

## CHAPTER 2: EFFECTIVE FOREIGN CREDENTIAL RECOGNITION LEGISLATION: RECOMMENDATIONS FOR SUCCESS

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Ontario, Manitoba, and Nova Scotia have enacted legislation to help streamline the registration process in regulated professions for foreign-trained professionals. This legislation, however, has failed to effectively promote fairness and transparency

*A crucial shortcoming of these statutes is the lack of legal authority on the part of independent oversight agencies, which are not authorized to make legally binding orders for professional bodies to change their practices nor even to hear complaints from individuals who believe they have been treated unfairly. “Fair access” statutes across Canada should be clear and multifaceted in addressing the duties of professional bodies. They should go far beyond merely prohibiting procedural unfairness in administering their entry systems.*

*In order for foreign credential recognition legislation to be effective, the legislation should:*

- *Incorporate an independent appeal body in order to provide more transparency, accountability, and perceived fairness;*
- *Increase the cost of non-compliance;*
- *Define the term “fairness” and specify it includes only those background, training, apprenticeship or testing requirements that are relevant or necessary for effective practice;*

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- *Require professional bodies to consider whether clinical skills-based testing, rather than standardized written tests, are an adequate means of testing competence for some or all foreign-trained professionals;*
- *Require professions to take reasonable steps to establish mechanisms to assess the value of foreign training, competence, and credentials when presented by applicants;*
- *Require that any examinations administered by professions are reliable in testing the competencies they are intended to cover, that testing is fairly conducted, and that both domestic and foreign-trained applicants have a fair opportunity to anticipate the nature of the examination and prepare accordingly;*
- *Where possible, the extent to which foreign qualifications will be recognized should be established prior to the application process, rather than leaving applicants uncertain about how their individual cases will be treated;*
- *Require professions to work with universities and colleges to establish training programs that can assist foreign-trained professionals in upgrading their skills so as to meet professional standards; and*
- *Require professions to maintain and publish data on inquiries, admissions, and rejections of foreign-trained applications.*

Overall, the top priority should be producing fair access legislation that is clear, enforceable, and encourages both pro-active measures to improve admission practices and also provides a usable mechanism for individuals who are unfairly denied registration in a regulated profession.

## I. INTRODUCTION

While many would prefer to believe the idea of foreign-trained doctors coming to Canada and ending up driving cabs is an antiquated stereotype, data suggest that painful scenarios such as this may occur more often than we would like to believe. When recruiting abroad, however, Canada's immigration policies have focused on highly educated and financially established populations.<sup>1</sup> Foreign credential recognition roadblocks that cause the underuse of immigrants' skills are estimated to amount to a staggering \$15 billion annual economic loss.<sup>2</sup> Immigration policies and effective strategies to capitalize on the talents of foreign-trained professionals should be an issue of primary concern for

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<sup>1</sup> "Skilled workers and professionals: Who can apply", online: Citizenship and Immigration Canada <<http://www.cic.gc.ca>>; see also Immigration Law and Policy Chapter.

<sup>2</sup> Canada, Parliamentary Information and Research Service, *Recognition of the Foreign Experience and Credentials of Immigrants* (Ottawa: Library of Parliament, 2001) at 1.

governments: by 2011, Canada's net labour force growth will be entirely dependent on immigration.<sup>3</sup> In this new era, failure to attract the best and brightest talent and successfully harness the power of these resources could cost Canada dearly on the global stage.<sup>4</sup> To effectively maximize human capital, the government must work to streamline the registration process for foreign-trained professionals attempting to enter regulated occupations.

Recognition of foreign-earned credentials has been a noteworthy issue in both political and professional circles. This is a logical consideration, as in 2006, a staggering 24.1% of immigrants had a professional occupational skill level.<sup>5</sup> In 2002, as well as in February and October 2004, foreign credential recognition was included in the Speech from the Throne as an issue in which the government was committed to making progress.<sup>6</sup> In 2003 and 2004, the federal government allocated \$68 million over six years to implement the Foreign Credential Recognition program, a collaborative federal intra-governmental effort to address foreign credential recognition issues involving several federal departments.<sup>7</sup>

In 2006, Ontario introduced Bill 124, the *Fair Access to Regulated Professions Act* (FARPA), intended to promote fairness and transparency in the registration practices of specific self-regulated professions. Manitoba introduced Bill 19, *The Fair Registration Practices in Regulated Professions Act*,<sup>8</sup> in an attempt to provide transparent, objective, impartial, and fair registration practices that would facilitate effective foreign credential recognition. In addition to the legislative efforts of Ontario and Manitoba, Québec introduced Bill 14, *An Act to Amend the Professional Code as Regards the Issue of Permits*.<sup>9</sup> Nova Scotia was another province to take the legislative route with the introduction of Bill 211, the *Fair Registration Practices Act*.<sup>10</sup>

This paper will discuss legislation relating to foreign credential recognition that has been introduced by a number of provinces, specifically Ontario, Manitoba, Nova Scotia, and Québec, and whether this legislation has achieved positive outcomes for foreign credential recognition in those jurisdictions. Above

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<sup>3</sup> Conference Board of Canada, *Renewing Immigration: Towards a Convergence and Consolidation of Canada's Immigrant Policies* by Douglas Watt, Tim Krywaluk & Kurtis Kitagawa (Ottawa: Conference Board of Canada, 2008) at 5 [Renewing Immigration].

<sup>4</sup> *Ibid.*

<sup>5</sup> *Renewing Immigration*, *supra* note 3 at 3.

<sup>6</sup> *Supra* note 2 at 5.

<sup>7</sup> "Foreign Credential Recognition Program", online: Human Resources and Skill Development Canada <<http://www.hrsdc.gc.ca>>; see Chapter 7, *Facilitating Credentials Recognition at Frontline Agencies*.

<sup>8</sup> 1st Sess, 39th Leg, Manitoba, 2007 (assented to 8 November 2007), SM 2007, c 21.

<sup>9</sup> 2nd Sess, 37th Leg, Quebec, 2006 (assented to 14 June 2006), SQ 2006, c 20.

<sup>10</sup> 2nd Sess, 60th Gen Ass, Nova Scotia (assented to 25 November 2008), SNS 2008, c 38 [*Fair Registration Practices Act*].

all else, this paper will argue that current and previous federal and provincial governmental initiatives, while well-meaning, have failed to produce any significant recognizable change in the lives of foreign-trained professionals seeking registration in regulated professions. Failure in this vital area should not be taken lightly, as a failure to properly utilize this source of talent results in a tremendous waste of human capital. To understand how the current legislative initiatives ended up with a litany of vulnerabilities, this paper will touch on the development and the strengths and weaknesses of the *Fair Access to Regulated Professions Act* [FARPA].<sup>11</sup> Finally, the paper will suggest tactics and strategies for making foreign credential recognition legislation effective in accomplishing its stated goals.

## II. SELF-REGULATED PROFESSIONS

Self-regulated professions have been defined as “professions governed in part by government and in part by organizations given self-regulatory powers”.<sup>12</sup> Given the vast amount of knowledge held by these professions, they were given self-regulatory powers on the basis that it would be in the public interest to give the professions this authority. The ability of the professions to adhere to the standards of practice to ensure the public received the highest quality services was also in the public interest.

A substantive amount of literature warns that professional bodies may at times impose requirements for entry that go beyond what is genuinely relevant and necessary for effective practice. The motivation for excessive requirements may include reducing competition and raising consumer costs along with the prestige of the profession. Those who are already admitted to the professions can, and often do, raise additional requirements in the name of quality that they themselves are not required to meet: rather, those already admitted are “grandfathered”.

Unnecessary barriers to entry can be damaging to all constituencies. Many will be unnecessarily denied a chance to pursue a profession that best suits their own talents and ideals. The public may find that unnecessary restrictive standards leads to higher prices for services, or that the services become altogether inaccessible due to the limited number of practitioners. Members of the public may simply forego the service, attempt to administer it themselves – often at great risk – or pursue dangerous substitutes. A person who cannot access

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<sup>11</sup> *Fair Access to Regulated Professions Act, 2006*, SO 2006, c 31 [FARPA].

<sup>12</sup> Competition Bureau, *Self-Regulated Professions: Balancing Competition and Regulation* (Gatineau, QC: Competition Bureau, 2007) at 13, online: Competition Bureau <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Professions%20study%20final%20E.pdf/\\$FILE/Professions%20study%20final%20E.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Professions%20study%20final%20E.pdf/$FILE/Professions%20study%20final%20E.pdf)>.

psychiatric or psychological services may try to address her problems by treating herself with alcohol, illegal drugs, or excessive or inappropriate prescription medications. The same individual may settle for counseling from a practitioner who does not have the training or ethics to provide satisfactory assistance.

With respect to foreign-trained professionals, maintaining unnecessary barriers may follow not only from the desire to protect economic and social standing, but also from misunderstanding, stereotypes or hostility with respect to the nature of education, training, practice and standards observed in other jurisdictions.

While human rights statutes can and, on several occasions, have been used to redress discrimination against foreign-trained professionals, there are limitations to their practical usefulness. Such statutes are genuinely complaint-driven, rather than placing pro-active obligations on professional bodies to review and put in place satisfactory systems for policing entry. Furthermore, the statutes are administered by human rights commissions that are often swamped with complaints and slow to act, and they may not readily appreciate the complexities of professional registration systems. A complainant can only achieve redress under the statute if he shows that a barrier to entry is “discriminatory”; the legal and conceptual technicalities standing in the way of a finding of “discrimination” may be substantial. Moreover, human rights regimes cannot provide redress where a barrier to entry is equally unfair to local and foreign-trained applicants. There is, therefore, a strong need for all provinces to put in place “fair access” legislation that ensures fair terms of entry to professions for all.

### III. LEGISLATIVE INITIATIVES

In professional self-regulation, a profession enters into an agreement with the government to regulate the members of a profession.<sup>13</sup> This agreement between the government and the profession is executed through legislation, which stipulates the regulatory framework for the profession and the level of legal authority that has been granted to the regulatory body of the profession.<sup>14</sup> Professional self-regulation allows the government to retain a level of control over a profession, and therefore over the services provided by the members of a profession.<sup>15</sup>

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<sup>13</sup> Glen E Randall, “Understanding Professional Self-Regulation”, online: Ontario Association of Veterinary Assistants <[http://www.oavt.org/self\\_regulation/docs/about\\_selfreg\\_randall.pdf](http://www.oavt.org/self_regulation/docs/about_selfreg_randall.pdf)>.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid* at 2. Self-regulated professions are ordinarily required to develop and enforce rules that help ensure the public is receiving services in a competent and ethical manner. In addition, self-regulation generally includes a complaints and discipline model that allows the public to bring forward concerns about a member of the profession. The penultimate purpose for these measures is to “protect the public from incompetent or unethical practitioners.”

Despite awareness of the flaws of the guild model, in particular when accompanied by monopoly grants for services, self-regulation is growing. Self-regulation remains a cost-effective mechanism for establishing and enforcing requisite standards of quality in providing a service. Governments are increasingly aware of the need to insert regulatory oversight mechanisms to ensure the protection of the public interest. Fair access legislation, particularly when it involves the creation of an Office of a Fairness Commissioner with appropriate oversight power, is an example of how self-regulation is contained in the public interest.

Canadian constitutional law has delegated power over most employment law matters to the provinces. For example, labour-management relations is a matter of provincial jurisdiction, as it falls within civil rights in the province.<sup>16</sup> Regulation of professions and trades also falls within “property and civil rights in the province.”<sup>17</sup> Having those in the profession evaluate the training and credentials of applicants seeking to join the profession raises the issue of conflicts of interest. It was traditionally assumed that the occupational regulatory body was not only obligated to protect public interests, but also to act in the best interests of the members of the profession.<sup>18</sup> It is now common knowledge that this is a flawed assumption. Consequently, in the case of protecting the public interest associated with recognizing foreign credentials, legislation is then enacted by the provinces to prevent these licensing bodies from engaging in practices that provide significant barriers to foreign-trained professionals attempting to have their credentials recognized in Canada.

If the impact of the decisions made by the professional self-regulating bodies is felt by those making them, it is understandable for the decision-makers to make decisions that are favourable to their own interests. This is in contrast to the principles enunciated by the Competition Bureau to assist regulators in developing and maintaining effective and efficient regulations that maximize the interest of the consumer.<sup>19</sup> Obstacles to entry faced by foreign-trained professionals indicate that unchecked self-regulation has not been successful. To ensure impartial decision-making and a competitive market, there must be checks and balances to the system.

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<sup>16</sup> Peter Hogg, *Constitutional Law of Canada*, loose-leaf (consulted on 3 August 2011), (Toronto: Carswell, 2010), ch 17 at 20.

<sup>17</sup> *Ibid*, ch 21 at 10.

<sup>18</sup> Todd-Jeffrey Weiler, “Professional Self-Regulation and Federal Competition Policy: The Calarco Case” (January 1997) 7 *Windsor Rev Legal Soc Issues* 119 at 126.

<sup>19</sup> *Ibid* at 37-39.

## A. Ontario: Fair Access to Regulated Professions Act, 2006

Bill 124, the *Fair Access to Regulated Professions Act, 2006*,<sup>20</sup> was introduced to the Legislative Assembly of Ontario on 8 June 2006.<sup>21</sup> The Bill was designed as a mechanism to abolish bureaucratic hurdles and assist newly landed immigrants in finding jobs in their chosen fields in a timely manner. This would be done by requiring that regulatory body registration procedures be quick, fair, and open.<sup>22</sup>

### 1. *Absence of an Independent Appeal Body*

Since the regulatory body's decision determines the ability of the applicant to practise his or her chosen profession, "access to independent appeal is vital."<sup>23</sup> However, the need for an independent appeal mechanism will be reduced if fair registration practices successfully increase the effectiveness, fairness, and clarity of internal registration procedures and review processes within regulatory bodies. In addition to the lack of an independent appeal mechanism under FARPA, an individual also does not have a right of access to the Office of the Fairness Commissioner. The Fairness Commissioner does not advocate for specific individuals, but acts as an oversight body to ensure progress towards fair registration practices in the professions included under FARPA.

The main criticism of FARPA remains the lack of an independent appeal body.<sup>24</sup> During the Standing Committee debates, most presenters stated that without an independent appeal tribunal, it would be difficult to achieve objectivity and fairness.<sup>25</sup> This is especially true in the case of appeals of regulatory body decisions that were to be heard by the same regulatory body that

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<sup>20</sup> FARPA, *supra* note 11.

<sup>21</sup> Bill 124, *An Act to Provide for Fair Registration Practices in Ontario's Regulated Professions*, 2nd Sess, 38th Leg, Ontario, 2006 [Bill 124].

<sup>22</sup> Ontario, Ministry of Citizenship and Immigration, *Results-based Plan Briefing Book 2007-2008*, online: Ministry of Citizenship and Immigration <[http://www.health.gov.on.ca/english/public/pub/ministry\\_annual/annual\\_rep07\\_08/annual\\_rep07\\_08.pdf](http://www.health.gov.on.ca/english/public/pub/ministry_annual/annual_rep07_08/annual_rep07_08.pdf)>.

<sup>23</sup> *Ibid* at ix & xviii. The report recommended enabling appeal processes on the following decisions: to deny registration, to grant or deny provisional or limited registration, lack of registration decision in reasonable timelines, refusals to accept or process applications.

<sup>24</sup> George M Thomson, *Review of Appeal Processes from Registration Decisions in Ontario's Regulated Professions: Report to the Ontario Minister of Citizenship and Immigration* (November 2005), online: Legislative Assembly of Ontario <<http://www.ontla.on.ca/library/repository/mon/13000/257188.pdf>>.

<sup>25</sup> An independent appeal tribunal exists under the *Regulated Health Professions Act*. Decisions of health care professional regulatory bodies may be appealed to the Health Profession Appeal and Review Board (HPARB). However, there are no such tribunals for many other professional regulatory bodies. See Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 2nd Sess, No T-15 (15 November 2006) at 198-199 (Anne Coghlan) [*Standing Committee* (15 November 2006)].

originally rejected the application.<sup>26</sup> In the absence of an independent appeal body, the only way an applicant can have his or her case heard by a third party would be through the court system, either by statutory appeal or judicial review. This is not a satisfactory appeal mechanism as court cases can be both expensive and risky, particularly for new immigrants who are often already struggling financially.<sup>27</sup>

An independent appeal body would provide more transparency, accountability, and the "appearance of fairness to the public."<sup>28</sup> As it is, the only provision ensuring objectivity in the internal review prohibits a decision maker involved in the original decision from acting as a decision maker in the review or appeal.<sup>29</sup>

The absence of an independent appeal body was strongly supported by the professional regulatory bodies.<sup>30</sup> While FARPA does not seem to ease the plight of foreign-trained professionals, it does present a threat to the regulated professions. The professional bodies found the language of the Bill overly restrictive and confusing. They raised the following concerns:

- *The Bill erodes self-regulation and there is the potential it will be replaced by state-regulation.<sup>31</sup> As the Fairness Commissioner has the authority to influence entry requirements, there is the possibility that the office will begin supervising professional bodies. This conflicts with the principle of independence self-regulated professions.<sup>32</sup> This, in turn, may interfere with*

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<sup>26</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 2nd Sess, No 101 (3 October 2006) at 5173(Peter Tabuns) [*Debates* (3 October 2006)]. The need for an independent appeal tribunal was emphasized by the College of Medical Laboratory Technologists of Ontario, Policy Roundtable Mobilizing Professions and Trade, MP Olivia Chow. Also, Institute of Chartered Accountants of Bangladesh, North American Chapter; Chinese Professionals Association of Canada; Thorncliff Neighbourhood Office; and others. See *Standing Committee* (15 November 2006), *ibid.* See also Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 2nd Sess, No T-16 (21 November 2006) [*Standing Committee* (21 November 2006)].

<sup>27</sup> *Debates* (3 October 2006), *ibid.* (Peter Tabuns).

<sup>28</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 2nd Sess, No T-17 (22 November 2006) at 231 (Mr. Chinniah Ramanathan), online: <<http://www.ontla.on.ca>> [*Standing Committee* (22 November 2006)].

<sup>29</sup> FARPA, *supra* note 11, s 9(5). See also *Debates* (3 October 2006), *supra* note 26 (Peter Tabuns).

<sup>30</sup> *Standing Committee* (22 November 2006), *supra* note 28 (Professional Engineers Ontario).

<sup>31</sup> *Standing Committee* (15 November 2006), *supra* note 25 (Ontario College of Teachers).

<sup>32</sup> *Standing Committee* (22 November 2006), *supra* note 28 (Law Society of Upper Canada). This was also the reason the Law Society of Upper Canada supported the government's decision not to create an independent appeal body. Also see *Standing Committee* (22 November 2006), *supra* note 28 (Ontario College of Social Workers and Social Services Workers & College of Physicians and Surgeons Ontario).



*the ability of regulatory bodies to ensure that applicants meet professional standards.*<sup>33</sup>

- *The sole contribution of the legislation is another layer of bureaucracy.*<sup>34</sup>
- *Audits and numerous reporting requirements are costly procedures that reduce flexibility. There is the risk that standardization will replace the individualized registration process. Also, audits may be limited to measuring technical credentials instead of actual competence.*<sup>35</sup> *Moreover, the additional reporting and auditing costs will eventually be transferred to the applicants.*<sup>36</sup>
- *The audit standards are unclear: the terms "transparent," "fair," and "objective" must be defined if regulatory body practices are to be assessed against them.*<sup>37</sup>
- *There is the potential for duplication of reporting duties: conflicts between the obligations under the Bill and those under the professional body's authorizing legislation may exist.*<sup>38</sup>

## 2. *Limited Role of the Fairness Commissioner*

FARPA created the Office of the Fair Registration Practices Commissioner (the Commissioner), responsible for the oversight of the compliance of regulatory bodies with FARPA.<sup>39</sup> The functions of the Commissioner include assessing the registration practices of regulatory bodies, determining their audit

<sup>33</sup> The Fairness Commissioner may impose different requirements or restrictions in respect to any class of regulated professions. *FARPA*, *supra* note 11, s 14(c). See also *Standing Committee* (15 November 2006), *supra* note 25 (College of Nurses of Ontario).

<sup>34</sup> *Standing Committee* (22 November 2006), *supra* note 28 (Ontario College of Social Workers and Social Services Workers).

<sup>35</sup> *Ibid* (College of Physicians and Surgeons Ontario & College of Medical Radiation Technologists of Ontario).

<sup>36</sup> *Debates* (3 October 2006), *supra* note 26 at 5167 (Elizabeth Witmer). See also The College of Physicians & Surgeons of Ontario (CPSO), "Legislative Update: CPSO's Response to Bill 124", online: CPSO <<http://www.cpso.on.ca>>. Regarding additional costs of the audits see also *Standing Committee* (15 November 2006), *supra* note 25 (Association of Professional Geoscientists of Ontario). Also see *Standing Committee* (22 November 2006), *supra* note 28 (Ontario College of Social Workers and Social Services Workers & Ontario Association of Architects).

<sup>37</sup> *Standing Committee* (15 November 2006), *supra* note 25 (Ontario College of Teachers & Association of Professional Geoscientists of Ontario).

<sup>38</sup> For example, under the *Regulated Health Professions Act*, health professions have a duty to report annually to the Ministry of Health. *Standing Committee* (15 November 2006), *supra* note 27 (College of Medical Laboratory Technologists of Ontario). Also see *Standing Committee* (22 November 2006), *supra* note 28 (Ontario College of Social Workers and Social Services Workers & Ontario Association of Architects).

<sup>39</sup> Bill 124, *supra* note 21, art 13(1)-(2). For more information about the Office of the Fairness Commissioner, and of the role of the Commissioner see "The Office of the Fairness Commissioner", online: Office of the Fairness Commissioner <<http://www.fairnesscommissioner.ca>>.

standards, deciding the time when registration practices are to be reviewed, providing advisory functions to the bodies and applicants, and, most importantly, reporting to the ministers on the registration practices of the regulated professions.<sup>40</sup>

The role of the Commissioner, however, is limited. According to the *Act*, the Commissioner is appointed by the Lieutenant Governor in Council, and reports to the Minister of Citizenship and Immigration.<sup>41</sup> The legislation does not indicate whether the Commissioner is intended to be independent, or if s/he must be independent. The Commissioner could be a member of the minister's staff, bringing into question the legitimacy of the role and of the work of the Commissioner. The Commissioner also does not have authority to intervene in procedures, question the decisions of the regulatory bodies, or represent the interests of an applicant to a body. Although section 26 of FARPA does grant the Commissioner the right to exercise discretion and issue compliance orders, there are no listed criteria on what creates grounds for the Commission to exercise this discretion and initiate compliance. As a result, this compliance order power appears to be merely cosmetic. The most visible function of the Commissioner is a series of reports and audits on the practices of the regulated professions.<sup>42</sup> These include an annual report to the Minister of Citizenship and Immigration, who may choose to submit the report to the Lieutenant Governor in Council.<sup>43</sup>

It has now been more than three years since the Office of the Fairness Commissioner was created. In January 2011, the Commissioner released a handout listing improvements implemented to the registration process in 18 of the regulated professions in Ontario.<sup>44</sup> However, these 18 improvements include

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<sup>40</sup> The Commissioner may also advise regulatory bodies, government agencies, community associations as well as ministers on the broad scope of matters. See Bill 124, *ibid*, art 13(3). Also see Ontario, Citizenship and Immigration, "Accessing and Recognizing Credentials in Canada: Ontario's New Fair Access to Regulated Professions Act, 2006" (Public Policy Forum Seminar, Regina, SK, 19 April 2007) at 7-8, online: Public Policy Forum <[http://www.ppforum.ca/common/assets/fcr/nuzhat\\_jafri.pdf](http://www.ppforum.ca/common/assets/fcr/nuzhat_jafri.pdf)>.

<sup>41</sup> FARPA, *supra* note 11, ss 13(1), 13(3).

<sup>42</sup> *Ibid*, ss 13(3), 15.

<sup>43</sup> *Ibid*, s 15(6). According to the legislation, the Minister must submit a copy of the report to the Lieutenant Governor in Council who will cause it to be laid before the Assembly if it is in session or, if not, at the next session. However, it does not specify a timeframe for the report's submission by the Minister to the Lieutenant Governor in Council. For a copy of the 2007 report see "Publications", online: Office of the Fairness Commissioner <[http://www.fairnesscommissioner.ca/pdfs/ofc\\_annual\\_report\\_2007-2008\\_english\\_online.pdf](http://www.fairnesscommissioner.ca/pdfs/ofc_annual_report_2007-2008_english_online.pdf)>.

<sup>44</sup> Ontario, Office of the Fairness Commissioner, *Fair Registration in the Professions: Regulators Make Improvements* (Toronto: Office of the Fairness Commissioner, 2011), online: Office of the Fairness Commissioner <[http://www.fairnesscommissioner.ca/en/downloads/PDF/OFC\\_Regulators-Make-Improvements\\_Jan-2011\\_Handout-EN.pdf](http://www.fairnesscommissioner.ca/en/downloads/PDF/OFC_Regulators-Make-Improvements_Jan-2011_Handout-EN.pdf)>.

simple changes, such as a revised College of Ontario Optometrists website “to ensure that registration information, application packages and frequently asked questions are complete, easy to find and easy to understand.”<sup>45</sup> While any improvement is better than no progress in this area, this is hardly the substantial change that many were hoping for following the introduction of FARPA.

In March 2010, the Commissioner released a report entitled “Clearing the Path: Recommendations for Action in Ontario’s Professional Licensing System”.<sup>46</sup> The report contained 17 recommendations for regulatory bodies, qualifications assessment agencies, the Government of Ontario, the Government of Canada, and applicants. Many of these recommendations were based on a December 2008 study released by the commissioner involving nearly 3,800 respondents from 37 regulated professions.<sup>47</sup> The study found:

[A] majority (76%) of domestically trained individuals were currently employed in their profession, while less than half (44%) of internationally trained individuals were employed in their field. Three times as many of internationally trained individuals (37%) were unemployed or employed in unrelated field compared to those trained in Canada (11%).<sup>48</sup>

The recommendations proposed by the Commissioner included streamlining the registration processes through faster decision making and the removal of unnecessary steps, and providing stricter oversight when outsourcing assessment of qualifications.<sup>49</sup> While these recommendations could potentially be very helpful to foreign-trained professionals, the Commissioner has limited authority to ensure compliance with these recommendations. As a result, the recommendations can at best be considered guidelines. This is unfortunate given the positive impact the implementation of these recommendations could have on the lives on foreign-trained professionals seeking registration in a self-regulated profession.

Although the Commissioner has released annual reports, much of these reports consist of a mass of unsubstantiated self-serving statements. What is actually taking place may be “regulatory capture”, where the regulated take de facto control over the regulator by issuing cosmetic reports containing information the regulated profession wants to release as opposed to having the regulated profession being required to release specific information. As some outside sources have experienced a lack of access to the Office of the Fairness

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<sup>45</sup> *Ibid* at 2.

<sup>46</sup> Ontario, Office of the Fairness Commissioner, *Clearing the Path: Recommendations for Action* (Toronto: Office of the Fairness Commissioner, 2010), online: Office of the Fairness Commissioner <[http://www.fairnesscommissioner.ca/en/downloads/PDF/Clearing-the-Path\\_Recommendations-for-Action\\_2010-03-30.pdf](http://www.fairnesscommissioner.ca/en/downloads/PDF/Clearing-the-Path_Recommendations-for-Action_2010-03-30.pdf)> [*Recommendations for Action*].

<sup>47</sup> Ontario, Office of the Fairness Commissioner, *Getting Your Professional Licence in Ontario: The Experiences of International and Canadian Applicants (Final Report)* (Toronto: Office of the Fairness Commissioner, 2010) [*Experiences of International and Canadian Applicants*].

<sup>48</sup> *Ibid* at 15-16.

<sup>49</sup> *Recommendations for Action*, *supra* note 46 at 4.

Commissioner, this may be enabling the continuation of these glossed-over reports.

### 3. *Lack of Tangible Results*

It is unclear whether the Commissioner is achieving any real and substantial change. The study used data extracted from a literature review, an online survey, and five focus groups.<sup>50</sup> Although the Commissioner has conducted studies such as the one listed above, it is difficult to tell which members of the regulated professions were questioned and whether this data is representative of the regulated professions as a whole. This is a closed system with no opportunity for the Commissioner to uncover any data that is not disclosed by the regulated profession. Future compliance may also be difficult to achieve, as the current consequence for non-compliance, a fine of \$100,000 for corporations and a fine of \$50,000 for individuals, may not be sufficient motivation for a professional body focused on their own self-interests to abandon unfair registration practices.<sup>51</sup>

As the Commissioner does not advocate for specific individuals, the role of the Commissioner is merely to observe the practices of professional bodies, and to compose reports for the minister detailing the processes and procedures of all self-regulated professions included under FARPA. The position is not independent from the ministry that implemented the legislation, raising questions of the effectiveness and legitimacy of the position. In addition, the role does not come with the authority to fulfill practical purposes such as intervening on behalf of a foreign-educated professional in a dispute with a professional body, or insisting on reconsideration of an applicant's case.

### 4. *Limited Role of the Access Centre*

FARPA established the Access Centre for Internationally Trained Individuals (Access Centre), which also contains significant shortcomings.<sup>52</sup> The Access Centre is designed to provide information regarding requirements for and assistance with registration, to conduct research and analysis on the problems related to the registration of foreign-trained professionals, and to advise and assist various government and community agencies, ministries, institutions, professional associations, employers, and regulated professions on the training and registration of internationally-trained professionals.<sup>53</sup> The sole responsibility of the Access Centre is to provide information regarding the process.<sup>54</sup> The functions of the Access Centre are limited to orientation and referring foreign-

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<sup>50</sup> *Experiences of International and Canadian Applicants*, *supra* note 47 at 2.

<sup>51</sup> See *FARPA*, *supra* note 11, s 30(3)(b).

<sup>52</sup> Bill 124, *supra* note 21, art 17(1).

<sup>53</sup> *Ibid*, art 17(2)(a)-(d).

<sup>54</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 2nd Sess, No T-20 (7 December 2006) at 311 (Riet Verheggen).

trained professionals to the applicable regulatory body.<sup>55</sup> The Access Centre does not provide legal or professional assistance. As a result, it is the responsibility of the applicant to defend his or her cause before an internal review or appeal panel. Although the Access Centre provides applicants with information regarding the recognition of their credentials, it does not assist applicants in the practical process of obtaining registration in a regulated profession.

While FARPA is well-intentioned, it is ineffective. As the legislation does not accomplish its goals for foreign-trained professionals, it is little more than a symbolic gesture.<sup>56</sup> There is a significant difference between the intent of FARPA to ensure fair and transparent registration procedures and what it actually delivers.<sup>57</sup> FARPA does attempt to tackle issues surrounding fairness, although this is limited to administrative issues. As a result, there are questions as to the practical usefulness of FARPA. To achieve results and rectify the foreign credential recognition problems, fairness must be prominent in a practical solution for foreign-trained professionals and the Government of Canada.

## B. Manitoba: The Fair Registration Practices in Regulated Professions Act

Bill 19, *The Fair Registration Practices in Regulated Professions Act* (FRPRPA), received Royal Assent on 8 November 2007.<sup>58</sup> The legislation was intended to encourage transparent, objective, impartial, and fair registration practices.<sup>59</sup> The Act came into force on 15 April 2009.<sup>60</sup>

During the legislative process of the bill, it became apparent that the regulated professions felt that the bill was drafted in haste.<sup>61</sup> Nineteen presenters

<sup>55</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 2nd Sess, No 110 (19 October 2006) at 5648 (Rosario Marchese) [*Debates* (19 October 2006)].

<sup>56</sup> *Bill 124: Second Reading* (3 October 2006), *ibid* at 5173 (Peter Tabuns).

<sup>57</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 2nd Sess, No 104A (10 October 2006) at 5324 (Frank Klees) [*Debates* (10 October 2006)].

<sup>58</sup> For first reading see Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 39th Leg, 1st Sess, No 10 (26 September 2007) at 333 (Hon. Nancy Allan), online: Manitoba Legislative Assembly <<http://www.gov.mb.ca/legislature/hansard/1st-39th/hansardpdf/10.pdf>>; for second reading see Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 39th Leg, 1st Sess, No 24B (23 October 2007) at 1586-1595; for minutes of the Manitoba, Legislative Assembly, *Standing Committee on Justice*, 39th Leg, 1st Sess, No 2 (29 October 2007) at 10-47; for third reading see Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 39th Leg, 1st Sess, No 33 (7 November 2007) at 2019-2023.

<sup>59</sup> Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 39th Leg 1st Sess, No 24B (23 October 2007) at 1586 (Hon Nancy Allan) [*Debates* (23 October 2007)].

<sup>60</sup> See *The Fair Registration Practices in Regulated Professions Act*, RSM 2007 c 21 [*FRPRPA*]. Manitoba Gazette 28 March 2009. Little has changed since the enactment of this legislation apart from a regulation registered on 9 October 2009 adding The College of Dental Hygienists of Manitoba to the Schedule of the Act (Regulation 169/2009).

<sup>61</sup> *Debates* (23 October 2007), *supra* note 58 at 1586-1595 (Mavis Taillieu).

outlined their opinions on the bill to the Standing Committee on Justice.<sup>62</sup> Concerns regarding additional bureaucratic red tape,<sup>63</sup> loss of independence,<sup>64</sup> the excessively wide scope of the legislation,<sup>65</sup> unclear and unduly burdensome provisions,<sup>66</sup> and the fact that the commissioner would report to the minister as opposed to the entire house<sup>67</sup> were raised by the regulatory bodies. Despite all of these concerns, only three amendments were made to the bill<sup>68</sup> regarding written decisions,<sup>69</sup> disclosure of personal information,<sup>70</sup> and confidentiality of information.<sup>71</sup>

The Manitoba legislation inherited many of the same flaws as FARPA, its predecessor. The FRPRPA also does not contain an independent appeal mechanism. In addition, the fairness commissioner is also appointed by the Lieutenant Governor in Council,<sup>72</sup> with an even more limited role than under FARPA.<sup>73</sup> Unlike FARPA, which requires annual reports, the commissioner is only required to submit a report every two years under the Manitoba legislation.<sup>74</sup> The FRPRPA also expressly limits the fairness commissioner from becoming involved in a registration decision on behalf of an applicant.<sup>75</sup> The Manitoba legislation also does not stipulate an audit process as a responsibility for the fairness commissioner. Notably, the Manitoba fairness commissioner does not have any power to make compliance orders to those professions who are found to have contravened the provisions of the Act.

The role of the fairness commissioner under the Manitoba legislation appears to be very limited. The core responsibilities of the fairness commissioner is primarily confined to providing information on the requirements of the Act, reviewing registration practices, and advising the professions, government departments, government agencies, and other relevant groups regarding matters under the Act. Given this limited role, the Manitoba fairness commissioner, similar to the Commissioner under FARPA, is not likely to produce any significant change.

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<sup>62</sup> Manitoba, Legislative Assembly of Manitoba, *Standing Committee on Justice*, 39th Leg, 1st Sess, No 2 (29 October 2007) at 9.

<sup>63</sup> *Ibid* at 10-13 (Sharon Eadie).

<sup>64</sup> *Ibid* at 14-15 (Douglas Bedford).

<sup>65</sup> *Ibid* at 18-19 (William D.B. Pope).

<sup>66</sup> *Ibid*.

<sup>67</sup> *Ibid* at 14-15 (Douglas Bedford).

<sup>68</sup> Manitoba, Legislative Assembly, *Standing Committee on Justice*, 39th Leg, 1st Sess, No 2 at 45-47.

<sup>69</sup> *Ibid* at 45.

<sup>70</sup> *Ibid* at 46.

<sup>71</sup> *Ibid* at 46.

<sup>72</sup> *FRPRPA*, *supra* note 60, s 11.

<sup>73</sup> *Ibid*, s 12(1)(a)-12(1)(g).

<sup>74</sup> *Ibid*, s 13(1).

<sup>75</sup> *Ibid*, s 12(3).

The Manitoba fairness commissioner released her first report to the minister in December 2010.<sup>76</sup> The report encompassed the period from December 2008-December 2010 and identified numerous issues in the registration process for internationally educated persons. These issues included lack of information, misinformation, confusion, testing methods, lack of feedback, and the high cost of the process.<sup>77</sup> In terms of implementing the Act, the fairness commissioner states that their work has just begun but is “nurturing change.”<sup>78</sup> Eight regulators are currently undergoing a review of their registration process by the Fairness Commissioner, including three regulators in the pilot program,<sup>79</sup> and five regulators undergoing reviews initiated in 2010.<sup>80</sup> It is hoped that these reviews will result in a more streamlined registration process for foreign-trained applicants.

The cost of non-compliance with the Manitoba Act is also much lower than the Ontario Act: the penalty for an offence under the FRPRPA is capped at a fine of \$25,000,<sup>81</sup> while FARPA has a maximum fine of \$50,000 for an individual<sup>82</sup> or \$100,000 for a corporation.<sup>83</sup> To ensure the effectiveness of the legislation, there must be a higher penalty for non-compliance. This will act as a deterrent for offences under the Act and encourage those already in violation of the Act to revise their practices to comply with the legislation.

The Manitoba Act also does not define the term “fairness”. This is concerning given the Act is aimed at ensuring fair registration practices in regulated professions. In addition, the Manitoba Act does not require professions to work with post-secondary institutions to establish training programs to assist foreign-trained professionals in upgrading their skills to meet registration requirements. At best, the Manitoba Act makes the fairness commissioner responsible for advising post-secondary institutions on matters under the Act. Lastly, the Manitoba Act does not require professions to take reasonable steps to

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<sup>76</sup> Office of the Manitoba Fairness Commissioner, *The Fair Registration Practices in Regulated Professions Act: A Report on its Implementation and Effectiveness (December 2008-December 2010)* (Winnipeg: Office of the Manitoba Fairness Commissioner, 2010), online: Office of the Manitoba Fairness Commissioner <[http://www.manitobafairnesscommissioner.ca/wp-content/themes/fairness/images/OMFC\\_Report\\_Minister\\_web.pdf](http://www.manitobafairnesscommissioner.ca/wp-content/themes/fairness/images/OMFC_Report_Minister_web.pdf)>.

<sup>77</sup> *Ibid* at 26-29.

<sup>78</sup> *Ibid* at 34.

<sup>79</sup> The College of Registered Nurses of Manitoba, The College of Occupational Therapists of Manitoba, and The College of Midwives of Manitoba participated in the pilot review of registration processes. See *ibid* at 36.

<sup>80</sup> Regulated professions that underwent a review of their registration processes in 2010 were The Association of Engineers and Geoscientists of Manitoba, The Certified Technicians and Technologists Association of Manitoba, The Licensed Practical Nurses of Manitoba, the Professional Certification Unit of Manitoba Education (Teachers), and Apprenticeship Manitoba (Trades Qualification). See *ibid*.

<sup>81</sup> *FRPRPA*, *supra* note 58, s 17(2).

<sup>82</sup> *FARPA*, *supra* note 11, s 3(a).

<sup>83</sup> *FARPA*, *supra* note 11, s 3(b).

establish mechanisms to assess the value of foreign credentials when presented by applicants. As a result, a profession does not have a specific duty to assess the credentials of a foreign-trained professional in a timely manner, even though it may be in the public interest to do so.

### C. Nova Scotia: the Fair Registration Practices Act

Bill 211, the *Fair Registration Practices Act* (FRPA),<sup>84</sup> received Royal Assent on 25 November 2008.<sup>85</sup> The FRPA inherited many of the same flaws as the Ontario and Manitoba legislation. The FRPA establishes the role of a Review Officer (Officer) and the responsibilities of the Officer,<sup>86</sup> which is also a limited role similar to the other provincial legislation. Like the Manitoba legislation, the Officer is prohibited from becoming involved in a registration or internal review decision.<sup>87</sup> The cost of non-compliance with the FRPA is limited to a fine of \$10,000,<sup>88</sup> the lowest of all the current provincial fair access legislation. The FRPA does not require an independent review body or panel.

The first attempt to introduce legislation in this area in Nova Scotia occurred on 24 April 2008 with the introduction of Bill 126, the *Fair Access to Regulated Professions Act*.<sup>89</sup> Second reading of the bill was adjourned on 30 April 2008.<sup>90</sup> Debate was also adjourned on 24 May 2008 after it was revealed the speaker had called the wrong person, when instead he was supposed to call the member who had previously adjourned debate.<sup>91</sup> This adjournment signalled the death knell for Bill 126, as it was never re-introduced.

Bill 126 was in some respects similar to the FRPA, although the bill also applied to decisions of regulatory bodies that “propose that an applicant not be granted registration”<sup>92</sup> and when a regulatory body decided to “grant registration to an applicant subject to conditions”.<sup>93</sup> Bill 126 also defined an internationally educated individual.<sup>94</sup> In addition, Bill 126 required the disclosure of “objective requirements for registration by the regulatory body, including a description of

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<sup>84</sup> *Fair Registration Practices Act*, *supra* note 10, s 14(1)(a)-14(1)(f).

<sup>85</sup> Nova Scotia, House of Assembly, *Debates and Proceedings*, 60th Leg, 2nd Sess, No 08-55 (25 November 2008) at 6475.

<sup>86</sup> *Fair Registration Practices Act*, *supra* note 10, s 14(1)(a)-14(1)(f).

<sup>87</sup> *Ibid*, s 14(5).

<sup>88</sup> *Ibid*, s 20(3).

<sup>89</sup> Nova Scotia, House of Assembly, *Debates and Proceedings*, 60th Leg, 2nd Sess, No 08-17 (24 April 2008) at 1905 (Hon Mark Parent).

<sup>90</sup> Nova Scotia, House of Assembly, *Debates and Proceedings*, 60th Leg, 2nd Sess, No 08-21 (30 April 2008) at 2398.

<sup>91</sup> Nova Scotia, House of Assembly, *Debates and Proceedings*, 60th Leg, 2nd Sess, No 08-38 (27 May 2008) at 4074-4075.

<sup>92</sup> Bill 126, *An Act Respecting Fair Access to Regulated Professions*, 2nd Sess, 60th Leg, Nova Scotia, 2008, cl 2(h)(ii) (first reading 24 April 2008) [Bill 126].

<sup>93</sup> *Ibid*, cl 2(h)(iv).

<sup>94</sup> *Ibid*, cl 2(d).



the criteria used to assess whether the requirements have been met, together with a statement of which requirements may be satisfied through alternatives that are acceptable to the regulating body.”<sup>95</sup>

This provision is broader than section 7 of the FRPA, which does not require disclosure objective admission requirements or a statement of which requirements may be satisfied by alternatives. Bill 126 would be more advantageous to foreign-educated professionals as it would help ensure more information was available to them, reducing the need to spend time searching for this information themselves. By expressly stipulating which alternatives are acceptable, this provision could have helped eliminate discriminatory treatment by ensuring that the regulatory body has to recognize the alternative information from all applicants, as opposed to merely some applicants.

In addition to requiring regulatory bodies and third parties relied on by regulatory bodies to make assessments on qualifications a manner that is “transparent, objective, impartial and fair”,<sup>96</sup> Bill 126 also required assessments on qualifications to be made “in a manner that is compliant with the labour mobility provisions of the Agreement on Internal Trade.”<sup>97</sup> This provision was also more advantageous to the applicant as it provided the applicant additional protections. While “transparent, objective, impartial and fair” were not defined in Bill 126, the Agreement on Internal Trade was defined and offered a more objective point of reference.

#### D. Québec: An Act to Amend the Professional Code as Regards the Issue of Permits

On 14 June 2006, Québec enacted Bill 14, *An Act to Amend the Professional Code as Regards the Issue of Permits*.<sup>98</sup> Unlike Ontario and Manitoba, Bill 14 was not intended to ensure the process of registration was fair and transparent. The Québec legislation intended to facilitate the recognition of credentials and diplomas of foreign-educated persons.<sup>99</sup> The goal of Bill 14 was to shorten the period of time it takes to recognize professional credentials before a foreign-trained specialist may start working in his or her field of expertise.<sup>100</sup> Bill 14 establishes three new types of work permits: temporary restricted permit, permanently restricted (or special) permit, and “le permis sur permis” (licence on licence). This legislation will affect the 45 professional bodies in Québec.

<sup>95</sup> *Ibid*, cl 7(c).

<sup>96</sup> *Ibid*, cls 9(2)-9(3).

<sup>97</sup> *Ibid*.

<sup>98</sup> *An Act to Amend the Professional Code as Regards the Issue of Permits*, *supra* note 9.

<sup>99</sup> Québec, National Assembly, *Journal des débats*, 37th Leg, 2nd Sess, No 41 (9 June 2006) (M. Yvon Marcoux) (French) (translated by the authors) [*Journal des débats* (9 June 2006)]. Also see “Quebec Bill Would Speed Up Accreditation of Foreign Professionals.” *CBC News* (11 May 2006), online: CBC <<http://www.cbc.ca>>.

<sup>100</sup> *Ibid*.

The first new type of permit, the temporary restricted permit, allows a foreign-trained professional to apply for employment upon arrival to Québec, with the expectation that he or she will take an accreditation exam in the immediate future.<sup>101</sup> This type of permit may promote the faster integration of immigrants into the province's labour market. Also, working in a restricted capacity throughout the re-qualification period eases the financial problems faced by many foreign-trained professionals seeking registration in a regulated profession in Canada.<sup>102</sup>

The second new type of permit, the permanently restricted (or special) permit, allows a foreign-trained professional to practise in his or her field of expertise permanently, but it is restricted to the areas he or she practised in the country of origin. This does not require any additional accreditation exams in Québec.<sup>103</sup> The third and final new type of permit, "le permis sur permis", or licence on licence, automatically grants the foreign-trained professional a local licence upon the presentation of evidence that the foreign-trained professional earned equivalent credentials in their country of origin. This type of permit is possible wherever the professional evaluated the person's experience, competence, and professional body's regulations in his or her country of origin, and ruled them to be equivalent to Québec's standards.<sup>104</sup> Evaluations take place on a case-by-case basis.<sup>105</sup>

According to the Honourable Yvon Marcoux, Québec Minister of Justice at the time of enactment, the amendment gives professional bodies more flexibility to recognize the equivalence of credentials earned abroad.<sup>106</sup> Although the amendment has been seen as an essential step towards the integration of foreign-trained immigrants, it still attracts criticism.<sup>107</sup> Critics argue that no amount of restricted work permits will ever replace the recognition of competencies and evaluation of standards of education in foreign jurisdictions.<sup>108</sup> It is argued that Bill 14 does not introduce anything new. Rather, everything existed previously in the regulations of the professional body.<sup>109</sup> As well, Bill 14 will only affect a small

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<sup>101</sup> "New Law Will Ease the Way for Professional Credentials Recognition in Quebec", online: Canadavisa.com <<http://www.canadavisa.com>>.

<sup>102</sup> *Journal des débats* (9 June 2006), *supra* note 99.

<sup>103</sup> This kind of permit fits the legal profession and resembles a foreign consultant licence. *Ibid.*

<sup>104</sup> *Ibid.*

<sup>105</sup> Foreign-trained professionals seeking to join professional associations in Québec will have to meet an additional requirement, such as knowledge of the French language. See *ibid.*

<sup>106</sup> Minister of Justice introduced the Bill to the National Assembly of Québec. See "Quebec Bill Would Speed Up Accreditation of Foreign Professionals", *supra* note 99.

<sup>107</sup> For example, it has been stated that restrictive permits would fail to promote integration, but would only allow foreign-trained professionals to practice in a very restricted domain. See *Journal des débats* (9 June 2006), *supra* note 99 (Stéphane Bédard).

<sup>108</sup> *Ibid.*

<sup>109</sup> Québec, National Assembly, *Journal des débats*, 37th Leg, 2nd Sess, No 43 (13 June 2006) (Elsie Lefebvre) (French) (translated by authors) [*Journal des débats* (13 June 2006)].

number of immigrants that arrive in Québec annually.<sup>110</sup> As such, the critics recommend cooperation between the government and the professional organizations. Instead of developing purely governmental solutions, the government should encourage professional associations to act by allocating additional funds to expedite and improve the foreign credential recognition mechanisms.<sup>111</sup>

Notwithstanding substantial criticism, from a practical point of view, Bill 14 seems to support foreign-trained professionals more efficiently than the Ontario or Manitoba legislation. The major advantage of Bill 14 is it presents foreign-trained professionals with the opportunity to engage in their professional labour market before starting the re-qualification process. The automatic recognition of foreign-issued licences in the “le permis sur permis” category is an effective means to quickly allow professionals to enter the labour market. This process does not usurp or infringe Québec’s professional standards, since foreign credentials are still evaluated and compared against those standards. Although Bill 14 does not affect a large number of professionals, it is a benefit to those covered by the legislation.

While Bill 14 is both practical and effective, it does not provide an external review for the decisions of regulatory bodies regarding work permit applications, much like its Ontario and Manitoba counterparts. Also, Bill 14 does not address the problems of systematic bias and discrimination that were raised during the legislative process of FARPA.

## E. Summary of Legislative Initiatives

Although FARPA is a well-intentioned idea, it falls short of its lofty aspirations. Substituting the recommendation of an independent panel with the Commissioner and the Access Centre detracts from the goal of the legislation. Neither of these attempted solutions serves the practical purpose of facilitating more effective foreign credential recognition. As a result, the legislation does not accomplish its goal of getting more foreign-trained professionals working in their respective professions.

Manitoba’s Bill 19 is based on FARPA. The Legislative Assembly of Manitoba passed the legislation with few amendments, as opposed to reviewing the strengths and weaknesses of the Ontario legislation and taking measures to avoid the same pitfalls in Bill 19. As a result, the Manitoba legislation inherited many of the flaws of FARPA. The *Fair Registration Practices Act* enacted in Nova Scotia, also modeled off of FARPA and the Manitoba Act, has inherited the same weaknesses of the previously enacted provincial legislation.

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<sup>110</sup> It has been argued that of the estimated 30,000 newcomers, who may experience difficulties regarding integration into the labour market, the Bill will affect no more than 5,000 professionals. *Ibid.*

<sup>111</sup> *Ibid.*

Québec's Bill 14 seems to have created a more efficient basis to support foreign-trained professionals than any of the other legislative measures. Bill 14 does not cover registration procedures and the administration of registration procedures by the regulatory bodies. Bill 14 creates a desirable result, as fairness must play a prominent role in a practical solution oriented to the facilitation of effective foreign credential recognition.

#### IV. POLICY RECOMMENDATION

- *Fair access legislation should apply to a broad range of entities that effectively control access to the occupations, dealing with only certain professions may mean the legislation falls short;*
- *The norms stipulated by fair access legislation should also be extensive. It is not enough merely to address procedural fairness in administering current systems. Rather, legislation should clearly provide that the gate-keeping entities covered by the legislation:*
  - *cannot establish substantive requirements for entry that are irrelevant or unnecessary;*
  - *must ensure that their testing processes are fair, including ensuring that both local and foreign-trained applicants have a reasonable opportunity to understand the nature and breadth of the test and expected proficiencies;*
  - *must make efforts to ensure that the means to assess credentials acquired in other jurisdiction are effective and expeditious;*
  - *must also establish mechanisms to evaluate substantive competency for applicants who are trained and practised in other jurisdictions, rather than exclusively or excessively confining admission processes to the evaluation of paper credentials;*
  - *Regulatory bodies must make best efforts to have “bridging” programs in place that permit applicants from other jurisdictions to overcome deficits in their competencies.*
- *The enthusiasm for compliance on the part of regulatory bodies, and with it their effective cooperation, can be greatly enhanced if provincial governments not only impose requirements on those bodies, but also provide resources to help meet them. One source of resistance to evaluating the proficiency of foreign-trained professionals, for example, can be the sheer cost in time and capital to set up a program whereby current members of the occupation can observe and evaluate the substantive competence of an applicant. Fair access laws should be accompanied by the creation of dedicated funds to which occupational bodies can apply for support in order to fulfill their new,*

*broader mandates. Provincial governments should also play a role in coordinating the efforts of occupational gate-keeping bodies to open doors of educational and training entities, such as high schools, colleges and universities.*

- *Fair access legislation must include the creation of a Fairness Commissioner whose office holds adequate independence, authority and funding to effectively and pro-actively promote change.*
- *There must be an independent appeal body to hear and decide complaints from individuals who believe that existing registration practices have been administered improperly, or that the admission practices themselves fall below the standards of procedural and substantive fairness established in the statute.*
- *The independent appeal body must also have authority to hear and decide cases referred by the Fairness Commissioner pursuant to his own review of the registration practices.*
- *The oversight body should be mandated to provide regulated and detailed reports on the progress being made towards full compliance by all the occupational entities covered;*
- *Fair access laws must prevail over other statutes in case of conflict.*

## V. ACCESS TO REMEDIES AND THE NEED FOR TRAFFIC CONTROL

The recent decision of the Supreme Court of Canada in *Figliola*<sup>112</sup> raises the question of “traffic control” among the various avenues for challenging a decision by an occupational regulator.

In *Figliola*, the applicant asked British Columbia’s Workers’ Compensation Board to apply that province’s Human Rights Code<sup>113</sup> in the context of his case. He lost. The applicant then asked British Columbia’s Human Rights Tribunal to consider the same human rights issue. The case eventually went to the Supreme Court of Canada, which held that the Human Rights Tribunal should have refused to hear the case. The Court reasoned that in the context of these particular overlapping statutory schemes, the tribunal should have applied general legal principles that prohibit repeated litigation of the same issue; one type of administrative tribunal should not, in effect, carry out a judicial review of the decision of another. The only recourse for the applicant should have been

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<sup>112</sup> *British Columbia (Workers’ Compensation Board) v Figliola*, 2011 SCC 52, 337 DLR (4th) 413, 25 Admin LR (5th) 173; see also *College of Nurses of Ontario v Trozzi*, 2011 ONSC 4614, 207 ACWS (3d) 537.

<sup>113</sup> *Human Rights Code*, RSBC 1996, c 210.

moving up the legal hierarchy to a supreme court, rather than horizontally, to another administrative tribunal.

In the context of human rights tribunals—and fair access legislation, as well—*Figliola* suggests that Legislatures will have to carefully consider “traffic control” issues. Legislatures should not leave it to the courts to sort out the interaction of overlapping systems. Foreign-trained applicants tend to have limited resources and legal sophistication, yet they must bear the burden of changing the *status quo*. Confusion and uncertainty over where and how to proceed will deter applicants from even commencing complaints. Furthermore, if the matter of “traffic control” is left to courts, the principles in *Figliola* might generally be applied and might largely preclude applicants from accessing tribunals that are expert in human rights or fair access to regulated occupations. Applicants rejected by occupational bodies might have no option but to go through the exhausting process of pursuing all appeals that are routinely available to a rejected applicant, and then ask a court to intervene on judicial review.

Even if the applicant still has the emotional and financial resources for court-based litigation, the process may be less fair and effective than being able to complain to a body with specialized expertise, such as a human rights tribunal or fair access body. A court engaged in judicial review generally must rely on the factual record and findings of the initial decision makers, whereas a specialized body might have a mandate to hear fresh evidence, and may even include an investigative arm that is able to assist the applicant in obtaining relevant information. A generalist court may be inclined to defer to the judgment of an occupational body, whereas a specialized tribunal may rightly review itself as having its own distinctive statutory mandate and expertise. The occupational body itself may have no expertise at all in either human rights or fair access legislation, and be composed mostly of members of the regulated profession who may have a predisposition, conscious or not, to support restrictive rules rather than re-evaluate or overrule them when necessary.

Proceeding to court may be costly, and the applicant can be exposed to the risk of paying the occupational body’s legal costs if the latter wins. The mandate for human rights or fair access bodies may, by contrast, render the procedures involved less formal, less expensive, and eliminate the risk that an unsuccessful applicant might end up bearing not only his own costs, but that of the occupational body that he has unsuccessfully challenged.

It is recommended, therefore, that in bolstering human rights legislation to deal with regulated occupations and in setting up effective fair access bodies, the Legislature produce systems that interact in a manner that is efficient, expeditious, and not tilted in favour of the *status quo* in the regulated profession.

Consideration should be given to options that ensure that applicants will have continuing and expeditious access to review by human rights tribunals or fair access bodies. Possibilities include:

Providing the applicant the option of proceeding immediately to a human rights tribunal or fair access body to challenge rules that appear unlawfully restrictive, rather than first filing an application with the occupational body;

Ensuring that the routine appeal processes associated with a self-regulating occupation are reasonably accessible to applicants, and not unduly expensive or protected or filled with too many layers;

Providing applicants an option, once rejected at the first level by an occupational self-regulation, of either pursuing the routine occupational process or now proceeding to a human rights or fair access body;

Giving applicants the option, even if rejected after pursuing the routine occupational appeal process, of then proceeding to a human rights tribunal or fair access body;

Drafting human rights and fair access legislation in a manner that makes it clear that they are paramount over the routine legislation, regulations and policies of a regulated professions, and that specialized bodies and courts of law do not owe a duty of deference to the judgment of occupational bodies concerning the interaction of these higher norms and the law that ordinarily would apply.

Another approach that might be considered would be for a Legislature to accept the *Figiliola* approach, whereby all occupational registration issues, including those concerning human rights and fair access, would generally be considered by the usual occupational gatekeeper (such as a Registration Committee for a regulated profession) and their usual appeal and reviewing bodies (such as the Health Professionals Appeal Board in Ontario or courts carrying judicial reviews of administrative decisions). The Legislature would take active measures, however, to:

- *Ensure that the ordinary occupational gate-keepers are expressly and clearly instructed by statute to take into account human rights and fair access laws;*
- *Provide unmistakable legislative direction that these specialized laws, concerning human rights and fair access, override usual registration rules in case of conflict;*
- *Authorize and direct occupational gatekeepers to take whatever remedial steps are necessary to decision to ensure that particular applications are resolved in a manner consistent with human rights and fair access laws, and to adjust occupational procedures to the extent necessary to bring them into line with human rights and fair access laws;*

- *Provide that occupational gatekeepers must include in their deliberations at least some individuals appointed by the fair access body or human rights commission or both. Thus, it might be required that an occupational registration committee include at least one individual who designated by the Fair Access commissioner in a particular province, or the chair of its Human Rights commission.*

Human rights laws and fair access legislation may prove to be useless in practice unless they are accompanied by legislative efforts to enact and coordinate appropriate enforcement mechanisms.

## VI. CONCLUSION

The legislative initiatives introduced by the federal and provincial governments have seemingly noble intentions. Governments, recognizing the loss of human capital caused by unemployment or underemployment of foreign-trained professionals, have decided to implement these initiatives in order to affect positive change. Despite these good intentions and the resources spent on drafting and implementing the provincial legislation, these initiatives have fallen short of their goals. They have failed to produce any significant recognizable change in the lives of foreign-trained professionals who are struggling to have their credentials recognized in Canada. Good intentions alone are not enough in this critically important area. Legislation must be effective. Each failed or underachieving federal or provincial initiative, however, signals a continuation of the plight of this underappreciated group.

A chronic issue facing individual professions is the cost of establishing proper systems to evaluate and test foreign-trained applicants. Provinces that enact fair access legislation should at the same time establish a fund to which professions can apply to study and carry out improvements. While millions of dollars may be required each year, the investment may prove to be extremely rewarding. A modest amount of money invested towards evaluating or upgrading the skills of foreign trained professional can have very large societal benefits, including enabling an individual to provide services to an underserved market. In addition, by fully deploying their skills, these individuals will be in a position to contribute far more to the economy through taxes. The cost of evaluating a foreign-trained professional or upgrading their skills may be a small fraction of training a new professional.

An ideal model would include cross-Canada cooperation on issues such as evaluating foreign qualifications and establishing testing procedures. This cooperation can be achieved in several ways, such as through bodies that include professional regulators from all jurisdictions, and the Government of Canada may have a very useful role in coordinating and providing additional financial support for such bodies. Cooperative efforts may greatly reduce the average cost



of evaluating and upgrading skills. If a nation-wide body assesses the value of a degree from a particular country, individual jurisdictions are each spared the cost of assessment. A nation-wide body can also provide a forum to enable sharing of information gleaned by a body in one jurisdiction to other jurisdictions.

Despite the many benefits of cooperation, the requisite level of cooperation may be difficult to achieve. In the absence of adequate national coordination, it is unlikely a province would proceed with the expense of being a leader in evaluating and providing supplementary training to foreign-trained professionals. Even if national cooperation would lower the cost of such an initiative, it can remain worthwhile if conducted independently. In fact, a provincial leader in this area can actually obtain an advantage from attracting a greater share of foreign-trained professionals.

Recognition in one more progressive province would not necessarily be recognized in other provinces. In accordance with the AIT, however, a province that wishes to withhold recognition of credentials from another province must have legitimate reasons for doing so. The balanced system in the AIT should alleviate concerns that any particular province is going to provide an unreasonably lax gateway to practicing a profession across Canada.<sup>114</sup> It is far-fetched, moreover, to suppose that any particular provincial regulator is going to have unreasonably low standards. Government and professional bodies in each province will remain accountable to their own populations for an individual who is admitted to a profession but performs services in an incompetent or unsafe manner.

While nation-wide cooperation would be ideal, the government and professional bodies would be well advised to proceed boldly on their own if cooperation proves to be slow in coming with respect to various professions. Among the highest priorities includes producing fair access legislation that is clear, enforceable, and encourages both pro-active measures to improve admission practices and a usable appeal mechanism for individuals who are unfairly denied registration in a regulated profession.

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<sup>114</sup> See Chapter 5, Improving Foreign Credential Recognition through Reform in Immigration Law and Policy.