Federal Court Cour fédérale

Date: 20180622

Docket: T-1773-17

Citation: 2018 FC 645

Ottawa, Ontario, June 22, 2018

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

ARTHUR KEITH

Applicant

and

CANADIAN HUMAN RIGHTS COMMISSION

Respondent

and

CANADIAN ARMED FORCES

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review of a decision by the Canadian Human Rights Tribunal [the Tribunal] made on October 19, 2017. The Tribunal dismissed the Applicant's complaint against the Canadian Armed Forces [CAF].

[2] The Applicant is an American-born and American-trained psychiatrist. The CAF requires its psychiatrists to be accredited by the Royal College of Physicians and Surgeons of Canada [RCPSC] whose accreditation is recognized across Canada. The Applicant unsuccessfully attempted to pass the RCPSC accreditation process; as a result, he is not accredited by the RCPSC. However, the Applicant has obtained recognition (as opposed to accreditation) in Ontario as a psychiatrist by the College of Physicians and Surgeons of Ontario [CPSO].

[3] The Applicant alleges that CAF's requirement that its psychiatrists be accredited as specialists by the RCPSC discriminates on the grounds of "national origin" contrary to section 7 of the *Canadian Human Rights Act*, RSC 1985, c H-6 [the CHRA]. The Applicant also alleges that the RCPSC accreditation requirement is not a *bona fide* occupational requirement [BFOR] per paragraph 15(1)(*a*) of the CHRA.

[4] The Tribunal dismissed his complaint on both grounds.

[5] The Applicant submits that the CAF's requirement of RCPSC accreditation precludes qualified specialists of non-Canadian origin – which he claims to be – from being considered for employment by the CAF. He also says it subjects him to discriminatory exclusion from employment opportunities, i.e., discrimination having an adverse effect.

[6] The Respondent's position is that the CAF is made up of individuals who move from base-to-base across the country, and by adopting the RCPSC standard, the CAF ensures

psychiatrists attending to CAF members and personnel meet a Canada-wide recognized standard for proficiency in psychiatry. The uncontested evidence was that the CAF needed to have a psychiatrist in one part of the country to be the same as – at least have a basic minimum similarity to a psychiatrist in any other part of the country. Continuity of and a common standard of psychiatric care was important to the CAF. The Respondent submits that the RCPSC accreditation requirement is not discriminatory, and in any event that it is a BFOR.

[7] For the following reasons the application is dismissed.

II. Background Facts

[8] The Applicant is an American-born physician who received his medical training and specialty training in psychiatric medicine in the U.S. He completed his residency in psychiatry in the U.S. in 1983. He was certified in the U.S. as a specialist in psychiatry by the American Board of Psychiatry and Neurology [ABPN] in 1987. He was a physician with the U.S. Armed Forces from 1979 until 1986.

[9] In 1988, he moved to Canada. In 1991, he became a permanent resident and in 1995, he obtained Canadian citizenship.

A. *Applicant's attempt to obtain RCPSC accreditation*

[10] In 1989, while residing in the U.S., and in an effort to obtain Canadian recognition in psychiatry, the Applicant applied to the RCPSC for accreditation (also known as fellowship) as a specialist in psychiatry. At that time, the RCPSC was the only entity in Canada to grant specialist

accreditation. The Applicant did not reside in Canada nor was he seeking employment with the CAF at that time.

[11] The RCPSC recognized most of the Applicant's American training. However, it determined he needed to take three extra steps to be accredited: (1) to pass a written examination; (2) to complete a six-month residency in child psychiatry; and (3) to pass an oral examination in psychiatry.

[12] He passed the written exam component of the RCPSC process on his second attempt. He completed the required child psychiatry residency.

[13] However, while the Applicant undertook the oral exam in psychiatry on three separate occasions, he was unsuccessful each time. After his third attempt, his eligibility for the oral examination expired. To complete the oral examination and by extension, to become RCPSC-accredited, he needed to apply to the Credentials Committee of the RCPSC to renew his eligibility. This he chose not to do.

B. *Applicant's work in Ontario and dealings with the CPSO*

[14] In 1992, the Applicant obtained a general medical licence to practice medicine as a non-specialist in Ontario from the CPSO. At that time, the CPSO, as Ontario's medical licensing body relied exclusively on specialist certification conferred by the RCPSC to grant specialist recognition, which the Applicant did not have.

[15] From 1993 to 1998, the Applicant worked in Ontario as a staff psychiatrist and forensic psychiatrist in health care facilities that did not require RCPSC specialist accreditation.

[16] After a further period of practice in the U.S., the Applicant returned to Ontario in 2003, where he again worked as a psychiatrist. He continued doing this sort of work until he retired in 2015.

[17] In 2004, the Applicant sought to be recognized as a psychiatrist by the CPSO. At that time, the CPSO was working towards establishing a mechanism for "recognizing" (not "accrediting" as is the case with the RCPSC) foreign-trained medical doctor specialists without requiring them to be accredited by the RCPSC.

[18] In 2007, the Applicant obtained specialist recognition in psychiatry from the CPSO through a "functional assessment" procedure designed for foreign-trained specialists like the Applicant. He was one of the first to obtain such recognition. Further particulars of the CPSO are provided starting at paragraph 32 of these Reasons.

[19] Notably, the new CPSO process did not involve passing exams as required by the RCPSC.

[20] It is also worth noting that, according to the Applicant, the ABPN certification process he underwent to assess his competence in psychiatry in the U.S. was based on examinations similar to the RCPSC accreditation process.

[21] At all material times, CPSO specialist recognition was not accepted by all provinces, nor was any other provincial recognition of specialists accepted by all provinces.

[22] On the other hand, RCPSC specialist accreditation in psychiatry was recognized across Canada.

[23] The Tribunal found that CPSO specialist recognition was not equivalent to accreditation by the RCPSC:

> The CPSO specialist status is not equivalent to a fellowship with the RCPSC. The CPSO register provides doctor-specific information about physicians in Ontario, including whether a physician is a specialist and the body that accredited the physician's specialty.

III. The RCPSC and the CPSO

A. *The RCPSC*

[24] At the time of the Applicant's complaint to the Tribunal, physicians in Ontario could obtain specialist recognition in two ways: (1) specialist accreditation (fellowship) with the RCPSC, or (2) specialist recognition by CPSO. For completeness, there is a third method for family physicians available from the College of Family Physicians of Canada; it is not relevant to this application.

[25] The nature and scope of recognition by the RCPSC and CPSO differ.

[26] The RCPSC is the national body that accredits specialists across Canada in all branches of medicine and surgery. A physician accredited as a specialist by the RCPSC is recognized as such across Canada.

[27] The RCPSC also had responsibility for accrediting university programs that trained physicians for their specialty practices across Canada. The RCPSC administered oral and written exams to obtain RCPSC accreditation, accredited residency programs at medical schools across Canada, and ensured that the training and evaluation of medical and surgical specialists met appropriate standards. Upon completion of postgraduate medical education, all physicians in Canada were required to write the RCPSC certifying examinations in order to become specialists.

[28] As noted above, when the Applicant applied to the CAF, the recruiting standard in force required psychiatrists to have RCPSC accreditation in psychiatry. However, there was an exception for those accredited by the Collège des Médecins du Québec [the CMQ]. The CAF accepted CMQ accreditation because the CMQ differed from other provincial licensing bodies: the CMQ encompasses both a licensing body and a certification body. Importantly, the CMQ and RCPSC harmonized their respective requirements for accreditation/certification.

[29] When the Applicant applied for RCPSC accreditation in 1989, all physicians, regardless of their national origin or where they received their training, were required to take the standardized RCPSC written and oral examinations to be accredited. It was the oral component of these standardized RCPSC examinations in psychiatry that the Applicant failed to pass on three occasions.

[30] The same situation prevailed when the Applicant unsuccessfully applied to the CAF in 2008, which application led to his complaint to the Tribunal at issue today: all physicians,

regardless of their national origin or where they received their training, were required to take the standardized RCPSC written and oral examinations to become accredited with the RCPSC.

[31] In 2010, the RCPSC created a new practice eligibility route to accreditation for those physicians whose training was not recognized and who could not access the regular accreditation examinations. Under this new process, the RCPSC would perform a practice-based assessment of a physician to determine if he or she should be recognized as a specialist. However, the Applicant has not attempted to avail himself of this new way to obtain RCPSC accreditation.

B. *The CPSO*

[32] The CPSO is the provincial governing body that regulates the practice of medicine in Ontario. I should note that the practice of medicine is a matter of provincial jurisdiction. The CPSO issues certificates of registration to physicians, allowing them to practice medicine. However, without agreement with another jurisdiction, CPSO certificates are only valid in Ontario. More generally, medical certificates or licences to practice medicine issued by any province of Canada are not automatically transferrable between all provinces.

[33] The CPSO also recognizes areas of specialization in Ontario, such as psychiatry. Since the regulation of medicine in Canada is a provincial matter, once again CPSO recognition is only valid in Ontario, unless another province agrees to adopt or accept CSPO’s recognition; not all do.

[34] In addition, the CPSO maintains provincial standards of practice, investigates physician-related complaints by patients, and is responsible for discipline matters involving physicians who have committed misconduct.

[35] In 2004, the CPSO adopted a new individual "functional assessment" comprised of a physician-specific and occupation-based assessment to recognize specialists who were unable to pass the RCPSC's requirements, including those whose foreign training was not recognized by the RCPSC, and those who, like the Applicant could not pass part, or all, of the RCPSC's examinations.

[36] Some other provinces also developed functional assessments for specialist recognition. However, when the Applicant went through the CPSO recognition process, the provinces had not standardized these assessments, and the specialist recognition process in one province was not automatically recognized in another.

[37] As noted, the Applicant was recognized as a specialist by CPSO in 2007 under its "functional assessment" policy. This procedure consisted of CPSO reviewing the Applicant's education, training, experience and foreign certification. It also involved input by survey from his supervisor and colleagues together with an in-person, on-site practice assessment. The CPSO's functional assessments did not involve oral or written examinations, a difference between CPSO recognition and RCPSC accreditation.

[38] The Applicant passed the CPSO functional assessment procedure; he was therefore recognized in Ontario as a specialist in psychiatry. Such CPSO recognition entitled him to

practice as a specialist in psychiatry in Ontario and in some other provinces on the same basis as RCPSC-accredited specialists.

IV. The Applicant's Application for Employment to the CAF

[39] Calian Ltd. [Calian] is a corporate contractor that provides health service professionals to the CAF. It does this by recruiting, hiring and managing qualified health service providers. However, it is the CAF, not Calian that determines job requirements for CAF positions. The CAF selects successful candidates from among those identified by Calian.

[40] Within this context, the CAF tasked Calian to recruit civilian psychiatrists at two CAF bases in Canada: one in Cold Lake, Alberta and the other in Petawawa, Ontario. For both positions, the CAF required the successful recruit to be accredited in psychiatry by the RCPSC.

[41] In early 2008, the Applicant applied for both positions, notwithstanding he lacked the required RCPSC accreditation in psychiatry. He knew he needed RCPSC accreditation, and knew he did not have it. His position was – and is – that the CAF's RCPSC accreditation requirement contravenes the CHRA such that he did not have to comply with it.

[42] The Applicant was informed by Calian recruiters that Calian would hire him if his credentials were acceptable to the Department of National Defence. Calian presented the Applicant's candidacy to the CAF notwithstanding the Applicant lacked RCPSC accreditation. Calian recruiting staff asked the CAF to waive the RCPSC accreditation requirement for the Applicant.

[43] In this connection, numerous emails were sent by Calian's Deputy Program Manager to the CAF in support of the Applicant's application. On July 15, 2008, senior Calian staff met with one Major Tremblay of the CAF to discuss the Applicant's candidacy.

[44] However, the CAF declined to exempt the Applicant from the required RCPSC accreditation in psychiatry. Colonel Boddam, Ret., CAF's practice leader for Psychiatry and Mental Health, considered the Applicant's candidacy, but determined the Applicant did not meet the requirements of the position because he did not have RCPSC certification in psychiatry as the posting required. In August 2008, the Applicant was informed by Calian that his application would not proceed further because he did not have the required RCPSC accreditation for the positions.

V. Applicant's Litigation History

A. *Against the CPSO*

[45] In December 2008, the Applicant filed an application with Ontario's Human Rights Tribunal [the HRTO] pursuant to section 34 of Ontario's *Human Rights Code*, RSO 1990, c H 19 against the CPSO, alleging that certain actions by the CPSO amounted to discrimination on the grounds of place of origin and citizenship.

[46] The Applicant alleged that CPSO's failure to individually assess his qualification as a specialist between 1992 and 2007 and its reliance on specialist accreditation by the RCPSC amounted to discrimination on the grounds of place of origin and citizenship because it undervalued his American training. By an interim decision, the HRTO held that the allegations

relating to the pre-2007 conduct were untimely and could not be heard: *Keith v College of Physicians and Surgeons of Ontario*, 2010 HRTO 2310.

[47] In *Keith v College of Physicians and Surgeons of Ontario*, 2013 HRTO 1646, the Applicant took issue with a public register maintained by the CPSO which provides doctor-specific information about physicians in Ontario, including whether the physician is a specialist and the body that accredited the physician's speciality. In the Applicant's submission to the HRTO, he alleged the CPSO register discriminated against CPSO specialists on the basis of place of origin because most CPSO specialists are foreign-trained. The HRTO dismissed his complaint; it concluded the distinction on the register between RCPSC and CPSO specialists was not discriminatory in that there was no evidence it resulted in any adverse treatment or disadvantage. The Applicant did not appeal.

B. *Complaints under the CHRA*

[48] The Applicant also applied to the Canadian Human Rights Commission [the Commission] for relief. In February 2009, he filed an amended complaint against the CAF alleging discrimination on the basis of national origin. The Commission undertook an investigation and dismissed the complaint for want of jurisdiction. The Commission simultaneously dismissed a similar complaint the Applicant had made against Correctional Service Canada [CSC]. Both the CSC and CAF required RCPSC accreditation for psychiatrists they hire; the Applicant was turned down by both because he lacked RCPSC certification, and notwithstanding by then he had CPSO recognition.

[49] The Applicant sought judicial review of both Commission decisions. In 2011, Justice O'Reilly dismissed both applications. In doing so, Justice O'Reilly found the Commission was correct to conclude that the Applicant's "quarrel" was against the RCPSC and not the CAF. As a result, Justice O'Reilly concluded the Commission was without jurisdiction to investigate the Applicant's complaint against the CAF: *Keith v Canada (Correctional Service)*, 2011 FC 690.

[50] In 2012, the Federal Court of Appeal upheld Justice O'Reilly's decision in respect of the CSC. However, the Federal Court of Appeal allowed the Applicant's appeal in respect of his complaint against the CAF. Per Mainville JA, it concluded the Commission did have jurisdiction to consider the Applicant's complaint against CAF: see para 81 of *Keith v Canada (Correctional Service)*, 2012 FCA 117:

> [81] I am however well aware that in light of the findings of the Commission leading to the dismissal of the complaint against the Correctional Service, the investigation of the complaint against the Canadian Forces may be somewhat supererogatory. However, the Commission must be held to its very conscious choice of treating both complaints separately under distinct statutory processes. The Commission was well aware that both complaints were pending before it, but chose to treat them separately. For some unknown reason, it did not rely on the evidence gathered in its investigation of the complaint against the Correctional Service for the purpose of deciding the complaint against the Canadian Forces.

[51] Hence, the Applicant's complaint was returned to the Commission. In 2013, the Commission referred his complaint against the CAF to the Tribunal. The Tribunal conducted an inquiry and held an eight-day hearing. Having considered the matter, the Tribunal dismissed the Applicant's complaint in October 2017. This decision is the subject of the current application for judicial review.

VI. Decision

[52] The Tribunal concluded that the CAF's hiring practice did not discriminate on the grounds of national origin. It also concluded, in *obiter*, that the CAF's hiring practice was a BFOR. The Tribunal dismissed the Applicant's complaint.

VII. Issues

[53] The Applicant submits the following issues for determination**:**

(1) Did the Tribunal err in its assessment of discrimination by:

a) Misapprehending the law and misapplying it to the facts to find that the Applicant's foreign education and training did not serve as a proxy for the protected ground of national origin (i.e. place of origin);

b) Taking a formal (sic) equality approach and making determinate errors of fact to rule out adverse impact; and

c) Improperly inferring intention into the contribution leg of the *prima facie* analysis?

(2) Did the Tribunal err in its application of the BFOR test by failing to properly apply the *Meiorin* analysis and by relying on evidence that could not reasonably lead to a finding of undue hardship?

(3) Did the Tribunal breach the applicant's right to procedural fairness by holding it against the Applicant that no evidence was led on whether the RCPSC certification is discriminatory when this issue was not properly before it?

[54] In my view, there are two determinative issues:

(1) Whether the Tribunal acted reasonably in finding that the CAF's requirement that all psychiatrist practitioners be RCPSC accredited was not *prima facie* discriminatory.

(2) Whether the Tribunal breached procedural fairness.

VIII. Standard of Review

[55] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." The Federal Court of Appeal has also confirmed that reasonableness is the standard of review for decisions of the Tribunal involving interpretation of its home statute: *Adamson v Canada (Human Rights Commission)*, 2015 FCA 153 at para 30, and more generally, see *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 27. Reasonableness is the standard of review for the first issue.

[56] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> … A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[57] When reviewing for reasonableness, this Court should only interfere if the Tribunal's conclusions fall outside the range of possible and acceptable outcomes that are defensible on the facts and law. As a result, there may be multiple possible outcomes that meet the *Dunsmuir* standard for reasonableness. In addition, it is well-established that on judicial review, courts must

refrain from reweighing and reassessing the evidence considered by the decision maker: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 64.

[58] In this connection, the Tribunal has considerable and specialized expertise. As such the Tribunal's decision is entitled to "considerable deference": *Stewart v Elk Valley Coal Corp*, 2017 SCC 30 at para 20. Tribunal decisions come to this Court on judicial review are not *de novo* hearings.

[59] A Tribunal under the CHRA is charged with weighing and assessing the evidence. The Supreme Court of Canada has ruled that Tribunals such as this have the "mandate and expertise to make factual findings relating to discrimination": *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at para 25. See also *Lévis (City) v Fraternité des policiers de Lévis Inc*., 2007 SCC 14 at para 112.

[60] As to questions of procedural fairness, Tribunal decisions are reviewed on the correctness standard: *Mission Institution v Khela*, 2014 SCC 24 at para 79. In *Dunsmuir* at para 50, the Supreme Court of Canada explained what is required of a court reviewing on the correctness standard of review:

> … When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[61] The Supreme Court of Canada also instructs that judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

IX. Analysis

A. *Issue 1 – Tribunal's Application of the* Moore *Test for* prima facie *discrimination*

[62] The Supreme Court of Canada sets out the test for *prima facie* discrimination in *Moore v British Columbia (Education)*, 2012 SCC 61 [*Moore*], which is the controlling authority at para 33:

> [33] As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the Code; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

[63] I will deal with the three-part test one part at a time.

(1) Did the Applicant, as required, show that he had a characteristic protected from discrimination under the CHRA?

[64] The Tribunal correctly relied on *Moore* for its test for *prima facie* discrimination.

[65] I did not hear the Applicant argue he was discriminated on the basis of his national origin as such (*per se*). National origin is a prohibited ground of discrimination under subsection 3(1) of the CHRA:

Prohibited grounds of discrimination	**Motifs de distinction illicite**
3 (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.	**3** (1) Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'identité ou l'expression de genre, l'état matrimonial, la situation de famille, les caractéristiques génétiques, l'état de personne graciée ou la déficience.
[Emphasis added.]	[Je souligne.]

[66] Instead, the Applicant submitted he was discriminated against on the basis of his education, which, he submits, serves as a proxy for the prohibited ground of "national origin" discrimination.

[67] The Tribunal subscribed to the discussion of origin of education as a proxy for "place of origin" ("national origin" in the CHRA context) found in *Grover v Alberta (Human Rights Commission)*, [1996] AJ No. 667 (Alta QB), aff'd 1999 ABCA 240 [*Grover*]. The Tribunal stated:

> [46] I subscribe to the opinion expressed in *Grover v Alberta (Human Rights Commission)*, [1996] AJ No. 667 (Alta QB) and affirmed [1998] AJ No 924 (Alta CA) in discussing origin of education as an extension of "place of origin", the Court stated at paragraphs 47-48 that "it must give a fair, liberal but faithful interpretation to the phrase "place of origin'. That phrase – place of origin of a person – cannot be stretched to include the place where a person received their PhD degree".

[68] While the Applicant criticizes *Grover* and the Tribunal's acceptance of it, I find *Grover* is useful; I take it to establish a starting point in the *Moore* analysis. In other words, to determine if a complainant has a characteristic that is protected against discrimination, one first looks at the statute – in this case the CHRA. I am not persuaded this was an objectionable or unreasonable approach to interpreting the Tribunal's home statute.

[69] Therefore, the inquiry in this case should focus on "national origin" or, where that is not made out, on a proxy for "national origin." That is what the Tribunal did; the process is defensible. The Tribunal agreed, saying at para 45 that "the extension of 'place of origin' to include place of foreign education may be appropriate in some circumstances."

[70] To the point of the reference to *Grover*, the CHRA does not prohibit discrimination on the ground of country of education; there is no basis to criticize the Tribunal's finding in this regard which makes the same point:

> … One cannot automatically apply the principal that foreign education is an extension of foreign birth. It is not absolute; otherwise it would also be a separate heading for discrimination under the CHRA. While the Tribunal has wide discretion in interpretation, it is entitled to limit what otherwise might apply in a case of dissimilar facts.

[71] While the Applicant argued before the Tribunal that his American medical education was an accepted proxy for "place of origin", the Tribunal disagreed. The Tribunal did not accept that "merely born and educated outside of Canada" leads to discrimination having an adverse impact and is therefore "automatically protected" under the CHRA on the record in this case. In my view this inquiry must be both context and fact-dependent, and it was in this case.

[72] The Tribunal in this connection, and appropriately in my view, turned to the evidence. On the record, the Tribunal did not accept the Applicant's submission that his U.S. education served as a proxy for national origin. The Tribunal referred to *Bitonti v College of Physicians & Surgeons of British Columbia*, [1999] BC HRTD No. 60 [*Bitonti*]. The Tribunal stated at para 44:

> [44] I do agree that one's place of origin, may well serve as an appropriate ground for finding discrimination in the work force and in society as a whole, and therefore an appropriate prohibition under the *CHRA*. However, I do not subscribe to the theory that merely born and educated outside of Canada leads to discrimination having an adverse impact and therefore automatically protected under the *CHRA*.
>
> [45] While the extension of "place of origin" to include place of foreign education may be appropriate in some circumstances, such as educational degrees from some third world university. I agree that automatic extension of the definition of "place of origin" was not the intention of *Bitonti*, and the finding expressed in *Fazil* is the proper interpretation. There was no evidence before the Canadian Human Rights Tribunal ("Tribunal") that RCPSC certification process was more onerous due to Dr. Keith's American birth and education.
>
> [Emphasis added.]

[73] I am unable to fault the reasonableness of this finding. To put it in context, the Applicant took the position before the Tribunal that: "[H]uman rights jurisprudence has consistently held

that place of training is a proxy for place of origin" (see paragraph 134 of the Applicant's Submissions to Tribunal).

[74] With the greatest respect, this submission by the Applicant was not well-founded when he made it to the Tribunal. And, it is less well-founded now.

[75] While the Applicant cited *Bitonti* as authority for this submission to the Tribunal, a review of *Bitonti* confirms that the British Columbia Human Rights Tribunal [BCHRT] did not make the finding the Applicant attributed to it. Instead, the conclusion in *Bitonti* was based on the case before it, which included statistical data. In *Bitonti*, the BCHRT reasonably stated at para 145 that it was for the tribunal, "to give such weight and draw such inferences from [the evidence] as I find appropriate in the circumstances." The BCHRT's conclusion in *Bitonti*, at para 147 was that, based on the evidence before it, "the correlation between place of origin and place of graduation is high." In other words, the Tribunal only reached the conclusion that there was high correlation after it considered and analysed the evidence before it.

[76] In this connection, the Applicant also drew the Tribunal's attention to *Mihaly v The Association of Professional Engineers, Geologists and Geophysicists of Alberta*, 2014 AHRC 1 [*Mihaly Tribunal*]. In *Mihaly Tribunal* the Alberta Tribunal held at para 171, "on these facts", i.e., on the evidence before it, that the complainant's educational credentials were a "proxy for [his] place of origin". However, the *Mihaly Tribunal* decision was set aside on appeal: *The Association of Professional Engineers, Geologists and Geophysicists of Alberta v Mihaly*, 2016 ABQB 61 [*Mihaly Queen's Bench*]. *Mihaly Tribunal* thought the complainant faced discrimination because as a foreign-trained engineer from a non-accredited engineering program,

he was required to meet more onerous standards than those from accredited engineering programs. To the contrary, *Mihaly Queen's Bench* ruled there was no discrimination where a requirement to take and pass exams applied to all individuals wishing to be registered as professional engineers, regardless of where they were educated or whether they graduated from an accredited engineering program.

[77] Of particular relevance to the case at bar, *Mihaly Queen's Bench* held, at para 106: "[w]hile there was evidence that Mr. Mihaly failed the [NPPE] examination three times, there was no evidence that this was in any way related to his place of origin."

[78] I note the importance of considering and analysing the evidence before the Tribunal to determine the first step of *Moore*: whether or not a complainant has a characteristic protected from discrimination under the CHRA.

[79] As stated in para 45 of the Tribunal's Decision, quoted at paragraph 72 above, the Tribunal in the present case agreed with the interpretation of the first part of the *Moore* analysis set out in *Fazli v National Dental Examination Board of Canada*, 2014 HRTO 1326 [*Fazli*]. In *Fazli*, an Afghanistan-trained dentist failed to meet the respondent's requirements for certification. He alleged discrimination because of place of origin, a prohibited ground, relying on education as a proxy. Mr. Fazli's application was dismissed by the Tribunal. The Tribunal considered the evidence, and concluded Mr. Fazli had not "established any differential and disadvantageous treatment that he may have experienced as a result of having graduated from a

non-accredited dental program constituted discrimination against the applicant based on his place or origin."

[80] At paras 37-40, the Tribunal in *Fazli*, found:

> [37] To the extent that graduates from non-accredited dental programs experience any disadvantage in the respondent's system, the respondent submits and I agree that such disadvantage is linked to the individuals' place of study or training, not their place of origin. Place of study or training is not a prohibited ground of discrimination under the *Code*. *Neiznanski v. University of Toronto*, (1995) 24 CHRR D/187 at para. 49 and 50, as cited in *Durakovic v. Canadian Architectural Certification Board*, 2011 HRTO 333 (CanLII).
>
> [38] To be fair, the applicant acknowledges this. However, he submits that place of training can be a proxy for place of origin, because people tend to get training in their place of origin. *Neiznanski*, above; *Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta*, 2014 AHRC 1 (CanLII).
>
> [39] In circumstances where more onerous certification or licensing requirements are imposed based on negative assumptions about an individual's place of training, it may be appropriate to find discrimination based on place of origin. For example, in [*Bitonti*], a case heavily relied upon by the applicant, the BC Human Rights Tribunal found that it was discriminatory for the BC College of Physicians and Surgeons to give preferential treatment to medical school graduates from Canada, the United States, Great Britain, Ireland, Australia, New Zealand and South Africa, as compared to medical school graduates from anywhere else in the world, based on assumptions about the merits of the British medical education system in place in those countries, as opposed to actual knowledge.
>
> [40] In the case at hand, however, the evidence does not establish that the respondent imposed more onerous certification requirements on the applicant based on any assumptions about Afghanistan or any other countries.
>
> [Emphasis added.]

[81] I make three observations regarding *Fazli*. First, *Fazli*, as with the Tribunal decision before this Court, was fact-based. Second, *Fazli* properly recognizes that place of education may – not always or consistently – be a proxy for place of origin, such that discrimination based on place of education may be a proxy for and thus support a complaint based on discrimination on national origin. There is no disagreement with this.

[82] The third point from *Fazli* is its general proposition that place of education may be a proxy for national origin discrimination, if more onerous certification or licensing requirements are imposed on certain groups of individuals, particularly if those more onerous requirements are based on negative assumptions about the group's place of training.

[83] The Tribunal adopted this approach, and in doing so found against the Applicant. The Tribunal concluded, at para 45, that "[T]here was no evidence before the Canadian Human Rights Tribunal ("Tribunal") that RCPSC certification process was more onerous due to Dr. Keith's American birth and education." In other words, the Applicant failed to establish the first part of the *Moore* test. In my view this was neither an unreasonable assessment of the evidence nor an unreasonable approach to the interpretation of its home statute.

[84] The Tribunal also concluded that the Applicant provided no evidence that his ABPN certification was inferior to the RCPSC accreditation. Had there been such a finding it might have created the proxy between place of origin and place of education, but that was not the evidence:

> [47] I do not accept that the policy of the CAF requiring RCPSC certification was based on discriminatory assumptions and no evidence was provided to the Tribunal that Dr. Keith's ABPN and certification was inferior to RCPSC certification and therefore

> creating the extension of "place of origin" with "place of education". Dr. Keith argued that they were substantially similar.
>
> [48] Further if place of training is to serve as a proxy for place of origin, then the emphasis, must be on the place of training to extend the place of origin to include place of training. No evidence was advanced by the Complainant that American trained physicians are substantially of American origin, therefore equating American trained as therefore American or therefore foreign trained.

[85] The Tribunal ruled:

> [51] The CAF required all medical applicants to pass and acquire the RCPSC credentials. Similar to *Mihaly* [Alberta Court of Queen's Bench], the Complainant did not provide any compelling evidence that his national origin was a factor in any disadvantage that he may have had obtaining RCPSC certification.
>
> [...]
>
> [53] Whether Canadian born or foreign born, the CAF required all doctors to be certified by the RCPSC. The Respondent Counsel correctly, in my view, stated that there was no evidence that the requirement to take the RCPSC certification was in any way related to place of origin. Whether he was Canadian, American or other, CAF required the same qualification.
>
> [54] I found no compelling evidence that Dr. Keith was treated differentially as a result of his educational qualification from any other party as a result of being American. I do not find that his place of origin resulted in an adverse effect on his ability to pass the requirements of the RCPSC.

[86] The findings in paras 53 and 54 of the Tribunal's decision come from evidence at the eight-day Tribunal hearing. In my respectful view, these findings were reasonably open to the Tribunal on the record before it; this is because there was no evidence of discriminatory assumptions. In addition, there was no evidence that ABPN certification was inferior to RCPSC accreditation.

[87] The Tribunal further determined that the Applicant provided no evidence that his American psychiatric (ABPN) certification was inferior to the RCPSC accreditation to establish or evidence a nexus between "place of origin" and "place of education": see para 46 of its reasons quoted above at paragraph 67 of these Reasons. In this connection, the Respondent submits that the record supports the Tribunal's finding that the Applicant failed to lead evidence establishing that place of education could be found to be a proxy for place of origin in the current case. The Respondent is also correct in noting that the Applicant's evidence on this issue relied heavily on reported demographics of CPSO-accredited specialists. The Applicant emphasized evidence that at least 72% of CPSO recognized specialists were born outside Canada and that 92% obtained their medical training outside Canada. By inference, he argued the majority of foreign-born, CPSO-recognized specialists must have received specialty education outside of Canada. The Applicant told the Tribunal that this "inference" makes sense because since 2008, the CPSO practiced-based assessment has been restricted exclusively to foreign-trained specialists. By analogy to *Bitoni*, at paras 138-147, the Applicant argued this CPSO statistical evidence demonstrated a high correlation between place of education and training and place of origin.

[88] The Respondent points to evidence that contradicted the Applicant's submissions. This evidence is found in the National Physicians' Survey [the National Survey] conducted by the Canadian Medical Association [CMA], a national organization representing the interests of many physicians across Canada. The CMA's National Survey reported that while 2.4% of specialists in Ontario were born in the U.S., only 1.1% of the same group completed their medical training in the U.S. In addition, the National Survey reported that while 7.3% of specialists in Ontario completed their most recent postgraduate training in the U.S., only 2.4% of the same group were

born in the U.S. On this record, it was open to the Tribunal, within its fact-finding "mandate", to decline to conclude that being "born and educated outside of Canada leads to discrimination having an adverse impact and therefore automatically protected under the CHRA."

[89] The Tribunal had the "mandate" and was thus entitled to find the Applicant's evidence unpersuasive; likewise the Tribunal could reject the Applicant's evidence as having been rebutted by the Respondent's evidence. It appears to have done both. The issue in part then becomes whether that amounts to reviewable unreasonableness or error.

[90] In my view, the Tribunal's assessment of whether American trained physicians are substantially of American origin involved assessing the weight of evidence. The weighing and assessing of the Applicant's evidence in this regard lie within the "mandate" recognized by the Supreme Court of Canada as belonging to the Tribunal: *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at para 25. The Tribunal held the evidence did not establish that American-educated physicians were substantially of American origin such that the Applicant's American training was a proxy for national origin. In my view, this finding was open to the Tribunal on the record.

[91] The Tribunal also emphasized that whether Canadian-born or foreign-born, the CAF required all doctors to be accredited by the RCPSC. The Tribunal preferred the Respondent's submission that there was no evidence that the requirement to take the RCPSC accreditation was, in any way, related to place of origin. Put differently, whether Canadian, American or other, the CAF required the same qualification. These findings were open to the Tribunal on the record.

[92] The Applicant criticizes the Tribunal for its finding that whether Canadian-born or foreign-born, the CAF required all doctors retained through Calian to be accredited by the RCPSC.

[93] The Applicant's criticism is based on two facts. First, the Applicant notes that a single psychiatrist was in fact retained by the CAF notwithstanding that he, like the Applicant, did not have RCPSC accreditation in psychiatry. I am not persuaded of the relevance of this submission. The psychiatrist in issue was hired some six years *after* the Applicant's complaint. Importantly, this hiring took place *after* the RCPSC revised its accreditation policies in 2010 as described above at paragraph 31 of these Reasons. In addition, the doctor was subject to a formal risk analysis – "Credentialing Review" – conducted by the CAF through a committee of four CAF members. While Calian asked for a waiver or exemption for the Applicant, the CAF did not request a Credentialing Review of the Applicant. Further, the CAF's Credentialing Review determined that the doctor at issue had completed two Canadian supervised fellowship training programs, had teaching / professorship appointments, had been practising in a group setting similar to what the CAF then needed, had addictions expertise required for the position, had a licence in the province of practice, and had dual diagnosis expertise and occupational expertise recognized by and expressly desired by the mental health team in question. He had also previously worked for the Royal Canadian Mounted Police, which, like the CAF has a large cross-Canada workforce. I conclude that the CAF wished to engage this particular psychiatrist and took the necessary steps to obtain his services. I am not persuaded the decision to hire this doctor casts doubt on or undermines the decision of the CAF to rely on the standard requirement of RCPSC accreditation in the Applicant's case.

[94] The second basis for the Applicant's criticism of the Tribunal finding that whether Canadian-born or foreign-born, the CAF required all doctors to be accredited by the RCPSC, relates to psychiatrists from Quebec. These physicians may or may not have RCPSC accreditation. However, this criticism is immaterial; while Quebec doctors may obtain their credentials through the CMQ, the CMQ and RCPSC have harmonized their respective standards: see paragraph 28 above.

[95] The Applicant also submits the Tribunal conducted a formalistic analysis, pointing to the Supreme Court of Canada's decision in *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 2. I agree the inquiry may not be formalistic or arbitrary; however, upon review of the decision at hand, I am not persuaded the Tribunal fell into such error.

[96] As noted at the outset of this part of the *Moore* analysis, the onus was on the Applicant to establish his case before the Tribunal. Based on the foregoing, I am not persuaded the Tribunal acted unreasonably or erred in finding the Applicant did not satisfy the first part of the *Moore* test. This specialized Tribunal found the Applicant did not establish his American education constituted a proxy for the prohibited ground of discrimination, namely "national origin." This finding is entitled to considerable deference. In addition, the Tribunal's finding in this regard falls within the range of possible, acceptable outcomes that are defensible on the facts and law. Therefore, in the normal course, at this point, judicial review would be dismissed.

[97] However, because it was argued before me, I will review the second step in the *Moore* analysis.

(2) Did the Applicant experience an adverse impact with respect to the service in dispute?

[98] In *Moore*, the Supreme Court of Canada sets out the second step of the *prima facie* discrimination analysis: a complainant must establish that he or she experienced an adverse impact with respect to the service in dispute.

[99] In this respect, on the evidence before it, the Tribunal concluded against the Applicant at para 54. The Tribunal found there was no compelling evidence the Applicant was treated differently because of his American education:

> I found no compelling evidence that Dr. Keith was treated differentially as a result of his educational qualifications from any other party as a result of being American.

[100] When considering the submissions in this respect, I remind myself of the considerable deference owed to this specialized Tribunal. I recognize again that the Tribunal has a "mandate" confirmed by the Supreme Court of Canada, namely the "mandate and expertise to make factual findings relating to discrimination": *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at para 25.

[101] In support of his adverse impact submissions, the Applicant relied in part on Professor Reitz who gave expert evidence as to the differential treatment of immigrants and ethnic minorities.

[102] The Tribunal assessed but downplayed the evidence of Professor Reitz because it "was based on visible minorities and did not provide any substantial evidence as to education and place of origin for white American born and American trained physicians."

[103] While the Applicant disagreed with this assessment, in my respectful view the Tribunal's assessment of this particular evidence was reasonable. I note that Professor Reitz testified in cross-examination that the focus of his research was "on employment issues as they relate to immigrants and visible minorities". He also agreed that much of his "work deals with race or visible minority immigrants" (Applicant's Record, pages 791-792). He had not written any articles or books specifically about American medical credential recognition in Canada. He conceded he had not done any particular research on the issue of American medical credential recognition in Canada except as included in his other work. He conceded he had not studied the issue of American medical recognition in Canada (Applicant's Record, pages 795 and 796).

[104] As noted, the weighing and assessing of this evidence fall within the mandate of the Tribunal. In my view, its assessment fell within the range of outcomes permitted.

[105] In addition, and set against the Applicant's arguments, there was evidence led by the CAF in the form of the National Survey administered by the CMA. The National Survey found most specialists recognized in Ontario are RCPSC certified to the extent that 99.2% of Ontario specialists born outside Canada are RCPSC accredited. The Tribunal chose to rely on the National Survey evidence:

> [59] The Complainant is unsuccessful in establishing that the CAF's requirement of RCPSC certification is discriminatory against foreign born and trained. I accept the Respondent's evidence produced by the National Physicians' Survey administered by the Canadian Medical Association, which found that most specialists in Ontario are RCPSC certified to the extent that 99.2% of Ontario specialists who are born outside Canada are RCPSC certified.

[106] While at the hearing the Applicant disagreed with the Tribunal's reliance on the CMA's National Survey, as noted previously it was for the Tribunal, not this Court, to weigh and assess evidence, absent unreasonableness or indefensibility. I am not persuaded that the CMA was biased or inaccurate in conducting the survey, or that its National Survey was flawed in either such respect.

[107] The National Survey suggests the Applicant was in a very small minority of foreign-born specialists who could not obtain RCPSC accreditation; this weakened the Applicant's allegation of adverse impact discrimination.

[108] The Applicant also pointed to documentary and expert evidence that, he alleged, showed adverse impacts that the facially neutral CAF hiring practice imposed on the Applicant "and other applicants of foreign education and training." He in effect invited the Court to re-weigh the evidence, which is contrary to settled jurisprudence. The Tribunal chose to accept the National Survey; the Applicant has not established that these evidentiary findings should be re-litigated or re-assessed on judicial review. The Tribunal's findings must fall within the range set out in *Dunsmuir*: in my view, they do.

[109] The Applicant also alleged that CPSO recognition (which the Applicant had) was equivalent to RCPSC accreditation (which the Applicant did not have). The Tribunal rejected this submission:

> [60] Similarly I do not accept that the CAF's insistence on RCPSC certification is discriminatory, as it is equivalent to CPSO credentials. I accept the evidence of Mr. Dan Faulkner and Dr. Harris, as both the RCPSC and CPSO view the credentials

> differently. The RCPSC is recognized as a national standard, recognized across Canada.

[110] In this connection, the Tribunal had before it the evidence of Dr. Faulkner, a deputy registrar of the CPSO, who testified that physicians such as the Applicant with American training were able to access the RCPSC process. He testified that the number of countries that had access to the RCPSC examinations was in the neighbourhood of 20 to 30. He also confirmed the CPSO process was designed to ensure that if an international medical graduate is practising in Ontario and cannot obtain their RCPSC examinations, the CPSO "will enable a process to recognize them through the Ontario college as a specialist." (Applicant's Record, page 937).

[111] The Applicant in asking this Court to re-weigh the evidence, relied upon a submission by the Respondent: "[T]he CF [CAF] does not take the position that the RCPSC certification is superior or that CPSO-recognized specialists are inferior." However Dr. Faulkner, who spent years at the CPSO testified that RCPSC accreditation was *not* equivalent to CPSO recognition. Dr. Faulkner confirmed that there is no reciprocal recognition of each provincial specialist recognition processes. He testified that "there are criteria in other provinces that are different from Ontario's that we [CPSO] don't accept as specialty recognition criteria" (Applicant's Record, page 955). In particular, Dr. Faulkner noted there is one jurisdiction that has as one criteria that a candidate "has practiced in that jurisdiction for two years in a speciality and have three reference letters" in order to receive speciality recognition in that jurisdiction (Applicant's Record, page 957). He confirmed that the practice "is not consistent. There are similarities, but it is not consistent" (Applicant's Record, page 957).

[112] The Tribunal accepted Dr. Faulker's evidence, which was that the CPSO itself does not view its specialist recognition process "as equivalent to certification with the Royal College of Physicians and Surgeons of Canada." Dr. Faulkner testified that "there is great meaning in the term 'equivalent'. … The process by which you get there is very different, and the understanding of what those processes are is very inconsistent across the country in terms of how the individual provinces are applying that recognition." He noted the RCPSC process is examination-based, while that of the CPSO is based on specific criteria and in some cases, "a practise assessment of what you are doing. In some cases, individuals are doing things that are not broadly based in a specialty. They are much more focused. Those are a couple of key differences, I believe, which would suggest that these aren't equivalent" [emphasis added].

[113] In this connection, the HRTO in *Keith v College of Physicians and Surgeons of Ontario*, 2010 HRTO 2310 also concluded that recognition by the CPSO was not the same as accreditation by the RCPSC, at paras 46-50:

> [46] A further problem with Dr. Reitz's [witness for Dr. Keith] evidence is that it presumes CPSO specialists and RCPSC specialists are the same. In his evidence, Dr. Reitz stated if the qualifications between CPSO and RCPSC are truly equivalent, the CPSO is inviting the public to wonder what the difference is between the two by maintaining the distinction on the Register. The question arises as to whether his opinion holds weight if the two groups are not equal. The distinction on the Register may reflect their substantive differences, not devaluation.
>
> [47] In his report, Dr. Reitz states the "CPSO has stated formally that status as CPSO Recognized Specialist is equivalent for all purpose to RCPSC Specialist status". There is no documentation by the CPSO where it has used the words "equivalent" or "equivalency" when referring to CPSO recognized specialists and RCPSC specialists. This point was conceded to by both Dr. Reitz and the applicant.

> [48] The applicant relies on an internal memo of the CPSO dated September 18, 2003 from the then Deputy Registrar Dr. John Carlisle where he uses the words "specialist for all purposes" when describing CPSO recognized specialists. The subject of the memo is "recognition of physicians for specialists billing". The applicant extrapolates from this statement that "the CPSO clearly accepted, that those who met the standard for CPSO recognition met the same basic standard for practice of a particular specialty as was met by those certified as specialists by the RCPSC".
>
> [49] The CPSO is the governing body for physicians in Ontario and is mandated to regulate Ontario's medical profession in the public interest. The fact that CPSO recognized specialists must meet certain standards of practice does not mean that they are the same as RCPSC specialists.
>
> [50] There is no evidence that any assessment has been done of the CPSO recognition process and the RCPSC accreditation process to support the conclusion that CPSO specialists and RCPSC specialists are the same. In fact, there are significant differences between the two processes. The RCPSC is exam-based and the CPSO is a functional assessment. The RCPSC is national in scope and the CPSO is provincial. The RCPSC accredits specialists and the CPSO recognizes their expertise. The RCPSC develops national standards and the CPSO deals with licensing to practise medicine in Ontario. If a physician is certified by the RCPSC, it suggests broad-based skills in all aspects of a specialty class. The functional assessment by the CPSO looks at what the physician is doing at the present time and determines whether he/she is practicing at the level of competence of a specialist in that particular work. A successful practice assessment by the CPSO does not mean general specialization as it does for RCPSC specialization.

[114] In addition, Professor Reitz testified that "American credentials are sometimes undervalued in Canada." He also testified that in the medical field, "there is in some contexts, a presumption that Canada and the U.S. share the same standards and what is suspect is the rest of the world." He also agreed that American medical training is overvalued in some cases or certainly seen as on par with Canadian medical training, and that in many cases American training would certainly be equivalent. In other words, the Applicant's evidence was that

American training was not undervalued, was the same, or was overvalued, depending on the context. The Tribunal was entitled to weigh and assess this evidence in reaching its conclusion not only in connection with this witness generally, but on the Applicant's unsuccessful argument that he had experienced adverse impact discrimination per the second part of the *Moore* analysis.

[115] With respect, I am not persuaded the Tribunal acted unreasonably on the law or facts either in concluding at para 54 that there was "no compelling evidence that Dr. Keith was treated differentially as a result of his educational qualifications from any other party as a result of being American", or in finding the Applicant's place of origin did not result "in an adverse effect on his ability to pass the requirements of the RCPSC."

[116] Thus, the Applicant has failed to show unreasonableness or error in relation to the second step of the three-part *Moore* analysis. In the normal course, this finding would also result in dismissal of this judicial review. However, because it was argued before me, I will review the third step of the *Moore* analysis.

(3) Was the protected characteristic a factor in the adverse impact discrimination?

[117] The Tribunal not only found there was no adverse impact, but to the third part of the test, concluded that while the Applicant did not pass the exams three times, "there was no evidence that this was related to his place of origin." In doing so, the Tribunal, at para 55 paraphrased the decision of the reviewing Court in *Mihaly Queen's Bench* at para 106: "while there was evidence that Mr. Mihaly failed the [the NPPE] examination three times, there was no evidence that this was related to his place of origin."

[118] In this respect, the Applicant faults the Tribunal for allegedly considering "the intention" of the CAF's hiring practice, based on para 47 of its decision where the Tribunal states, "I do not accept that the policy of the CAF requiring RCPSC certification was based on discriminatory assumptions."

[119] It is well-established that "an intent to discriminate is not a precondition to finding discrimination": *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892 at para 67.

[120] In my view, simply noting the absence of "discriminatory assumptions" within the CAF's hiring practice differs materially from basing a decision on whether there was an intention to discriminate: the latter may be open to criticism, perhaps fatally so. But that did not happen in this case.

[121] The Applicant also noted that on the third part of *Moore*, *prima facie* discrimination need not be based solely on a prohibited ground; *prima facie* discrimination may be made out if it is based in whole or in part on a prohibited ground: *Quebec (Commision des droits de la personne et des droits de la jeunesse) v Bombardier Inc. (Bombardier Aerospace Training Centre)*, 2015 SCC 39 at para 48. Again, no one disagrees with this proposition. However, and with respect, it does not assist the Applicant because on the evidence discussed above, the Tribunal found there was no adverse impact discrimination. The third part of *Moore* is not engaged for the same reasons.

[122] I have therefore concluded that this aspect of the Tribunal's decision is reasonable in that it falls within the range of possible, acceptable outcomes which are defensible on the facts and law, as set out in *Dunsmuir*.

B. *Issue 2 – Did the Tribunal err in its assessment of the BFOR?*

[123] At this point in this case, a BFOR analysis is not necessary because the Applicant didn't meet the test for *prima facie* discrimination per *Moore*. In the normal course, judicial review would be dismissed without analysing it as a BFOR; this is so because the burden to deal with a BFOR has not shifted to the Respondent.

[124] That said, the Tribunal dealt with the BFOR issue in *obiter*. Its reasons are set out in paras 60-65:

> [60] Similarly I do not accept that the CAF's insistence on RCPSC certification is discriminatory, as it is equivalent to CPSO credentials. I accept the evidence of Mr. Dan Faulkner and Dr. Harris, as both the RCPSC and CPSO view the credentials differently. The RCPSC is recognized as a national standard, recognized across Canada.
>
> [61] The CAF's reliance on RCPSC credentials results in a standard to which it can rely across Canada. The Complainant argued that CPSO was equivalent. There was no credible evidence to this effect. While CPSO specialty accreditation is accepted in some of the Canadian Provinces but not all, no evidence was provided that it was accepted by the Province of Alberta. Dr. Ken Harris, Executive Director of the RCPSC testified that specialty certification is a national standard applicable in all provinces and is also accepted by all Provincial Colleges as having met the standard for specialty designation.
>
> [62] The OHRT found that the CPSO and RCPSC are not equivalent while the RCPSC develops national standards and the CPSO deals with licensing to practice medicine in Ontario. *Keith-CPSO, supra,* at paragraphs 46, 49 & 50.
>
> [63] I also accept that RCPSC is a BFOR. The Respondent referred to the three-step test by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC), [1999] 3 S.C.R. ("*Meiorin*") at paragraph 54 to establish that an occupational requirement is *bona fide*:

[…]

> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job.
>
> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work related purpose, and;
>
> (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

[64] I accept that it would be an unduly hardship on the CAF to be required to determine the qualifications of all of its medical practitioners. I accept the plain explanation of Colonel MacKay when he stated:

> Before 2009, not all the provinces in this country would recognize the licence and certification from one province to another. If all of the provinces can't come to an agreement with respect to the certification process within each of those provinces what level of confidences can I have in the process that was undertaken to certify them within that province? The Royal College of Canada's certification was recognized by every province at that time as it is today as an acceptable standard to assure high quality of care to be provided by health care providers.

[65] As I find that the CAF did not discriminate against Dr. Keith within the requirements of the *CHRA*, having met the test set out by the Supreme Court of Canada in *Meiorin*, and to suggest otherwise would place an undue hardship on the CAF and the health and standards of its employees.

[125] The issue of a BFOR cannot be argued in a factual vacuum. As previously noted, the CAF is made up of mobile individuals who may be required to move from base-to-base across the country. The uncontested evidence of Colonel Boddam, Ret., previously with the CAF, was that the CAF "needed to have a psychiatrist in one part of the country to be the same as – at least have a basic minimum similarity to a psychiatrist in any other part of the country." Continuity of and a common standard of psychiatric care was of obvious importance to the CAF. Only the RCPSC offered minimum accreditation standards for psychiatrists that were accepted across Canada. While the CPSO recognized the Applicant in the province of Ontario, and while that recognition was accepted in some other provinces, the fact is that CPSO recognition did not provide the necessary assurance of basic minimum similarity across Canada.

[126] The Applicant argues that there was insufficient engagement in the Tribunal's BFOR analysis. There is no merit to this submission. I am not persuaded the law set out by *Meiorin* was ignored by the Tribunal, or that the Tribunal's analysis was flawed; the Tribunal asked itself and answered appropriate legal questions. The record and facts recited support its conclusions.

[127] I am also reminded that the Tribunal is a specialized tribunal with particular expertise in assessing and determining BFOR evidence and related arguments. Because of this, its reasons on BFOR are entitled to considerable deference by reviewing courts including this one. In my respectful view, the Applicant's submissions on this point do not adequately acknowledge either the expertise of the Tribunal or the deference owed. In my respectful view, the BFOR conclusions fall within the range of possible, acceptable outcomes which are defensible on the facts and law. *Dunsmuir* is therefore satisfied.

C. *Issue 3 – Did the Tribunal breach its duty of procedural fairness to the Applicant?*

[128] The Applicant submits that by stating that there was no evidence before it "that the RCPSC certification process was more onerous due to [the Applicant's] American birth and education", the Tribunal suggested the Applicant was expected to lead evidence on the discriminatory nature of the RCPSC accreditation process in order to establish his complaint. The Applicant emphasizes that this was not an issue before the Tribunal and at no time did the Applicant argue the RCPSC accreditation process was discriminatory. The issue he submits is whether the CAF's hiring practice requiring RCPSC accreditation was discriminatory in the Applicant's circumstances.

[129] To begin with, the Tribunal's statement must be read in its context:

> While the extension of "place of origin" to include place of foreign education may be appropriate in some circumstances, such as educational degrees from some third world universities. I agree that automatic extension of the definition of "place of origin" was not the intention of *Bitonti*, and the finding expressed in *Fazli* is the proper interpretation. There was no evidence before the [Tribunal] that RCPSC certification process was more onerous due to Dr. Keith's American birth and education.
>
> [Emphasis added.]

[130] In my view, the Applicant mischaracterizes the issue as one of procedural fairness. It is not. Instead, the Tribunal's discussion relates to the Tribunal's substantive decision which the Tribunal was entitled to consider. The Applicant claimed he suffered adverse effect discrimination: that the RCPSC accreditation requirement – while neutral on its face because the CAF required it of all physicians regardless of place of origin – had an adverse impact on him as

an individual of American national origin and education. The only way in which the CAF's requirement of the RCPSC accreditation requirement could have an adverse impact on American physicians was if achieving RCPSC accreditation was more difficult for American-born and trained physicians than for Canadian-born and trained physicians. Thus, the issue of whether the RCPSC standard was more difficult for foreign-born and trained physicians was squarely before the Tribunal. That was the issue on the third leg of the *Moore* test for *prima facie* discrimination.

[131] I also note that in the cases relied on by the Applicant such as *Bitonti* and *Mihaly*, in determining whether adverse effect discrimination exists, a determinative issue was whether foreign-trained complainants were required to meet different and more onerous requirements than Canadian individuals based on their training elsewhere. This also justifies the Tribunal's comments. In my view there is no merit to the procedural fairness argument.

X. Conclusions

[132] Stepping back and reviewing the decision as an organic whole, one must ask whether the decision of the Tribunal is reasonable in the sense that it falls within the range of possible, acceptable outcomes which are defensible on the facts and law. The Court appreciates that there may be multiple acceptable outcomes within that range. The Court must also recognize the specialized expertise of the Tribunal, its "mandate" to make factual and other determinations established by the Supreme Court of Canada, and the considerable deference the Tribunal is owed on judicial review. I also recognize that judicial review is not a treasure hunt for errors.

[133] Taking these factors into account, I am not persuaded the Tribunal's decision is unreasonable. In my respectful view, the decision falls within the range of possible, acceptable outcomes which are defensible on the facts and law in this case. In addition, I found no merit in the Applicant's procedural fairness argument. Therefore, this application for judicial review must be dismissed.

XI. Costs

[134] The parties agreed that the successful party should have costs awarded to it on an all-inclusive basis including fees, disbursements and applicable taxes in the amount of $10,000. Given the Respondents were successful, costs in that amount will be made payable by the Applicant to the Respondents.

JUDGMENT in T-1773-17

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed with costs payable by the Applicant to the Respondents in the all-inclusive amount of $10,000.00.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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