

ADVERSE IMPACT

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Rebecca Durcan
Richard Steinecke

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Before we begin...

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 - rdurcan@sml-law.com
 - rsteinecke@sml-law.com

Concept of Adverse Impact Discrimination

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- One of the more challenging expectations
 - E.g., examination requirement impact re: anxiety disorders
 - E.g., university degree requirement; rarer for men to get one
 - ✦ Regulator makes a rule / policy
 - ✦ It applies to everyone equally
 - ✦ However, it has a more than usual impact on some groups
 - ✦ Those it impacts more are in a protected group
- Issues:
 - Evidence of undue impact
 - Does it adversely impact a protected group
 - Can concern be accommodated to point of undue hardship

Context where issue has been raised about a Regulator

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- A. Brar and others v. B.C. Veterinary Medical Association and Osborne, 2015 BCHRT 151 (CanLII), <https://canlii.ca/t/glsds>
- B. Siadat v. Ontario College of Teachers, 2007 CanLII 253 (ON SCDC), <https://canlii.ca/t/1q84w>
- C. Berard v College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario, 2015 CanLII 67404 (ON HPARB), <<https://canlii.ca/t/glqsb>>
- D. Xue v College of Massage Therapists of Ontario, 2014 CanLII 20924 (ON HPARB), <https://canlii.ca/t/g6pff>
- E. Gichuru v. The Law Society of British Columbia (No. 4), 2009 BCHRT 360 (CanLII), <https://canlii.ca/t/26d13>
- F. Complainant v. College of Physicians and Surgeons of BC (No. 2), 2018 BCHRT 189 (CanLII), <https://canlii.ca/t/hthx9>
- G. Law Society of Ontario v. Stewart, 2019 ONLSTH 118 (CanLII), <https://canlii.ca/t/j2hbm>
- H. Ontario Teacher Candidates' Council v. The Queen, 2021 ONSC 7386, <https://canlii.ca/t/jlcvg>

A. *Brar v BCVMA*

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- Was really a case of systemic discrimination against Indo-Canadian veterinarians and applicants
- But the rules/policies in issue are illustrative
 - Language proficiency requirements
 - Criteria for unscheduled inspections
 - Transparency of complaints outcomes
- Evidence of actual collateral purpose
 - But even without that evidence, could complaint have been substantiated?
- Damages and corrective order

B. *Siadat v OCT*

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- Iranian refugee required to provide original documentation
 - Impossibility
 - Risk to applicant's family
- Required of all applicants to avoid fraud
 - Declined to accommodate with other mechanisms to verify education because of unreliability
- Court order to reconsider and accommodate

C. Berard v CTCMPAO

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- Grandparenting requirement of 5000 patients visits during the previous five years before proclamation
- Applicant argued that requirement had an undue impact given her pregnancies and childcare responsibilities during the period
- Board concluded concern not proved
 - Applicant did not establish a causal connection
 - ✦ Applicant could never have met the requirement
 - Also: reasonably necessary to ensure safe practice

D. *Xue v CMTO*

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- Applicant for registration unsuccessful in OSCE due to language-based communications concern
- Board upheld refusal of registration
 - No evidence that second language posed barrier to those educated elsewhere in another language
 - In any event, language fluency was a necessary component to working within the health care system (patient safety)

E. *Gichuru v. The Law Society of British Columbia*

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- Registration application form question:
 - Have you ever been treated for schizophrenia, paranoia, or a mood disorder described as a major affective illness, bipolar mood disorder, or manic depressive illness?
- “Yes” answer enmeshed applicant in process
 - Continuous conditions and reporting
- Tribunal found question to be discriminatory
 - Also found that it had an undue impact beyond public interest
- Required rewording of question to be more relevant

F. *Complainant v CPSOBC*

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- Long history of poor judgment in practice
 - Practitioner has a mental disability
- Regulator imposed competency and currency requirements to re-enter practice
 - Imposed on all applicants with extended practice absences
- Arguable case of nexus between disability and meeting the universal requirements
- Arguable case that regulator could accommodate practitioner without compromising public safety
- Full hearing required

G. *LSO v Stewart*

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- Practitioner had engaged in conduct that amounted to serious misconduct
- Interim suspension
- Practitioner recognized mental illness and substance abuse disorder, obtained treatment
- Misconduct proceedings halted
- Transferred to incapacity route
- Consent order for treatment and monitoring
- Tribunal commends approach

H. *Ontario Teacher Candidates Council v The Queen*

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- In 2017 the MOE conducted a survey to gauge parents' opinions on declining EQAO math scores
- Government decided that in order to become registered with OCT, applicants needed to pass a Mathematics Proficiency Test (MPT)
- Rationale? Concern that Ontario students' math skills were falling
- Desired outcome? To ensure Ontario teachers were equipped to teach math so that students' could better grasp math skills

H. Ontario Teacher Candidates Council v The Queen

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- But...
 - Data demonstrated that:
 - ✦ Racialized applicants failed the MPT at a far higher rate than White applicants
 - ✦ Alternative options (mandating a math course in educational programs, requiring a math course in undergraduate program) were as effective as the MPT
 - ✦ Weak positive correlation between teacher competency scores and student outcomes
 - MPT was only one component of the Government's four year plan
 - There was a significant under representation of Racialized teachers in Ontario
 - Racialized students benefitted from being taught by Racialized teachers

H. Ontario Teacher Candidates Council v The Queen

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- OTCC claimed that the MPT breached s. 15 of the Charter

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

- OTCC sought a judicial review before the Divisional Court

H. *Ontario Teacher Candidates Council v The Queen*

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- Each party relied on data and expert reports
- OCCT
 - High stakes teacher testing has detrimental effects on racial diversity within the teaching population
 - There is empirical data that points to an association between teacher test scores and student performance, but that association is limited and does not demonstrate a causal relationship between teacher test scores and student test scores.
 - One expert passed the math component but failed the pedagogy component three times
- Government
 - There is a correlation between teacher competence and confidence in math and student performance.
 - A key benefit of the MPT is that it encourages math-avoidant teacher candidates to sign up for a mathematics course, whereas they would simply avoid taking math courses altogether if there were not a “bar” at the end of the teacher certification process.

H. *Ontario Teacher Candidates Council v The Queen*

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- Government reassured court that applicants who failed the MPT could take it again (and again ...)
- Court concerned that this was not a panacea to concern that MPT was resulting in marked different marks dependent on race (and experts stated that disadvantaged candidates would be less likely to retake the MPT)
- Government said that the MPT data needed time to settle
- Court concerned that this would simply result in more Racialized applicants failing and not obtaining CQR

H. *Ontario Teacher Candidates Council v The Queen*

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- Court determined that MPT had an adverse impact on Racialized applicants and that it imposed burdens that reinforced, exacerbated or perpetuated the disadvantages that Racialized applicants face in registering as a teacher
- Court also determined that the MPT did not minimally impair s. 15 rights
- Therefore, the MPT requirement failed and was declared null and void

Strategies for Regulators

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- Do not make decision before reviewing all of the data
- Build in time to ensure informed decision
- Conduct impact analysis of all major rules/policies
- Should regulators seek evidence of adverse impact?
- Treat all concerns seriously
- Obtain advice
- Consider whether an accommodation is possible
- If cannot reach agreement, provide reasons based on undue hardship (i.e., risk to the public)
 - Explain why alternatives are unacceptable
 - Avoid “nexus” argument unless absolutely obvious

Contact Us

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Steinecke Maciura LeBlanc

Barristers & Solicitors

401 Bay St., Suite 2308

www.sml-law.com

Blog: sml-law.com/blog-regulation-pro/

 [@SMLLawToronto](https://twitter.com/SMLLawToronto)

Richard Steinecke

Tel: 416.626.6897

Email: rsteinecke@sml-law.com

Rebecca Durcan

Tel: 416.644.4783

Email: rdurcan@sml-law.com