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File No. 03 358 293

March 31, 2006

Ms. Jennifer Wright, Director, Research and Evaluation  
Canadian Tourism Human Resource Council  
608 - 151 Slater Street  
Ottawa, Ontario  
K1P 5H3

Dear Ms. Wright:

**Re: Canadian Tourism Human Resources Council (“CTHRC”)  
Contract RFP 5775  
Research: Legal Implications**

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This is further to your request to conduct a research project relating to the recognition of foreign credentials of immigrants and foreign trained Canadians in non-regulated professions and more specifically, your request to provide you with a report regarding the following:

- a. The liability concerns, legal implications, risks and obligations associated with the assessment and recognition of foreign credentials awarded by foreign academic professional institutions and recognized/certified agencies outside of Canada.
- b. The possible legal implications and requirements for changes or additions to the CTHRC’s certification program and whether the certification program poses a barrier to foreign trained immigrants.
- c. The best means to reduce risk and provide assessment and recognition of services, including services provided by partnering with identified agencies and stakeholders.
- d. The findings of a review of background documents, legal precedents and agreements around labour mobility internationally and pan-Canadian, pointing out the clauses concerning labour mobility.

This final report is based upon the following background information regarding the CTHRC and the foreign credentials recognition (FCR) initiative.

## Background

The CTHRC's overall mandate is to provide leadership and direction for human resources development in the tourism sector. A key interest of the CTHRC is to support labour mobility and to address labour market concerns for the supply of qualified workers. The CTHRC has created occupational standards and professional recognition programs which designate credentials which are recognized throughout the Canadian tourism industry. The CTHRC's current system of training programs and professional recognition is a competency-based model. Certification through these programs is granted when an individual demonstrates, through an examination process and performance assessment/"on the job" evaluation, that they have acquired the skills which meet the standards of their profession in a practical job setting.

Recent studies show that by 2015 the net growth of the Canadian labour force will depend entirely on immigration. Foreign credentials recognition ("FCR"), the process of verifying that the education and job experience obtained in another country are equal to the standards established for Canadian workers, has been identified by the Government of Canada as an important initiative towards addressing, through immigration, increasing shortages in the labour supply. Accordingly, the Government of Canada has implemented a Foreign Credentials Recognition Program aimed at improving integration of immigrants and foreign trained Canadians in the workforce by improving credential assessment and recognition processes in various key occupations and sectors, including the tourism sector.

We understand that as part of the Foreign Credentials Recognition Program, the CTHRC has been tasked with developing a FCR model to facilitate the recognition of foreign credentials of immigrants and foreign-trained Canadians in non-regulated professions.

### **1. Liability Concerns, legal implications, risks and obligations associated with the assessment and recognition of foreign credentials awarded by foreign academic and professional institutions, as well as recognized/certified agencies outside Canada.**

#### *The Charter of Rights and Freedoms (the "Charter")*

Section 15(1) of the *Charter* guarantees the right to equality and provides as follows:

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.

The purpose of s. 15(1) of the *Charter* is to "prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and

consideration”.<sup>1</sup> A law, government program or policy which discriminates on the basis of any ground enumerated in section 15(1), may amount to a violation of the *Charter*.

The *Charter* is intended to regulate the relationship between the government and the public and does not typically apply to relationships between private persons. However, the definition of “government” has been held to include not only a government body but a government actor, an entity that exercises governmental functions or an entity that is implementing a government program or policy.

Based upon the information available regarding the CTHRC we are not in a position to confirm with absolute certainty whether the *Charter* applies to all or part of the actions of the CTHRC’s. However, it is likely that the CTHRC’s role in implementing a FCR model as part of the Government of Canada’s initiative to improve integration of immigrants and foreign trained Canadians into the workforce with the aid of government funding, may be viewed as activity in furtherance of a specific government program or policy, namely the Government of Canada’s, FCR Program. Accordingly, the CTHRC’s actions specifically with respect to the creation and implementation of a FCR program may be subject to the *Charter*.

Based upon the foregoing, the CTHRC may have an obligation to ensure that any FCR program which is created and implemented does not violate section 15(1) of the *Charter*. The Supreme Court of Canada in the case of *Law v. Canada (Minister of Employment and Immigration)*<sup>2</sup> set out the following three-part “test” for determining whether or not s. 15(1) has been violated:

- a. Does the impugned program or activity imposed (a) draw a formal distinction between an individual or particular group and others on the basis of one or more personal characteristics, or (b) fail to take into account the individual or particular group’s already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
- b. Is this differential treatment based on one or more enumerated ground i.e. race, national or ethnic origin, colour, religion, sex, age or mental/physical disability or analogous grounds?
- c. Does the impugned program or activity have a purpose or effect that is substantively discriminatory? Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the individual or particular group in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual or particular group is less capable or worthy of recognition or value as a

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<sup>1</sup> *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497 (at para. 51)

<sup>2</sup> *Ibid*

human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

Ultimately, discrimination and a breach of section 15(1) of the *Charter* will be established when it can be demonstrated that an individual or group is being treated differently because of the individual or groups' race, national or ethnic origin, colour, religion, sex, age or mental or physical disability and the differential treatment would be viewed by a reasonable person as having the effect of demeaning an individual's human dignity.

A FCR program takes into account the disadvantaged position of immigrants within Canadian society by virtue of the fact that the program itself is aimed at facilitating an immigrants' entry into Canada and assisting integration into the Canadian labour force. However, the CTHRC must ensure that the FCR program itself does not draw any distinctions between individuals or a particular group on the basis of any enumerated ground i.e. race, national or ethnic origin, colour, religion, sex, age or mental/physical disability which would exclude that group from obtaining FCR. For example, a FCR program that has the effect of drawing a distinction solely based upon a person's place of origin, which distinction has the effect of denying the foreign-trained individual recognition of his/her foreign credentials and promotes the view that the individual is less competent solely because of where the person originates may be a violation of section 15(1) of the *Charter*.

Additionally, the courts have held that discrimination under section 15(1) of the *Charter* may be established on the basis of a ground that is "analogous" to an enumerated ground. In determining whether a ground is analogous to those enumerated in section 15(1) of the *Charter*, one must consider whether differential treatment based upon the particular ground has the potential to violate a person's essential human dignity and freedom.<sup>3</sup>

The case law suggests that an individual's place of training and education could be recognized as analogous to the enumerated grounds of national or ethnic origin, race or colour and therefore section 15(1) could be read to include protection against discrimination on the basis of place of training or education. Based upon the foregoing, it is also possible that an individual's place of work experience could also be recognized as analogous to the enumerated grounds of national or ethnic origin, race or colour. Accordingly, if the FCR program fails to recognize the experience, skills and qualifications of foreign trained workers from one particular place, the program may be viewed as discriminatory on the basis of place of training, education or work experience.

Note that pursuant to section 1 of the *Charter*, a violation under section 15(1) may be justified if it can be demonstrated that the basic effects of the distinction do not perpetuate the view that foreign-trained individuals are less capable or less deserving of concern, respect and consideration, if the motivation for the distinction is to maintain the integrity of the relevant profession or occupation in Canada by ensuring that all workers have received the proper level of training. In this case, the CTHRC would be required to demonstrate the importance of

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<sup>3</sup> *Ibid*

recognizing only those foreign-credentials that are comparable with similar Canadian credentials, in order to ensure the integrity and training of individuals working in the relevant occupations.

### Human Rights Legislation

Each province has enacted Human Rights legislation which applies to both public and private organizations and individuals.

Human Rights legislation provides the right to equal treatment with respect to services, goods and facilities, employment and membership in any trade union, trade or occupational association or self-governing profession without discrimination based upon various grounds including, race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability (“prohibited grounds”).

Human Rights legislation may apply to the CTHRC if it can be shown that the CTHRC’s involvement in the creation and implementation of an FCR program constitutes the provision of “services” or relates to “employment” or “membership in an occupational association or self-governing profession”.

If the recognition of foreign credentials under the CTHRC’s FCR program is a requirement for membership in an association or organization, it could be argued that the CTHRC’s conduct in creating and implementing the FCR program effectively determines membership in the association or organization. Therefore, if an individual or a particular group is denied entry into an association due to a failure to obtain recognition of his/her foreign credentials through the CTHRC’s FCR program and the failure is due to the fact that the FCR program discriminates based upon a prohibited ground, a human rights complaint could be brought against the CTHRC.

Similarly with respect to employment, if an individual is denied foreign credential recognition through the CTHRC’s FCR program, the recognition of his/her foreign credential is required to secure employment in a particular area, and there is an allegation that the denial of foreign credential recognition is due to the fact that the FCR program is discriminatory, the CTHRC could be viewed as having discriminated against the individual with respect to employment.

Finally, the CTHRC may be viewed as providing a “service” in the sense that it is providing the service of testing foreign credentials and setting standards for the recognition of foreign credential. Accordingly, the CTHRC may be held liable under the applicable Human Rights legislation if the FCR program discriminates against foreign-trained individuals on the basis of any of the prohibited ground (i.e. the standards for recognition, the testing, the evaluation process etc. must be free from any bias based upon any of the prohibited grounds).

Essentially, discrimination under the Human Rights legislation is the impact of treating a person unequally by imposing unequal burdens or denying benefits based upon any of the aforementioned prohibited grounds, rather than treating the person fairly on the basis of individual merit or ability.

It is important to note that while the treatment of an individual or group pursuant to a policy, requirement, program, or qualification may not be directly or intentionally discriminatory it may nonetheless have an adverse effect or systemically discriminate against a particular group of individuals and constitute a breach of the Human Rights legislation (“adverse, constructive or systemic” discrimination).

Adverse, constructive or systemic discrimination occurs where a requirement, qualification or factor exists that does not discriminate based upon 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. For example, if the FCR program required a specified type of work experience that one could not obtain in a certain country with the effect of excluding all of the immigrants from that country, there could possibly be a finding of adverse discrimination based upon place of origin.

Note that all provincial and federal Human Rights legislation provide a defence against an allegation of adverse effect, systemic or constructive discrimination where it is established that the distinction, requirement or qualification is reasonable and *bona fide*.

To establish that the distinction, requirement or qualification is reasonable and *bona fide*<sup>4</sup> one must demonstrate that the requirement or qualification is adopted for a purpose that is rationally connected to the performance of the occupation, the requirement or qualification was adopted in the honest and good belief that it is necessary to the fulfillment of a legitimate purpose and that the requirement or qualification is reasonably necessary to the accomplishment of the purpose. It must also be demonstrated that it is impossible to accommodate the individual or group without imposing undue hardship.

Accordingly, the CTHRC has an obligation to develop a FCR program that is inclusive, sets standards for recognition of foreign credentials and entry into the Canadian workplace that are not discriminatory and is implemented without any bias. If the CTHRC’s FCR program has the effect of excluding an individual or particular group on the basis of a prohibited ground, in its’ defence, the CTHRC has an obligation to demonstrate that the standard is a reasonable and *bona fide* requirement of the FCR program.

Accordingly, the CTHRC would be required to establish, for example, that a particular standard which appears to discriminate, is rationally connected to the general purpose of the FCR program i.e. ensuring that foreign trained individuals’ credentials are commensurate with Canadian trained individuals. Furthermore, the CTHRC would be required to demonstrate that it adopted the standard with the honest belief that it was reasonable and necessary to fulfill this purpose. Finally, CTHRC would have an obligation to consider whether the standard could be modified to be more inclusive and recognize the diversity among different groups worldwide without imposing undue hardship. By way of example, if the standard which has the effect of discriminating against a particular group is absolutely necessary to ensure the safety of the worker, other workers and/or the public and no modification (i.e. accommodation) is feasible

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<sup>4</sup> *British Columbia (Public Service Employee Relations Commission v. BCGSEU, (Meiorin)* [1999] 3 S.C.R.

without putting the safety of these individuals at risk, the CTHRC would likely be able to establish that the standard is reasonable and *bona fide*.

### Due Diligence

The CTHRC has an obligation to be diligent in the implementation of its program and ensure that the foreign credentials recognized under the FCR program are verified for authenticity. Note that an employer may rely upon the fact that a foreign trained individual's credentials have been recognized under the CTHRC's FCR program in the hiring process. If the individual's credentials are not valid and he or she is negligent in the performance of the duties of his/her occupation, thereby causing damage to person or property, the CTHRC may be at risk for failing to ensure the authenticity of the individual's credentials.

While respecting the *Charter* and Human Rights obligations, the CTHRC also has a positive obligation to ensure that the standards set for foreign credentials recognition are at least equal to minimum applicable Canadian standards. Accordingly, the FCR program should set out standards that are sufficiently stringent and thorough to meet Canadian requirements (i.e. the foreign immigrant's credentials should be at a minimum equal to the job entry level qualifications required in Canada). A failure to meet this obligation could result in exposure to liability for the negligent actions of an individual that was approved under the FCR program, where the individual's conduct falls below the comparable Canadian standards resulting in damage to either person or property. Please note that there is no case law on this point, but it is not out of the realm of reasonableness that this type of claim could be brought against the CTHRC.

## **2. Legal implications and requirements for changes or additions to the CTHRC's certification program and whether the certification program poses a barrier to foreign trained immigrants.**

We understand that the CTHRC, under the *emerit* program, has developed an industry certification program which includes professional certification based upon National Occupation Standards for 26 tourism related occupations, including banquet server, bartender, campground operator, casino dealer, casino slot attendant, food and beverage manager, food and beverage server, front desk agent, freshwater angling guide, guest services attendant, heritage interpreter, housekeeping room attendant, hunting guide, line cook, tour guide, reservation sales agent, retail sales associate, sales manager, event coordinator, event manager, taxicab driver, tour director, tourism supervisor, tourism trainer, tourism visitor information, wine service.

The National Occupational Standards are standards established by CTHRC under the *emerit* Program based upon the collective expertise of tourism industry professionals across Canada.

It is our understanding that the occupational standards set out the skills, knowledge and attitudes an individual must demonstrate to be considered competent in the chosen occupation and provide a practical tool that can be used for human resource development. Certification compares an individual's knowledge and skills against the occupational standards and provides recognition that the individual has the required knowledge, skills and attitude to perform all of the tasks needed in a particular position or skill area. Every certification program contains a series of

requirements which a candidate must meet in order to attain certification, which includes passing a written examination, a passing score for industry evaluation, and a minimum amount of relevant practice experience. When candidates have completed all of the steps of the process, they are issued national certificates by the certifying body testifying that they are certified by industry professionals.

Generally, the CTHRC faces the same legal obligations with respect to its' certification program that have been outlined above regarding any FCR program that might be put in place. More specifically, CTHRC must ensure that the certification program does not have the result of denying an individual certification based upon a prohibited ground under the applicable Human Rights legislation. Having reviewed the Certification Program, Policy and Procedures Manual it does not appear that, on its face, the Certification Program contains any elements which could result in discrimination of residents of Canada. I note that the Policy regarding the Certification Program specifically provides that to ensure that the testing is valid, reliable, fair and efficient, measures should be taken to ensure that the tests and the assessors of the testing are not biased in terms of the grounds enumerated in the Human Rights legislation. Please see below for a discussion of the potential difficulties that could arise if this Certification Program was used to assess foreign credentials.

In terms of the obligations under the *Charter*, in this case, it appears less likely that CTHRC's role in the implementation of its existing certification programs (not as part of the foreign credentials recognition program) would be viewed as "government" activity as defined in the *Charter*. Therefore, the CTHRC would not be subject to scrutiny under section 15(1) of the *Charter* in relation to its' certification programs.

With respect to our opinion as to whether the existing certification programs would possibly pose a barrier to foreign trained immigrants, we have reviewed the Certification Program, Policy and Procedures Manual and note the following potential barriers to foreign trained immigrants:

- a. relevant work experience as a minimum qualification could pose a barrier depending upon what specific type of work experience is required, as an immigrant from a particular location may not have the opportunity to obtain this type of work experience. In this type of case, it would be well advised that the CTHRC assess whether some form of accommodation could be made without jeopardizing the integrity of the certification process.
- b. the requirement to have completed specific training may also be a barrier if this requirement must be met before entry into Canada as training such as WHIMIS, basic first aid or safe food handling or similar training may not be available in the immigrants place of origin. Accordingly, the program should be designed so that it allows the immigrant an opportunity to obtain this training in Canada or via correspondence prior to entry into Canada.
- c. the requirement for an on-the-job performance evaluation would be a barrier to foreign immigrants given that it would likely not be possible to carry out such an evaluation since the cost associated with retaining a third party to assess the

immigrant's on-the-job performance in the individual's place of residence would be prohibitive.

We recognize that the Occupational Standards upon which the Certification Program is based are expert level versus job-entry level. Accordingly, given the various barriers set out above, it may be that the FCR Program should focus on job-entry level as opposed to expert level, especially, given the fact that the Certification Program is not a requirement for Canadian residents to work in various tourism industry occupations but rather is voluntary.

**3. The best means to reduce risk and provide assessment and recognition of services, including services provided by partnering with identified agencies and stakeholders.**

The best means to reduce risk is to ensure that the program designed to assess and recognize foreign credentials does not discriminate on the basis of any prohibited ground or analogous ground under the *Charter* or the applicable Human Rights legislation. Additionally, CTHRC must conduct its' due diligence to ensure that the credentials of foreign trained Canadians or immigrants are authentic and meet the minimum Canadian occupational standards.

To this end, the CTHRC should keep in mind the following in an attempt to reduce risk and meet its obligations when creating a FCR program. Please keep in mind that this is simply a general list of recommendations and perhaps a psychometrician will be required to advise how these recommendations can implemented in a Foreign Credentials Recognition Program.

- a. The standards for recognition of foreign credentials should be "discrimination-free" and not be based on any form of discrimination on the basis of age, gender, disability, national or ethnic origin, citizenship, nationality, political beliefs, religion, sexual orientation or race.
- b. The procedures and criteria used in the assessment and recognition of foreign credentials should be clear, rational, consistent, reliable, fair, and connected to the purposes for which the recognition of foreign credentials is right.
- c. Develop standards that work for both foreign trained and Canadian trained individuals.
- d. Ensure that assessment and recognition standards are inclusive and not exclusive of a particular group.
- e. The evaluation and assessment of a foreign credential should take into account the diversity among the foreign trained and Canadian trained individuals while reflecting the true requirements of the position.
- f. If, after thorough consideration, a conclusion is reached that recognition cannot be granted, alternative or partial recognition should be considered.
- g. The assessment and recognition process should provide standardized information on the procedures and criteria for the evaluation of foreign credentials, that should then be

applied consistently to every applicant without distinguishing based upon any prohibited or analogous grounds under the applicable Human Rights legislation or *Charter*.

- h. The evaluation and recognition of foreign credentials in individual instances should take into account the diversity of educational traditions around the world to prevent a denial to recognize foreign credentials on the basis of an individual's place of origin and education.
- i. The recognition of foreign credentials should be recognized as valid across Canada, and not limited to one or more provincial or territorial jurisdictions.
- j. A process should be established to validate the credibility and authenticity of credentials obtained in foreign jurisdictions.
- k. Credit should only be considered for education or training attained through recognized institutions. A process for the recognition of institutions should be established to meet this obligation.
- l. A credential should only be recognized if the related program is also recognized by a competent authority.
- m. A process should be established to compare the level of education, training and experience to the Canadian equivalent to ensure commensurability.
- n. Ensure the reliability of the translations of documents and credentials.
- o. The foreign degrees, programs and certifications that are recognized should be reviewed periodically against existing Canadian standards to ensure their continued compliance with legal obligations.
- p. Accept only original/official documents or certified copies of documents required to complete the assessment of foreign credentials. Only in exceptional circumstances, where the individual for valid and good reasons is unable to provide official documentation, accept sworn statements in lieu of documentation.
- q. All documents which form part of the assessment process should be thoroughly examined to ensure authenticity. If there is reason to believe that the document has been altered, the institution that issued the document should be contacted to verify the authenticity of the document.

The above represents preliminary suggestions which should be considered when creating a FCR program. We would be pleased to review the FCR program once it has been created to assess whether the FCR program may constitute a breach of the *Charter* or Human Rights legislation.

#### **4. The findings of a review of background documents, legal precedents and agreements around labour mobility internationally and pan-Canadian.**

Section 6 of the *Charter* guarantees the mobility of individuals to other provinces to earn a livelihood by prohibiting discrimination based upon place of residence. More specifically, pursuant to section 6, every citizen of Canada and every person who has the status of a permanent resident of Canada has the right to pursue the gaining of a livelihood in any province, subject to any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence.

In Canada, regulation of professions and licensed occupations falls under provincial jurisdiction. Licensing authorities have the right under provincial statute to restrict access to the profession and review the credentials of anyone claiming to be qualified to work as a professional. At the moment, the standards for the recognition of regulated and non-regulated professions and the assessment of qualifications vary from province to province. Clearly, the lack of national standards and that right to restrict access to professions on a provincial level is not complimentary to the labour mobility rights and often creates difficulties for Canadians that move from one province to another. Unfortunately, this lack of national standards will also have the same negative effect on the labour mobility of foreign trained individuals.

The lack of national standards for the recognition of professions and assessment of occupational qualifications has been identified as a barrier to labour mobility and the Agreement on Internal Trade was created to address this problem.

##### ***Agreement on Internal Trade***

The *Agreement on Internal Trade* (the “*Agreement*”) is an agreement between federal, provincial and territorial governments which came into effect on July 1, 1995 and is aimed at reducing barriers to the movement of persons, goods, services and investments within Canada, promoting an open, efficient and stable domestic market for long-term job creation, economic growth and stability, and reducing and eliminating barriers to the free movement of persons, goods, services, and investments in Canada.

Chapter 7 of the *Agreement* specifically addresses labour mobility and identifies three main barriers to labour mobility namely; residency requirements as a condition of licensure or certification, practices related to occupational licensing, certification and registration requirements; and differences in occupational standards. The aim of Chapter 7 is to remove these barriers and ensure that the qualifications earned in one Canadian jurisdiction will be recognized in other Canadian jurisdictions. This *Agreement* applies to professional occupations and trades such as electricians, plumbers and mechanics.

Article 706 of the *Agreement* provides that a government or regulatory body can no longer require that out-of-province workers reside within its province or territory as a condition of access to employment opportunities, licensing, certification or registration relating to the worker’s occupation or eligibility for the worker’s compensation.

Article 707 states that any measure adopted or maintained by a regulatory body or government relating to occupation licensing, certification or registration should meet four conditions:

- a. The measure should relate principally to competence, which means that the principle criteria for granting licensure, certification, or registration should be based on the ability to perform the occupation.
- b. The measure should be published or otherwise readily accessible. By making this information readily accessible, regulatory bodies and other groups can assist workers who are considering moving to another province or territory to make informed decision and help facilitate their plans.
- c. The measure should not result in unnecessary delay in recognizing the occupational qualifications of workers from other provinces or territories.
- d. Fees that are more burdensome from other provinces or territories may not be imposed.

Article 708 provides the further obligation of the parties to undertake to mutually recognize the occupational qualifications required of workers of any other Party to the *Agreement* and to reconcile differences between those occupational standards. Note that this obligation does not require the harmonization of occupational standards or the development of a single national standard; parties to the *Agreement* remain free to develop their own standards subject to a series of measures set out in Annex 708.

To assist the parties to the *Agreement* to meet the obligations outlined in Chapter 7, the Labour Mobility Coordinating Group was created and it has outlined the following four steps which should be followed to assist in removing the barriers to inter-provincial labour mobility: (1) assessment of occupations which are regulated in order to identify areas of commonality in occupation standards; (2) recognition of qualifications; (3) reconciliation of occupational standards; and (4) making of appropriate accommodation references to accommodate the competencies of out-of-province workers based on the differences identified in step 3.

These steps are important as they are similar to the steps needed to reduce barriers to foreign credential recognition and should be used as a guideline in creating and implementing a FCR program. This could be a fairly significant undertaking as it would involve the assessment of the occupational standards in the foreign immigrant's country of origin, a comparative review of the standards with the occupational standards in Canada, identification of the differences between the occupational standards and a determination of how these differences can be accommodated, if at all, to permit recognition of the foreign immigrant's credentials.

### ***The North American Free Trade Agreement (NAFTA)***

Chapter Twelve of the NAFTA entitled Cross-Border Trade in Services deals with measures to be adopted or maintained by a Party to NAFTA relating to cross-border trade in services by service providers of another Party. Article 1210 regarding Licensing and Certification sets out the obligations of each Party to ensure that measures adopted or maintained for licensing and

certification of nationals of another Party does not constitute an unnecessary barrier to trade. The Article also provides that the Party should ensure that the measure adopted or maintained for licensing and certification:

- a. is based on objective and transparent criteria, such as competence and the ability to provide a service;
- b. is not more burdensome than necessary to ensure the quality of a service; and
- c. does not constitute a disguised restriction on the cross-border provision of a service.

This Article also provides that “a Party shall afford another Party an adequate opportunity to demonstrate that education, experience, licenses or certifications obtained in that other Party’s territory should also be recognized or to conclude an agreement or arrangement of comparable effect”.

This is informative and can be used as a guideline when creating and implementing a FCR program. For example, when making a determination as to what level of competency will be required to obtain foreign credential recognition, CTHRC should ensure that the level of competency is not more burdensome than what is necessary to allow the individual to work in the particular occupation in Canada. Accordingly, CTHRC may wish to consider whether the level of competency that would be required under the FCR program should be job-entry level as opposed to expert level which is achieved through the certification program on a purely voluntary basis.

### ***The Universal Declaration of Human Rights***

*The Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (affirmative vote, including Canada) was signed on December 10, 1948 (UDHR). The declaration pledges the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family” as well as the recognition and protection of the “dignity and worth of the human person.” The UDHR reflects fundamental beliefs shared by countries around the world regarding human rights, and seeks to set a common standard of achievement for all peoples and nations.

Article 13 provides that everyone has the right to freedom of movement and residence within the borders of each State and that everyone has the right to leave any country, including his own, and to return to his country.

Article 23 provides that everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment; that everyone, without any discrimination, has the right to equal pay for equal work; that everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection; and that everyone has the right to form and to join trade unions for the protection of his interests.

### ***International Covenant on Economic, Social and Cultural Rights***

The *International Covenant on Economic, Social and Cultural Rights*, Can. T.S. 1976 No. 46 (date of accession: May 19, 1976), was adopted in 1966 and came into force in 1976 (the “ICESC”). The ICESC seeks to protect the economic and social rights of all people, and commits the member nations to take the positive steps required to meet the rights recognized within the Covenant.

Article 6 recognizes the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right, and that the steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7 provides the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular remuneration which provides all workers, as a minimum, with fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work and a decent living for themselves and their families in accordance with the provisions of the Covenant, and the right of everyone to equal opportunity to be promoted in their employment to an appropriate higher level, subject to no considerations other than those of seniority and competence.

Together the UDHR and ICESC form part of the *International Bill of Rights*, and while they are technically not “binding” law within Canada, both have been signed by Canada and are recognized as the international standards against which the success of the protection of human, economic and social rights within Canada are measured.

### **Prior Learning Assessment and Recognition (PLAR)**

Many colleges and institutions across Canada offer PLAR services which is a process of assessing and recognizing an individual’s skills, abilities, and knowledge that have been acquired through education, work and life experiences.

The PLAR process compares the learning gained from prior education, work and life experiences to the learning gained from college and institute courses so that students can obtain credit equivalent to college and institute level courses.

PLAR services can be used to facilitate recognition of foreign credentials based on education and education gained by foreign immigrants. CTHRC may wish to consider partnering with a college that can assist in the development of a FCR program designed to compare a foreign immigrant’s knowledge and work experience to either the national occupational standards or the standards required for job-entry level in a specific occupation.

## Conclusion

The key obligation that CTHRC must keep in mind when creating and implementing a FCR program is the obligation to create a FCR program that does not discriminate against any individual or group based upon any of the enumerated grounds under the applicable Human Rights legislation or under the enumerated or any analogous grounds set out in the *Charter*. However, while respecting its obligations under the *Charter* and Human Rights legislation, it is also important that the CTHRC ensure that the standards set by the FCR program are commensurate with the Canadian standards. Finally, the CTHRC must ensure that it puts into place due diligence mechanisms as part of the FCR program which will ensure the validity and authenticity of foreign credentials recognized under its program.

We would be pleased to review the FCR model program once complete to ensure that the program is consistent with the CTHRC's obligations set out above.

Yours very truly,

**GOWLING LAFLEUR HENDERSON LLP**

Elisa A. Scali

EAS:vr

Enclosure

c.c. Gail Hall

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