

Removing the “Canadian experience” barrier

A guide for employers
and regulatory bodies



**Ontario
Human Rights Commission**
**Commission ontarienne des
droits de la personne**

Introduction

When an employer requires people applying for jobs to have “Canadian experience,” or where a regulatory body requires “Canadian experience” before someone can get accredited, they may create barriers for newcomers to Canada. Requiring “Canadian experience” could violate the Ontario *Human Rights Code* (the *Code*), which protects people from discrimination based on grounds such as race, ancestry, colour, place of origin and ethnic origin.

Basing hiring and accreditation decisions on whether a person has Canadian experience is not a reliable way to assess a person’s skills or abilities. Employers and regulatory bodies should ask about all of the candidate’s relevant trade, professional or other qualifications and prior experience, regardless of where they got it.

A strict requirement for “Canadian experience” may result in discrimination, and should only be used in limited circumstances. Employers and regulatory bodies would have to show that a requirement for Canadian experience is a “*bona fide*” or necessary requirement.

The Ontario Human Rights Code

The *Code* is for everyone. It is a provincial law that gives everybody equal rights and opportunities without discrimination in specific areas, including employment and membership in occupational associations and self-governing professions. The *Code*'s goal is to create a climate of understanding and mutual respect, so that each person feels that they belong in the community and can contribute to it.

Sometimes a rule or practice unintentionally singles out particular people and results in unequal treatment. This type of discrimination is called “constructive” or “adverse effect” discrimination.

A job ad or hiring process that limits the opportunity to people with Canadian experience can have an adverse impact on recent immigrants to Canada who may lack Canadian experience, even though they may have relevant international experience and be qualified to do the job. A distinction based on where a person got their work experience may indirectly discriminate based on *Code* grounds such as race, ancestry, colour, place of origin and ethnic origin.

The *Code* makes it illegal for an employer to put out a job ad, use an application form, or ask applicants questions that directly or indirectly classify them under a prohibited ground of discrimination. Employers must not refer to Canadian experience at the application stage since it may reveal characteristics about the person that are related to *Code* grounds.

During a job interview, employers should not ask questions about where an applicant obtained their experience, and should consider all prior work experience, regardless of where it was obtained. Employers can only ask specifically about “Canadian” experience if they can show that work experience in Canada is a legitimate requirement of the job, and that providing accommodation would cause undue hardship. The legal test for such requirements is a high one.

The *Code* also prevents an employer from using an employment agency to hire people based on preferences related to *Code* grounds. An employer cannot use an employment agency to recruit, select, screen or hire people based on whether they have Canadian work experience.

Often, there are easy ways to assess a person's skills and abilities, even if they have not worked in Canada.

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



Make sure job requirements are legitimate

Job requirements should be reasonable, genuine and directly related to doing the job. A requirement for Canadian work experience, even when implemented honestly, can be a barrier in the hiring process and may result in discrimination. The Supreme Court of Canada has set out a test for determining whether a requirement that results in discrimination can be justified (see *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 [*Meiorin*]). To do this, an employer must show that the requirement:

- Relates to the purpose or nature of the job
- Was adopted honestly rather than for a discriminatory reason
- Is necessary to do the job, and
 - there isn't a more inclusive alternative that would avoid or reduce the negative effect (on protected groups)
 - the circumstances of individual applicants are still considered and accommodated as much as possible, unless there are costs or health and safety reasons that would cause undue hardship.

An employer or a regulatory body won't be able to prove that a requirement for Canadian experience is justified unless they can show they have taken a flexible approach, looked at the person's other types of experience, and weighed this against the other requirements of the job or membership. Some of the questions to consider are:

- Did the employer or regulatory body look at different approaches that don't have a discriminatory effect?
- Why were other approaches not used?
- Can there be different standards that reflect group or individual differences and capabilities?
- Can an employer or a regulatory body meet its needs in a less discriminatory way?
- Have all the people who must help in the search for accommodation fulfilled their roles?

Employers and regulatory bodies should not act based on stereotypes about people or assumptions about the quality of work experience not gained in Canada. Where an applicant lacks Canadian experience for reasons related to a *Code* ground, employers and regulatory bodies should look at other available information to make a reasonable and fair assessment. It is up

to the employer or regulatory body to show that a requirement for Canadian experience is justified, and that they have taken steps to make sure that they assess applicants/prospective members on an individual basis.

Make decision-making processes related to hiring and accreditation as transparent as possible. Job advertisements should state clearly the specific skills and work experience that are required for each of the job duties, and these requirements must be related to the job. Applicants should be given an opportunity to show their abilities during interviews and even in a simulated job setting.

Example: Rather than imposing a general Canadian experience requirement on job applicants, or insisting that they have established local business contacts before they are hired, an advertising agency provides job applicants with the opportunity to show their ability to generate business.

Example: Instead of requiring all foreign-trained applicants to undergo two years of practicum training to receive a professional designation, a regulatory body provides the opportunity for applicants to show their technical skills and knowledge in a practical, competency-based test.

Organizational responsibility

Employers and regulatory bodies must take steps to make sure they do not discriminate against people and that their policies, programs and practices respect human rights. This includes not having job or accreditation requirements that create barriers for newcomers. Where barriers exist, an employer has a duty to remove them.

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

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

Only in rare cases will a requirement for Canadian work experience be found to pass the high threshold of the Supreme Court of Canada (*Meiorin*) test. In every other case, employers, representatives of employers (including human resources staff and recruitment agencies) and regulatory bodies should follow these best practices.

Employers, representatives of employers and regulatory bodies should:

- ◆ Examine their organizations as a whole to identify potential barriers for newcomers; address any barriers through organizational change initiatives, such as by forming new organizational structures, removing old practices or policies that give rise to human rights concerns, using more objective, transparent processes, and focusing on more inclusive styles of leadership and decision-making.
- ◆ Review job requirements and descriptions, recruitment/hiring practices and accreditation criteria to make sure they do not present barriers for newcomer applicants.
- ◆ Take a flexible and individualized approach to assessing an applicant's qualifications and skills.
- ◆ Give an applicant the opportunity to prove his/her qualifications through paid internships, short contracts or positions with probationary periods.

- ◆ Provide newcomers with on-the-job training, supports and resources that will enable them to close “skill gaps” (*i.e.* acquire any skills or knowledge they may be lacking).
- ◆ Use competency-based methods to assess an applicant’s skill and ability to do the job.
- ◆ Consider all relevant work experience – regardless of where it was obtained.
- ◆ Frame job qualifications or criteria in terms of competencies and job-related knowledge and skills.
- ◆ Support initiatives designed to empower newcomers inside and outside of their organizations (for example, formal mentoring arrangements, internships, networking opportunities, other types of bridging programs, language training, *etc.*).
- ◆ Monitor the diversity ratios of new recruits to make sure they reflect the diversity of competent applicants overall.
- ◆ Implement special programs, corrective measures or outreach initiatives to address inequity or

disadvantage affecting newcomers For more information, see the OHRC's *Special Programs and the Ontario Human Rights Code: A Self-Help Guide*, 2012, available online.

- ◆ Supply newcomers and social service agencies serving newcomers with information about workplace norms, and expectations and opportunities within their organizations.
- ◆ Retain outside expertise to help eliminate barriers to newcomer applicants.
- ◆ Form partnerships with other similar institutions that can help to identify additional best practices.
- ◆ Provide all staff with mandatory education and training on human rights and cultural competence.

Employers, representatives of employers and regulatory bodies should not:

- ◆ Require applicants to have prior work experience in Canada to be eligible for a particular job.
- ◆ Assume that an applicant will not succeed in a particular job because he or she lacks Canadian experience.

- ◆ Discount an applicant's foreign work experience or assign it less weight than their Canadian work experience.
- ◆ Rely on subjective notions of "fit" when considering an applicant's ability to succeed in the workplace.
- ◆ Include a requirement for prior Canadian work experience in the job posting or ad, or a requirement for qualifications that could only be obtained by working in Canada.
- ◆ Require applicants to disclose their country of origin or the location of their work experience on the job application form.
- ◆ Ask applicants questions that may directly or indirectly reveal where their work experience was obtained.
- ◆ Ask for local references only.

What is cultural competence?

Cultural competence can be defined as “an ability to interact effectively with people of different cultures, particularly in the context of human resources, non-profit organizations, and government agencies whose employees work with persons from different cultural/ethnic backgrounds.” Cultural competence has four parts:

1. Awareness of one’s own cultural worldview
2. Attitude towards cultural differences
3. Knowledge of different cultural practices and worldviews
4. Cross-cultural skills.

“Developing cultural competence results in an ability to understand, communicate with, and effectively interact with people across cultures.”

Source: Wikipedia
(http://en.wikipedia.org/wiki/Cultural_competence, reviewed on November 20, 2012).

For more information

Employers and regulatory bodies must be aware of their duties under the Ontario *Human Rights Code*. For more information, see the OHRC's *Policy on removing the "Canadian experience" barrier*, available at: www.ohrc.on.ca.

To make a human rights complaint – called an application – contact the Human Rights Tribunal of Ontario at:

Toll Free: 1-866-598-0322

TTY Toll Free: 1-866-607-1240

Website: www.hrto.ca

To talk about your rights or if you need legal help, contact the Human Rights Legal Support Centre at:

Toll Free: 1-866-625-5179

TTY Toll Free: 1-866-612-8627

Website: www.hrlsc.on.ca

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