



# What's New in HR Law

## Is Requiring Permanent Eligibility to Work in Canada Permissible?

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### Bottom Line

In July of 2018, [we wrote about](#) *Haseeb v. Imperial Oil Limited*, 2018 HRTO 957. In this decision, the Human Rights Tribunal of Ontario (“HRTO”) found that requiring a job candidate to be a permanent resident of Canada ran afoul of the *Human Rights Code* (“Code”). The HRTO’s decision was recently appealed to, and overturned by, the Divisional Court. In this update, we summarize this new development and outline what it means for employers.

### Decision of the HRTO Quashed

As noted above, the HRTO found that the employer, Imperial Oil Limited (“Imperial Oil”), violated the *Code* when it required a prospective job applicant, Muhammad Haseeb (“Haseeb”) to be a permanent resident of Canada as a condition of employment. The HRTO determined this

constituted an act of direct discrimination on the basis of citizenship; a protected ground under the *Code*. The HRTO awarded Haseeb approximately \$120,000.00 in compensation for his loss of income and the injury to his feelings, dignity, and self-respect.

In *Imperial Oil Limited v. Haseeb*, 2021 ONSC 3868, the Divisional Court granted judicial review of the HRTO's ruling and, ultimately, quashed the decision.

In short, the Divisional Court found that "permanent residency" is not synonymous with or subsumed by the definition of "citizenship" under the *Code*. Accordingly, the permanent residence requirement is not an example of direct discrimination on the basis of citizenship. However, the Divisional Court did not rule out the possibility that requiring an applicant to be a permanent resident of Canada could support a finding of "indirect" or "constructive" discrimination in certain circumstances.

### *The Facts*

Haseeb, an international engineering student, applied for an entry-level position with Imperial Oil and was ranked first among the other engineering graduates that applied for the position. In order to be eligible for employment, applicants had to be permanent residents in Canada. Haseeb was eligible for a postgraduate work permit which would allow him to work full-time in Canada for three (3) years and had a reasonable expectation that he would eventually obtain permanent residence status through a special immigration programme involving the Federal and Ontario governments. However, Haseeb was not a permanent resident at the time of making the application. The offer of employment Haseeb eventually received was conditional upon proof of permanent residency, which Haseeb was unable to provide. Imperial Oil was unwilling to make an exception for Haseeb once it learned that he was not a permanent resident. Ultimately, but for the permanence requirement, Haseeb would have been in a position to accept Imperial Oil's offer of employment.

### *Citizenship vs. Permanent Residency*

The *Code* does not contain a definition of "citizenship". The HRTO found that the permanent residency requirement was subsumed in the definition of citizenship such that discrimination on the basis of permanent residency constituted direct discrimination on the basis of citizenship.

The Divisional Court considered the plain and ordinary meaning of "citizen", being membership in a state, and found that while permanent residence is a right or privilege that comes with citizenship, someone does not need to be a citizen to be a permanent resident. Unlike citizenship, immigration status (including permanent residency) is not an immutable characteristic. Permanent residence has a meaning and standing of its own that exists independently from citizenship.

### *Indirect Discrimination and Continued Risk of Liability for Employers*

The HRTO determined there was direct discrimination on the basis of citizenship. Accordingly, the HRTO did not require Haseeb to provide evidence of indirect or constructive discrimination.

As a reminder to our readers, indirect discrimination is where a prohibited *Code* ground (like citizenship) is not directly engaged but where the employment requirement unintentionally singles out a group of people and results in unequal treatment.

The Divisional Court found that the HRTO's decision was unreasonable. An employer cannot directly discriminate against an individual unless the basis of discrimination is prohibited under the *Code*; permanent residency is not the same as citizenship and is not itself a prohibited ground of discrimination under the *Code*.

The Divisional Court refused to consider whether the permanent residency requirement supported a finding of indirect or constructive discrimination in this case, particularly in light of the absence of evidence on this issue. However, the Court noted that it is possible to imagine circumstances where a requirement for permanent residency **could** manifest as a requirement for citizenship and be indirectly discriminatory.

## Check the Box

Employers should continue to exercise caution in excluding individuals who, while not permanent residents, are eligible to work in Canada. Recruitment, hiring, and employment processes should be carefully reviewed to ensure that any eligibility criteria tied – whether directly or indirectly – to protected grounds under the *Code* are properly construed so as to minimize any potential legal liability.

## Need more information?

For more information about recruitment and hiring processes, or for advice or representation in relation to human rights proceedings, contact [Becky Langille-Rowe](#) or your regular lawyer at the Firm.



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