

HUMAN RIGHTS CODE OF BRITISH COLUMBIA

REPORT OF A BOARD OF INQUIRY ESTABLISHED UNDER
SECTION 16(1) OF THE HUMAN RIGHTS CODE OF
BRITISH COLUMBIA TO ENQUIRE INTO A COMPLAINT
AGAINST THE COLLEGE OF PHYSICIANS AND SURGEONS

The members of this Board of Inquiry were appointed by the Minister of Labour pursuant to the provisions of section 16(1) of the Human Rights Code of British Columbia, S.B.C. 1973 (2d. Sess.), c. 119, to enquire into a complaint made by the Human Rights Commission of British Columbia against the College of Physicians and Surgeons of British Columbia. The complaint alleges that in May 1975 the College adopted a policy with regard to the admission to its membership of non-Canadian doctors, that is discriminatory towards them in a manner that contravenes section 9(1) of the Human Rights Code.

In order to practise medicine in British Columbia, it is necessary to be enrolled on one or other of the limited, the temporary, and the permanent registers maintained by the College, pursuant to the provisions of the Medical Act, R.S.B.C. 1960, c. 239. For the purposes of the present enquiry, only the temporary and the permanent registers are relevant.

Section 34 of the Medical Act provides:

Every person who

- (a) [Repealed. 1966, c. 26, s. 14.]
- (b) produces a diploma of qualification issued to him by a college or school of medicine that at the time the person graduated therefrom was approved by the Council of the College;
- (c) produces satisfactory evidence of identification, experience, good professional conduct, and good character as a citizen; and
- (d) passes before a Board of Examiners, appointed or approved by the Council, an examination touching his fitness and capacity to practise as a physician and surgeon; and
- (e) pays the fee fixed by the Council in respect of his registration,

is entitled to be registered under this Act.

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Section 38 of the Act provides, in part, that:

38. (1) The Council shall cause to be kept by the registrar a register to be known as "the temporary register," in which shall be entered the name, address, qualifications, and terms and conditions of temporary registration of every person who is entitled to be registered under this section.

(2) The persons entitled to be registered in the temporary register are....

(b) any person who has graduated from a school of medicine approved by the Council and whose registration under this section has been requested by the Lieutenant-Governor in Council in respect of a medical appointment to the Provincial public service or by the governing body of a hospital or charitable institution in respect of an appointment in that hospital or institution;

(c) any person who has graduated from a school of medicine approved by the Council and whose registration under this section has been directed by the executive committee; and

(d) any person who is enrolled as an undergraduate student in a school of medicine approved by the Council and whose registration under this section is recommended by the dean of medicine of that school.

(3) The registration of any person under this section is subject to any terms and conditions that the executive committee may prescribe.

(4) A person registered in the temporary register shall be deemed to be registered under this Act as though his name were entered in the register, and he is, for the period, in the manner, to the extent, and subject to the terms and conditions set out in this section and the temporary register, subject to the obligations and entitled to all the rights and privileges of a member of the College except the right to vote and hold office.

(5) The registrar shall issue to each person whose name is entered upon the temporary register a certificate to be known as "temporary certificate," which shall state on its face the terms and conditions (if any) of the registration of the person.

Registration under these provisions is referred to, respectively, as "full" or "permanent," and "temporary" registration. Pursuant to the power given to it by section 5(2) (d) of the Medical Act, the Council of the College has passed, inter alia, the following regulations governing registration:

71. Every applicant for full registration must:

(a) be a graduate in medicine from a university or medical school approved by the Council,

- (b) be a Licentiate of the Medical Council of Canada,
- (c) meet all the conditions of one of the categories of applicants specified in Regulation 72, and
- (d) meet any applicable conditions of Regulations 73 and 79.

72. Every applicant for full registration shall fall into and meet the requirements of one of the following categories:

CATEGORY I shall consist of applicants who are graduates in medicine from an approved university or medical school in Canada, the United States, Great Britain, Eire, Australia, New Zealand or South Africa. It shall be a condition of registration for an applicant in this category that he has completed twelve months of satisfactory internship in a hospital approved by the Council.

PROVIDED THAT this condition may be waived if the applicant is a Certificant or a Fellow of the Royal College of Physicians and Surgeons of Canada.

CATEGORY II shall consist of applicants who are graduates in medicine from a university or medical school not being in a country listed in Category I, but listed in the World Directory of Medical Schools (as amended or supplemented to date of application) published by the World Health Organization. The following conditions of registration apply to an applicant in this category:

- (a) that he has completed one year of satisfactory internship in a hospital approved by the Council, and a further year of post graduate training in such a hospital, and,
- (b) that, if required to do so, he has passed the British Columbia basic sciences examination;

PROVIDED THAT if an applicant in this category is a Certificant or Fellow of the Royal College of Physicians and Surgeons of Canada and if he has taken one year of speciality training in Canada in a hospital approved by the Council the requirements of conditions (a) and (b) may be waived.

73. The following conditions apply to all applicants for full registration:

- (a) An applicant who has previously practised medicine or surgery outside of the province must hold certificates of good standing from every place in which he has practised medicine or surgery.
- (b) An applicant must be a Canadian citizen.
- (c) An applicant must be able to speak, read and write English to the satisfaction of the registrar.
- (d) An applicant shall produce to the registrar documentary proof in a form satisfactory to the registrar that he meets the

qualifications and conditions of his registration.

(e) An applicant shall pay his registration fee and his annual fee (if any) for the current fee year prior to registration being effected.

- 74. An applicant for registration in the temporary register or limited register shall meet the requirements of Regulations 73 and 79, provided that, with respect to Regulation 73(b), it shall be sufficient that the applicant has landed immigrant status in Canada.
- 75. Every applicant for registration in the temporary register or in the limited register, except an applicant under Section 38 (2)(d) of the Act must be a graduate in medicine from a university or medical school coming within Category I or II of Regulation 72.
- 79. All applicants for registration or Enabling Certificates shall be required to satisfy the registrar as to their good character and good professional conduct in such manner as the registrar sees fit.

It is helpful at this point to consider the respective positions under these regulations of two hypothetical applicants for registration by the College, each of whom, it will be assumed, meets all the educational and character requirements of the regulations except that he has not completed the licentiate examinations of the Medical Council of Canada. One "A" is a Canadian citizen. The other "B" is a landed immigrant. While neither is entitled to full registration, "A" can become so entitled upon completion of the licentiate examinations, whereas "B" cannot.

Under the practice of the College prior to May 1975, both "A" and "B" would have been admitted to the temporary register, and with few exceptions each would have been required to practise in an area of the Province that is "under-doctored." Broadly speaking, the under-doctored areas of the Province are geographically defined by a line running eastwards from Prince Rupert to the Alberta border, and northwards from

Ashcroft to the Yukon border. There are, within this broad area, pockets in which there is an adequate supply of medical services, and equally, there are enclaves outside it which may fairly be regarded as under-doctored. However, upon completion of his licentiate examinations, each would have become free to practise medicine in any area of the Province, regardless of the state of the medical services in that area, although for lack of the requirement of citizenship, "B" would have remained on the temporary register.

For reasons which are not immediately relevant, the Council of the College, in May 1975, adopted the policy challenged by the Human Rights Commission. The effect of that policy is that applicant "B", upon completion of the licentiate examinations, not merely remains on the temporary register until attaining Canadian citizenship, but also remains subject to the restriction that his right to practise is confined to a specific under-doctored area of the Province. In March 1976 this policy was modified slightly in anticipation of contemplated changes in the citizenship and immigration laws, so that geographical restrictions upon the right to practise cease upon attainment of Canadian citizenship or after three years' residence in the Province, whichever happens sooner.

It is thus clear that a non-Canadian doctor wishing to practise in British Columbia, notwithstanding an identity of educational qualifications and general competence and integrity, is treated differently from a Canadian doctor in two respects: (a) the Canadian can become a fully registered member of the College whereas the non-Canadian cannot; and (b) the Canadian can exercise a free choice as to where, in British Columbia, he or she may practise, whereas the non-Canadian cannot.

The non-Canadian doctor is discriminated against, therefore, in the sense that he is treated in a different manner than the Canadian doctor. It is not every form of discrimination,

however, that is condemned by the Human Rights Code. Section 9(1) of the Code, which it is alleged has been contravened in this case, does contemplate that some forms of discrimination may be lawful. It provides, in part:

9.(1) Every person has the right of equality of opportunity based upon bona fide qualifications in respect of his occupation or employment, and in respect of his membership or intended membership in a trade-union, employers' association, or occupational association; and, without limiting the generality of the foregoing, no trade-union, employers' association, or occupational association shall, without reasonable cause in respect of such qualifications of that person,

(a) refuse membership to, expel, suspend, or otherwise discriminate against that person;....

(2) For the purposes of subsection (1),

(a) the sex, race, religion, colour, age, marital status, ancestry, place of origin, or political belief of any person or class of persons shall not constitute reasonable cause;....

It was not disputed that the College is an "occupational association" within the meaning given to that expression by section 1 of the Code: "any organization, other than a trade-union or employers' organization, in which membership is a prerequisite to carrying on any trade, occupation, or profession."

The complaint of the Human Rights Commission is that the policy of the College of Physicians and Surgeons of British Columbia discriminates against non-Canadian doctors in respect to their qualifications in respect of their occupation, and in respect of their membership in an occupational association, and does so without reasonable cause.

So that the basis upon which we confront this issue will be clear, we should explain that we do not consider that the policy of the College constitutes discrimination without reasonable cause as being discrimination in respect of place of origin. For as we understand the policy of the College, a doctor who was born outside Canada of non-Canadian parents,

and came to this country as a babe in arms, but who has lived here all his life and been educated here, though never taking Canadian citizenship, is as much subject to the policy as any other person not having Canadian citizenship. Equally, a Canadian citizen who has been educated in medicine in Canada, but then leaves and acquires citizenship of some other country, is subject to the policy should he or she wish to return to Canada. Though, as a practical matter, the application of the policy to these and similar cases may be rare (though one instance was cited to us), the fact that in principle the policy applies to them clearly indicates, in our view, that the discrimination is based upon citizenship, and not place of origin.

It is clear under the Code that not all discrimination on the grounds of citizenship is prohibited. Under section 8(2)(a1), for example, it is declared that for the purposes of section 8(1), which deals with discrimination without reasonable cause in respect of employment, "a provision respecting Canadian citizenship in any Act constitutes reasonable cause," and there are, indeed, a number of statutes of the Province that accord preferential treatment to Canadian citizens, in respect of employment, such as the Public Service Act, S.B.C. 1973 (2d. Sess.), c. 143, s. 49. But we are not here concerned with discrimination in respect of employment under section 8.

Our concern is with section 9, and we have reached the conclusion that the effect of the policy of the College is, without a doubt, to discriminate without reasonable cause against non-Canadian doctors in respect of their qualifications in respect of their occupation, and in respect of their qualifications in respect of membership in the College.

We have reached this conclusion because, in our opinion, the additional requirement for registration of a geographic restriction upon the right to practise, based only upon citizenship, is quite unrelated to bona fide qualifications

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for the practise of medicine. We have some doubt whether, under the Medical Act, the College has power to make regulations of any kind referring to citizenship, such as Regulation 73(b). Since, however, our conclusion is that the College policy contravenes the Human Rights Code to the extent that it discriminates against non-Canadian doctors with respect to their right to practise under temporary registration free of geographical constraints, it is not necessary for us to go further and consider the question whether it is authorized to discriminate with respect to full registration.

We have no doubt that the principal motivation of the College in adopting the policy under review was a wholly laudable one. An abundance of evidence was put before us to show that the College has had a long standing concern for the problem of improving the level of medical care in the under-doctored areas of British Columbia. We heard of innumerable suggestions, proposals and entreaties made over an extended period of time to the provincial health authorities to do something about the problem, and we were left with a distinct sense of the frustration and chagrin felt by the College at what it regarded as the total inadequacy of the governmental response. When, in circumstances to which we shall briefly refer below the College was approached with a suggestion that it adopt a policy of the kind here involved, it saw the possibility that to act upon that suggestion might permit it to make a modest contribution to the solution of a problem about which it had quite properly been concerned.

To acknowledge, as we do, that the College has acted with a high public purpose, does not however affect the fact that the result of its policy is to discriminate against non-Canadian doctors on grounds quite unrelated to their qualifications for the practise of medicine, and in our view this, quite apart from any question of motive, constitutes a form

of discrimination without reasonable cause that is prohibited by the Code. This conclusion is not affected, either, by the fact, which again the evidence amply supports, that the College administers the policy with tact and sensitivity. Provision is made for appeals against decisions made under the policy, and, where special hardship or inconvenience has been shown, exemption has been granted. But a policy that is, as a matter of law, unreasonable, remains unreasonable even if reasonably applied.

The conclusion that we have reached - that the policy has nothing whatever to do with qualification for the practise of medicine, becomes inescapable when the circumstances leading to its adoption are considered. Prior to May 1975, as we understand the evidence, it was the practice of the Canadian immigration authorities to grant landed immigrant status to doctors who indicated an intention to practise in some area of need. Unless they so indicated, foreign doctors would receive no points for their medical qualifications and this meant in effect that their ability to secure landed immigrant status would be severely prejudiced. Once landed immigrant status was granted, however, the authorities were bereft of any means under the Immigration Act and regulations, to insure that immigrant doctors would remain in those areas. The federal immigration authorities, therefore, apparently approached the provincial health authorities to solicit their assistance to police the immigration system in relation to doctors, and the provincial health authorities invited the College, in effect, to act as their surrogates in this enterprise.

It is not for us to speculate upon the motives for this oblique approach to the problem of controlling the flow of immigrant doctors into Canada, though we were left with the impression, both from the oral evidence and the documents submitted, that the College was entrusted with the implementation of a policy which ought more properly to have been administered by those responsible for its formulation, and we have some sympathy for the situation

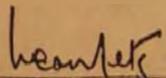
in which the College now finds i-self.

Section 17(2) of the Human Rights Code provides that "where a board of inquiry is of the opinion that an allegation is justified, the board of inquiry shall order any person who contravened this Act to cease such contravention, and to refrain from committing the same or a similar contravention, and may (a) order a person who contravened the Act to make available to the person discriminated against such rights, opportunities, or privileges as, in the opinion of the board, he was denied contrary to this Act...."

We accordingly order the College of Physicians and Surgeons of British Columbia to cease acting upon the policy which we have found to constitute a contravention of this Act, and we further order that it make available to any doctors discriminated against by reason of the operation of the policy, the rights, opportunities and privileges that they have been denied. In our view, this second order requires the College to remove any geographical restrictions that have been imposed on any non-Canadian doctors, and to advise any such doctors of their right to practise in any area of the province that they choose.

Dated at Vancouver, B.C., this 27th day of May, 1976.

ON BEHALF OF THE BOARD OF INQUIRY



Leon Getz, Chairman