HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Muhammad Haseeb

Applicant

-and-

Imperial Oil Limited

Respondent

INTERIM DECISION

Adjudicator: Yola Grant

Date: July 20, 2018

File Number: 2015-20082-I

Citation: 2018 HRTO 957

Indexed as: **Haseeb v. Imperial Oil Limited**

APPEARANCES

Muhammad Haseeb, Applicant	)	Chantal Tie, Counsel
Imperial Oil Ltd., Respondent	)	Richard Nixon, Counsel

INDEX

INTRODUCTION

[1] This is an Application filed under s. 34 of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"), alleging discrimination with respect to employment because of a pre-employment requirement that a prospective job applicant must be able to work in Canada on a "permanent basis". In his Application, the self-represented applicant alleged that the respondent Imperial Oil Limited ("Imperial Oil" or "IO") breached s. 5(1) of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"), on the basis of place of origin, citizenship and ethnic origin.

[2] At the hearing, the applicant who was then represented by counsel amended the grounds of discrimination to allege a breach on the ground of citizenship only. In opening statement, the applicant's counsel articulated that the Application disclosed breaches of sections 13(1), 23(1) and 23(2) of the *Code* in connection with IO's job posting / advertising, its written on-line application form and verbal requests at various job interviews for the applicant to disclose whether he was able to work in Canada on a "permanent basis".

[3] Throughout IO's selection process, the applicant was a student at McGill University in Quebec completing his engineering degree (mechanical) with an interest in the energy sector. He was an international student and his visa permitted him to obtain a work permit for on-campus part-time work and for full time work during regular breaks between academic terms. Aside from internships, for which he obtained temporary social insurance numbers (SIN), the applicant did not work (on or off campus) while he was a student.

[4] On graduation, with a letter from his University attesting to completion of his credits for his degree, the applicant became eligible for a "postgraduate work permit" (PGWP) for a fixed term (3 years). The PGWP would permit him to work full time, anywhere and with any employer in Canada. The applicant anticipated that he would attain permanent residency status within three years and thus be able to settle and work in Canada indefinitely. The applicant was among graduates from participating Canadian universities who, under a special immigration program involving the federal and Ontario government, were permitted to obtain work in Canada and be processed in-land for permanent resident status.

[5] In a nutshell, the applicant learnt from more senior students that Imperial Oil recruiters required graduate engineers to have permanent residency or citizenship to be eligible to apply for a permanent full-time job as Project Engineers. The applicant testified that he believed that one of his friends did not proceed past the first round of interviews because he answered truthfully that he did not have the required permanent status. On the contrary, the applicant gave a positive response repeatedly to IO's representatives' questioning regarding his eligibility to work in Canada on a permanent basis and progressed through every step of IO's selection process for an entry level position as Project Engineer, starting with IO's on-campus recruitment, online application form and through to interviews during a site visit at the prospective refinery work location. His "positive" responses were in fact false.

[6] As the applicant was ranked first among the candidates, he was offered a job with certain conditions that he had to fulfill to accept the job offer by a stipulated deadline. As part of accepting the job offer, the applicant was asked to provide proof of his eligibility "to work in Canada on a permanent basis" by way of (1) Canadian birth certificate (2) Canadian citizenship certificate or (3) Canadian certificate of permanent residence (permanent resident card). This eligibility to "work in Canada on a permanent basis" is sometimes referred to as the "permanence requirement" or IO policy in this decision.

[7] After graduation in early 2015, the applicant expected to obtain a work permit for 3 years under the PGWP with no difficulty so he could work anywhere and with any employer on a full time basis. He was unable to provide the required proof to accompany his acceptance of the job offer by December 11, 2014.

[8] IO later rescinded the job offer, about a month after the deadline for its acceptance. The rescission letter, on its face, invited the applicant to re-apply if he became eligible to work in Canada on a permanent basis in the future. In response to the instant Application, the respondent stated that the job offer was rescinded because of the applicant's misrepresentation of his status throughout the hiring process.

Summary of the Decision on the Merits

[9] The applicant has standing to bring this Application as an individual who has a direct interest in the dispute concerning a pre-employment condition that he was unable to meet, thus losing a career employment opportunity with a large and eminent corporation. On all the evidence before the Tribunal, the applicant was engaged in a genuine search for employment with IO in fall 2014 and was excited by the prospect of working with IO after his graduation. This was not a sham job search by the applicant. His firm belief and reasonable expectation was that he would complete his degree and obtain a PGWP to work off campus on a full time basis in early 2015. There was no genuine issue regarding his eligibility to obtain a post-graduate work permit that would coincide with the job start date in 2015 contemplated by both IO and the applicant.

[10] The evidence was undisputed that IO requested that the applicant answer questions at various stages of the selection process about his eligibility to "work in Canada on a permanent basis". The applicant applied for and was judged by IO representatives to be qualified for the entry level Project Engineer position. He was ranked first among the job candidates as long as he maintained the ruse that he was eligible to work in Canada on a permanent basis. But for the "permanence requirement", the applicant met all other conditions of the offer of employment and would have been able to accept the offer by the stipulated deadline.

[11] The Tribunal's finds that the "permanence requirement" is discrimination based on the ground of "citizenship". While a definition of "citizenship" is not contained in the *Code*, a reading of the three defences available under section 16 of the *Code* indicates that the legislature contemplated that any requirement, consideration etc. that distinguished among individuals on the basis of either "Canadian citizenship", "permanent residence" status or "domicile in Canada with intention to obtain citizenship" is discrimination unless the requirement is imposed or authorized by law, or the other criteria are met for each of three defences. More specifically, in the Tribunal's view, IO's requirement amounted to a direct breach of the *Code* when it distinguished among job candidates who were eligible to work in Canada on the basis of citizenship and created categories of "eligible" and "ineligible" for progressing through IO's screening process. IO's requirement was not excused by s.16(1) of

the *Code* as IO was not adhering to a requirement that was authorized or imposed by law. The further defence available for corporations under s.16(3) of the *Code* is also inapplicable in the circumstances of an entry level position ("as opposed to chief or senior executive position").

[12] The Tribunal ruled further that the fact that IO's requirement distinguished on the basis of "Canadian citizenship" and "permanent residence" does not change the analysis to being a distinction based on "immigration status". It is sufficient that IO's requirement cited "Canadian citizenship" as a criterion to engage the prohibited ground of "citizenship" the *Code*.

[13] During the hearing, IO characterized its requirement/policy as an "occupational requirement" or an "employment strategy" that supported succession planning. IO's evidence was that the permanence requirement was sometimes waived for candidates whose skills were in high demand but no waiver had ever been provided for a candidate for the entry level position of Project Engineer. The rationale for the non-waiver for entry level positions was that (a) new graduates did not have any highly sought after skills (b) there was a large pool of new engineering graduates from which to choose those who met the permanence requirement and (c) IO would risk losing its investment of time and money in training a new graduate whom it may not be able to retain and meet the company's succession planning goals if her/his application for permanent resident status failed.

[14] The evidence of the respondent supported a finding that job candidates were deemed "eligible" and "ineligible" based on their response to the question about their eligibility to work on a permanent basis. No statistical analysis or examination of disparate impact, for example, was required to determine the effect of IO's requirement in imposing a disadvantage on the applicant and other international students (all of whom are non-citizens). The Tribunal thus found that direct discrimination resulted from IO's "permanence" requirement.

[15] In Ontario, a BFOR defence to "indirect" or "constructive" discrimination is addressed separately under s.11 of the *Code* for instances where a prohibited ground is *not* directly engaged but where the requirement "results in exclusion, restriction or preference of a group of persons identified by a prohibited ground…." In the Tribunal's view, the BFOR defence is not

available to IO for a direct breach of the *Code,* notwithstanding the unified approach to BFOR defence articulated by the Supreme Court of Canada in *Meiorin*.

[16] If the Tribunal is wrong in the above ruling on direct discrimination and the non-availability of the BFOR defence, the Tribunal further rules that IO's policy is not an "occupational requirement" as IO was clear in its evidence that the purported "requirement" could be waived at its discretion and no evidence was led to link the requirement to any job tasks being performed at IO. The Tribunal finds that it is untenable to treat this requirement as a BFOR for the purposes of the *Code* for the following reasons:

1. An "occupational requirement" must *per se* be linked to the performance of essential tasks relating to a job; and,
2. A *bona fide* occupational requirement is a necessary requirement and cannot be subject to waiver for varying business reasons, unrelated to accommodating and individual to successfully perform the essential tasks of the job.

[17] In the further alternative, if one were to assume that IO's policy is an "occupational requirement", the Tribunal finds that IO has not discharged its onus to demonstrate (a) that this requirement was *bona fide* and "necessary" and (b) that accommodating the applicant, a PGWP holder, with a waiver of the requirement, would have caused the corporation "undue" hardship (as opposed to some hardship or uncertainty).

[18] Given that the facts regarding the job posting, the job application form and repeatedly questioning the applicant about whether he met the requirement to work permanently in Canada is not disputed, the Tribunal finds that sections 13(1), 23(1) and 23(2) of the *Code* were breached in connection with IO's job posting / advertising, its written on-line application and verbal requests at various job interviews of the applicant and that these acts contravened s. 5(1) of the *Code*. No defence was available to IO under s.16 of the *Code* that addresses citizenship and permanent residency as a condition for employment in very limited circumstances.

[19] Finally, the Tribunal finds that the dishonesty of the applicant in his responses to IO regarding his eligibility to work on a permanent basis is not relevant to deciding whether the

Code was breached. It is sufficient to find that IO's decision to not hire the applicant was tainted by the permanence requirement. For this merits decision (as opposed to remedy), the focus is appropriately on IO's conduct during the job selection process and its conditional offer to the applicant. The Tribunal was not persuaded that "but for" the applicant's dishonesty, he would have been hired by IO. Any consideration of the applicant's dishonesty must be viewed in context: he misrepresented his eligibility to work permanently in order not to be categorized by IO as "ineligible" for a permanent position *before* his skills and experience were evaluated by IO. The Tribunal finds that the applicant's misrepresentation is inextricably linked to IO's pre-employment "permanence requirement" that deemed him ineligible for a permanent position.

[20] In the result, the Tribunal finds that IO's offer with the "permanence requirement" that the applicant could not meet was discriminatory under the *Code* on the basis of citizenship.

Summary of the parties' positions

[21] The applicant asserted that the pre-employment requirement disadvantages non-citizens and conceded that a sub-group of non-citizens, permanent residents, are not disadvantaged by IO's requirement. The applicant asserted that IO treated candidates who are entitled to work on a post-graduate work permit as "ineligible" and terminated the processing of their job applications. The applicant asserted that but for the requirement that he provide proof that he was able to work on a permanent basis, he would have accepted the offer by the deadline and he would be currently employed by IO on a permanent basis. In the applicant's view, this is a simple case of direct discrimination on the grounds of citizenship, notwithstanding that a sub-set of non-citizens are not disadvantaged by IO's requirement / policy.

[22] IO had a policy, dating back to 2004 or earlier, to make job offers only to candidates who were eligible to work in Canada on a permanent basis for the entry level position as Project Engineer, the position to which the applicant aspired. On an exceptional basis only, IO hired a few *experienced* engineers for "hard to fill" positions, or who possessed "a unique / strong skill set that is difficult to source" who did not meet the "permanent basis" eligibility

criterion. These experienced engineers were typically persons whose skills were in high demand and IO recruited and hired them, notwithstanding that at the start of their employment with IO, they were on work permits for limited terms and, thus, were unable to provide proof that they were "eligible to work in Canada on a permanent basis."

[23] IO asserted that throughout the selection process and up to the date of the rescission of the conditional offer, the applicant did not have the right to work full time in Canada for any employer. Accordingly, IO asserted that the applicant had no "standing" to bring the instant Application. The applicant characterized the "standing issue" and the work permit status associated with the applicant's final term of study as "red herrings".

[24] With respect to the merits, IO characterized its requirement/ policy as an employment strategy that is concerned with succession planning, beginning with grooming of recruits who are hired into entry level positions immediately after graduation. IO took the position that this is a valid business objective and that there is no discrimination on a protected ground under the *Code*. IO characterized the issue as discrimination on the basis of "immigration status" which is not a protected ground under the *Code*. IO submitted that its policy did not discriminate on the basis of citizenship as one need not be a Canadian citizen to meet the requirement (as permanent residents can meet the requirement).

[25] In the alternative, IO asserted that its requirement / policy is justified as a *bona fide* occupational requirement because of the investment made by IO in training new recruits and IO's expectation that its recruits intend to spend their entire careers with IO in positions of progressive responsibility. Furthermore, IO would experience undue hardship if it were to hire and train the applicant and assume the risk that if he did not obtain permanent resident status, their investment in him would be lost.

[26] IO's rationale for its "requirement" was provided in the *viva voce* evidence of its Human Resources Manager. The summary of her evidence mirrored the assertion of a bona fide occupational requirement (BFOR) defence in IO's amended Response, Exhibit 2, page 14, an excerpt of which follows:

This requirement is in place for permanent positions at IO, including the Project Engineering position for two reasons:

> First, IO invests an enormous amount of time, energy and tens of thousands of dollars in training, educating and developing engineers who are *hired by* IO *following their graduation*. Project Engineers must successfully complete formal and informal training programs for many years after an engineer is hired after graduating from a university. The training process is not only very time-consuming and intense, it is very expensive. IO makes a significant investment of time, money and energy in new engineers in the early years of their careers.
>
> Second, IO wants to hire engineers who will stay employed with IO in different positions for their entire career. The Project Engineer position is an entry level position. IO expects that the engineers that IO hires will be repeatedly promoted and transferred to more senior position in different departments, business lines, and locations throughout Canada throughout their careers, with ever expanding duties and responsibilities…. *IO's employee relations strategy is focused on doing everything possible to attract and retain the engineers who are hired out of university.* This *strategy* is reflected by IO's
>
> (a) Policy to promote from within, whenever possible;
>
> (b) Generous benefit plan, incentive plans, pension plan, etc.;
>
> (c) Commitment to ensure employee turnover is kept to a minimum; and,
>
> (d) Continuous focus on succession planning.
>
> When IO hires an engineer out of university, IO's hope and expectation is that the engineer will be in a senior management, leadership, engineering or technical position in 25, 30 or 35 years later.
>
> [*emphasis added*]

[27] To complete its BFOR defence, IO's Response pleaded and IO's Human Resources manager testified to the effect that:

> Without this [BFOR] requirement, IO would lose the benefit of the time, energy, and money IO had just invested in the employee, an employee who IO hoped and expected would remain employed by IO for the employee's entire career.

[28] The applicant in turn submitted that the application of IO's policy amounted to a direct breach of the *Code* and that BFOR is not available in Ontario for direct, as opposed to indirect, breaches of the *Code*. Alternatively, if a BFOR is available, it was not made out in these circumstances as there was no link between the requirement/qualification and the job tasks to be performed by an entry level Project Engineer. In the further alternative, if the Tribunal ruled that it was a BFOR, the respondent did not discharge its onus to demonstrate undue hardship would result from accommodating the applicant by hiring him on condition that he obtain permanent residency within a 2-3 year timeframe.

[29] Finally, IO asserted that it was the dishonesty of the candidate in the job selection process, not his failure to meet the pre-employment requirement, that was the reason for rescinding the offer.

[30] In reply to IO's assertion of dishonesty as a reason for the rescission of the offer letter, the applicant urged the Tribunal to consider the root of the dishonesty and the fact that it is linked to a claim of human rights infringement and is thus excusable or, at least, taints the assessment of dishonesty. The applicant further submitted that the issue of "dishonesty" must be considered contextually; the applicant would not have had engaged in the ruse to obtain an opportunity to demonstrate that he was fully qualified for the job, but for the permanence requirement imposed by IO.

History of these proceedings

[31] Mr. Haseeb's Application was amended at the start of the hearing on June 14, 2016 to allege a breach on the basis of citizenship only.

[32] On February 10, 2016, during a pre-hearing telephone case conference the Application was amended, on consent, to:

1. increase the general damages claimed to $25,000.00;
2. add a claim for pre- and post-judgment interest;

3. remove a claim for travelling costs; and,

4. remove a statement regarding alleged remarks by an IO employee “D.P.” and the applicant’s associated claim for “mental anguish and depression”.

[33] By letter to the Tribunal on February 11, 2016 the applicant consented to the respondent’s filing of an amended Response.

[34] By a Case Assessment Direction (“CAD”) dated June 10, 2016, the respondent’s request to adjourn the hearing of the merits, scheduled to commence on June 14 and continue on June 15, 2016, was denied while the respondent’s request to bifurcate the hearing, to address merits separately from remedy if any, was granted with oral reasons to follow at the hearing.

[35] Also, by the above CAD, the respondent’s request to proceed by way of a summary hearing (SH) as “there was no reasonable prospect of success” was denied. No reasons were issued as is provided for in the Tribunal’s Rules of Procedure (19.5 A). Subsequent to the denial of the SH request, the respondent gave notice to the Registrar on June 10, 2016 of its intent to seek judicial review of the denial of the summary hearing request. This judicial review was abandoned by IO and the hearing commenced as scheduled on June 14, 2016.

[36] At the start of the hearing, oral reasons were given for the denial on June 10, 2016 of the most recent SH request. At the request of the respondent, the oral reasons were reduced to writing and issued on June 14, 2016 as an Interim Decision (2016 HRTO 805). That decision further outlined the prior multiple requests to dismiss the Application on a summary basis.

[37] This Application was heard over 13 days spanning 8 months and argument was completed on February 28, 2017. Six witnesses, including the applicant, IO’s Human Resources Manager (formerly Canada Recruitment Manager from July 2014 - August 2016), the Refinery Manager for Sarnia, the retired Central Engineering & Construction Manager for Sarnia and two expert witnesses on immigration matters were heard by the Tribunal.

[38] Subsequent to the close of argument, and without leave of or solicitation by the Tribunal, the respondent filed a further submission concerning the government of Alberta's initiative to foster the hiring of Alberta residents for certain high skilled, high wage jobs rather than sponsor a foreign worker under the federal *Temporary Foreign Worker Program*. In response, the Applicant repeated his earlier submission that the s.16(1) *Code* defence is not available to IO and submitted that the Tribunal had no obligation to consider the respondent's post-hearing submissions. The unsolicited submissions have not been considered for the purpose of this decision.

[39] On account of a leave by the adjudicator, this decision is being released in July 2018.

[40] The evidence submitted to the Tribunal is copious, consisting of approximately 430 documents, including affidavits. Witnesses' viva voce testimony was fully captured in verbatim transcripts of the proceedings by the respondent. Transcripts were shared with the Tribunal and the applicant.

EVIDENCE & FACT FINDING

[41] Six witnesses, including the applicant, provided viva voce evidence. As noted earlier, the documentary record is large, comprising over 400 documents in total including emails, record of student visas and associated SIN, conditional offer letter of IO hires for whom an "exception" to the permanence policy was made, record of training of Project Engineers, record of promotions and records of ethics compliance.

[42] Apart from the genesis of the policy itself, there was virtually no controversy regarding what the documents entered as exhibits meant. A plain reading sufficed to interpret the meaning of each. Regarding evidence of IO's requirement / policy impulse and its original purpose, the Tribunal noted that one of the persons listed as authors of the policy is still employed by IO but was not called as a witness to state her recall of the purpose of the policy and the climate in which it was developed. IO's main witness, who was promoted to Human Resources Manager during the proceedings, admitted that she did not consult with that author before giving evidence regarding the purpose of IO's permanence policy.

[43] Below, the Tribunal has incorporated the narratives of the applicant, Muhammad Haseeb, and IO's Human Resources Manager, Caroline Francis, for ease of relating the facts on which the Tribunal relied for Analysis that follows regarding whether the *Code* was breached as alleged.

Applicant's search for a permanent position with IO

[44] On September 10, 2014, the applicant, Mr. Haseeb, then an engineering student in his final term at McGill University (in Quebec), filled out an online application for an entry position with Imperial Oil. As a McGill graduate, he expected that on completion of his courses in December 2014 he would be able to start work soon afterwards as he qualified for an "open" PGWP that entitled him to work fulltime, with anyone and anywhere within Canada.

[45] Prior to applying for work with IO, the applicant learnt from other students that IO did not hire international student engineers for its permanent entry level positions (career positions), but had hired them for co-op or regular breaks between terms. He nonetheless sought an entry level permanent job with IO as he admired the company and felt certain that he would enjoy a long career with them in energy, his area of special interest.

[46] IO's application process required the applicant to answer a number of questions regarding whether he was eligible to work in Canada on a permanent basis, to which he repeatedly responded "Yes". IO's first interview guide indicated to the interviewer that if the response was "No" the interviewer was guided as follows:

> **If no, note to interviewer: For grad positions, from the first day of employment* permanent eligibility *is required because we are hiring for career employment. (If candidates indicate that they are in the "process" of seeking permanent eligibility, this must be recorded as currently "not eligible" and flagged to your Business Unit Recruitment Contact.)*
>
> Ex. 4, Tab 6, page 3

[47] A further guide to the second interview, found at Ex. 4, Tab 7, page 3 repeated the above text and is preceded by the text:

> Eligibility to work in Canada *(this question must be asked during one of the candidate's second interviews)*.
>
> Employees of Imperial Oil must be permanently eligible to work in Canada. Proof of permanent eligibility to work in Canada is a condition of employment and the only acceptable proof of permanent eligibility is a copy of one of the following documents:
>
> - A Canadian birth certificate,
> - A Canadian citizenship certificate, or
> - A Canadian certificate of permanent residence.
>
> Work permits, including student or post-doctorate work permits, are temporary rather than permanent entitlements to work in Canada and will disqualify you from being considered for permanent employment with the Company. Can you confirm that you have one of these three documents? *(Note to interviewer –the candidate does not need to produce the document during the interview. This documentation will be requested at a later point in the recruitment process.)*

[48] The applicant admitted he repeated his "Yes" response verbally throughout his in-person interviews and was successful in IO's multi-step selection process. He was ranked at the top of the group of would-be permanent hires as an entry level Project Engineer.

[49] He was offered a job by letter dated December 2, 2014 at IO's Sarnia (Ontario) location on condition that he provide documentary proof of citizenship or permanent residency by December 11, 2014. He was unable to provide IO with their required proof and in separate phone calls with two IO personnel, on December 10, he admitted for the first time that he was not a permanent resident. According to the applicant, in these phone calls he attempted to explain (a) that he could get a PGWP for a three-year term (b) that the work experience gained at IO would assist greatly with his eligibility for permanent residency and, (c) that he felt that he needed to answer "Yes" to IO's repeated questioning of whether he was able to work in Canada on a permanent basis for fear that he would be set aside without any consideration of his skills and his desire to be part of IO.

[50] After his verbal admission to S.B., Recruitment Coordinator, by phone that he could not meet the condition of the offer letter, the applicant wrote to her on December 10, 2014 by email (excerpted in part) as follows:

> "It was a pleasure talking to you this morning. As we discussed, I came across the clause on [sic] the job offer letter stating that I have to be permanently eligible to work in Canada (Canadian Passport, or PR Card or a Canadian Birth Certificate). Since I am an international student, I will have to work on a Federal Work Permit before I am permanently allowed to work in Canada. *The work permit is issued upon graduation, and is valid for 3 years, but before the permit even expires, I will have obtained permanent residence in Canada (please see Ontario Immigration website link below). That being said, I do intend to work and settle in Canada on a permanent basis.*
>
> S., I am interested in the position and in working for Imperial Oil. *Will you be able to make and exception at your end.*
>
> Please let me know if you need any other information from me. …."
>
> Ex. 3, Tab 13 or Ex. 4, Tab 19 [emphasis added]

[51] At the hearing, the applicant conceded that he had misled IO regarding his then ineligibility to work permanently in Canada. (See Ex. 5 and Ex. 21, joint chronology and statement of fact respectively.) Furthermore, the applicant conceded that in fall 2014 through to IO's deadline for acceptance of its conditional offer, the applicant was ineligible to work full-time with any off-campus employer. The applicant's admission of the latter fact came in response to a report of the expert called by the respondent that reads in part as follows:

> The Applicant was not authorised under IRPA [Immigration and Refugee Protection Act, S.C. 2001, c.27] to work for Imperial Oil in Sarnia, Ontario on a full time basis, on Sept 8th, 2014, October 23rd, 2014… and December 11th, 2014. The Applicant was attending school on those dates, and could only work part-time on campus during school terms, under the terms of the Study Permit issued to him on July 25th, 2013.
>
> Ex. 8, letter from Chantal Tie to Richard J. Nixon dated July 4th, 2016

[52] By letter dated January 8, 2015, IO rescinded the job offer in writing and cited the applicant's failure to provide proof of his ability work on a permanent basis in Canada. An excerpt from the rescission letter to the applicant follows (Ex. 4- Tab 28):

> By letter dated December 2, 2014 Imperial Oil extended a conditional offer of employment to you. That offer was expressly subject to a number of conditions, including your ability to work permanently in Canada. You were required to submit proof of your permanent eligibility in the form of a copy of one of the following: Canadian birth certificate, Canadian citizenship certificate or a Canadian certificate of permanent residence. You have since notified Imperial Oil that you are not eligible to work in Canada on a permanent basis. Because you have not met the conditions of employment as outlined in our offer letter dated December 2, 2014 our offer of employment has now been rescinded.
>
> If you become eligible to work permanently in Canada, and you still wish to be considered for a position with Imperial Oil, please re-apply by following our application guidelines, which are available on our website. We would be pleased to consider your application at that time.
>
> …

[53] The text of the letter to the applicant was near identical to seven (7) redacted rescission letters (Ex 4, Tab 149-155) sent to candidates between 2009 and 2014 who did not have the required citizenship or permanent residency documents to disclose concurrent with acceptance of IO's offer of employment. Indeed, the letter dated December 16, 2014 at Tab 155 referred to a conditional offer extended on December 2, 2016 and apart from the date, it is in *every respect identical to the letter* dated January 8, 2015 (Ex. 4, Tab 28) that was sent to the applicant by a "Recruitment Consultant" The other 6 rescission letters filed by IO were signed by a "Recruitment Coordinator". No evidence was led to clarify whether the redacted letter dated December 16, 2014 was addressed to the applicant, and if so, was it delayed to January 2015 pending IO's management's consideration of (a) a waiver of the "permanence" criteria or (b) a response to the revelation that the applicant had misled IO personnel before he received the job offer.

Applicant's study and work permit status

[54] During fall 2014 and throughout the job application/recruitment process, the applicant was entitled to study in Canada and to work, with restrictions, on a student visa. Apart from internships, the applicant did not work on or off campus during his school terms as he desired to focus on his studies. It was undisputed that his student visa was insufficient to permit him to work with IO or any other off-campus employer on a full time basis during fall 2014. After graduation in early 2015, the applicant expected to obtain a PGWP for 3 years so that he could work anywhere and with any employer on a full time basis.

[55] The applicant had obtained a social insurance number for his internship periods with no difficulty and expected to have the same ease after he obtained his PGWP. Obtaining the PGWP was conditional only on proof that he had completed his degree and he indeed received his SIN for full time post-graduate work within minutes of applying for same in early 2015.

[56] Much evidence was led by IO regarding the applicant's various student visas and his ineligibility to work full-time and off-campus, excepting during scheduled school breaks, from August 2009 – February 2015. The Tribunal found that the documentary evidence was self-explanatory and did not require an expert's opinion.

[57] There was a dispute between the experts regarding whether the applicant being a part-time student in his final term, deprived the applicant of his eligibility to work in fall 2014. This was resolved in cross-examination when Evan Green (expert called by the respondent) conceded that he was aware of a particular Operational Bulletin regarding part-time international students during their final term being deemed to be full time students. Green ultimately conceded that it undermined his opinion that there was a "fatal flaw" in the applicant's claim, supported by the expert Michael Schelew, that he was at all times in good status and capable of obtaining a PGWP without any difficulty.

[58] Where there was a divergence of opinion between the experts regarding the applicant's ability to obtain necessary SIN and PGWP, the Tribunal preferred the evidence of Schelew,

supported by documentary evidence (including McGill's bulletin to international students) over that of Green.

[59] It was undisputed that there is a legal requirement for an employee to furnish her or his employer with a SIN at the outset of the relationship and establish that she or he has a valid work permit.

[60] The Tribunal finds that the applicant was at all times in status as an international student, with no hindrance to his obtaining a PGWP and SIN for commencement of work with IO in February 2015 or any other later employment start date that could have been negotiated between the parties.

[61] It appeared to the Tribunal that Green lacked expertise in the area of immigration law that pertained to international students and the federal and provincial programs designed to facilitate their in-land application for permanent residency. His failure to revise his position on what he characterized as a "fatal flaw" to the applicant's case and offer a neutral opinion to the Tribunal needlessly prolonged the hearing. In the Tribunal's view, the controversy about the applicant's ability to lawfully accept full time work in Canada at the time he received IO's conditional offer was irrelevant to a determination of whether IO's job advertising and interview questions, and, ultimately, IO's conditional offer breached the *Code*.

[62] None of the immigration opinion evidence was relevant in deciding the applicant's "standing" to bring this case. In the Tribunal's view, there was no dispute that the applicant was a legitimate international student whose student visa was current (in status) at all times, including during the period of his job application from September 2014 onwards while he interacted with IO's personnel in his job search.

Imperial Oil's hiring policy & employee relations strategy

[63] From the outset, IO acknowledged that citizenship is a prohibited ground of discrimination and asserted that a job applicant does not have to be a Canadian citizen to be eligible to work in Canada on a permanent basis. IO admitted that it requested the applicant answer questions at various stages of the selection process regarding eligibility to "work in Canada on a permanent basis". IO further admitted that the applicant was asked to provide proof by way of (1) Canadian birth certificate (2) Canadian citizenship certificate or (3) Canadian certificate of permanent residence (permanent resident card) to demonstrate his eligibility to "work in Canada on a permanent basis".

[64] The written evidence regarding training costs was headlined "Imperial's Enormous Investment in employee [name] Training, Development and Education", followed by "Imperial has made a huge investment in time, money and energy in employee [name] training, development and education since [name] was hired by Imperial." (See the Agreed Statement of Facts, Ex. 21.)

[65] After the commencement of the hearing the applicant requested and the respondent, through its witness the Human Resources Manager, provided some quantification of costs for the training of Project Engineers who were citizens or permanent residents. These costs were not contrasted with that associated with inexperienced engineers (e.g. K.P.) or other engineers who were hired as "exceptions" to the policy.

[66] Also after the commencement of the hearing the applicant requested and the respondent, through its witness the Human Resources Manager, provided information concerning two groups of Project Engineers; those hired between 2010 and 2016 and prior to 2010. The applicant "worked up" this data to demonstrate job moves /promotions for 37 Project Engineers during the 18-36 months timeframe after hire where this timeframe is roughly speaking consistent with the window within which a PGWP holder might receive permanent residency status.

IO's "exceptions" and conditional offer of employment for permanent work

[67] For clarity, IO did not dispute that it had a requirement that for *permanent* jobs, applicants were asked at the outset whether they were eligible to work permanently in Canada and that at the time of hire, offers were made conditional on providing proof of same. IO's evidence was that this requirement was rarely waived and was never waived for entry level engineering graduates who did not have any particular skill that was hard to find in the job market.

[68] IO provided 16 conditional offer letters of hire [Ex. 4, Tabs 157-173] to illustrate its waivers during the period March 15, 2010 to January 22, 2016. None of these conditional offers were made to an entry level Project Engineer. The positions for which exceptions were granted include process engineers (2), geophysicist/seismic interpreter (2), geoscientist, geo-technologist (3), mining engineer (3), financial analyst (2), procurement associate, reservoir engineer, research technologist and reliability engineering graduate.

[69] Four samples of text of conditional offer letters relating to "Eligibility to work in Canada" from the "Terms and Conditions" follow.

1. For the geophysicist/seismic interpreter, offer letter dated July 16, 2010 [Ex. 4, Tab 158] reads:

   > This offer is conditional upon your submitting proof that you are eligible to work in Canada on a permanent basis. Proof of eligibility may come in the form of a *certified* copy of a Canadian birth certificate, Canadian citizenship certificate or a Canadian certificate of permanent residence.
   >
   > RIGHT TO WORK
   >
   > We require verification of your right to work in Canada as a condition of your employment with Imperial. Please submit a photocopy of your Social Insurance Number (SIN) with your acceptance of this offer.

2. For the reservoir engineer, offer letter dated November 30, 2013 [tab 171] reads:

This offer is conditional upon your submitting proof *that you are temporarily eligible to work in Canada from May 1, 2013 to April 30, 2016* and permanently eligible to work in Canada prior to May 1, 2016. Proof of temporary eligibility may come in the form of a copy of one of the following: Canadian birth certificate, Canadian citizenship certificate, Canadian certificate of permanent residence, or a copy of a valid temporary work permit. Proof of permanent eligibility may come in the form of a copy of one of the following: Canadian birth certificate, Canadian citizenship certificate or a Canadian certificate of permanent residence. Should you for any reason, fail to become temporarily eligible to work in Canada and provide proof thereof prior to May 1, 2013, Imperial reserves the right to immediately terminate your employment contract with no notice or pay in lieu of notice. In addition, should you for any reason, fail to become permanently eligible to work in Canada and provide proof thereof prior to May 1, 2016 Imperial reserves the right to immediately terminate your employment contract with no notice or pay in lieu of notice.

3. For the research technologist, offer letter dated December 2, 2014 [tab 172], on the *same day as the applicant's offer*, reads:

   This offer is conditional upon your submitting proof that you are eligible to work in Canada on a permanent basis. You will be required to provide a valid Social Insurance Number (SIN) *and a copy of your temporary work permit prior to commencement of employment*.

   Imperial acknowledges that at the date you commence your employment, you will not, at that time, be permanently eligible to work in Canada. However, you acknowledge Imperial's requirement that you will become permanently eligible to work in Canada prior to the expiry of your temporary work permit. Securing permanent eligibility to work in Canada is your sole responsibility, and the company will not sponsor or guide you through this process. Should you, for any reason fail to become permanently eligible to work in Canada before the expiry of your temporary work permit, Imperial reserves the right to immediately terminate your employment contract with no severance payable. [emphasis added]

4. For the Reliability Engineering Graduate, offer letter dated January 22, 2016 [tab 173], after the expiry and rescission of the applicant's offer, reads:

   This offer is conditional upon your submitting proof that you are eligible to work in Canada. You will be required to provide a valid Social Insurance Number (SIN) and a *copy of your temporary work permit prior to commencement of employment.*

   Imperial acknowledges that at the date you commence your employment, you will not, at that time, be permanently eligible to work in Canada. However, you acknowledge Imperial's requirement that you will become permanently eligible to work in Canada and provide proof of such eligibility by November 1, 2018 or

> provide proof of an extended work permit allowing you to continue to work in Canada by this date. Securing permanent eligibility to work in Canada is your sole responsibility, and the company will not sponsor or guide you through this process. Should you, for any reason fail to become permanently eligible to work in Canada by November 1, 2018, Imperial reserves the right to immediately terminate your employment contract with no severance payable. [emphasis added]

[70] Three of the above four sample conditional offer letters dated from 2010 to 2016, before, on the same day as (December 2, 2014) and after the applicant's offer letter, illustrate the manner in which IO provided job offers that expressly addressed the condition of prospective employees who, like the applicant, had only temporary work permits. The Tribunal finds that these express waivers of the requirement were made for a variety of positions at IO's discretion over a period of at least 6 years, both before and after the applicant's disclosure of his international student status. The first sample above (Ex. 4, Tab 158) addressed to the geophysicist in 2010 does not make reference to a temporary work permit but expressly requested disclosure of a social insurance number at the time of acceptance of the offer. From the documents and the opinion evidence provided by the expert witnesses, this SIN would begin with the numeral "9" and would properly trigger an employer's inquiry into the term of the underlying temporary work permit. These samples, in the Tribunal's view, demonstrate that IO had experience with hiring temporary permit holders and communicated offers that did not engage citizenship or other "permanence" requirements.

[71] The Tribunal's further review of the 16 exceptions submitted by IO indicated that only three (3) were provided with credits for relevant professional experience (financial analysts at Ex. 4, Tab 159 & 160 and a procurement associate at Tab 166). All others, including the four excerpted above, were provided with the same language as that included in the applicant's offer regarding 3 weeks of vacation, pro-rated to the start date of employment. This supports a finding that the majority of the "exceptions" were not granted any prior experience recognition and that the express waivers were associated with relatively inexperienced employees rather than "experienced" engineers as attested to by the Human Resources Manager.

[72] Apart from the 16 "exception" offer letters referred to above, IO conceded that it hired other individuals who like the applicant had only temporary work permits. One of the

interviewers of the applicant, K.P., was himself an electrical engineer graduate of a Canadian University (Dalhousie) and was hired by IO with a PGWP.[1] According to IO, K.P.'s hire was exceptional as:

> ".. Even though Mr. P. was not eligible to work in Canada on a permanent basis, …[he] had the skill set to be an Electrical and Instrument Engineer – something that is rare in the oil industry." [Ex. 21, Agreed Statement of Facts, page 3].

[73] Furthermore in relation to K.P.'s hire in 2011, K.P. had informed S.B. (Recruitment Coordinator, who also handled the applicant's hire) by email dated, June 2, 2011 about the Ontario Nominee Program (an aspect of Canada's and Ontario's immigration policy to foster the retention of graduates of certain universities). K.P. noted that an offer of permanent, full time employment would facilitate his obtaining permanent residency (at Ex. 4, tab 50) as follows:

> Recently, I received a job offer from Imperial Oil for a position of Electrical Engineer located in Sarnia, Ontario. After sending some required documents to Sarnia, I received an email that I am not eligible to work unless I am a Canadian Citizen/Permanent Resident. *My current status is a recent international graduate with a valid work permit that expires on April 2014. This permit can be renewed numerous times as long as I remain employed*. In addition, I have a SIN card that expires … however, it can be renewed until the expiry date of my work permit.

[1] K.P. was not included among the 16 "exceptions" disclosed by IO. This might suggest that the waiver of the requirement is more widespread than was appreciated by the witness, who assumed the role of Human Resources Manager in August 2016, after the commencement of this hearing.

> *I am eligible to apply of the Ontario Nominee Program upon receiving an offer of permanent and full time employment from an Ontario employer. It is my intention to apply for permanent residency through the Ontario Nominee Program upon receiving a full time position with Imperial Oil*.
>
> ***For further clarification, please find attached the Ontario Nominee Program for international students***. [emphasis added]

[74] The above email from K.P. 2011 mirrored that of the applicant Haseeb when he was faced with the permanency requirement on the eve of the expiry of his conditional offer (email dated December 10, 2014). The applicant's email is excerpted above at para. 48. Both K.P. and the applicant addressed their email to S.B., Recruitment Coordinator, and both referred her to government websites. A third individual, who had been a co-op student with IO in 2009 also provided information to D.P., also involved in the applicant's recruitment, as follows (Ex. 4, Tab 147):

> ** *Please note that I do not need a job offer or any support/sponsorship from an employer for the Post Graduate Work Permit. It solely depends on me graduating successfully from university. Also, I do not need any sort of visa* for employment and this means that the company does not need to get involved. *** …
>
> ... The above process *is an accelerated process for obtaining permanent residence* and should take anywhere between 6-9 months after the initial six months work period [Alberta specific requirement] is complete. Following this I will become a permanent resident.
>
> **Please note that the above process is for international students who have completed their undergraduate education in Canada.* If I follow the regular immigration process it can take up to 5 years just to become permanent resident and thus that is not an option.** [italics added for emphasis]

[75] The Tribunal finds that the applicant and at least two predecessor international students gave ample information to IO's recruitment personnel to familiarize themselves regarding: the ease of obtaining the 3-year term PGWP without IO's involvement; the fast-tracked program (Ontario Nominee) for international students to obtain permanent residency; the renewal/ extension process for PGWP while the engineer remained employed on a full time basis; and, their intention to apply for permanent residency after they obtained an offer of fulltime, permanent work.

[76] Evidence from IO (in the joint statement of facts) regarding K.P.'s hire indicated that he had special skills as an electrical engineering graduate when he was hired on a PGWP. There was no indication of what, if any, special skills were attributed to D.P., a former IO co-op student, to justify a waiver of the permanence requirement when he too was hired on a PGWP. These candidates were permitted to work as PGWP holders while they obtained permanent resident status. The Tribunal finds that, contrary to testimony of IO's Human Resources Manager, the exception was not limited to experienced engineers only. On the basis of IO's documentary evidence regarding its waiver of the "permanence requirement" (Tabs 157-173), the Tribunal finds that this exception was granted for experienced and inexperienced job candidates alike, for engineering and non-engineering positions and did not appear to be truly "exceptional".

[77] On the other hand, the Tribunal accepts IO's Human Resources Manager's undisputed evidence that for new engineering graduates who are recruited on campus for entry level Project Engineer position, no exceptions to this requirement have ever been made as candidates are deemed "ineligible" as soon as they disclosed their post-graduate work permit status.

Project Engineers' job moves within 18-36 months

[78] There was some agreement between the immigration experts that if all went smoothly, a PGWP holder would obtain permanent residency within 6-18 months of an application. In Ontario, that application could be filed after completing 1 year of full-time employment.

[79] The applicant obtained raw data from the respondent on March 18, 2016 (during the hearing process) concerning 37 engineering personnel who were hired between 2016 and 2010. This data was "worked up" (in Ex. 24) to reveal the date that Project Engineers changed roles after their initial hire in an attempt to quantify IO's risk to its succession planning. The result demonstrated that 11 Project Engineers did not move within 3 years of hire and 29 did not move within the first 20 months. Only 9 (or 21.6%) moved within 20 months with an average time spent as a Project Engineer being 762 days in their entry level position. A further analysis of IO's data to include only those employees whose first position was as a Project

Engineer (23 in total), showed that 18 of 23 did not changed roles within 20 months and only 5 moved within 20 months, with an average of 451 days in their entry level position. *At least 7 of 23 (30%) , remained in their entry level position for 3 years (1095 days) and counting*.(See Ex. 24 and 26).

ISSUES TO BE DETERMINED

1. Assuming that the applicant did not have a work permit that allowed for him to work full-time and off-campus during the selection process up to the date of rescission of the offer, did the applicant have "standing" to bring this Application?

2. Is the requirement that an applicant be eligible to work in Canada on a permanent basis direct discrimination on the ground of citizenship?

3. Is the defence that the requirement is a *bona fide* occupational requirement (BFOR) available in the circumstances of direct discrimination?

4. If the defence that the "permanence" requirement is a *bona fide* occupational requirement (BFOR) is available, has this defence been established?

5. Did IO engage in prohibited conduct described in s. 23(1) and 23(2) of the *Code* in posting or advertising the "permanence" requirement and in asking questions about this requirement in interviews?

Issue 1: Did the applicant have standing to bring this Application?

[80] The applicant filed this Application pursuant to section 34(1) of the *Code*, which states as follows:

> 34(1) If a person believes that any of *his or her rights* under Part` I have been infringed, the person may apply to the Tribunal for an order under section 45.2,
>
> (a) within one year after the incident to which the application relates; or
>
> (b) if there was a series of incidents, within one year after the last incident in the series.
>
> [*Emphasis added*]

[81] The issue of "standing" was raised repeatedly in requests by the respondent to dismiss the Application prior to the start of the hearing. The respondent's request for a Summary Hearing (SH) on the basis that the Application had "no reasonable prospect of success" as the applicant had no "standing" to challenge the requirement. This SH request was denied on the basis that the Application would be more appropriately decided on an evidentiary record, particularly as there were facts in dispute and thus, the tribunal could not determine on the basis of assertions alone that the Application had no reasonable prospect of success (see *Haseeb*, Interim Decision 2016 HRTO 805).

[82] During the hearing, the issue of "standing" was again pursued by the respondent. Expert opinion evidence was led regarding whether the applicant could *work* for IO, off-campus and full-time, anytime from the start of his job application (September 10, 2014) up to the date of rescission of the conditional offer letter (January 8, 2015). According to the respondent's theory, if the applicant could not be legally employed by IO off-campus and on a full time basis prior to the rescission of the offer letter, he had no "standing" to bring a claim for discrimination in employment.

[83] The HRTO has repeatedly ruled that to have standing to bring an application under section 34(1) of the *Code*, an applicant need only allege that her or his *Code* rights have been infringed. It is clear on the face of the Application that the applicant has alleged that *his* right to be free from discrimination with respect to employment was engaged in his interactions with IO. The applicant is not a "public interest" applicant but is indeed a person whose interest was directly at stake and who alleged that he experienced discrimination on the basis of citizenship.

[84] The applicant's recruitment process began with an in-person contact on campus followed by an on-line application on September 10, 2014. The "job posting preview" submitted by IO at the hearing (Ex. 4, Tab 1) clearly indicated that the expected start date was *May 2015* while the conditional offer letter dated December 2, 2014 that stipulated a start date of *February 2, 2015* with "negotiable" in parenthesis (Ex. 4, Tab 17 or Ex. 3, Tab 1). The Tribunal notes that IO led no evidence that the applicant was expected to commence any work before the completion of his engineering studies (in December 2014) or his graduation from McGill (in February 2015) to support its argument. The documentary and *viva voce* evidence disclosed

that neither IO nor the applicant expected full time work to commence before February 2015, some six (6) or more weeks after the deadline IO set for acceptance of its conditional offer of employment. This evidence is consistent with the testimony of IO's witness regarding new graduates starting employment *after* their graduation as well as the "job posting review" document (Ex. 4, Tab 1) that indicated an application deadline in September 2014 for jobs to commence in May 2015.

[85] The Tribunal accepts the uncontroverted evidence of the applicant that he was a student engineer who was genuinely seeking his first job that would commence after his graduation. He had high hopes that he would be employed by IO as he progressed through the hiring process. As a genuine job seeker, for work to commence at some yet to determined date after his graduation, it is abundantly clear to the Tribunal that the applicant had a direct stake in IO's hiring process, starting with IO's screening of recruits on the McGill campus and thus he has standing to challenge IO's employment practices under the *Code*. The interpretation of section 34 of the *Code* was fully explored in *Carasco v. University of Windsor*, 2012 HRTO 195, and the principles articulated there apply in the instant matter to confer standing and party status to the applicant based on his having a direct interest at stake in IO's hiring process.

[86] It was undisputed that up to February 2, 2015, the applicant was in Canada on an international student visa and was not in possession of proof of permanent residence or Canadian citizenship to meet the requirement imposed by IO as a pre-condition to his acceptance of the job offer and finalizing employment arrangements.

[87] It is also undisputed (and indeed common knowledge) that all employers are legally required to obtain proof of *eligibility to work in Canada* at the outset of the employment relationship. The un-contradicted evidence of the immigration expert called by the applicant was that a social insurance number (SIN) was required within three (3) days of the start of employment to demonstrate eligibility to work in Canada. If follows then that the law contemplates that the applicant need not possess a SIN during his job *search* process or at the time he accepts a job offer but it becomes necessary within 3 days of his start date on the job when he performs tasks in exchange for pay.

[88] The respondent led evidence and argued that the applicant was unable to take up full time work in Sarnia, Ontario between September 2014 and January 2015 as he was an international student without *any* work permit. The applicant led evidence and argued that he was at all times "in status" and able to perform some work, with restrictions, while he studied in Montreal, Quebec but did not do so because of his desire to focus on his studies. In the circumstances of an engineering student who was enrolled in his final term of studies, the timing of his job search in fall 2014 was reasonable and his limited eligibility to work during that period is irrelevant to the issues in the instant proceeding.

[89] There was ample evidence before the Tribunal that during his job search the applicant reasonably expected, and the applicant's expert witness concurred, that after graduation he would obtain a "Federal Work Permit" (aka PGWP) without delay. This "post-graduate work permit" (PGWP) was "open" and permitted him to work anywhere and with any employer in Canada. This "open" work permit would allow him to work off campus on a full time basis after his graduation for IO, but was limited to three years. In the Tribunal's view, the issue that the applicant faced is whether he could accept the offer of employment and concurrently provide written proof of eligibility to "work in Canada on a permanent basis", by the deadline December 11, 2014 set by IO for acceptance of the offer. The applicant was only able to provide an assurance that he would obtain a PGWP and pursue permanent residency status as it was his intention to "settle in Canada on a permanent basis."

[90] The Tribunal finds no merit in the respondent's argument or logic that if the applicant could not be legally employed full time off campus *prior* to the date of rescission of the offer letter, he has no standing to bring a claim for discrimination in employment. During this same time period, it could be reasonably argued that the applicant was not yet a graduate engineer and thus did not meet one of the basic requirements for the entry level engineering position at IO.

[91] On a practical level, students in their final term routinely engage in job search efforts in the expectation that they will graduate and meet the conditions of the job offers they have accepted for a start date at some point in the future. Along with his student cohorts who met with IO's representatives on campus, the applicant reasonably searched for work in fall 2014

and expected to graduate and obtain a post graduate work permit to commence full-time employment at IO in February 2015 or later but for his inability to meet IO's requirement to prove his eligibility to work permanently in Canada. The respondent has offered no policy reason to treat an international student differently from a student who is a Canadian citizen or permanent resident in her or his final term of study with regard to the timeline for job search and acceptance of conditional job offers.

[92] In Ontario, it is settled law that job applicants enjoy the protection of the *Code* even before they are formally employed as the wording "with respect to employment" in s. 5(1) of the *Code* has routinely been interpreted broadly to include pre-employment scenarios.

[93] The respondent provided no statutory authority or precedent in law in support of its proposition that the applicant, a prospective employee, must demonstrate eligibility to work without restrictions in Canada *before* engaging in a job search or *before* accepting an offer. The applicant was enrolled in his final term of study and there was no legal bar to him engaging in his search for a full time off-campus job. The fact that the applicant was a genuine job seeker who alleged differential treatment is sufficient to secure his standing as a party to an Application to challenge the prospective employer's hiring practice or policy. Moreover, a plain reading of s.5(1) of the *Code,* that addresses freedom from discrimination in employment, provides that "every person has a right to equal treatment ..." Contrary to the respondent's submission, there are no qualifiers to limit the meaning of "every person" or to disqualify the applicant from *Code* protection "with respect to employment".

[94] The Tribunal is of the view that there is no basis on which to deprive the applicant of an opportunity to have his Application dealt with on the merits given that his direct interests were engaged and his allegations of a breach of his human rights identified grounds of the *Code* that he believed were breached. To do otherwise would be to limit an individual's ability to access the Tribunal's process to assert a fundamental human right to be free from discrimination. This would be inconsistent with giving a broad and liberal interpretation to the *Code*, given that it is a remedial statute and quasi-constitutional in nature.

Issue 2: Is the requirement that an applicant be eligible to work in Canada on a permanent basis direct discrimination on the basis of citizenship?

Legal Framework

[95] This Application relates to ss. 5, 9, 11, 13(1), 23(1), 23(2) and 16(1) of the *Code*, some of which are reproduced below for ease of reference:

> 5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, *citizenship*, creed, sex ….
>
> 9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.
>
> 11. (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
>
> (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances…
>
> (…)
>
> (2) The tribunal or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

[96] Drawing on well established human rights jurisprudence summarized in *Garofalo v. Cavalier Hair Stylists Shop Inc.,* 2013 HRTO 170 at paras. 154 - 155, the onus on the parties is as follows:

> The applicant has the onus of proving, on a balance of probabilities, that a violation of the *Code* has occurred. A balance of probabilities means that it is more likely than not a violation has occurred. Clear, convincing and cogent

> evidence is required in order to satisfy the balance of probabilities test. See *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41 at para. 46.
>
> The initial onus is on the applicant to establish, on a balance of probabilities, a prima facie case of discrimination. A *prima facie* case is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a finding in the applicant's favour in the absence of an answer from the respondent. See *Ontario Human Rights Comm. v. Simpsons-Sears*, 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536 at para. 28. If the applicant establishes a *prima facie* case of discrimination, the respondent must establish, on a balance of probabilities, *a statutory defence and/or a credible non-discriminatory explanation for the impugned treatment*. If the respondent is able to rebut the applicant's *prima facie* case of discrimination, the burden returns to the applicant to establish, on a balance of probabilities*, that the respondent's explanation is erroneous or a pretext for discrimination.* See *Wedley v. Northview Co-operative Homes Inc*., 2008 HRTO 13 (CanLII) at para. 52. The ultimate issue is whether the applicant has proven, on a balance of probabilities, that a violation of the *Code* has occurred. Although an evidentiary burden to rebut discrimination may shift to the respondent, the onus of proving discrimination remains on the applicant throughout. See *Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593 (CanLII) at paras. 112 and 119. [emphasis added]

[97] Any policy that distinguishes between candidates based on personal characteristic is *per se* suspect. The *Code* does not provide a definition of "discrimination" but guidance can be obtained from *Andrews v. Law Society of British Columbia* [1989] S.C.R. 143, an early Charter case on citizenship (versus permanent resident status), where the Supreme Court stated at para 175:

> Discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society. *Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merit and capacities will rarely be so classed.* [emphasis added]

Citizenship

[98] In this Application, the issue concerns post-graduate work permit holders (international students or PGWP), permanent residents and citizens and their respective eligibility to work indefinitely as opposed to temporarily for a fixed-term with IO. It is generally understood that citizens and all permanent residents who maintain certain residency requirements prescribed by law are eligible to work on a permanent basis while visitors, international students, Convention refugees, temporary or migrant workers and other categories of persons who do not have the right to remain in Canada permanently, have limited or no eligibility to work in Canada. For clarity, only citizens and permanent residents have an unrestricted right to work for any employer, anywhere and permanently (indefinitely).

[99] IO's policy clearly conferred an advantage on Canadian citizens and permanent residents as it required that job candidates be able to work permanently in Canada starting on their first day at work. While persons with temporary work permits were not barred entirely from hire, IO reserved for itself the discretion to decline hiring candidates who were qualified but did not possess citizenship or permanent residency status. On those occasions when IO waived its policy, IO gave employees offers that were conditional on them obtaining permanent residence in a fixed period of three years or less.

[100] In the instant case, the applicant's contention is simple: all international students are non-citizens and *all are disadvantaged by IO's policy.* This constitutes discrimination on the basis of citizenship, notwithstanding the fact that not all non-Canadian citizens are disadvantaged by IO's "permanence requirement". For its part, the respondent asserted that its policy does not disadvantage permanent residents who are not citizens, so the issue really amounts to a distinction made on the basis of "immigration status" rather than citizenship. If the issue is so characterized, the respondent submitted that the *Code* offers no protection and IO's policy is not discriminatory.

[101] "Citizenship" is a listed ground in the prohibitions against discrimination contained in both the *Code* and the equality provisions of the *Canadian Charter of Rights and Freedoms Charter of Rights and Freedoms,* Part 1 of the Constitution Act, 1982 being Schedule B of the

Canada Act 1982 (U.K.), 1982, c.11 (the "*Charter*"). These various categories of non-citizens require resident permits that may be styled as "immigration status", such as a permanent resident, international student, refugee/asylum seekers etc. These categories of non-citizens are mutable and are not "personal characteristics" includes as protected grounds in Ontario's *Code* or the *Charter*. As cases decided under that *Charter* invariably engage government actors as respondents, those cases do not provide much guidance in deciding Applications under the *Code* regarding "citizenship" given that the *Code* provides a defence under s.16(1) that where "Canadian citizenship is a requirement, qualification or consideration imposed or authorized by law" , a right is not infringed. This defence effectively screens government (and others) who elect to use citizenship as a requirement and who can demonstrate that the requirement is imposed or authorized by law. In the instant Application, this defence is not available to IO.

[102] It appears that the applicant's issue is somewhat novel to HRTO as earlier cases involving a claim of "citizenship" were ultimately decided without resort to a detailed analysis of this ground in the *Code* and its relationship to various subgroups of non-citizens.

[103] In *Washington v. Student Federation of the University of Ottawa,* 2010 HRTO 1976 at para. 75, the Tribunal addressed an on-campus election requirement that, akin to IO, required that the applicant provide documents to show that he was a citizen or permanent resident as follows:

> The SFUO's requirement that candidates for election in 2004 be Canadian citizens or permanent residents was in violation of the *Code.* It operated to disqualify candidates based on their citizenship, a prohibited ground at both section 1 and section 5 of the *Code.*

[104] In *Washington*, the applicant was a permanent resident and the Application was dismissed in part as the applicant did not suffer disadvantage from the requirement, notwithstanding the Tribunal's conclusion that the requirement violated the *Code*. *Washington* provides this Tribunal with a precedent that use of "Canadian citizenship" as a criterion for eligibility, although not the sole criterion is sufficient to support a finding of discrimination based on citizenship. For further clarity, the addition of "permanent residence" as a second criterion

does not transform the analysis to one concerning "immigration status". In the Tribunal's view, the fact that Canadian citizenship is invoked by IO as a requirement governs the *Code* analysis; it is immaterial that it is not the only requirement.

[105] In another case alleging discrimination based on citizenship where sub-classes of non-citizens were raised, *Toussaint v Ontario (Health and Long-Term Care)*, 2011 HRTO 760 at para. 2, the HRTO decided the case based on s.16(1) *Code* defence "assuming but without deciding that the Application raises the ground of citizenship." *Toussaint* is not particularly helpful in the instant Application as it was immediately obvious that Ontario, the respondent in *Toussaint*, had the defence of s.16(1) available to it to justify any distinction it made between citizens and various sub-groups of non-citizens that Ontario imposed or authorized by law.

[106] As noted above, on its face, IO's policy gives preference to hiring Canadian citizens and permanent residents. This language addressing citizenship and permanent residence is found in the statutory defence at s.16 of the *Code*:

> 16. (1) **Canadian Citizenship** - A right under Part I to non-discrimination because of citizenship is not infringed where *Canadian citizenship is a requirement*, qualification or consideration *imposed or authorized by law*.
>
> (2) – A right under Part I to non-discrimination because of citizenship is not infringed where *Canadian citizenship or lawful admission to Canada for permanent residence is a requirement*, qualification or consideration adopted for the purpose of fostering and developing participation in cultural, educational, trade union or athletic activities by Canadian citizens or persons lawfully admitted to Canada for permanent residence.
>
> (3) A right under Part I to non-discrimination because of citizenship is not infringed where *Canadian citizenship or domicile in Canada with the intention to obtain Canadian citizenship* is a requirement, qualification or consideration adopted by an organization or enterprise for the holder of chief or senior executive positions. [italics added for emphasis]

[107] To interpret the meaning of the ground of "citizenship" in s.5(1) of the *Code*, the Tribunal found it useful to examine the *Code* for other usage(s) to ensure that a consistent meaning was attached to the term. "Canadian citizenship" appeared as a "requirement, qualification or consideration" and was associated with "permanent residence" and "Canadian domicile" in the

three statutory defences found at s.16 of the *Code* (above). The Tribunal interpreted the defences (each being distinct and not superfluous) as follows:

1. A statutory defence like s.16 of the *Code* exculpates or excuses conduct that would otherwise be found to be discriminatory. A plain reading of the s.16(1) defence above deems that a requirement that job applicants demonstrate that they are "Canadian citizens", distinct from the general pool of persons entitled to work in Canada, is non-discriminatory if it is *imposed or authorized by law.* (The corollary being that favouring Canadian citizens in employment decisions is not discrimination if the citizenship requirement is imposed or authorized by law.)

2. For the defence outlined at s.16(2) and 16 (3) of the *Code* to have substantive meaning, it must excuse a requirement, qualification or consideration made on the basis of "Canadian citizenship" or "permanent residence" or "domicile in Canada with intention to obtain Canadian citizenship" that would be capable of supporting a finding of discrimination *in the absence* of this specific statutory defence.

3. Furthermore, a plain reading of *s.16*(3) *Code* defence indicates that "an organization or enterprise" like IO can impose a citizenship requirement for chief or senior executive positions. This is not applicable to the instant case where the applicant sought an entry level position at IO.

[108] In the Tribunal's view, the very fact that the Legislature saw fit to deem that in certain situations, hiring preference for "Canadian citizens" and "permanent residents" is not discrimination, means that *conversely*, in the absence of the s.16 defence, HRTO can find that preferential hire on the basis of Canadian citizenship and permanent residence status amounts to discrimination under the *Code*. The language chosen by the Legislature in formulating a defence in s.16 clearly contemplated that "permanent residence" (or "domicile in Canada with intention to obtain citizenship") as well as "Canadian citizenship" are requirements that in certain context may properly found a claim of discrimination *on the ground of citizenship*.

[109] A plain reading of the text above indicates that the Legislature, in drafting the s.16 *Code* defence(s) expressly associated "domicile in Canada", "permanent residence" with the concept of "Canadian citizenship". In the Tribunal's view, this association supports the view that "permanent residence", although not expressly a listed "ground", is properly associated with the ground of "citizenship" (or lack thereof) under the *Code*.

[110] Furthermore, in the Tribunal's view, citizenship and non-citizenship are clear demarcations that are captured by the *Code*, with non-citizenship serving to capture all individuals in Ontario who are not Canadian citizens. Among non-citizens, there are individuals with varying residence status and different degrees of entitlement to work in Canada. Residence status and work entitlement are subject to change over time (i.e. they are mutable) within the class of non-citizenship. Citizenship, on the other hand, has attributes that are not mutable and the status of "citizen" is subject to revocation only in rare circumstances. To obtain protection from discrimination under the *Code* on the basis of "citizenship", the applicant need only establish that the alleged discriminatory treatment is linked to his personal characteristic of being a non-citizen of Canada (or non-Canadian citizen). The case law is clear that the applicant need only demonstrate that he belongs to a class of non-Canadian citizens; he need not demonstrate that all members of that class are disadvantaged by IO's requirement: *Meiorin,* above*,* at page 32 and 34 .

[111] The Tribunal finds that IO's "permanence requirement" imposed a disadvantage on the applicant and is linked to "Canadian citizenship" and "permanent residence", terminology contemplated by the Legislature and used together when drafting a defence to "Canadian citizenship" being a non-discriminatory requirement under s.16 of the *Code.* The fact that IO's requirement distinguished on the basis of "Canadian citizenship" and "permanent residence" does not morph the distinction to one based on "immigration status". As in *Washington* above, it is sufficient that "Canadian citizenship" is engaged by IO's requirement for it to run afoul of the *Code* on the ground of citizenship.

[112] For greater clarity, the fact that permanent residents, a category of non-Canadian citizens, are advantaged relative to the applicant is immaterial to the finding that IO's requirement imposed a disadvantage on the applicant and is discriminatory on the ground of "citizenship".

Proving discrimination in the hiring process

[113] As a job candidate, the applicant needed to demonstrate the following three criteria to establish a *prima facie* case of discrimination:

1. that he was qualified for the job;

2. he did not get the job because of a prohibited ground; and,

3. the person who got the job was no more qualified but lacked the attribute on which the applicant based his human rights complaint.

Shakes v. Rex Pax Ltd. (1981), 3 CHRR, D/1001 (Ont. Bd. of Inquiry).

[114] IO did not dispute that they treated the applicant differently based on the "permanence requirement" and thus a *prima facie* case was made out that required an answer from IO.

[115] In the Tribunal's view, given that a *prima facie* case has been established, IO was required to provide a response to the allegation of discrimination by way of a *statutory defence and/or a credible non-discriminatory explanation for the impugned treatment (*see *Garofalo* excerpted above). No statutory defence was advanced by IO.

[116] IO neither made assertions nor did it lead any evidence to counter the readily drawn inference that the purpose of its "permanence requirement" was to exclude job candidates' entry into Project Engineer positions who did not have permanent residence or citizenship. Instead, IO admitted the essential facts that underpin the claim of discrimination (see Ex. 2 supported by the *viva voce* testimony of the Human Resources Manager) and framed its "non-discriminatory explanation" for its policy as a *bona fide* occupational requirement (BFOR). In the Tribunal's view, IO's reliance on a BFOR defence means that IO has conceded that its requirement / policy is discriminatory (but it can be justified).

[117] IO's policy *on its face* distinguished between candidates based on the permanence requirement. It operated as a complete bar to any job candidate for the Project Engineer position who was not "eligible to work permanently in Canada". In the Tribunal's view, this was not a policy that was "neutral" on its face that had an indirect or disparate effect on a group of persons identified by a prohibited ground. No statistical analysis or examination of disparate impact, for example, was required to determine the effect of IO's requirement in imposing a disadvantage on the applicant and other international students (all of whom are non-citizens). This discrimination can be properly characterized as "direct" as opposed to "indirect" or

"constructive" and has implications for whether a defence of *bona fide* occupational requirement is available to the respondent.

[118] As noted in the section immediately below, IO's policy that distinguished between graduates who were eligible to work in Canada can be summed up simply as "IO does not employ new graduates who are international students with PGWP for entry level Project Engineer positions". This is a simple, direct and complete bar to employment for a group of non-citizens as in *Simpson-Sears*, a leading case on direct discrimination, but in this instance based on citizenship. In the result, the Tribunal finds that IO engaged in direct discrimination based on citizenship.

[119] As a *prima facie* case of discrimination on the ground of citizenship was made out by the applicant and IO did not rebut the allegations of discrimination as false, and in fact conceded the essential facts as alleged, in the Tribunal's view, the applicant has discharged his onus to demonstrate discrimination under the *Code* on the basis of citizenship.

Issue 3: Is the defence that the requirement is a *bona fide* occupational requirement (BFOR) available in this case of direct discrimination?

[120] The Supreme Court of Canada in *British Columbia v. B.C.G.S.E.U ("Meiorin"),* [1999] 3 SCR 3, at para. 54, articulated elements of a "unified" approach to address the availability of the defence of BFOR for direct and indirect discrimination. The Tribunal notes however, that unlike the *British Columbia Human Rights Code*, R.S.B.C. 1996, c. 210, on which *Meiorin* was decided, the Ontario *Code* expressly provides limited defences for indirect (constructive or adverse effects) discrimination. Ontario's *Code* provides specifically for a broad BFOR defence (s.11) *for constructive or adverse effects discrimination*, while only a limited BFOR defence is available for *direct* discrimination in the context of "special employment" as set out in s. 24 of the *Code*. The list of grounds in s. 24 of the *Code* (sex, marital status, age etc.) does not include citizenship and thus s.24 limited BFOR defence is not available to IO.

[121] In view of the unified approach articulated in *Meiorin,* the Ontario Court of Appeal later addressed the interplay with BFOR defences found in Ontario's *Code* in the a case on alcohol

and drug testing policy where the applicant alleged discrimination on the ground of disability. While ruling that *Meiorin* is applicable to Ontario, the OCA approved of a narrow construction of the availability of a BFOR defence in instances of direct discrimination. In *Entrop et al v. Imperial Oil Limited et al ("Entrop")*, 137 OAC 15 at para 80 (Laskin J.A. writing for the court reasoned):

> [77] The Supreme Court's three-step test was formulated in the context of a discrimination complaint under the *British Columbia Human Rights Code.* The wording of the statutory defences available to an employer under Ontario's Code differs from the wording under the British Columbia *Code*. Section 11 of Ontario's *Code* sets out in detail the elements of a BFOR; the comparable provision of the British Columbia Code, s. 13(4), provides simply that "subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement." [See Note 2 at end of document] In the case of handicap discrimination, s. 17 of the Ontario *Code* has no counterpart in the British Columbia *Code*. The difference in wording in the two statutes raises the question whether the Supreme Court's three-step test for justifying a prima facie discriminatory workplace rule should be applied in this case. In my view, the unified approach and the three-step test adopted in *Meiorin* should be applied. Applying the unified approach means that Imperial Oil can rely on s. 11 of the Code as well as s. 17. Under either section, however, to justify its workplace rules it must satisfy the three-step test in Meiorin. I rely on the following reasons for applying *Meiorin* in this case.
>
> [78] First, although the Supreme Court in *Grismer* said only that the Meiorin test applies to all claims for discrimination under the British Columbia Code, it seems to me the court contemplated that the test would apply generally to discrimination claims under human rights legislation unless precluded by the applicable statutory provisions. Thus, at p. 880 S.C.R., p. 393 D.L.R. of *Grismer*, McLachin J. wrote: "*Meiorin* announced a unified approach to adjudicating discrimination claims under human rights legislation."
>
> [79] Second, as McLachlin J. observed in Meiorin, the Ontario statute already reflects the unified approach she advocates. Section 11(2) of the *Code* provides that a board of inquiry shall not find a rule is a BFOR "unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship". Similarly, the statutory defence under s. 17 imposes a duty to accommodate to the point of undue hardship and a prima facie discriminatory rule not saved by s. 17 will be struck down: see Central Alberta Dairy Pool v. Alberta (Human Rights Commission), 1990 CanLII 76 (SCC), [1990] 2 S.C.R. 489, 72 D.L.R. (4th) 417.

> [80] Third, though the language of s. 11 does reflect the distinction between direct and adverse effect discrimination -- because it provides a BFOR defence "where a requirement . . . exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by prohibited ground of discrimination" -- *I would limit the situations to which s. 11 does not apply to those few cases that can be "neatly characterized" as cases of direct discrimination. I have in mind the kinds of cases referred by McIntyre J. in Ontario v. Simpson-Sears, supra -- "No Catholics or no women or no blacks are employed here" -- where the requirement expressly includes a prohibited ground of discrimination. So limiting the cases to which s. 11 does not apply is consistent with the reasoning underlying the Supreme Court's unified approach in Meiorin.* The case before us, however, is the kind of case where characterizing whether the discrimination is direct or indirect is problematic and thus where s. 11 should be applied using the Meiorin test. The focus should be, as s. 11 mandates, on the effect or the result of the challenged provisions of the policy. [emphasis added]
>
> [81] Fourth, the three-step justification test proposed by the Supreme Court is consistent with both the language of ss. 11 and 17 of the Code and the jurisprudence under these provisions: see Ontario (Human Rights Commission) v. Etobicoke (Borough), 1982 CanLII 15 (SCC), [1982] 1 S.C.R. 202, 132 D.L.R. (3d) 14 and Large v. Stratford (City), 1995 CanLII 73 (SCC), [1995] 3 S.C.R. 733, 128 D.L.R. (4th) 193. Indeed, the Supreme Court's new three-step test combines the elements of the previous test for justifying adverse effect discrimination with the elements of the previous test for justifying direct discrimination. And, as McLachlin J. observed in Meiorin, there is little difference between the two previous tests, other than semantics.
>
> [82] As I have said, eliminating the distinction between direct and adverse effect discrimination and adopting *Meiorin's* unified approach allows Imperial Oil to rely on s. 11 of the Code as a defence to *Entrop's* claim, a defence the Board held was not available to it. But that defence, which is an express BFOR defence, must now be assessed against the *Meiorin* test.

[122] It is thus the Tribunal's view that in direct discrimination cases (e.g. no lesbians/gays need apply for employment), despite the unified approach articulated in *Entrop*, no general BFOR defence is available to a respondent. A respondent in a direct discrimination case has only statutory defence(s) available to excuse a conduct or policy that is found to discriminate in a direct (or express, targeted) manner "where the requirement expressly included a prohibited ground of discrimination" as reasoned by Laskin, J.A. in *Entrop* above.

[123] In the Tribunal's view, IO's requirement operated as a simple and complete "citizenship" bar, albeit one that captured Canadian citizens and permanent residents. It directly screened out international students, who were eligible for post-graduate work permits on graduation, as "ineligible" for "career" Project Engineer entry level positions. The applicant, a PGWP holder, was the intended target/audience of IO's bid to screen out a sub-group of non-citizens in a purposive fashion, an effectively bar them from employment until they obtained permanent residenct status. As noted above, this Tribunal ruled that IO's policy / requirement amounted to discrimination on the ground of citizenship. Thus, the Tribunal finds that a BFOR defence (e.g. section 11 of the *Code*) is not available to IO based on an application of the Court of Appeal's carve-out from a BFOR defence in *Entrop*.

Conclusion regarding the availability BFOR defence

[124] IO's purported non-discriminatory explanation for this bar for career positions was framed as a BFOR, a justificatory defence available under s.11 of the *Code* in instances of adverse effects or constructive (i.e. *indirect*) discrimination is proven.

[125] Given that the law is settled that defences are to be interpreted narrowly, the s.11 BFOR defence is not available to IO to *justify* its total ban on hiring international students (a sub-class on non-citizens) for career positions as the Tribunal has found above that IO engaged in direct discrimination with a requirement that can be boiled down to: "IO does not employ new graduates who are international students with PGWP for entry level Project Engineer positions"

[126] In the event that the Tribunal is incorrect in the above finding and s.11 BFOR is an available defence or "non-discriminatory explanation" for the allegations that established a *prima facie* case of discrimination, IO's BFOR assertions will be addressed below expressly.

Issue 4: If the defence that the requirement is a *bona fide* occupational requirement (BFOR) is available, has the defence been established?

[127] The evidence was clear that IO's requirement that candidates be eligible to work in Canada on a permanent basis as a pre-condition to hiring is restricted to its "career" positions only. For co-op or regular breaks between school terms, international students like the applicant who possessed a limited work permit were welcomed as short-term employees. No evidence was led by IO to demonstrate that job tasks in co-op sessions were not linked to the ability to work permanently, except for the fact that the sessions were, by definition, time limited.

Legal framework

[128] It has long been established that an occupational requirement relates to the functions an employee must fulfill to carry out her or his practical, daily tasks safely and efficiently.

[129] Assuming but not deciding that IO's permanence requirement amounts to constructive (or indirect) discrimination, below is an excerpt from HRTO's jurisprudence, *Garofalo*, above, that summarizes the case law (including *Entrop* and *Grismer*) regarding BFOR defence that is available in instances where a facially neutral rule (i.e. indirect discrimination under s.11 of the *Code*) is challenged:

> [155] The initial onus is on the applicant to establish, on a balance of probabilities, a *prima facie* case of discrimination. A *prima facie* case is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a finding in the applicant's favour in the absence of an answer from the respondent. See *Ontario Human Rights Comm. v. Simpsons-Sears*, 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536 at para. 28.
>
> …
>
> [170] The applicant alleged that Cavalier's preferential pay policy for barbers had an adverse discriminatory effect on her because she is a woman, and was not a *bona fide* occupational requirement. This allegation engages ss. 5(1), 9 and 11 of the *Code*. Section 11 of the *Code* recognizes that a rule or standard can be

neutral on its face, but have an adverse effect on an individual or individuals because of a *Code* ground...

[171] There is a three-step test for determining whether a *prima facie* discriminatory rule or standard has a *bona fide* and reasonable justification. The respondent may justify the impugned rule or standard by establishing, on a balance of probabilities, that:

> 1) it adopted the rule or standard for a purpose rationally *connected to the function being performed;* [emphasis added]
>
> 2) it adopted the rule or standard in an honest and good faith belief that it was necessary to the fulfilment of that purpose; and
>
> 3) the rule or standard is reasonably necessary to accomplish its purpose, in the sense that the respondent *cannot accommodate individuals sharing the characteristics of the applicant without experiencing undue hardship.* [emphasis added]

See *Entrop v. Imperial Oil Limited* (2000), 2000 CanLII 16800 (ON CA), 50 O.R. (3d) 18 (C.A.) at paras. 75-81, which cited *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC), [1999] 3 S.C.R. 3 ("*Meiorin*") at para. 54; and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights) ("Grismer")*, 1999 CanLII 646 (SCC), [1999] 3 S.C.R. 868 at para. 20.

[172] In *Grismer*, *supra*, the Supreme Court of Canada explained further at para. 21:

> This test permits the employer or service provider to choose its purpose or goal, as long as that choice is made in good faith, or "legitimately". Having chosen and defined the purpose or goal – be it safety, efficiency, or any other valid object – the focus shifts to the means by which the employer or service provider seeks to achieve the purpose or goal. The means must be tailored to the ends. For example, if an employer's goal is workplace safety, then the employer is entitled to insist on hiring standards reasonably required to provide that workplace safety. *However, the employer is not entitled to set standards that are either higher than necessary for workplace safety or irrelevant to the work required, and which arbitrarily exclude some classes of workers.* On the other hand, if the policy or practice is reasonably necessary to an appropriate purpose or goal, and accommodation short of undue hardship has been incorporated into the standard, the fact that the standard excludes some classes of people does not amount to

> discrimination. Such a policy or practice has, in the words of s. 8 of the [British Columbia] *Human Rights Code*, a "bona fide and reasonable justification". Exclusion is only justifiable where the employer or service provider has made every possible accommodation short of undue hardship. [emphasis added]

[130] More than a decade after *Grismer*, the Supreme Court of Canada in *Meiorin* also echoed the ruling in *Simpson-Sears* regarding the need for a BFOR to prove a rational connection between the requirement and the function being performed, the honest and good faith belief that the requirement is necessary for the fulfillment of the purpose for which it was adopted, proof that the requirement must be reasonably necessary and that undue hardship means it is impossible to accommodate individuals who share the characteristics of the applicant.

Occupational Requirement must be linked to the performance of the essential job tasks

[131] In the Tribunal's view, IO failed to meet the first of the three-part test articulated above in *Meiorin*. The Tribunal finds that there was no evidence that the permanence requirement, while it purportedly pursued a business purpose of retention of trained personnel and succession planning, was rationally linked to any specific task to be performed by the Project Engineer.

[132] The Tribunal is not persuaded that IO's pursuit of a particular employment strategy / hiring policy that included the blanket exclusion of PGWP holders (all of whom are non-citizens) can be properly treated as an "occupational requirement" for the purpose of the *Code*. This would be a departure from the understanding attached to the term "occupational requirement" in human rights and labour jurisprudence. IO provided no statutory authority or case law precedent to support its proposition that a hiring policy/ permanence requirement can be cast as an "occupational requirement" in human rights or labour jurisprudence. IO also provided no evidence of how possession of a PGWP influenced how the temporary work permit holder performed her or his tasks on the job. To date, "occupational requirement" has been linked to skills that are required *to safely perform discrete tasks that are an essential part of a job*.

[133] The Tribunal notes that the fact that a "requirement" can be waived through a process of management approval (see Ex. 4, Tabs 11 and 21) suggests that it is in fact optional, and not required or necessary for the performance of the job. There was no evidence of a tie-in between the job function and the "permanence requirement". IO's evidence was that it used its discretion to suit its needs based on the availability of an applicant's skill in the marketplace. Even if this exercise of discretion was not entirely arbitrary, the Tribunal finds that IO's exclusionary hiring policy cannot be characterized a *bona fide* "occupational requirement". The excess / scarcity of skills might translate to IO's incentives to new recruits and this may contribute to the waiver of qualifications that are "nice to have" or "considered an asset". The very fact that the job qualification/ employment pre-condition can be waived offers proof that it is not a "requirement" and that it is unnecessary to the job function being performed. This further strengthens the Tribunal's view that the "permanence" requirement is unessential/ irrelevant to the performance of the job and thus cannot constitute an "occupational requirement".

The requirement was adopted in an honest and good faith belief that it was necessary

[134] IO also failed to meet the second part or the three-part test. There was no evidence from IO's witnesses to address the climate in which the policy was adopted, to give evidence of honest and good faith belief in the necessity of the "requirement" to achieve the purpose for which it was adopted. As mentioned earlier, the Tribunal noted that one of the persons listed as authors of the policy was still employed by IO at the time of the hearing but was not called as a witness to state her recall of the purpose of the policy and the climate in which it was developed nor was she consulted by the Human Resources Manager who testified. There was no evidence before the Tribunal of what the policy drafters believed to be the purpose of the requirement in 2004 or earlier.

[135] The Tribunal also notes that IO's risks were not empirically or rationally assessed at the time of imposing the requirement. There was no evidence of an empirical assessment of "necessity" to adopt the impugned policy / requirement for the purported purpose of minimizing

the “risk” IO’s succession planning or risk to investment in training new employees. There was no evidence that at the time of adopting the impugned requirement, IO made an assessment of the costs or risk of loss of investmentand disruption to IO’s succession plans if a PGWP holder was forced to leave IO’s employment because of a failed application for permanent resident status and non-renewal of her or his PGWP.

[136] Thus, the Tribunal finds that there was no evidence that the permanence requirement was adopted for its purported purpose with an honest belief that it was necessary to mitigate IO’s risk to its succession plan or the risk of loss of investment in the training of entry level engineers.

IO cannot accommodate PGWP holders without experiencing undue hardship

[137] IO sought to establish that its employment strategy that includes retention and succession planning goals necessitated that IO not assume the risk that they would lose their “training” investment in a Project Engineer who was a PGWP holder if she or he did not become a permanent resident. No evidence or reason was offered as to why this risk was relevant only to training Project Engineers as opposed to other employees for whom IO waived the permanence requirement. (Note that 13 of 16 employees identified among the exceptions cited in the evidence above, who joined IO on a temporary work permits, the Tribunal found to be relatively inexperienced.) Nor was this risk contrasted with the rate of attrition / voluntary departures from IO within the first 3 years of hire of Project Engineers that would impact succession planning – the purported reason for the requirement.

[138] No evidence was provided by IO to demonstrate that PGWP holders could not renew their permits beyond the initial 3 year term (K.P.’s email in 2011 assures IO of renewals) although this three-year period was relied on to assess its risk of non-retention of a PGWP holder.

[139] Additionally, IO provided no empirical data to (a) demonstrate from their hiring experience that persons whom they hired on PGWP (for non-Project Engineer position) voluntarily or involuntarily departed within the 2-3 years that it generally took to obtain

permanent residency, at a higher rate than citizens or permanent residents or (b) demonstrate from their experience that persons whom IO hired on PGWP (e.g. engineer like K.P. and D.P. and likely others that may comprise a reasonable data set from which to make a statistical judgment) departed because of failure to obtain permanent resident status or (c) demonstrate the rate of progression out of the Project Engineer position to higher positions of responsibility within the 2-3 years required to change one's PGWP status to permanent resident status. In the result, IO provided no evidence of the measure of the risk to its succession planning strategy or the risk of loss of investment in training entry level engineers if it offered employment to PGWP holders for the entry level Project Engineer position conditional on them pursuing permanent residency (as was done for many other positions within IO).

[140] The Agreed Statement of Facts and IO's Human Resources Manager's testimony stressed that IO's placed an "enormous investment" in its employees in "training, development and education". However, the Tribunal noted that there was no quantification of costs and time for the training for entry level Project Engineers who were citizens or permanent residents, nor were those costs contrasted with that associated with inexperienced engineers (e.g. K.P.) who were hired as "exceptions" to the policy to assist the Tribunal in appreciating the *relative* level of hardship that PGWP holders presented to IO.

[141] With respect to potential loss of training investment in PGWP holders, the Tribunal was unable to assess what the witness meant in empirical costs by "huge" and "enormous" investment in training. IO's failure to provide empirical evidence e.g. contrasting the investments made in newly hired Project Engineers with those for employees to whom "exceptions" were granted does not permit the Tribunal to assess whether the costs associated with a PGWP holder, like the applicant, would cause undue hardship to the financial viability of the corporate enterprise.

[142] The Tribunal notes that IO did not rely on its own personnel files to extract "experience data" of the employees for whom it waived the requirement and who subsequently obtained permanent residency within 3 years. This data of IO's actual experience with PGWP holders becoming permanent residents did not inform IO's 2004 policy in the first place, nor did IO demonstrate that it made any effort to update its policy after a decade, to align with the

changing nature of the *Immigration Act* that permitted new graduates from participating institutions to become permanent residents, without the need for IO's sponsorship or any other involvement.

[143] Finally, IO provided no empirical evidence of the disruption to its succession planning (and grooming of employees for progressive responsibility) if IO attempted to accommodate a PGWP holder by delaying promotion out of the entry level position until permanent residence was established. Notwithstanding that the onus to prove undue hardship rests squarely with the respondent IO, as noted in the evidence above (paras. 78-79), the applicant worked-up data disclosed by IO during the hearing and demonstrated that approximately 30% of new hires are not promoted within 3 years

[144] The Tribunal thus finds that the "risk" of disruption to IO's succession planning, involving regular promotions from the early years of employment, is minimal if any at all. The applicant's rough analysis demonstrated that at least 30% of Project Engineers remained in their initial roles at the end of their third year of hire. For clarity, if a PGWP holder was not promoted within 2-3 years that would have little bearing on the rate at which IO could predictably train and promote 70% of the employee pool with the expectation that she / he would remain with IO and assume progressive responsibilities. During the first 2-3 years of hire that a PGWP holder may need to attain permanent residence status, there was some job movement/ promotions for Project Engineers, but not at a sufficient rate to constitute undue hardship to the respondent.

[145] Some hardship is contemplated by the *Code* in any accommodation measure. It is, however, *undue* hardship that must be demonstrated as a defence to exclusion of a group of persons who are deemed not to meet a BFOR. Even if the Tribunal were to assume that IO's policy with the "permanence requirement" is a BFOR, and assume further that a BFOR defence is available in this instance of direct discrimination, IO has failed to discharge its onus to demonstrate *undue* hardship.

Conclusion regarding whether IO established a BFOR defence

[146] Given the above finding that IO's permanence requirement is not an "occupational requirement', there is no need for this Tribunal to examine at length the *bona fides* or honesty of IO's belief that the requirement achieved its purported purpose of succession planning and retention of trained employees, or, to examine IO's assertion of undue hardship. The Tribunal has nonetheless addressed these parts of the *Meiorin* three-part test in the interest of completeness.

[147] In addressing the BFOR defence, the Tribunal is particularly guided by the Supreme Court of Canada in *Grismer*, above, that "the employer is not entitled to set standards that are either higher than necessary for workplace safety or irrelevant to the work required, and which arbitrarily exclude some classes of workers." IO's requirement operates as a blanket exclusion of PGWP holders from Project Engineer positions. The waiver of this requirement appears to be linked solely to market forces: new engineering graduates without special skills are readily available and the blanket exclusion of PGWP holders does not affect IO's ability to fill its vacancies (per testimony of IO's Human Resources Manager). Whatever the "risk" to IO's succession planning or investment in training, IO demonstrated that it would assume these risks when it suited the corporation to recruit particular individuals with sought-after skills. This market based approach to the waiver of the requirement is not consistent with compliance with the *Code* that is premised on respect for every individual's dignity.

[148] IO had the onus to establish a defence of BFOR, if this defence is at all available in this instance of direct discrimination, and it has failed to do so.

Issue 5: Did IO engage in prohibited conduct described in s. 23(1) and 23(2) of the *Code* in posting or advertising the requirement and in asking questions about this requirement in interviews?

[149] The *Code* provides as follows:

> 23(1) Discriminatory employment advertising – The right under section 5 to equal treatment with respect to employment is infringed where an invitation to apply for

> employment or an advertisement in connection with employment is published or displayed that indirectly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination.
>
> (2) Application for employment – the right under section 5 to equal treatment with respect to employment is infringed where a form of application for employment is used or written or oral inquiry is made of an applicant that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination.

[150] The applicant raised violation of these sections of the *Code* at the outset of the hearing and during argument after evidence was led. The respondent, however, did not address these sections of the *Code* expressly and appeared instead to focus on whether IO's requirement "indicates a qualification by a prohibited ground" or alternatively, could be justified as a BFOR.

[151] It was manifest from the documents provided and evidence of IO's witness that the impugned permanence requirement was posted as a condition for applying for a permanent job and that the applicant was repeatedly asked questions regarding his eligibility to work on a permanent basis. Based on the evidence on the record, IO has engaged in prohibited conduct outlined in sections 23(1) and 23(2) of the *Code* regarding discriminatory employment advertising and written and oral inquiries that classified the applicant on a prohibited ground. IO has essentially conceded that it engaged in the activity that is prohibited by sub-sections 23(1) and (2) of the *Code*.

[152] As the Tribunal has found above that the pre-employment requirement/ qualification (that required proof of eligibility to work in Canada on a permanent basis) is discriminatory, and no defences under the *Code* has been established by IO, IO's prohibited conduct infringed the right of the applicant to equal treatment with respect to employment that is provided for by section 5 of the *Code*.

THE APPLICANT'S "HONESTY"

[153] IO lead evidence through John Blysniuk, a manager, that on January 4, 2015 he gave consideration to the applicant's file and issued a direction by email to rescind the offer to the applicant (tab 64). He testified that he decided on the basis of the applicant's dishonesty,

rather than an evaluation of whether the applicant was "exceptional" and worthy of the waiver of the requirement. He did not consult with a lawyer or with Farooqi (interviewer who gave directions to Human Resources) and admitted that he did not read the entire file before he decided to rescind the *expired* offer in early January 2015, weeks after the deadline for the applicant's acceptance. Aside from Blysniuk's *viva voce* testimony, there was no evidence in all the internal IO correspondence or the phone and email communication to the applicant that after December 11, 2014, IO was considering a waiver of the requirement or that IO had judged him to be unfit for hire as he had misled the recruiters regarding his status as a permanent resident or Canadian citizen.

[154] In response to Blysniuk's email (above, Tab 64), M. Farooqi who had ranked the candidates wrote on January 4 as follows (at 7:37 p.m. at Tab 64):

> I would agree we should rescind the offer. When we interviewed last, we had 5 candidates recommended for hire however there were only 4 open positions. Now that we had rescind [sic] one offer, we can consider the 5th candidate S. for hire (see attached list with recommendations)
>
> Note-> S. did mention that he has a graduate work permit so in this case it will have to be a conditional offer.

[155] In a previous email dated November 28, 2014 (at 12:51 p.m., Tab 64), Farooqi indicated that "[my] gut feel says he [the applicant] would be similar to S.'s case in regards to eligibility" and indicated that he had questioned S in detail but missed asking the applicant for proof. Regarding making an offer to the applicant, Farooqi instructed "proceed only if he [the applicant] is eligible per the rules. I don't think we want to go out of the way to get him hired…" On the face of this email, Farooqi appeared reluctant to make an offer to the applicant, who he suspected was an international student. This reluctance appeared absent when Farooqi instructed that an offer be made to the 5th ranked candidate, S., on January 4, 2015 who like the applicant was an international student who did not meet the "permanence" criteria. Farooqi clearly indicated that a "conditional offer" (to work on a PGWP and pursue permanent resident status) was required (Tab 64) for candidate "S".

[156] From the four sample conditional offers above spanning the period 2010 – 2016, and additionally, from the hire of K.P., an electrical engineer, it is clear that IO had developed text to specifically deal with international students, who like the applicant, had a PGWP. None of these hires involved the entry level Project Engineer position.

[157] IO sent a *pro forma* rescission letter on January 8, 2015 to the applicant that mentioned "because you have not met the conditions of employment … [to produce proof of citizenship or permanent resident status]". On its face, this letter made no mention of honesty as a factor in the rescission and no mention of whether a waiver was considered and declined. This letter was also identical in all respects to another letter dated December 16, 2014 that referred to a job offer made on December 2, 2014. However, there was no clarification regarding whether IO personnel delayed sending the *pro forma* rescission letter to the applicant pending a review of the applicant's file a decision on a waiver of IO's requirement.

[158] The Tribunal finds that there is some evidence to support IO's assertion that the applicant was not granted the same consideration (or exception) given to S. based on the following: IO judged the applicant to be dishonest and unfit for hire; in contrast, S. had disclosed during the interview process that he had a PGWP only; IO's contemporaneous precedents of issuing conditional offers to non-Project Engineer candidates illustrated that it had some history of hiring candidates for other positions who did not meet the permanence requirement and, finally, Blysniuk's *viva voce* evidence regarding his review of *some* of the notes in the applicant's file.

[159] The Tribunal noted, however, that IO's documents indicated, and Blysniuk acknowledged this fact during his testimony, that the applicant's status as an international student was a live issue, known to IO (as disclosed Farooqi's email in Ex. 4, Tab 10) as early as November 27, 2014. In my view, it was open to IO at that juncture to reconsider use of the "permanence requirement" and hire the applicant conditionally, rather than waive the same requirement 6 weeks later to hire S., the 5th ranked candidate, after removing the applicant from consideration and after a month's delay during the period of IO's offer and acceptance for the 2015 new hires.

[160] While in hindsight the applicant's conduct may be judged to be dishonest (and the applicant conceded that he lied), it is the Tribunal's view that one cannot lose sight of the circumstances. IO gave no assurance to candidates in 2014 that it would consider a waiver to the pre-employment requirement and IO's evidence was clear that it provided no waivers for entry level Project Engineer positions. The first waiver in favor of a Project Engineer was made only ***after*** the applicant's ruse was admitted his ruse.

[161] Finally, it is noteworthy that the offer letter to the Applicant required him to accept by December 11, 2014 and that offer expired with the passage of time. Blysniuk's effectively rescinded an already expired offer letter. In the result, the Tribunal finds that there is insufficient evidence to demonstrate on a balance of probabilities that the applicant's dishonesty was the *sole* reason for his non-hire. In the Tribunal's view, the expiry date of the offer letter that contained the discriminatory requirement that he could not meet is the date on which the applicant's loss as a job seeker crystallized. There was no evidence from IO that it considered waiving the requirement as requested by the applicant on December 10, 2014 and in so doing, extended the offer deadline past December 11. In the Tribunal's view, IO's reason for the rescission of an already expired and unmet conditional offer is immaterial, except to the extent that it may relate to remedy.

[162] The Tribunal finds that time span that is material to the determination of whether IO violated the *Code* ran throughout the selection process to the deadline contained in the conditional job offer, during which time the applicant was in his final term before graduation and fully expected to obtain an open PGWP once he graduated. In the circumstances, the Tribunal need not determine IO's primary reason for the non-hire of the applicant to decide whether IO breached the *Code*, as the conduct that amounted to a breach of the *Code* relates to IO's imposition of the requirement including the information IO shared on campus with potential recruits, the job posting, the online application ,the questioning at multiple interviews and making the requirement a condition of acceptance of the job offer.

[163] Similarly, the Tribunal need not determine whether there is any likelihood that the applicant, if he had adopted a truthful approach as suggested by Blysniuk, would have been "accommodated", i.e. *not* screened out as "ineligible" by IO recruiters. The Tribunal accepts the

evidence of the Human Resources Manager (in cross-examination) that the applicant, who was processed as "eligible", would be working at IO today if he had been able to produce the required documents to demonstrate citizenship or permanent resident status. The Tribunal also accepts the applicant's explanation of his ruse in seeking to have an opportunity to "sell" himself and then educate IO about his route to permanent resident status (akin to the education of IO personnel (S.B.) about PGWP by K.P. (electrical engineer) in 2011 that netted him an "exception".) Finally, the Tribunal also accepts that the applicant feared that the rumour he had heard was true: that IO would exclude him from interviews for the entry level Project Engineer position if he revealed his status as an international student.

[164] Given the evidence of IO's Human Resources Manager that no exceptions had been granted up to December 2014 to entry level Project Engineers, the Tribunal finds that the applicant's fear was well-founded. It is clear that the applicant, a young graduate (age 24 at the time of the job search) did not appreciate that his ruse might be viewed unsympathetically as a measure of untrustworthiness, where trust is essential to his role as an engineer. In the Tribunal's view, "but for" IO's permanence requirement, the applicant would have no need for a ruse to circumvent the requirement. Thus, an issue regarding the applicant's honesty would not have arisen and in all likelihood, the applicant would have been hired by IO as he was ranked first among the candidates.

[165] For clarity, the fact that the applicant may be seen as untrustworthy is not relevant to a determination of whether IO's conduct up to the date of the offer letter's expiry is a violation of the *Code*. The applicant had no role in devising or applying IO's impugned policy during the fall of 2014. The advertising of and application of the impugned policy or "permanence requirement" is the central issue in this Application. Even if the Tribunal accepted the fact that the applicant misled IO may have factored in IO's decision to not grant a waiver and to not hire him, it is clear to the Tribunal that the applicant's inability to meet the permanence requirement contributed to IO's non-hire.

[166] Finally, in view of IO's submission that the applicant was not hired for reason of dishonesty, the Tribunal notes that the case law is clear that a protected ground need only be one of the factors involved for there to be a violation of the *Code*. The "permanence

requirement" imposed by IO need not be the only factor, or even the primary factor: *Janzen v. Platy Enterprises Ltd.,* 1989 CanLII 97 (SCC), [1989] 1 S.C.R. 1252. In the Tribunal's view, IO's imposition of the permanence requirement is the impulse for the applicant's ruse that later formed the basis for viewing him as dishonest. The Tribunal views the ruse as inextricably linked to the "permanence requirement" and find that IO's requirement was a factor in its decision to not hire the applicant. As noted above, the Tribunal finds that IO's "permanence requirement" is discriminatory and tainted the hiring process, resulting in discrimination in employment on the ground of citizenship.

CONCLUSION

[167] The applicant had standing to bring this Application to the HRTO for a decision on the merits of his allegations.

[168] The applicant has discharged his onus to demonstrate that he experienced discrimination in employment (hiring process) based on the ground of citizenship contrary to the *Code*. IO has engaged in prohibited conduct outlined in sections 23(1) and 23(2) of the *Code* regarding discriminatory employment advertising and written and oral inquiries that classified the applicant (and deemed him ineligible for employment) on the basis of citizenship. The defence of BFOR, if it is at all available to IO in this instance, was not established.

ORDER

[169] For the foregoing reasons, the Tribunal makes the following order:

a. Imperial Oil's policy of requiring a job applicant to disclose in writing and verbally that she or he is a citizen or permanent resident of Canada is prohibited conduct (outlined in sections 23(1) and 23(2) of the *Code*) that directly violated section 5(1) of the *Code*, and is not saved by any defence available in the *Code*;

b. The applicant and the respondent shall advise the Tribunal within 45 days of receipt of this Interim Decision whether they are interested in engaging in mediation, with or without assistance of a Tribunal member, to settle this matter; and,

c. If mediation is not desirable, the Tribunal shall schedule two days for evidence and argument regarding damages to determine an appropriate remedial order.

Dated at Toronto, this 20th day of July, 2018.

"Signed by"

_____
Yola Grant
Associate Chair