutes and must be replaced.

[53] In the Grismer case, *supra*, McLachlin J. said at para. 22 that, “failure to accommodate may be established by ... an unreasonable refusal to provide individual assessment ...,” and at para. 32 that, “in order to prove that its standard is ‘reasonably necessary,’ the defendant always bears the burden of demonstrating that the standard incorporates every possible accommodation to the point of undue hardship, whether that hardship takes the form of impossibility, serious risk or excessive cost.”

[54] The foregoing decisions, released in 1999, continue to be the “law of the land” on the duty to accommodate.

[55] The decision of the College indicates at the bottom of page 2 that the issue of failure by the College to accommodate her had been raised in December of 2001. The Committee refused her application on March 27, 2002. The current application was commenced in 2004, bolstered by six affidavits and four additional volumes of various materials, raising the issue of accommodation under both the Ontario Human Rights Act and the treaty obligations to Convention refugees, which also call for accommodation. Despite having in hand all of this material, the decision does not indicate that the Committee considered the request for accommodation in any meaningful way. It simply, in the last page and a half, states that the documents provided to establish evidence of a previous teaching certificate, an undergraduate degree, completion of a teacher education program, and a statement of professional standing have not come directly from the issuing institution and cannot be verified by the College. The decision indicates that the affidavits provided are not acceptable because they are not supported by any original documents. Even photocopies presented were not accepted as appropriate evidence. In the second from the last paragraph of the decision, the Committee acknowledges that the materials filed referenced difficulties of internationally trained individuals in providing evidence acceptable to the College but then simply states the material presented as “social context” does not convince the Committee that the appellant should be treated any differently from other applicants because other applicants with similar backgrounds and experiences have successfully met the requirements for Ontario certification. Not only does that statement not provide any particulars of how others with similar backgrounds and experiences somehow managed to satisfy the “uncompromisingly stringent” (to use the words of McLachlin J., *supra*), College requirements, it reverses the onus, which is on the Committee to establish that accommodation is not possible without undue hardship.

[56] I find that the Committee failed to properly interpret and apply the provisions of the Ontario Human Rights Code.

Sufficiency of Reasons

[57] Secondly, I have considered the decision of the Committee in light of the requirement on administrative tribunals to give sufficient reasons for their decision.

[58] The duty to give sufficient reasons is a component of procedural fairness. That is triggered by the fact that the decision here is administrative and affects “the rights, privileges or interests of an individual.” See *Cardinal v. Kent Institution* 1985 CanLII 23 (S.C.C.), [1985] 2 S.C.R. 643 at p. 653.

[59] In *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (S.C.C.), [1999] 2 S.C.R. 817, the court held that procedural fairness can include a duty to give reasons, and stated at para. 43 that: “... it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantage of written reasons suggest that, in cases such as this where the decision has important significance for the individual, where there is a statutory right of appeal, or in other circumstances, some form of reasons should be required.”

[60] In Ontario, the obligation to give adequate reasons has been commented on, both where the empowering statute requires written reasons (see *Gray v. Ontario (Disability Support Program, Director)* 2002 CanLII 7805 (ON C.A.), (2002), 59 O.R. (3d) 364 (C.A.)), and where the empowering statute does not impose such a requirement (see *Lee v. College of Physicians and Surgeons* 2003 CanLII 41662 (ON S.C.D.C.), (2003), 66 O.R. (3d) 592, where the obligation was found to arise from the common law, as enunciated in *Baker*, *supra*, and as a component of procedural fairness).

[61] In *London (City) v. Ayerswood Development Corporation*, [2002] O.J. No. 4859 (C.A.) the court said, in relation to an allegation of lack of procedural fairness, at para. 10: “... a court need not engage in an assessment of the appropriate standard of review. Rather, the court is required to evaluate whether the rules of procedural fairness or the duty of fairness have been adhered to. The court does this by assessing the specific circumstances giving rise to the allegation and by determining what procedures and safeguards were required in those circumstances in order to comply with the duty to act fairly.”

[62] In *Gray*, *supra*, Chief Justice McMurtry, for the court, at para. 22 set out succinctly the requirements for adequate reasons by administrative tribunals as follows:

The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision maker must set out its findings of fact and the principle evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors.

[63] I find that the “reasons” provided by the Committee do not meet the above criteria at all. The point at issue before the Committee was appropriate accommodation for the Applicant, in view of her status as a Convention refugee, from a place of origin that would not provide her with formally certified documents. The only mention of that was in the “background” section, where the Committee in effect said that it had heard all of this before, and had turned her down; and on the last page, where the Committee said, “the material presented as ‘social context’ does not convince the Committee that the appellant should be treated any differently from other applicants because other applicants with similar backgrounds and experiences have successfully met the requirements for Ontario certification.”

[64] Particularly, the Committee did not ask itself the questions suggested by the Supreme Court of Canada in the *B.C. Firefighter*, *supra*, case, let alone provide answers thereto, and it did not seem to appreciate that, with the issues of discrimination and treaty compliance before it, the obligation was upon the Committee to provide individual accommodation, unless it could establish that accommodation was impossible without imposing undue hardship on the College. Simply saying that unnamed others had met the College criteria does not even address, much less answer, the issue before the Committee.

Conclusion

[65] I therefore conclude, as the Committee has failed to meet both the obligation to properly interpret and apply the relevant law, and the obligation to provide adequate reasons for its decision, that its decision must be rescinded, and the application of Ms. Siadat must be referred back to the Committee for re-hearing, in the context of the statute and case law referred to in these reasons.

[66] Counsel for the parties agreed there would be no costs of this appeal.

Brockenshire J.

I concur

Macdonald J.

I concur

Cameron J.