COURT OF APPEAL FOR ONTARIO

CITATION: Imperial Oil Limited v. Haseeb, 2023 ONCA 364
DATE: 20230523
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van Rensburg, Sossin and Copeland JJ.A.

BETWEEN

Imperial Oil Limited

Applicant (Respondent)

and

Muhammad Haseeb and the
Human Rights Tribunal of Ontario

Respondents (Appellant/Respondent)

Toby G. Young and Megan Evans Maxwell, for the appellant

Richard Nixon and Duncan Burns-Shillington, for the respondent Imperial Oil Limited

Brian A. Blumenthal, for the respondent Human Rights Tribunal of Ontario

Sujit Choudhry and Arash Nayerahmadi, for the interveners the South Asian Legal Clinic of Ontario and the Colour of Poverty/Colour of Change Network

Heard: November 24, 2022

On appeal from the order of the Divisional Court (Justices Thomas R. Lederer, Graeme Mew, and Harriet E. Sachs, dissenting), dated June 1, 2021, with reasons reported at 2021 ONSC 3868, granting an application for judicial review of the decisions of the Human Rights Tribunal of Ontario, dated July 20, 2018, with reasons reported at 2018 HRTO 957, dated February 14, 2019, with reasons reported at 2019 HRTO 271, and dated August 23, 2019, with reasons reported at 2019 HRTO 1174.

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Copeland J.A.:

A. INTRODUCTION AND BACKGROUND

[1] The appellant appeals from the decision of the Divisional Court, which set aside the decision of the Human Rights Tribunal of Ontario (the "tribunal") finding that the respondent ("Imperial") discriminated against him in employment on the basis of citizenship.

[2] Ontario's *Human Rights Code*, R.S.O. 1990, c. H.19 (the "*Code*"), prohibits discrimination in employment on the basis of citizenship. In the time period relevant to this appeal, the appellant was not a Canadian citizen or permanent resident (he has since become a Canadian citizen). He was an international student in Canada about to graduate with a mechanical engineering degree. As a matter of federal immigration law, upon graduation, he would be entitled to a Post-Graduate Work Permit ("PGWP"), which would allow him to work full-time, anywhere in Canada, for any employer, for up to three years. This entitlement forms part of a scheme of immigration legislation and regulation designed to attract skilled workers to settle in Canada, become permanent residents, and ultimately, Canadian citizens.

[3] During his last semester of university, the appellant applied for an entry-level engineering job with Imperial. Imperial had a policy that required, as a condition of employment, permanent eligibility to work in Canada, as established by proof of either Canadian citizenship or permanent resident status. The appellant

was the top candidate for the job. Imperial offered him the job, conditional on permanent eligibility to work in Canada, as established by proof of either Canadian citizenship or permanent resident status. When the appellant disclosed that he was neither a Canadian citizen nor a permanent resident, and would have to initially work on the three-year PGWP, Imperial withdrew its job offer.

[4] For reasons I explain below, I conclude that the tribunal's decision that Imperial discriminated against the appellant on the basis of citizenship was reasonable. I would allow the appeal and restore the tribunal's order.

(1) The appellant's status in Canada and eligibility to work

[5] In the fall of 2014, the appellant was a student in his final semester of a mechanical engineering degree at McGill University. He was scheduled to complete his studies in December 2014, and to formally graduate in January 2015.

[6] The appellant was, at that time, a citizen of Pakistan. He was in Canada on a student visa. Upon graduation from his university program, he would be eligible for a PGWP for a period of three years. The appellant's entitlement to a PGWP was conditional only on his providing a letter from the university attesting to the completion of his degree. The PGWP would permit him to work full-time, for any employer, anywhere in Canada. That is, it would give him an unrestricted right to work in Canada, subject only to the three-year time limit.

[7] The PGWP program is part of a federal immigration program aimed at attracting international students to attend Canadian universities and colleges, in order to provide a source of skilled labour to Canada. The PGWP program is designed as a pathway to Canadian citizenship.[1] It has three stages. First, while an international student is still in school, federal immigration law permits them to work up to 20 hours per week during academic sessions, and full-time during scheduled breaks in academic sessions. Second, once an international student, like the appellant, graduates, they are eligible for a PGWP, which allows them to work full-time, for any employer, anywhere in Canada, for up to three years. Third, once the individual is working under the PGWP, they are eligible to apply for permanent resident status from within Canada after they have one year of full-time work experience in Canada. The finding of the tribunal, based on the evidence of immigration experts who testified before it, was that if all went smoothly, a PGWP-holder would obtain permanent residency status within 6-18 months of applying for it.

[8] The tribunal found that there was no doubt that the appellant would obtain a PGWP shortly after his graduation in January 2015. The tribunal also accepted

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[1] I base this description of the PGWP program on the tribunal's findings. These findings were based on expert evidence before the tribunal. See also *Immigration and Refugee Protection Regulations*, SOR/2002-227, ss. 87.1, 186, 199, 205, enacted pursuant to s. 14 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

that the appellant reasonably anticipated obtaining permanent resident status before his PGWP expired. As alluded to above, the appellant followed this path and became a permanent resident in June 2017 (more than one year before the expiration of his PGWP), and a Canadian citizen in March 2022.

[9] I pause to underline the finding of the tribunal with respect to the appellant's entitlement to a PGWP upon graduation. Based on the record before it, the tribunal found:

> - "There was no genuine issue regarding [the appellant's] eligibility to obtain a post-graduate work permit that would coincide with the job start in 2015 contemplated by both [Imperial] and [the appellant]."
> - "Obtaining the PGWP was conditional only on proof that [the appellant] 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."
> - "[T]he [appellant] was at all times in status as an international student, with no hindrance to obtaining a PGWP and SIN for commencement of work with [Imperial] in February 2015 or any other later employment start date that could have been negotiated between the parties."

Thus, the tribunal's analysis of whether Imperial discriminated against the appellant on the basis of citizenship proceeded from its factual finding that there was no doubt that the appellant would be granted a PGWP shortly after his graduation in January 2015 (he was granted a PGWP in February 2015).

(2) The hiring process

[10] In September 2014, during the final semester of his university program, the appellant applied for a full-time job as an entry-level engineer in Sarnia, Ontario, with Imperial. The job posting stated that applicants must be “permanently eligible to work in Canada” and that proof of permanent eligibility to work in Canada “must be in the form of your Canadian birth certificate, Canadian citizenship certificate or Canadian certificate of permanent residence.” This requirement was repeated by Imperial throughout the job competition process.

[11] The appellant, fearful that he would be screened out of the competition, lied and answered “yes” on the application to a question asking whether he was “eligible to work in Canada on a permanent basis”. During the interview process with Imperial, between October and November 2014, the appellant was asked this question several more times, and gave the same untruthful answer. On December 1, 2014, in response to an inquiry from Imperial, the appellant told Imperial that he had received his permanent resident card and his social insurance number the previous year. These statements were untrue.

[12] The appellant was successful in his job application to Imperial. Indeed, he was the top-rated candidate in his group. On December 2, 2014, Imperial wrote to him offering him the position. The letter stated that the offer of employment was conditional on the appellant providing proof that he was “eligible to work in Canada

on a permanent basis." The letter continued that such proof could be in the form of a Canadian birth certificate, a Canadian citizenship certificate, or a Canadian certificate of permanent residence. The conditional offer stated that the appellant was to provide his acceptance by December 11, 2014.

(3) The withdrawal of the offer

[13] On December 10, 2014, by two phone calls followed by an email, the appellant advised Imperial that because he was an international student, he would have to work on a PGWP, which would be issued upon his graduation (which was scheduled for January 2015), before he would be permanently allowed to work in Canada. He advised that the PGWP would be valid for three years, and that before it expired, he would obtain permanent residence in Canada. He also attached a link to an immigration website to support this information. He stated that he intended to work and settle in Canada on a permanent basis. He asked if Imperial could make an exception regarding proof of eligibility to work in Canada on a permanent basis.

[14] Imperial responded by letter dated January 8, 2015, and withdrew its job offer. The letter withdrawing the job offer stated as follows:

> 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.

The letter went on to invite the appellant to re-apply to Imperial if he became eligible to work in Canada on a permanent basis in the future. It further stated that if the appellant reapplied when he was eligible to work permanently in Canada, Imperial "would be pleased to consider [his] application at that time."

[15] The appellant graduated from McGill in January 2015 and obtained his PGWP in February 2015, as anticipated.

(4) The human rights claim

[16] In February 2015, the appellant filed an application with the tribunal alleging discrimination on the basis of citizenship.[2] In particular, the appellant claimed that Imperial had discriminated against him on the basis of citizenship in requiring that he be a Canadian citizen or permanent resident to be hired, despite the fact that by the time the position was anticipated to commence, he would have his PGWP and an unrestricted right to work in Canada for up to three years.

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[2] The appellant's application to the tribunal also raised place of origin and ethnic origin as grounds of discrimination; however, these grounds were not pursued by the appellant at the tribunal hearing.

[17] The appellant's position before the tribunal was that Imperial's requirement of permanent eligibility to work in Canada disadvantaged only non-citizens (PGWP-holders, who have a lawful right to work full-time in Canada for any employer). PGWP-holders, all of whom are non-Canadian citizens, are disadvantaged by the policy. The fact that permanent residents, a subset of non-Canadian citizens, are not subject to the disadvantage does not cure the discriminatory impact of Imperial's policy.

[18] Imperial's position was that its policy did not constitute discrimination based on citizenship because of the exception for permanent residents. Imperial took the position that the distinction its policy drew was based on "immigration status" and not citizenship, because candidates did not need to be Canadian citizens to meet the requirement. Imperial further argued that it withdrew the job offer because of the appellant's dishonesty and not because he was unable to fulfil its permanent eligibility to work in Canada requirement. Imperial also challenged the appellant's standing to bring the human rights claim.

(5) The tribunal decision

[19] At the request of Imperial, the liability and remedy portions of the hearing were bifurcated. The liability hearing was heard over 13 days spanning a period of eight months. Six witnesses testified – the appellant, three witnesses from

Imperial, and two experts on immigration matters. In addition, approximately 430 documents were filed, including affidavits.

[20] The tribunal found in the appellant's favour in a decision issued July 20, 2018. The tribunal's findings included: (1) that the appellant had standing under s. 34 of the *Code* to bring his application; (2) that Imperial discriminated against the appellant on the basis of citizenship by imposing an employment condition of permanent eligibility to work in Canada which must be proved by Canadian citizenship or permanent resident status; (3) that the discrimination was direct discrimination; (4) that Imperial had not established that the appellant's dishonesty was the *sole* reason for withdrawing the job offer – even if the appellant's dishonesty was one factor in Imperial's withdrawal of the job offer, it was clear that the appellant's citizenship status was also a factor, and thus the decision was tainted by discrimination on the basis of citizenship; and (5) in the alternative, if the discrimination was not direct discrimination, that Imperial had not established a *bona fide* occupational requirement ("BFOR") defence.

[21] Imperial sought reconsideration of the tribunal's decision. The tribunal denied the reconsideration application in a decision issued February 14, 2019. No issues relating to the reconsideration decision are raised in the appeal by either party.

[22] The tribunal held a further hearing with respect to remedy. In a decision issued August 23, 2019, the tribunal awarded the appellant $120,360.70 in damages for lost income, injury to dignity, feelings and self-respect, and pre-judgment interest. No issues are raised in the appeal relating to the tribunal's decision on remedy.

(6) The Divisional Court decision

[23] Imperial brought an application for judicial review to the Divisional Court. The Divisional Court (Sachs J. dissenting) found that the tribunal's decision was unreasonable. The majority granted the application for judicial review, quashed the tribunal's decision, and declined to remit the matter to the tribunal for a new hearing.

[24] Lederer J. and Mew J. gave separate reasons for the majority. Lederer J. characterized the tribunal's decision as subsuming "permanent resident" status into Canadian "citizenship" and held that the tribunal effectively created a ground of discrimination on the basis of not having Canadian permanent resident status that was not in s. 5 of the *Code*. In other words, according to Lederer J., the tribunal found that under s. 5 of the *Code*, the concept of "citizenship" directly protects against discrimination founded on "permanent residence." In his view, the effect of the tribunal decision was to allow permanent residence to become a separate ground on which discrimination could be alleged – one which was not, in fact, within

s. 5 of the *Code*. Based on this characterization of the tribunal's reasons, Lederer J. faulted the tribunal's failure to examine the "plain and ordinary" meaning of "citizenship" and "permanent residence" and found this to be a gap in the tribunal's analysis. In his view, the tribunal failed to provide a coherent chain of analysis for the conclusion that "permanent residence" is a ground for a claim of discrimination under the ground of "citizenship".

[25] Mew J. agreed with the result reached by Lederer J. In Mew J.'s view, a requirement that a job applicant be able to work permanently in Canada is not discrimination on the basis of citizenship. He held that it went beyond a reasonable interpretation of the *Code* to interpret the s. 5 prohibition against discrimination on the basis of citizenship as covering discrimination on the basis of non-Canadian citizenship. Taken to its logical conclusion, any person denied employment because they are not eligible to work in Canada could, in the absence of a BFOR defence, claim discrimination based on citizenship. In this regard, he referred to the example of a hypothetical American, living in Detroit, who is not a permanent resident in Canada (i.e., who has no status in Canada) (a hypothetical posited by Lederer J.).

[26] In addition, Mew J. observed that, if a Canadian employer is to make a substantial investment in training a professional employee, "it is reasonable to

require the prospective employee to have a permanent and unrestricted right to accept and maintain employment in Canada."

[27] Sachs J., in dissent, found that the tribunal's decision was reasonable, and would have dismissed the application. She began by setting out several basic principles governing interpretation of human rights legislation. In her view, the tribunal's interpretation of the scope of discrimination on the basis of citizenship was reasonable. In particular, she found reasonable the tribunal's consideration of the defences to discrimination on the basis of citizenship in s. 16 of the *Code* as a tool to interpret the scope of citizenship discrimination in s. 5 of the *Code*. As she summarized this point: "If discriminating on the basis of citizenship or permanent residence status cannot constitute discrimination on the basis of citizenship, why put in the defence?"

[28] Sachs J. further found that the tribunal's conclusion that Imperial discriminated against the appellant on the basis of citizenship was consistent with the burden in human rights litigation that a claimant need only establish that a decision not to hire is *connected to* their status as a non-citizen (the protected ground), and not that it was the *sole* reason they were not hired. She also concluded that the tribunal reasonably addressed the argument that not all non-citizens were affected by Imperial's policy (because of the exception for permanent residents). Consistent with the decision in *Brooks v. Canada Safeway Ltd.*, [1989]

1 S.C.R. 1219, the tribunal recognized that the fact that not all non-Canadian citizens were disadvantaged by the policy did not detract from the fact that only non-Canadian citizens were disadvantaged, while Canadian citizens were not. Finally, Sachs J. rejected Imperial's attempt to raise a defence under s. 16(1) of the *Code* for the first time on judicial review (this issue was not considered by the majority).

[29] I discuss the reasons of both the tribunal and the Divisional Court in more detail in the analysis section of these reasons.

B. GROUNDS OF APPEAL AND ADDITIONAL ISSUES RAISED BY THE RESPONDENT

[30] The appellant raises five grounds of appeal:

1. The majority of the Divisional Court incorrectly applied the reasonableness standard by misinterpreting and mischaracterizing the tribunal's reasons for finding discrimination on the basis of citizenship, and by substituting its own decision rather than beginning the analysis with respectful attention to the reasons of the tribunal;
2. The majority of the Divisional Court erred in concluding that the tribunal's finding that the appellant had established *prima facie* direct discrimination on the basis of citizenship was unreasonable, and in so

doing, the majority erred in its approach to the concepts of direct and indirect discrimination;

3. The majority of the Divisional Court incorrectly failed to apply the principle of partial discrimination;
4. The majority of the Divisional Court breached rules of procedural fairness by considering a BFOR defence which had been abandoned by Imperial; and
5. If the decision of the tribunal was unreasonable, the Divisional Court breached rules of procedural fairness and failed to provide adequate reasons for declining to remit the appellant's claim to the tribunal for a new hearing.

[31] Imperial raises a number of additional issues, seeking to uphold the Divisional Court decision on other grounds. Imperial raises the following additional issues:

1. The tribunal's decision that the appellant had standing to file an application claiming discrimination in employment on the basis of citizenship was unreasonable;
2. The tribunal's finding that Imperial withdrew the job offer because the appellant was not a Canadian citizen or a permanent resident, rather than solely because he lied on his application, was unreasonable;

3. The tribunal erroneously shifted the burden to Imperial to prove that it did not discriminate against the appellant, thereby rendering its decision unreasonable; and
4. The tribunal's decision that the defence under s. 16(1) of the *Code* was not available to Imperial was unreasonable because no reasons were given for that conclusion.

[32] It is open to a respondent in an appeal to advance arguments to sustain the judgment below which were not raised by the appellant. However, a respondent may not raise entirely new arguments which were not raised below or which would require further evidence which was not led at first instance: *R. v. Perka*, [1984] 2 S.C.R. 232, at p. 240; *Fanshawe College of Applied Arts and Technology v. Au Optronics Corporation*, 2016 ONCA 131, 129 O.R. (3d) 391, at para. 9; *The Guarantee Company of North America v. Royal Bank of Canada*, 2019 ONCA 9, 144 O.R. (3d) 225, at para. 102.

[33] As I explain in the course of the analysis below, three of the additional issues raised by Imperial meet the requirements of *Perka* for this court to consider them on appeal – the appellant's standing, whether the appellant's lies about his status in Canada were the sole basis for the withdrawal of the job offer, and whether the tribunal improperly shifted the burden of proof. However, one issue –

the defence under s. 16(1) of the *Code* – was not raised by Imperial before the tribunal, and I would not allow Imperial to raise it now.

C. SUMMARY OF MY CONCLUSIONS

[34] I would allow the appeal and restore the order of the tribunal. I am of the view that the tribunal's decision is reasonable and that the Divisional Court majority incorrectly applied the reasonableness standard of review in overturning the tribunal's decision.

[35] In the context of the appellant's circumstances – that by the anticipated commencement of work he would be permitted to work full-time, anywhere in Canada, for any employer, for a period of three years under the PGWP program – the tribunal's finding that Imperial's requirement that only Canadian citizens and permanent residents were eligible for the position was discrimination on the basis of citizenship was reasonable. Imperial's policy denied eligibility for the position only to non-Canadian citizens. The fact that Imperial excepted one class of non-Canadian citizens (permanent residents) did not insulate its policy from being discrimination on the basis of citizenship. Policies that discriminate on the basis of a prohibited ground are not saved on the basis that they only partially discriminate. As that policy applied to PGWP-holders, who are eligible to work without restriction in Canada for up to three years, it constituted discrimination on the basis of

citizenship. The tribunal's finding that Imperial had not established any defence was also reasonable.

[36] Nor would I uphold the Divisional Court majority's decision on the basis of any of the additional issues raised by Imperial. The tribunal's finding that the appellant had standing to bring his claim alleging employment discrimination on the basis of citizenship was reasonable. Regarding the appellant's dishonesty, the tribunal's finding of fact that there was insufficient evidence to demonstrate that Imperial withdrew the job offer solely because the appellant was neither a Canadian citizen nor a permanent resident was reasonable. The tribunal did not improperly place a burden on Imperial to prove that it did not discriminate on a prohibited ground. The tribunal's application of the burden of proof is consistent with jurisprudence on the ultimate burden of proof and evidential burdens in discrimination claims under human rights legislation. Finally, I would not permit Imperial to invoke a defence under s. 16(1) of the *Code*, as Imperial did not raise that defence before the tribunal.

D. STANDARD OF REVIEW

[37] In an appeal to this court from a decision of the Divisional Court on an application for judicial review, this court must determine whether the Divisional Court identified the appropriate standard of review and applied that standard correctly in reviewing the tribunal's decision. The latter step requires this court to

"step into the shoes" of the Divisional Court and focus on the tribunal's decision, applying the applicable standard of review. The appeal is, in effect, a *de novo* review of the tribunal's decision. This court is not restricted to asking whether the Divisional Court committed a palpable and overriding error in its application of the appropriate standard: *Ontario (Health) v. Association of Ontario Midwives*, 2022 ONCA 458, 161 O.R. (3d) 561, at para. 42; *Turkiewicz (Tomasz Turkiewicz Custom Masonry Homes) v. Bricklayers, Masons Independent Union of Canada, Local 1*, 2022 ONCA 780, 476 D.L.R. (4th) 421, at para. 49, leave to appeal to S.C.C. requested, 40564 (January 16, 2023); *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 45-46; *Canadian Federation of Students v. Ontario (Colleges and Universities)*, 2021 ONCA 553, 157 O.R. (3d) 753, at para. 20; *Briggs v. Durham (Police Services Board)*, 2022 ONCA 823, at para. 36, leave to appeal to S.C.C. requested, 40587 (January 27, 2023).

[38] The first step of the analysis is to determine whether the Divisional Court identified the correct standard of review. In this case, both the majority and the dissent in the Divisional Court identified the standard of review as reasonableness.

[39] The appellant and Imperial accept that the applicable standard of review for decisions of the tribunal is reasonableness.

[40] The tribunal participated in this appeal for the purpose of addressing the appropriate standard of review from the tribunal's decisions. In its factum, the tribunal argued that the appropriate standard of review is "patent unreasonableness" because this is the standard of review set out at s. 45.8 of the *Code*, and because, in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 34, the Supreme Court instructed that courts should "to the extent possible, respect clear statutory language that prescribes the applicable standard of review."

[41] After the tribunal's factum was filed, in *Midwives*, this court considered and rejected the same argument put forward by the tribunal that the patent unreasonableness standard should apply. The court held in *Midwives*, at paras. 44-83, that the standard of review applicable to reviews of the tribunal's decisions is reasonableness, consistent with this court's previous decision in *Shaw v. Phipps*, 2012 ONCA 155, 347 D.L.R. (4th) 616.

[42] In light of the decision in *Midwives*, the tribunal did not pursue oral submissions on the standard of review. Although the tribunal did not abandon its position that the appropriate standard of review is patent unreasonableness, it accepted that the court should follow the holding in *Midwives*. In light of the recent considered analysis of this issue in *Midwives*, I agree that the appropriate standard of review of the tribunal's decision is reasonableness.

[43] Reasonableness review finds its starting point in judicial restraint and respect for the distinct role of administrative decision-makers. A reviewing court must pay “respectful attention” to the reasons offered for an administrative decision. This means focusing on the decision actually made by the administrative decision-maker and starting the analysis by developing an understanding of the decision-maker’s reasoning process in order to determine whether the decision as a whole is reasonable. A reasonable decision is one that is “based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker”. In applying the reasonableness standard, the focus is “on the decision actually made by the decision maker, including both the decision maker’s reasoning and the outcome.” In addition, the reviewing court is not to hold the reasons up to a standard of perfection or conduct a “line-by-line treasure hunt for error”: *Vavilov*, at paras. 75, 82-86, and 99-135; *Turkiewicz*, at paras. 55-60; *Midwives,* at para. 82.

[44] Because the standard of review requires this court to step into the shoes of the Divisional Court and conduct a *de novo* review, these reasons focus on the tribunal’s decision. However, in the course of my analysis, I highlight areas where the Divisional Court majority erred in its application of the reasonableness standard.

[45] Although the majority and dissenting decisions of the Divisional Court correctly identified the standard of review as reasonableness, in my view, the majority erred in its application of the reasonableness standard in three ways.

[46] First, the majority failed to give “respectful attention” to the reasons of the tribunal. Although the majority said it was applying a reasonableness standard, the substance of the analysis by both judges in the majority approached the review by asking how they themselves would have decided the issues and restarted the analysis from scratch.

[47] Second, the majority mischaracterized the tribunal’s reasoning, contrary to the direction in *Vavilov* to begin the reasonableness analysis by developing an understanding of the administrative decision-maker’s reasoning that led to the decision. Starting with a mischaracterization of an administrative decision-maker’s reasoning undermines both deference and the possibility of reviewing the decision on a reasonableness standard.

[48] Third, the majority’s analysis ignored well-established law on the approach to be followed in analyzing a claim of discrimination under human rights legislation. As a result, the majority erred by failing to apply the reasonableness standard conscious of the law that constrained both the tribunal and the Divisional Court.

E. RELEVANT PRINCIPLES OF ANALYSIS OF DISCRIMINATION CLAIMS UNDER HUMAN RIGHTS LEGISLATION

[49] Before turning to the reasonableness of the tribunal's decision, I begin with a discussion of a number of basic principles for the analysis of human rights claims that are well-established in the jurisprudence. This context is relevant to understanding the law that constrained the tribunal as a decision-maker, and also relevant to where the Divisional Court majority misapplied the reasonableness standard.

(1) Elements of a claim of discrimination under human rights legislation

[50] The three-step analysis to establish a *prima facie* claim of discrimination is well-established. The applicant must show: (1) that they have a characteristic protected from discrimination under the *Code* (i.e., they are a member of a group protected by the *Code*); (2) that they have experienced an adverse impact (treatment) in a category of activity regulated by the *Code*, such as employment or a service; and (3) that the protected characteristic was a factor in the alleged adverse treatment: *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360, at para. 33; *Midwives*, at para. 101; *Peel Law Association v. Pieters*, 2013 ONCA 396, 116 O.R. (3d) 81, at paras. 55-59.

[51] Under the third branch of the analysis for a *prima facie* case of discrimination, the applicant need only prove a *connection* between the prohibited

ground and the adverse treatment. The connection does not need to be causal. Further, the connection between the adverse treatment and the prohibited ground can co-exist with other non-discriminatory factors. The prohibited ground need not be the only reason for the adverse treatment, or even the predominant reason: *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Centre)*, 2015 SCC 39, [2015] 2 S.C.R. 789, at paras. 43-52; *Midwives*, at para. 102; *Pieters*, at paras. 59-60.

(2) The burden of proof and the shifting evidential burdens

[52] The ultimate burden to prove a claim of discrimination on a prohibited ground is on the applicant. However, the case law establishes a series of shifting evidential burdens to structure the analysis. The law is well-settled and was recently considered by this court in *Midwives*, at paras. 143-51.

[53] An applicant who brings a claim under the *Code* bears the ultimate burden to prove that a discriminatory ground under the *Code* was a factor in the impugned conduct. If the applicant establishes a *prima facie* case of discrimination, then the evidential burden shifts to the responding party to rebut the *prima facie* case by providing a credible, non-discriminatory explanation for the impugned conduct which rebuts the *prima facie* case. In other words, once a *prima facie* case of discrimination on a prohibited ground is demonstrated, the evidential burden shifts to the respondent to rebut that a prohibited ground of discrimination was a factor

in the impugned conduct. If the responding party succeeds in rebutting the *prima facie* case, then the evidential burden shifts back to the applicant to prove that the respondent's non-discriminatory explanation is pretextual. See also: *Pieters*, at paras. 63-74; *Ontario v. Association of Midwives*, 2020 ONSC 2839, 82 Admin L.R. (6th) 241, at paras. 144-51, aff'd 2022 ONCA 458, 161 O.R. (3d) 561.

[54] The ultimate burden of persuasion always rests with the party claiming discrimination. However, the shifting evidential burdens support the underlying principle of anti-discrimination legislation that where a responding party seeks to demonstrate a non-discriminatory reason for the impugned action, it is not sufficient to show that a non-discriminatory reason was part of the reason for the action if discriminatory reasons were also part of the reason. Rather, the responding party must show that the non-discriminatory reason was the *sole* reason for the action. In other words, the jurisprudence recognizes that the reasons that motivate actions taken by, for example, an employer or potential employer, may be multi-factorial. If one of the reasons is discriminatory, this establishes a violation of the *Code* (subject to statutory defences): *Bombardier*, at paras. 43-52. The presence of a non-discriminatory reason for the impugned conduct does not insulate the conduct from a finding of discrimination under the *Code* if it is combined with one or more discriminatory reasons.

[55] The shifting evidential burdens also recognize that if there is a non-discriminatory explanation for the impugned conduct, the respondent is uniquely positioned to provide evidence on that issue, because it has to do with the respondent's state of mind or motivation: *Pieters*, at paras. 70-73.

(3) Direct versus adverse impact discrimination

[56] In *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*"), the Supreme Court adopted a revised unified approach to employer defences under human rights legislation, no longer based on categorizing discrimination as direct or adverse impact (sometimes referred to as indirect). The court gave several reasons for this, including that the distinction is sometimes artificial, difficult to apply, and manipulable; that it is difficult to justify different remedies depending on which category is applied to a discrimination claim; that it can tend to legitimate systemic discrimination; and that it is inconsistent with the purposes of human rights legislation: at paras. 25-53.

[57] However, the distinction between direct and adverse impact discrimination continues to have relevance in Ontario because the BFOR defence in s. 11 of the

Code is only available where discrimination is indirect:[3] *Entrop v. Imperial Oil Limited* (2000), 50 O.R. (3d) 18 (C.A.), at paras. 67-69.

[58] Although the Supreme Court in *Meiorin* signalled a move away from categorizing discrimination as direct or adverse impact, the concepts of direct and adverse impact discrimination have relevance to this appeal because one of the issues on which the majority of the Divisional Court found the tribunal decision to be unreasonable was the finding that Imperial's policy constituted direct discrimination.

[59] The distinction between direct and adverse impact discrimination has its origin in Canadian law in *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536 ("*O'Malley*"). In *O'Malley*, McIntyre J., writing for the court, described the distinction as follows, at p. 551:

> A distinction must be made between what I would describe as direct discrimination and the concept already referred to as adverse effect discrimination in connection with employment. Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, "No Catholics or no women or no blacks employed here." There is, of course, no disagreement in the case at bar that direct discrimination of that nature would contravene the Act. On the other hand, there is the

[3] There is a more limited BFOR defence for some circumstances of direct discrimination in the context of "special employment" in s. 24 of the *Code*. However, none of the defences in s. 24 would apply to the circumstances of this case, and Imperial did not raise s. 24 at any point in this litigation.

> concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force. For essentially the same reasons that led to the conclusion that an intent to discriminate was not required as an element of discrimination contravening the Code, I am of the opinion that this Court may consider adverse effect discrimination as described in these reasons a contradiction of the terms of the Code. An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply. [Emphasis added.]

[60] Thus, direct discrimination exists where a rule or policy discriminates against a protected group on its face. Adverse impact discrimination exists where a rule or policy is neutral on its face, but adversely affects members of a protected group (i.e., on the basis of a prohibited ground, such as race, sex, or creed).

[61] As is clear from the passage from *O'Malley*, the concern which motivated recognition of adverse impact discrimination is that a neutrally expressed rule or policy may affect particular groups protected from discrimination under human rights legislation in a discriminatory way. The fact the discrimination is not expressly intended by a neutral rule or policy does not make its effects any less real for the affected group: see also *Meiorin*, at para. 25; *Entrop*, at para. 71.

[62] More recent articulations of the distinction between direct and indirect discrimination have maintained the approach from *O'Malley* that discrimination is characterized as direct where a rule or policy is discriminatory on its face, and adverse impact where a rule or policy is neutral on its face but discriminatory in its effects on a particular group based on a prohibited ground: *Entrop*, at para. 65; *Fraser v. Canada (Attorney General),* 2020 SCC 28, 450 D.L.R. (4th) 1, at paras. 30-39; *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868, at para. 15 ("*Grismer*"); *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30, [2017] 1 S.C.R. 591, at para. 24.

[63] The Supreme Court in *Meiorin* and this court in *Entrop* recognized that in some cases, characterizing the alleged discrimination as direct or adverse impact may be difficult: *Meiorin*, at para. 27; *Entrop*, at para. 70.

[64] In light of the direction in *Meiorin* signalling a move away from undue focus on whether discrimination was direct or adverse impact, but mindful of the language of s. 11(1) of the *Code* which makes a BFOR defence unavailable for cases of direct discrimination, this court held in *Entrop*, at para. 80, that the s. 11 defence should be unavailable only in cases which can be "neatly characterized" as direct discrimination. In other words, if there is doubt about whether discrimination should be characterized as direct or adverse impact in a particular

case, it should be characterized as adverse impact, to allow a BFOR defence under s. 11 to be considered.

[65] I flag now an issue I return to below. The Supreme Court has held that the test to establish *prima facie* discrimination is the same whether the claim is of direct or adverse impact discrimination: *Grismer*, at paras. 18-19; *Fraser*, at para. 49.

[66] As a result, whether a discrimination claim is characterized as direct or adverse impact has one practical effect in Ontario – whether a BFOR defence under s. 11 is available. Where a BFOR defence is not in issue, the question of whether a claim of discrimination is properly characterized as direct or adverse impact has no practical effect.

(4) Partial discrimination is still discrimination

[67] In order to establish a finding of *prima facie* discrimination, it is not necessary that all members of the protected group at issue be affected or affected in the same way. For example, in *Brooks*, the Supreme Court held that an employer's policy that denied benefits to employees during pregnancy constituted discrimination on the basis of sex. Although not all women become pregnant, the policy had a discriminatory impact on women. In other words, the fact that discrimination is partial does not convert it into non-discrimination: *Brooks*, at

pp. 1247-48. See also: *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, at pp. 1288-89; *Fraser*, at paras. 72-75; *Meiorin*, at paras. 11 and 69.[4]

[68] The interveners, the South Asian Legal Clinic of Ontario and the Colour of Poverty/Colour of Change Network, directed the court to another helpful example of this principle. At one time, elementary school teaching contracts often either barred married women from contracts, or required that they be placed on limited-term contracts. These policies were based on sexist stereotypes of conflict between child-rearing and work for mothers, and gendered division of labour in families. Despite the fact that these policies did not affect women who chose not to marry – and thus did not affect all women – such policies were found to constitute discrimination on the basis of sex.[5] The policies only applied to women. The fact that not all women were affected did not "cure" the discriminatory effect. It simply made the policies partially, rather than fully, discriminatory.

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[4] The partial discrimination principle is not expressly discussed in *Meiorin*. However, the evidence was clear that some women were capable of passing the physical fitness requirement that was found to constitute adverse impact discrimination. The discrimination arose out of the fact that the policy impacted women differently (and negatively) compared to men. The fact that not all women were so affected did not render the policy non-discriminatory.

[5] These cases were decided prior to the inclusion of "marital status" in the relevant human rights legislation. See discussion of this type of policy in *Tomen v. O.T.F. (No. 4)*, 1994 CanLII 18431 (Ont. H.R.T.), at paras. 262-67. This type of policy was found to be discrimination on the basis of sex in *Ferguson v. Cape Breton District School Board*, 1986 CanLII 6514 (N.S.H.R.C.), aff'd (1987), N.S.R. (2d) 106 (C.A.).

[69] In light of this review of the human rights law principles and constraints governing the analysis of the tribunal (and the Divisional Court), I turn now to a consideration of whether the tribunal's decision was reasonable.

F. WAS THE TRIBUNAL'S LIABILITY DECISION REASONABLE?

[70] As outlined above, the standard of review in this case requires this court to step into the shoes of the Divisional Court and assess the reasonableness of the tribunal's decision. For this reason, rather than structure the analysis as a point-by-point assessment of the appellant's grounds of appeal and then the respondent's additional issues, I structure the analysis around whether the tribunal's decision was reasonable and focus on the areas where the reasonableness of the decision is challenged. The ultimate question this court must answer is whether the decision of the tribunal "is based on an internally coherent and rational chain of analysis and … is justified in relation to the facts and the law that constrain the decision maker:" *Vavilov*, at paras. 85 and 99.

[71] I structure my analysis of the reasonableness of the tribunal's decision around the following issues:

1. Was the tribunal's decision that the appellant had standing to file an application claiming discrimination in employment on the basis of citizenship reasonable?

2. Was the tribunal's finding of a *prima facie* claim of employment discrimination on the basis of citizenship reasonable?

3. Was the tribunal's finding that Imperial withdrew the job offer because the appellant was not a Canadian citizen or permanent resident, rather than solely because of his dishonesty in the job competition, reasonable?

4. Was the tribunal's decision that the defence under s. 16(1) of the *Code* was not available to Imperial reasonable?

(1) Was the tribunal's decision that the appellant had standing to file an application claiming discrimination in employment on the basis of citizenship reasonable?

[72] Imperial argues that the tribunal's finding that the appellant had standing to bring his claim alleging discrimination in employment on the basis of citizenship was unreasonable. The substance of Imperial's submission is that the appellant did not have standing to bring the claim because, at the time he applied for the position and until the date Imperial withdrew the job offer (as distinct from the time he would have been anticipated to commence work), he did not have status in Canada that permitted him to work without restriction, since up to that time, he was a foreign national and did not yet have the PGWP.

(a) Is Imperial entitled to raise the standing issue?

[73] There is a preliminary issue of whether Imperial may raise the appellant's standing on appeal, as there is dispute about whether it was raised in the Divisional Court.

[74] Neither the majority nor the dissent in the Divisional Court addressed the merits of Imperial's position that the appellant lacked standing to bring his application under the *Code*. However, Imperial's Notice of Application and factum in the Divisional Court raised the standing issue as a ground of review. In light of the lack of clarity on what position Imperial took in oral submissions in that court, I address the issue on the merits.

[75] As I explain below, in my view, the tribunal's conclusion that the appellant had standing to bring the claim that Imperial discriminated against him on the basis of citizenship is reasonable. I would not interfere with it.

(b) The tribunal's reasons on the appellant's standing to bring the claim

[76] The tribunal found that the appellant had standing to bring his claim under the *Code* because he had a "direct interest" in the pre-employment condition imposed by Imperial that he was unable to meet.

[77] Imperial had argued before the tribunal that the appellant did not have standing to bring his application because from the date that he made his job application to Imperial (September 10, 2014) to the date of the withdrawal of the job offer (January 8, 2015), he was an international student on a student visa, and as a result was not permitted to work off-campus on a full-time basis. In other words, Imperial argued that although the appellant's status as a PGWP-holder upon graduation (which the tribunal found was imminent) would entitle him to work full-time, anywhere in Canada, for any employer, for up to three years, because he had not yet graduated when the job offer was withdrawn, he did not have standing to bring the application.

[78] The tribunal rejected this argument. The tribunal's conclusion on standing is founded on both the wording of s. 34(1) of the *Code*, which defines the right to bring an application under the *Code*, and the evidence in the record, which supported the finding that the appellant had a direct interest in the application.

[79] The tribunal noted the breadth of the right of standing codified in s. 34(1) of the *Code*. Section 34(1) of the *Code* provides: "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" (either within one year after the incident if it is a single incident, or within one year after the last incident, if it is a series of incidents).

[80] The substance of the tribunal's holding on standing was as follows:

> 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. [Emphasis in original.]

[81] The tribunal referred to prior authority of the tribunal in support of assessing the appellant's standing based on whether he had a direct interest at stake in the subject matter of the proceeding: *Carasco v. University of Windsor*, 2012 HRTO 195. The tribunal also noted that it is settled law in Ontario that job applicants enjoy the protection of the *Code* before they are formally employed because the wording in s. 5(1) "with respect to employment" has been interpreted to include pre-employment scenarios – that is, it covers discrimination in the job search process.

[82] The tribunal then made findings based on the record before it in support of its conclusion that the appellant had a direct interest in the application. Central to these findings was evidence that under the PGWP program, the appellant would be entitled, upon graduation (which was imminent – scheduled for January 2015), to obtain a PGWP without delay. The evidence before the tribunal was that the only condition on the appellant obtaining the PGWP was confirmation from the

university that he had completed his university program. The PGWP was “open” and permitted him to work full-time, anywhere in Canada, for any employer, but was limited to three years. In other words, upon graduation, the appellant’s right to work in Canada was unrestricted, but was time-limited to three years.

[83] At the time the appellant applied for the job with Imperial, he anticipated completing his engineering studies in December 2014 and formally graduating in January 2015. Imperial’s job posting indicated the start date for the position was May 2015, after the appellant’s anticipated graduation. In the job offer letter of December 2, 2014, the start date listed was February 2, 2015, but the letter indicated that that date was “negotiable”. There was no evidence led before the tribunal that the appellant would be expected to commence work in the position with Imperial before his graduation. Indeed, the evidence from Imperial’s witnesses was that new graduate hires would start employment after their graduation. Thus, the evidence established that the appellant would be eligible to work without restriction for three years, by the time he would have been expected to start work for Imperial in the position. The evidence before the tribunal was that the appellant received his PGWP in February 2015, as anticipated at the time he applied for work with Imperial.

[84] The tribunal further accepted the uncontroverted evidence that the appellant was a student engineer who, in applying for the position at Imperial, was

genuinely seeking his first job that would commence after his graduation. The tribunal concluded that "[a]s a genuine job seeker, for work to commence at some yet to [be] determined date after his graduation, it is abundantly clear to the Tribunal that the [appellant] had a direct stake in [Imperial's] hiring process, starting with [Imperial's] screening of recruits on the McGill campus and thus he has standing to challenge [Imperial's] employment practices under the *Code*."

(c) Positions of the parties on standing

[85] Imperial argues that the tribunal's finding that the appellant had standing to bring his application under the *Code* was unreasonable. Imperial's argument is the same as that raised before the tribunal – that up until the date of Imperial's letter withdrawing the job offer (January 8, 2015), the appellant was not yet eligible to work without restriction in Canada. As such, according to Imperial, he did not have standing to bring an application under s. 34(1) of the *Code* based on discrimination in employment because he did not have an unrestricted legal right to work in Canada at the time he applied for the job and up to the time the job offer was withdrawn. Until his graduation, the appellant's right to work in Canada was limited to part-time work on the university campus or full-time work only in the regular breaks between academic terms. Imperial's position is that in order for a person to have standing to bring a claim based on discrimination in employment on the basis of citizenship, a person must be eligible to work in Canada, and that the relevant

time to assess an applicant's right to work is when they apply or when the job offer is made, not the anticipated date of commencement of work. Imperial argues that the tribunal's standing analysis does not reveal a rational chain of analysis.

[86] The appellant argues that the tribunal's decision that he had standing based on having a direct interest in the issues raised in the application was reasonable. The tribunal's reasons demonstrate that it applied the relevant legal principles grounded in the text of s. 34(1) of the *Code* and the concept of having a "direct interest" to ground standing, and its analysis and application of those principles on the factual record before it were reasonable.

(d) The tribunal's decision on the appellant's standing was reasonable

[87] I agree with the appellant that the tribunal's analysis and conclusion regarding his standing were reasonable. The principles relied on by the tribunal to assess the appellant's standing are consistent with the broad language of s. 34(1) of the *Code*, with prior jurisprudence of the tribunal on standing, and with the approach to direct interest standing (private standing) in the courts. The factual conclusions reached by the tribunal are well-grounded in the evidentiary record and are reasonable.

[88] As the tribunal noted, s. 34(1) of the *Code* provides for a broad grant of standing. Any person who "believes that any of his or her rights under Part I have been infringed" has standing to apply to the tribunal for a remedy. One could

imagine scenarios where there is no factual basis for a person's belief that their rights have been infringed, and on that basis the assertion of standing would be speculative. But that is not the case here.

[89] As noted above, the tribunal referred to its prior decision in *Carasco* regarding the principles governing standing under the *Code*. *Carasco* considered the three types of standing available under the *Code*. I will only address the type of standing under s. 34(1), as that is what is at issue in this case. *Carasco* held, in accordance with the wording of s. 34(1), that standing to bring an application under the *Code* is available to a person who believes that any of their rights under Part I have been infringed. *Carasco* notes that s. 45.2, which is referred to in s. 34(1), makes the tribunal's authority (following a hearing) to award a remedy conditional on the tribunal finding an infringement of the rights of the party bringing the application. Thus, in order for an applicant to have standing to bring an application under s. 34(1), the application must assert a breach of the applicant's rights under the *Code*, and seek a remedy for the breach of the rights. The analysis in *Carasco* focused on the importance of the claim being for the breach of the applicant's own rights, as opposed to a claim in the nature of public interest standing (which under s. 35(1) of the *Code*, may only be brought by the Ontario Human Rights Commission).

[90] The “direct interest” analysis applied by the tribunal in this case is consistent with the approach in *Carasco*. The tribunal considered whether the applicant had a viable claim that his rights under the *Code* had been infringed by Imperial and sought a remedy for the alleged breach.

[91] The analysis of standing under the *Code* need not be identical to the approach taken by the courts in civil matters, particularly given the broad grant of standing in s. 34(1) of the *Code*. That said, the tribunal’s approach to standing in this case is consistent with established principles regarding direct interest standing in the courts.

[92] The test applied by the courts for private interest standing requires that the applicant or plaintiff have a personal and direct interest in the issue raised in the proceeding. The interest must not be too indirect, remote, or speculative. Various formulations of this requirement are used in the jurisprudence, including that the person is “specifically affected by the issue”, has a “personal legal interest”, or has a “personal and direct interest” in the outcome of the proceeding. This type of standing is often referred to as “direct interest” or “private” standing to distinguish it from public interest standing (the latter having different requirements): *Canada (Minister of Finance) v. Finlay*, [1986] 2 S.C.R. 607, at pp. 617-18; *Bedford v. Canada*, 2010 ONSC 4264, 102 O.R. (3d) 321, at paras. 44-47, aff’d on this point, 2012 ONCA 186, 109 O.R. (3d) 1, at para. 50, rev’d in part on other grounds, 2013

SCC 72, [2013] 3 S.C.R. 1101; *Carroll v. Toronto-Dominion Bank*, 2021 ONCA 38, 153 O.R. (3d) 385, at para. 33; Thomas A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986), at p. 5.

[93] The ultimate concern behind rules for private standing (as distinct from public interest standing) is that the party bringing the proceeding have a real legal interest in the proceeding that they are seeking to vindicate, rather than just a "sense of grievance": *Carroll*, at para. 33; *Landau v. Ontario (Attorney General)*, 2013 ONSC 6152, at paras. 16 and 21; Cromwell, at pp. 9-10.

[94] The tribunal reasonably found that the appellant had a real legal interest in the claim he made. The tribunal applied the direct interest test reasonably to the record before it. The tribunal considered the legal and factual issues raised by the application, asked whether the appellant had a direct interest in them, and found that he did. The evidence before the tribunal supported its findings that the appellant was a genuine job seeker; that upon graduation he would be entitled to a PGWP which would entitle him to work full-time, anywhere in Canada, for any employer, for up to three years; that he was anticipated to graduate in January 2015 (and in the event did); and that the expectation of both the appellant and Imperial was that he would commence work after he graduated (i.e., once he was permitted to work without restriction under the PGWP program). These findings support the conclusion that the appellant had a direct interest in the hiring policy

of Imperial limiting prospective employees to Canadian citizens and permanent residents. The tribunal's conclusion that the appellant had satisfied the requirements for standing under s. 34(1) of the *Code* is reasonable.

[95] Imperial largely focuses its argument on the timing of the alleged discrimination in relation to the appellant's eligibility to work in Canada, arguing that because he did not have a legal right to work in Canada at the time the alleged employment discrimination occurred, he did not have standing to bring this claim. Lying behind Imperial's submissions on this issue is the asserted concern (as set out in Imperial's factum) that, if the appellant had standing to bring his claim, "then any person in the world would have standing to file a claim of discrimination in employment contrary to Section 5(1) of the *Code*."

[96] Respectfully, this argument is based on a false premise that is not supported by the record or the tribunal's reasoning. The tribunal found that the appellant had standing to bring the claim because on the record before it, the appellant was entitled to the PGWP once he graduated, conditional only on providing proof from the university of the completion of his degree. The appellant had already finished the coursework for his degree when the job offer was rescinded, and was just waiting on the formal graduation. Thus, the appellant's claim that he would have the status to work in Canada without restriction imminently was well-grounded in the record. The tribunal found that there was no

doubt that he would obtain his PGWP following his graduation in January 2015. The appellant's claim based on an anticipated right to work without restriction in the immediate future was not a speculative claim.

[97] By contrast, a hypothetical human rights claim filed by "any person in the world" (as posited in Imperial's factum), without any claim to a status in Canada that would give them an unrestricted right to work, would fail the test for standing because the assertion of any right to work in Canada would be speculative.

[98] The tribunal's finding that the appellant had standing to bring the claim of discrimination on the basis of citizenship was reasonable.

(2) Was the tribunal's finding of a *prima facie* claim of employment discrimination on the basis of citizenship reasonable?

[99] The Divisional Court majority held that the tribunal's finding that Imperial engaged in employment discrimination on the basis of citizenship was unreasonable. The appellant challenges this holding. Whether the tribunal's finding that Imperial discriminated against the appellant on the basis of citizenship was reasonable is at the heart of this appeal.

[100] The appellant argues that the tribunal's decision was reasonable. The appellant argues that the tribunal reasonably interpreted the meaning of discrimination in employment on the basis of citizenship in s. 5 of the *Code* in the context of the legislation as a whole – and in particular s. 16 of the *Code* – and in

accordance with the principle to interpret human rights legislation in a liberal manner, consistent with its purposes. The appellant argues that the tribunal did not conceive of “permanent resident status” as a distinct ground of discrimination under the *Code*. Rather, the tribunal found that the ability to live and work in Canada on a permanent basis is closely associated with Canadian citizenship, and that under Imperial’s policy, non-Canadian citizens who were eligible to work in Canada were excluded from consideration (although not all non-Canadian citizens were excluded because of the exception for individuals with permanent resident status). The tribunal found that based on these factors, the exclusion of PGWP-holders from consideration for employment constituted discrimination on the basis of citizenship. The fact that Imperial’s policy did not discriminate against all non-Canadian citizens, because of the exception for individuals with permanent resident status, did not cure the discrimination. Further the appellant argues that the tribunal reasonably characterized the discrimination as direct because it is apparent on the face of Imperial’s policy and the job posting.

[101] Imperial argues that its policy does not discriminate on the basis of citizenship, but rather on the basis of immigration status, which is not a prohibited ground under the *Code*. Imperial points to the fact that its policy provided that individuals with permanent resident status were eligible for employment as establishing that the policy did not discriminate on the basis of citizenship. Imperial

argues that the tribunal's reasons do not provide a coherent chain of reasoning. Imperial argues that the tribunal's reasoning unreasonably extended the prohibited ground of citizenship in s. 5 of the *Code* to include status as a permanent resident of Canada as an additional ground of prohibited discrimination.

[102] I begin the analysis with a summary of the tribunal's reasons on this issue.

(a) The tribunal's reasons for finding a *prima facie* claim of employment discrimination on the basis of citizenship

[103] The tribunal began its analysis of whether Imperial engaged in discrimination on the prohibited ground of citizenship with the applicable legal framework. This included:

- Section 5 of the *Code*, which provides that every person has the right to be free from discrimination with respect to employment on a number of grounds, including citizenship.
- Section 9 of the *Code*, which states, among other things, that no one shall "infringe or do, directly or indirectly, anything that infringes a right under this Part" (which includes a right under s. 5).
- Section 11 of the *Code*, which sets out the BFOR defence.
- The onus of proof in human rights claims. (I discuss the tribunal's consideration of the onus in more detail below, as it is a separate issue raised by Imperial).

[104] The tribunal then accurately summarized the positions of the parties.

[105] The tribunal pointed out that the issue raised in this case was somewhat novel to the tribunal, as earlier cases involving allegations of discrimination on the basis 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.” In this section of the analysis, the tribunal explained why particular prior tribunal decisions could not be said to have decided the issue raised in this case.

[106] As part of its interpretation of the meaning of discrimination on the basis of “citizenship” in s. 5 of the *Code*, the tribunal considered another section of the *Code* that uses the word “citizenship”, s. 16, to ensure that a consistent meaning is attached to the term within the *Code*. The tribunal noted that s. 16(1) creates a defence to discrimination on the basis of citizenship by providing that a right to non-discrimination based on citizenship is not infringed “where Canadian citizenship is a requirement, qualification or consideration imposed or authorized by law.” Section 16(2) provides that a right to non-discrimination based on 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.” Section 16(3) provides that the right to non-discrimination based on 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."

[107] Based on considering the meaning of citizenship in s. 5 of the *Code* in the context of its use in s. 16 of the *Code*, the tribunal found as follows:

> 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[s] may properly found a claim of discrimination *on the ground of citizenship*.
>
> 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*. [Emphasis in original.]

[108] The tribunal found that citizenship (of Canada) and non-citizenship were "clear demarcations captured by the *Code*" and that non-citizenship captures all individuals in Ontario who are not Canadian citizens. The tribunal recognized that

among non-citizens, there are individuals "with varying residence status and different degrees of entitlement to work in Canada." The tribunal found that for the appellant to obtain protection from discrimination under the *Code* on the basis of citizenship, he need only establish that the alleged discriminatory treatment was linked to his personal characteristic of being a non-citizen of Canada (or a non-Canadian citizen).

[109] The tribunal relied on the principle that discrimination only affecting some members of a protected group does not render the treatment non-discriminatory, referring to the Supreme Court decision in *Meiorin*. That is, partial discrimination against some members of a protected group is still prohibited discrimination. Thus, the fact that Imperial's policy only discriminated against some non-Canadian citizens (because it excepted permanent residents) did not render its policy non-discriminatory. On this issue of whether Imperial's policy discriminated on the basis of citizenship, the tribunal concluded:

> 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. [Citation omitted.]
>
> The Tribunal finds that IO's "permanence requirement"[6] imposed a disadvantage on the applicant and is linked to

[6] The "permanence requirement" was defined earlier in the reasons to refer to Imperial's policy that a condition of employment for the position at issue was eligibility "to work in Canada on a permanent basis".

> "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* [*v. Student Federation of the University of Ottawa*, 2010 HRTO 1976] 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. [Emphasis in original.]
>
> 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".

[110] The tribunal then turned to the three-part analysis for discrimination in hiring, which requires an applicant to show: (1) that they were qualified for the job; (2) that they did not get the job because of a prohibited ground; and (3) that the person who got the job was no more qualified but lacked the attribute on which the applicant based their human rights complaint.

[111] The tribunal noted that Imperial did not dispute that it treated the appellant differently based on its policy that a condition of employment was being eligible to work in Canada on a permanent basis. Thus, the tribunal found that a *prima facie* case was made out that required an answer from Imperial.

[112] The tribunal noted that Imperial did not dispute that its policy was designed to exclude job candidates who did not have eligibility to work permanently in Canada. However, Imperial took the position that its policy was not discrimination on a prohibited ground (i.e., that it was discrimination on the basis of immigration status and not citizenship), and also asserted a BFOR defence on the basis that permanence of employees was an operational requirement (I address the BFOR defence further below).

[113] The tribunal rejected Imperial's submission that the policy was not discrimination on the basis of citizenship because it permitted the hiring of permanent residents, and thus the distinction was on the basis of "immigration status" and not citizenship.

[114] The tribunal further held that Imperial's policy constituted direct discrimination. It explained that it reached this conclusion because the policy, on its face, distinguished between candidates based on whether they could work permanently in Canada, and barred any person who was not "eligible to work permanently in Canada", with such eligibility to be proven by proof of Canadian citizenship or Canadian permanent resident status. The tribunal held that this was direct discrimination on the basis of citizenship because only non-Canadian citizens are disadvantaged by the policy. As applied to the appellant's situation, all PGWP-holders (all of whom are non-Canadian citizens) are discriminated against,

despite their right to work in Canada for three years. The tribunal noted that no statistical analysis or examination of disparate impact was required to determine the impact of Imperial's policy. The discriminatory effect on non-Canadian citizens was express on the face of Imperial's policy. The fact that the discrimination was partial because permanent residents were excepted did not change that characterization. On this basis the tribunal found that the appellant had established a *prima facie* case of discrimination on the basis of citizenship.

[115] I break my analysis of the reasonableness of the tribunal's conclusion with respect to discrimination on the basis of citizenship into four parts:

- the reasonableness of the tribunal's interpretation of the scope of discrimination on the basis of citizenship under s. 5 of the *Code*;
- the reasonableness of the tribunal's finding that Imperial discriminated against the appellant on the basis of citizenship, including its findings in relation to the principle of partial discrimination;
- the reasonableness of the tribunal's analysis in light of this court's decision in *Irshad (Litigation Guardian of) v. Ontario (Minister of Health)* (2001), 55 O.R. (3d) 43 (C.A.); and
- the reasonableness of the tribunal's characterization of the discrimination as direct, rather than indirect.

(b) The tribunal's interpretation of the scope of discrimination on the basis of citizenship in s. 5 of the *Code* in the context of PGWP-holders is reasonable

[116] In my view, the tribunal's analysis of the scope of discrimination on the basis of citizenship in s. 5 of the *Code* is reasonable. The tribunal's reasons provide a rational chain of analysis that is justified in relation to the record before it and the relevant law. In particular, the tribunal's interpretation of s. 5 of the *Code* is reasonable in light of the principles of statutory interpretation.

[117] *Vavilov* is clear that decisions of administrative bodies involving the interpretation of statutes are subject to review on a standard of reasonableness, unless they raise (*inter alia*) "general questions of law of central importance to the legal system as a whole": *Vavilov*, at paras. 4, 53, 58-62, 69. No party to this appeal contends that the issues raised fall within the exception for general questions of law of central importance to the legal system as a whole.

[118] In light of the standard of review, I am cautious about elaborating on the interpretation of s. 5 of the *Code* beyond the reasons given by the tribunal. However, as the issue of the interpretation of discrimination in employment on the basis of citizenship comes before this court for the first time in this appeal, in my view, it is helpful for clarity of the analysis to address the issue in more detail. I do so, recognizing that it is not the role of this court to conduct a *de novo* interpretation

of s. 5, but rather to engage with the tribunal's reasoning and determine whether the tribunal's interpretation is "defensible in light of the interpretive constraints imposed by law": *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 S.C.R. 900, at para. 41.

(i) Principles of statutory interpretation and interpretation of human rights legislation

[119] The modern approach to statutory interpretation is set out in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at p. 41, quoting Professor Elmer Driedger:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

In the administrative law context, a decision-maker must interpret legislative provisions "consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue": *Vavilov*, at paras. 120-21.

[120] When the legislation to be interpreted is human rights legislation, a further principle applies. Human rights legislation is to be given a broad, liberal, and purposive interpretation, consistent with its remedial objectives: *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, at p. 1134; *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, at pp. 89-90; and *Brooks*, at pp. 1244-45.

[121] Both of these principles must be borne in mind when considering the meaning of discrimination on the basis of citizenship in s. 5 of the *Code*.

(ii) Text and history of ss. 5 and 16 of the *Code*

[122] Although not the focus of the tribunal's analysis, the legislative history of s. 5 and other provisions of the *Code* provides useful context for assessing the reasonableness of the tribunal's decision. The original version of the *Code*, passed in 1962, did not include citizenship as a protected ground. Section 4 of the original version prohibited discrimination in employment on the basis of "race, creed, colour, nationality, ancestry or place of origin."

[123] Citizenship as a protected ground in relation to employment discrimination was added to the *Code* in amendments passed in 1981.[7] At the same time, the defences in what is now s. 16 were enacted: *Human Rights Code*, *1981*, S.O. 1981, c. 53, ss. 4 and 15.

[124] Neither party provided the tribunal, the Divisional Court, or this court with references to the legislative debates in relation to the amendments leading to the addition of citizenship as a prohibited ground of discrimination. This may be because there is little in the legislative debates that assists with the interpretation

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[7] At the same time, citizenship was also added as a protected ground under ss. 1-3 and 5, prohibiting discrimination in services, accommodation, contracts, and vocational assessments.

of what are now ss. 5 and 16. Given the significant changes that the 1981 amendments made to the *Code*, and the expansion of prohibited grounds of discrimination, the debates largely focused on other topics, including whether to add sexual orientation as a prohibited ground: see e.g., Ontario, Legislative Assembly, *Hansard*, 31st Parl., 4th Sess. (9 December 1980); Ontario, Legislative Assembly, *Hansard*, 32nd Parl., 1st Sess. (15 May 1981).

[125] The text of both ss. 5 and 16 of the present *Code* is the starting point for the interpretation of the meaning of "equal treatment with respect to employment without discrimination because of … citizenship". The tribunal set out the text of s. 5, which enacts the right to equal treatment in employment and provides as follows:

> 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, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability. [Emphasis added.]

[126] The tribunal recognized that s. 16 creates statutory defences to claims of discrimination on the basis of citizenship in some circumstances where Canadian citizenship is a requirement, qualification, or consideration. It provides as follows:

> 16 (1) 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. [Emphasis added.]

(iii) Grammatical and ordinary meaning of s. 5 of the *Code*

[127] The tribunal noted that "citizenship" is not defined in the *Code*. While the tribunal did not explicitly discuss the term's ordinary meaning, it is clear the tribunal understood "citizenship" to refer to being a citizen of a country – that is, the formal status of citizenship. Section 5 does not limit itself to citizenship of any particular country. Thus, on a plain reading, s. 5 appears to prohibit[8] (subject to applicable defences) discrimination based on whether someone is or is not a Canadian citizen and also discrimination based on whether someone is or is not a citizen of another country (for example, discrimination based on whether someone is or is not a citizen of France).

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[8] As a technical matter, the prohibitions on discrimination are created by s. 9 and 11 of the *Code*. However, the grounds on which discrimination in employment is prohibited are defined in s. 5.

[128] However, *Rizzo* is clear that the ordinary meaning is not the end of the analysis. In this case, consistent with *Rizzo*, the tribunal reasonably considered how a related provision of the *Code*, s. 16, impacts the interpretation of discrimination on the basis of citizenship in s. 5.

(iv) Reading s. 5 in the context of s. 16 of the *Code*

[129] The crux of the Divisional Court majority's concern with the tribunal's analysis was the majority's view that interpreting s. 5 to cover employment discrimination based on citizenship or a factor associated with citizenship (ability to work in Canada permanently) would overshoot the purpose of s. 5, because in general, as a matter of federal immigration law, non-Canadian citizens are either not permitted to or have very limited ability to work in Canada. In my view, reading s. 5 in the context of s. 16 of the *Code*, as the tribunal did, supports the tribunal's analysis of the broader scope of s. 5.

[130] I pause to refer back to the established structure of analysis for human rights claims, which I have set out above, which involves assessing if a *prima facie* claim of discrimination has been established, and if so, considering whether any defences raised are applicable. This structure of analysis effectively separates the consideration of whether there has been discrimination on the basis of citizenship under s. 5 of the *Code* from the consideration of whether a defence has been made out under any of the subsections of s. 16.

[131] However, for purposes of statutory interpretation of the meaning of discrimination on the basis of "citizenship" in s. 5 of the *Code*, s. 5 must be read in the context of the *Code* as a whole, including s. 16: *Rizzo*, at para. 21; Ruth Sullivan, *The Construction of Statutes,* 7th ed. (Toronto: LexisNexis Canada, 2022) at § 13.02[3]. As the Supreme Court explained in *Heritage Capital Corp. v. Equitable Trust Co.,* 2016 SCC 19, [2016] 1 S.C.R. 306, at para. 28, provisions of a statute are presumptively intended to work together as a whole:

> There is a presumption of statutory interpretation that the provisions of a statute are meant to work together "as parts of a functioning whole" and form an internally consistent framework. In other words, "the whole gives meaning to its parts", and "each legal provision should be considered in relation to other provisions, as parts of a whole". [Citations omitted.]

[132] Based on these principles of statutory interpretation, it was reasonable for the tribunal to consider the scope of the defences available in s. 16 of the *Code* as providing interpretive guidance on the scope of "citizenship" as a prohibited ground of discrimination in s. 5.

[133] Section 16 of the *Code* enacts defences which are specific to discrimination on the basis of citizenship. Both ss. 16(1) and 16(3) create defences to allegations

of discrimination on the basis of citizenship that are applicable to the employment context.[9]

[134] The full scope of application of the s. 16(1) defence is beyond the scope of this appeal (as I discuss further below). But what is clear is that it creates a defence to allegations of discrimination on the basis of citizenship (in employment and in any other areas where discrimination on the basis of citizenship is prohibited) where "Canadian citizenship is a requirement, qualification or consideration imposed or authorized by law."

[135] Consistent with the tribunal's reasoning, the fact that the legislature created this defence and the terms in which it is expressed, show that the legislature understood that the concept of discrimination on the basis of citizenship in s. 5 of the *Code* applied to a requirement of Canadian citizenship. There would be no need to create a defence where a requirement of Canadian citizenship is imposed by law if requiring Canadian citizenship did not infringe s. 5 (in the absence of the statutory defence).

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[9] A portion of s. 16(2) applies indirectly to the employment context, to the extent it applies to "trade union…activities"; however, by its text, s. 16(2) is not directly applicable to allegations of discrimination by employers or potential employers (except, perhaps, employers involved in cultural, educational, or athletic activities). That said, the existence and scope of the s. 16(2) defence also supports a broad reading of the scope of discrimination on the basis of "citizenship" in s. 5. This is for the same reason that I articulate in relation to s. 16(1) and (3) – that the legislature would not have enacted these defences if the scope of discrimination on the basis of "citizenship" were as narrow as conceived of by the Divisional Court majority.

[136] Section 16(3) provides further support for interpreting s. 5 such that the exclusion of non-Canadian citizens or a subset of non-Canadian citizens constitutes discrimination on the basis of citizenship. There are two aspects of s. 16(3) that support this conclusion. First, the existence of a specific defence in s. 16(3) applicable to circumstances where a requirement of employment for "chief or senior executive positions" is "Canadian citizenship or domicile in Canada with the intention to obtain Canadian citizenship" supports the conclusion that the legislature was of the view that absent the enactment of s. 16(3), this type of requirement would infringe the right to be free of discrimination on the basis of citizenship protected by s. 5. The legislature would not have provided for the defence in s. 16(3) if the conduct was not otherwise in breach of s. 5, as it would be unnecessary.

[137] Second, the defence in s. 16(3) is limited to "holder[s] of chief or senior executive positions." The limiting of the defence to a class of high-level managerial employees supports that the legislature did not intend for there to be a defence created by s. 16(3) to apply to other types of employees.

[138] The tribunal reasonably relied on reading s. 5 in the context of s. 16 – considering it in the context of the statute as a whole – in interpreting the meaning of discrimination in employment on the basis of citizenship.

[139] The tribunal reasonably found that reading s. 5 and s. 16(1) together demonstrates a legislative intent to recognize limits placed on employment of non-Canadian citizens as a matter of federal immigration law, but to prohibit employers from placing additional barriers on non-citizens beyond the limits imposed by their status in Canada under federal immigration law (unless such limits can be brought within the defences in ss. 16(2) or (3)).

(v) Relevance of federal immigration law and the PGWP program

[140] Another consideration supports the tribunal's interpretation of discrimination in employment on the basis of citizenship in the context of PGWP-holders, although it is a consideration that was not directly addressed by the tribunal.

[141] In the usual course, provincial legislation is interpreted without regard to federal law. However, in the statutory context of ss. 5 and 16 of the *Code*, and in particular s. 16(1), the provincial statute clearly invokes considerations of federal immigration law.

[142] The s. 16(1) defence refers to a "requirement, qualification or consideration imposed or authorized by law." This language could apply to either provincial or federal law. That said, because immigration and citizenship law is a matter of federal jurisdiction, with extensive federal legislation and regulation, the provincial legislature must have been aware that federal law is the most likely source of a

requirement, qualification or consideration relating to Canadian citizenship "imposed or authorized by law."

[143] In this particular context, the harmony between the tribunal's interpretation of the scope of discrimination on the basis of citizenship and federal immigration law and policy supports the reasonableness of its interpretation. The tribunal and courts should strive to adopt interpretations of provincial laws that achieve harmony with, rather than frustrate, federal legislation: see e.g., *Fawcett v. Fawcett*, 2018 ONCA 150, at para. 35; *Maurice v. Priel*, [1989] 1 S.C.R. 1023, at pp. 1030-33.

[144] In general, by virtue of ss. 2(1) and 30(1) of the *Immigration and Refugee Protection Act,* S.C. 2001, c. 27 ("*IRPA*"), a "foreign national", defined as a person who is not a Canadian citizen or a permanent resident, may not work in Canada. However, s. 30(1) of *IRPA* also includes an exception to the prohibition against foreign nationals working in Canada, where they are "authorized to do so under [*IRPA*]."

[145] The clear legislative intent of the combined effect of ss. 5 and 16(1) of the *Code* is to prohibit discrimination on the basis of citizenship, including non-Canadian citizenship, but to create a defence so that a requirement, qualification, or condition of Canadian citizenship does not infringe the *Code* if it is imposed or authorized by law, including federal immigration law.

[146] The evidence and findings of the tribunal regarding the federal PGWP program are clear that the purpose of the PGWP program is to create a pathway to Canadian citizenship for international students who come to Canada to study and who intend to settle in Canada, in order to give Canada the benefit of these skilled workers. The program's design involves allowing individuals with a PGWP to work in Canada, obtain Canadian workplace experience, and establish roots in Canada. Indeed, workplace experience is a requirement to proceed through the program on the path to permanent residency and Canadian citizenship, because individuals on a PGWP must have one year of full-time employment in Canada on the PGWP before they can apply for permanent residency.

[147] In this context, interpreting s. 5 of the *Code* as prohibiting discrimination in employment against PGWP-holders on the basis that they are not eligible to work in Canada permanently is not contrary to federal immigration law. Indeed, the opposite is true. The federal PGWP program is undermined when job postings are restricted to Canadian citizens and permanent residents, excluding PGWP-holders such as the appellant. Such restrictions bar PGWP-holders from consideration for entry-level jobs which are a necessary step to successful labour market integration, and a condition precedent to their applying for permanent resident

status. The tribunal's interpretation is consistent with federal immigration law and policy.[10]

[148] Considering all of these factors together, I conclude that the tribunal's interpretation of the scope of discrimination in employment on the basis of citizenship as it relates to PGWP-holders is reasonable.

(c) The tribunal's conclusion that Imperial's policy discriminated against PGWP-holders on the basis of citizenship is reasonable

[149] The tribunal concluded that Imperial's policy discriminated against the appellant on the basis of citizenship (and, similarly, against all PGWP-holders on the basis of citizenship) because the policy excluded from hiring a group of non-Canadian citizens (and only non-Canadian citizens) who were eligible to work full-time, for any employer, anywhere in Canada. Even though not all non-Canadian citizens were excluded from hiring (because of the exception for permanent residents), the excluded group was composed solely of non-Canadian citizens who had a right to work in Canada (PGWP-holders).

[150] In my view, this conclusion is reasonable and is consistent with the law regarding proof of a claim of employment discrimination.

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[10] And I pause to note that, were federal immigration policy to change, that is a matter which could be considered in a given case in assessing the availability of a defence under s. 16(1) of the *Code*.

[151] As I have outlined above in the section of these reasons addressing principles of interpretation and application of human rights legislation, in order to establish a claim of discrimination, a claimant is required to show, *inter alia*, a "connection" between the prohibited ground and the adverse treatment they experienced. A claimant is not required to show that the prohibited ground was the only reason for the treatment, or even the predominant reason.

[152] In this case, the tribunal reasonably found that the appellant was a member of a group defined by a protected ground under the *Code*, citizenship, because he was a non-Canadian citizen. The tribunal reasonably found that the appellant experienced adverse treatment because the job offer was withdrawn. The tribunal reasonably found that the appellant's non-citizenship was a factor in the adverse treatment. The appellant was a non-Canadian citizen, who had a right to work full-time, for any employer, anywhere in Canada, for up to three years. Imperial withdrew the job offer because his right to work in Canada was not permanent – a factor that the tribunal reasonably found is closely connected to Canadian citizenship.

[153] An argument made by Imperial, and also relied on by the majority of the Divisional Court, is that Imperial's policy is not discriminatory because Imperial did not limit its hiring *only* to Canadian citizens, as it would also hire individuals with

permanent resident status. The tribunal rejected this contention, and in my view, did so reasonably.

[154] The fact that the policy does not exclude all non-Canadian citizens does not "cure" its discriminatory effect. Rather, it results in partial discrimination (against a subset of non-Canadian citizens eligible to work in Canada), rather than full discrimination (against all non-Canadian citizens eligible to work in Canada). It is well-established in Canada that partial discrimination is still discrimination. I have set out the law on this basic principle of human rights law above.

[155] Imperial's job posting and policy distinguished between two classes of non-Canadian citizens in circumstances where both classes are eligible to work full-time for any employer, anywhere in Canada – permanent residents (who were eligible for the position under Imperial's policy), and PGWP-holders (who were not eligible under Imperial's policy). Imperial argues, and the Divisional Court majority found, that this was discrimination on the basis of immigration status or permanent resident status, which are not prohibited grounds under the *Code*. While the conclusion that permanent resident status and immigration status are not prohibited grounds of discrimination under the *Code* is correct as far as it goes, it fails to acknowledge that Imperial's policy is also *partial* discrimination on the basis of citizenship.

[156] Imperial's policy denies one group of non-Canadian citizens, who are legally entitled to work full-time, for any employer, anywhere in Canada (PGWP-holders), eligibility for the position. The group excluded from the position by Imperial's policy is exclusively non-Canadian citizens. Based on the principles in *Brooks* and other cases, the fact that Imperial's policy does not discriminate against all non-Canadian citizens (because permanent residents are excepted) does not render it non-discriminatory.

[157] Further, the fact that Imperial's policy can also be described as discrimination on the basis of immigration status or lack of permanent resident status (which are not protected grounds) does not change the fact that it is also partial discrimination on the basis of citizenship. In this regard, it is like the cases involving discrimination against married women teachers referred to above. At the time those cases were decided, "marital status" was not a prohibited ground of discrimination under the Nova Scotia *Human Rights Act,* R.S.N.S. 1989, c. 214. Thus, although the policy discriminated on the basis of marital status, that in itself did not contravene the legislation. However, notwithstanding the fact that one could describe the policy as discrimination on the basis of marital status (not a prohibited ground), and notwithstanding that it did not apply to all women, since unmarried women were excepted, the policy was still found to constitute discrimination on the basis of sex.

[158] In sum, the tribunal's decision that Imperial's policy discriminated on the basis of citizenship demonstrates an internally coherent chain of analysis that is justified in relation to the facts and law. The decision is reasonable and the reviewing court was not justified in intervening.

(d) The tribunal's analysis of discrimination on the basis of citizenship was reasonable in light of this court's decision in *Irshad*

[159] The appellant argues that the Divisional Court majority erred in holding that one of the reasons the tribunal's decision was unreasonable is because it did not specifically reference or deal with this court's decision in *Irshad*. I agree.

[160] In *Irshad*, this court considered an argument made under s. 15 of the *Canadian Charter of Rights and Freedoms* involving an allegation of discrimination on the basis of citizenship. Imperial argued before the tribunal that the conclusions in *Irshad* about citizenship discrimination under s. 15 of the *Charter* should bear on the interpretation of discrimination on the basis of citizenship under the *Code*. The tribunal did not specifically reference *Irshad* in its reasons and the Divisional Court concluded this omission rendered its decision unreasonable.

[161] The appellant argues before us that the tribunal's decision is not unreasonable for not mentioning *Irshad* by name because the decision addresses the substance of Imperial's argument and because, in any event, *Irshad* is

distinguishable from the case at hand. Imperial responds that the issues raised in *Irshad* were analogous to the issues in this case, and as a result, the tribunal ought to have treated *Irshad* as persuasive legal precedent.

[162] I would reject Imperial's submission that the tribunal decision is unreasonable in light of *Irshad* for two reasons.

[163] First, although the tribunal did not mention *Irshad* by name, the tribunal addressed in substance the issue that Imperial had argued based on *Irshad* – that the interpretation of the scope of discrimination on the basis of citizenship under s. 5 of the *Code* should be governed by a case which considered an allegation of discrimination on the basis of citizenship under the *Charter*.

[164] The tribunal recognized that interpreting the meaning of citizenship discrimination under the *Code* was an issue of statutory interpretation. As a result, the meaning of discrimination on the basis of citizenship in s. 5 of the *Code* had to be considered within the context of the entire statute, and in particular related provisions of the *Code*. The tribunal found that the defences in s. 16 of the *Code* cast light on the meaning of discrimination on the basis of citizenship in s. 5 of the *Code*, which distinguished it from the interpretation of discrimination on the basis of citizenship under the *Charter*, because the *Charter* has no analogous defence to s. 16 of the *Code*. The tribunal concluded on this issue as follows:

> 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 [Imperial].

[165] The tribunal was not required to explicitly reference *Irshad* for its decision to be reasonable. *Vavilov* is clear that an administrative body is not required in its reasons to address every argument made by a party: at para. 91. In any event, the issue Imperial raised in relation to the *Irshad* decision was addressed, even though the case was not referred to by name. The tribunal dealt with the substance of Imperial's argument that discrimination on the basis of citizenship under s. 5 of the *Code* should be interpreted the same way as discrimination on the basis of citizenship under the *Charter*, and rejected it. This does not render the tribunal's decision unreasonable, per *Vavilov*.

[166] Second, the tribunal's conclusion that the analysis of discrimination on the basis of citizenship under the *Code* was distinguishable in this case from the interpretation of discrimination on the basis of citizenship under the *Charter* was

reasonable. In other words, the legal and factual circumstances in *Irshad* are distinguishable from the legal and factual circumstances in this case.

[167] It was reasonable for the tribunal to conclude that the presence of s. 16 as interpretive context for discrimination on the basis of citizenship in s. 5 of the *Code* distinguished the issue before it from the issue of discrimination on the basis of citizenship under s. 15 of the *Charter*. The *Charter* has no analogue to s. 16 of the *Code*. In the absence of reasons to interpret guarantees in human rights legislation differently from *Charter* guarantees, anti-discrimination provisions in human rights legislation and the *Charter* right to equality are often interpreted similarly where they address the same subject matter: see e.g., *Fraser*, at paras. 37-49. But where, as here, the statutory scheme provides a basis to support a different interpretation of human rights legislation, that context must inform the interpretation of human rights legislation because it speaks to a different intention.

[168] Further, the factual circumstances of *Irshad* are distinguishable from this case. *Irshad* involved a s. 15 *Charter* challenge to legislation and regulations that limited the right to insured health services in Ontario. The purpose of the legislation and regulations at issue was to limit healthcare expenditures by defining the residency requirement to be insured more precisely, and in particular, to eliminate insurance coverage for individuals who were temporarily resident in Ontario.

[169] The legislation and regulations limited eligibility to insured health services based on two factors. First, a person had to be “ordinarily resident” in Ontario, as that term was defined in the regulation. Second, individuals who were “ordinarily resident” in Ontario had to bring themselves within one of 11 categories set out in the regulation. Many, but not all, of the categories were based on immigration status.

[170] In *Irshad*, the individuals challenging the legislation and regulations were ordinarily resident in Ontario, but could not bring themselves within one of the 11 categories. They argued that the legislation and regulation drew a distinction between “new immigrants” who were ordinarily resident in Ontario and other persons ordinarily resident in Ontario. In addition, they challenged the three-month waiting period for coverage, which applied regardless of citizenship or immigration status (although with some exceptions). For example, it applied to Canadian citizens who moved to Ontario from another province.

[171] This court found that the legislation did not infringe the s. 15 right to equality. The court held that the impugned legislation and regulations did not draw a distinction based on whether individuals were or were not new immigrants. Many new immigrants would be within the 11 categories and eligible for health insurance (such as landed immigrants, some applicants for landed immigrant status, refugees, and some applicants for refugee status). Further, some people not

eligible for health insurance were neither new to Ontario nor new immigrants. This court also rejected the argument that the legislation and regulations drew a distinction on the basis of citizenship. The court found that under the scheme many non-citizens were eligible for health insurance, and that Canadian citizenship was "but one of many criteria" that would make a person eligible for health insurance if they were ordinarily resident of Ontario. Further, the court held that the three-month waiting period was not discriminatory, as it applied to all new residents of Ontario, regardless of their citizenship, former place of residence, or immigration status.

[172] In short, in *Irshad*, this court found that the distinctions drawn in the legislation and regulations at issue were not based on citizenship or being a new immigrant. Rather, they were based on a requirement that individuals have an intention to make Ontario their permanent home, and the legal status to "legitimately hold that intention": at para. 133. In my view, the factual and legal distinctions between *Irshad* and the case at hand mean that *Irshad* does not govern the result in this appeal, and that the tribunal sufficiently addressed the substance of Imperial's argument based on *Irshad*.

(e) The tribunal's finding that the discrimination was direct rather than indirect was reasonable

[173] In my view, the tribunal's finding that Imperial's discrimination against the appellant was direct is reasonable. However, if there is any doubt about whether the discrimination ought to have been characterized as adverse impact, in the circumstances of this case it would have no impact on the result.

[174] As I have explained above, given the jurisprudence and legislation concerning the availability of a BFOR defence under s. 11 of the *Code*, the only relevance to whether the discrimination in this case is characterized as direct or adverse impact is the availability of the BFOR defence. The tribunal found that the discrimination was direct, but went on, in the alternative, to consider whether Imperial had established a BFOR defence (in the event that the discrimination was better characterized as adverse impact). The tribunal found on the record before it that Imperial failed to establish a BFOR defence. Imperial did not seek review of that finding in the Divisional Court or raise it in this court. Thus, whether the discrimination was reasonably characterized as direct or indirect had no impact on the outcome. I will address each of these points in turn.

[175] As I have summarized above, direct discrimination occurs where an employer adopts a practice or policy which on its face discriminates on a prohibited ground. Adverse impact discrimination occurs where an employer's practice or

policy is neutral on its face, but has a discriminatory effect on a prohibited ground on an employee or a group of employees by imposing obligations or restrictions on them not imposed on other employees.

[176] The tribunal found that Imperial's discrimination against the appellant (and all PGWP-holders) was direct. The tribunal reached this conclusion because it found that, on its face, Imperial's policy discriminated against a subset of non-Canadian citizens. The tribunal found that this was so because the policy was clear that the only people eligible for employment were Canadian citizens and permanent residents. On its face, the policy excluded all non-Canadian citizens apart from permanent residents. It excluded a subset of non-Canadian citizens, and only non-Canadian citizens.

[177] In my view, particularly given the standard of review and the difficulty recognized in the jurisprudence of characterizing whether discrimination is direct or adverse impact, I find that the tribunal's conclusion that the discrimination was direct is reasonable.

[178] Reading the job posting and Imperial's policy, as well as its communications with the appellant, the effect is: We will hire Canadian citizens and also will hire a subset of non-Canadian citizens (i.e., permanent residents). On its face, Imperial's policy is clear that a subset of non-Canadian citizens eligible

to work in Canada is excluded from hiring, and it is only non-Canadian citizens who are excluded.

[179] Having said this, I accept that on this particular issue, reasonable people could differ on whether to characterize the discrimination as direct or indirect.[11] It may be that one could conceptualize the discrimination as being adverse impact if the requirement imposed by Imperial's policy were characterized as "permanent eligibility to work in Canada." Given the policy's express reference to Canadian citizenship, I am not persuaded that this would be the best characterization of the policy. For this reason, I do not view this case as a situation where this court's decision in *Entrop* would suggest characterizing the discrimination as adverse impact in order to leave open a BFOR defence. However, if the distinction made by the policy were characterized as being on the basis of "permanent eligibility to work in Canada", the policy would be neutral on its face, but have an adverse impact on non-Canadian citizens. All Canadian citizens are eligible to work under

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[11] I pause to note that certain comments of Lederer J. in the Divisional Court could be read as suggesting that statistical evidence is always required to support a claim of adverse impact discrimination. That is not the case. What is required to establish a claim of adverse impact discrimination is that the policy, which is neutral on its face, adversely impacts a group of employees who are members of a group against whom discrimination is prohibited (race, gender, etc.). In some cases, statistical evidence will be required to establish the adverse impact – for example the physical fitness standards in *Meiorin*. In other cases, statistical evidence will not be necessary to show the adverse impact – for example, adverse impact discrimination on the basis of religion caused by Sunday being the only closing day, or a refusal to allow accommodation for religious observance of holidays which are not statutory holidays. In the latter situation, evidence about the employee's religious beliefs will be required, but not statistical evidence. See also *Fraser*, at paras. 56-67.

the policy. But only a subset of non-Canadian citizens are eligible – permanent residents. This policy has an adverse impact on PGWP-holders, like the appellant, and the adverse impact is connected to their non-Canadian citizenship. Only non-Canadian citizens are impacted by the policy (although not all non-Canadian citizens are impacted because of the exception for individuals with permanent resident status).

[180] As I have adverted to above, and discuss further below, many non-Canadian citizens do not have the broad right to work that PGWP-holders have. As a practical matter, the claims of many non-Canadian citizens would founder on the s. 16(1) defence. But PGWP-holders, like the appellant, are legally eligible to work full-time, for any employer, anywhere in Canada. They are legally eligible to hold the job the appellant applied for. But Imperial's policy, even if characterized as a requirement of eligibility to work permanently in Canada, has an adverse effect on PGWP-holders that is connected to their non-Canadian citizenship.

[181] In light of this possibility to characterize the discrimination as adverse impact rather than direct, if I had concluded that the tribunal's finding that discrimination in this case was direct rather than indirect was unreasonable, is there any possibility that the outcome of this case would have been different? In my view, there is not. In the circumstances of this appeal, whether the

discrimination is characterized as direct or adverse impact has no impact on the outcome.

[182] As I have outlined above, the only practical effect in this case of whether the discrimination is characterized as direct or adverse impact is that, in Ontario, a BFOR defence under s. 11 of the *Code* is only available as a defence to a finding of adverse impact discrimination, and not available as a defence to direct discrimination.

[183] Although the tribunal concluded that the discrimination was direct, and thus a BFOR defence was not available pursuant to s. 11 of the *Code*, the tribunal went on to consider the BFOR defence on the merits, in the alternative.

[184] The tribunal found that Imperial had not established a BFOR defence on the merits. I do not summarize the reasons why the tribunal came to this conclusion because Imperial did not contest that finding in its application for judicial review to the Divisional Court. Nor does it contest that finding in its response to the appeal in this court.

[185] As Imperial did not contest the reasonableness of the tribunal's alternative finding that a BFOR defence was not established, even if the tribunal's conclusion that the discrimination was direct rather than adverse impact were found to be unreasonable, the characterization of the discrimination as direct had no impact on the outcome of the proceedings before the tribunal.

(f) The Divisional Court majority did not correctly apply the standard of review

[186] As the standard of review directs this court to step into the shoes of the Divisional Court on an appeal from an application for judicial review, I need not examine in detail the errors made by the Divisional Court majority. But I will flag them briefly.

[187] First, the majority reasons did not take as a starting point respectful attention to the reasons of the tribunal. Rather, the majority started by assessing the question of whether Imperial discriminated against the appellant by re-doing its own analysis from scratch. This is evident from, for example, the hypothetical fact situations involving non-citizens without any legal right to work in Canada that appear to have driven the majority's analysis. These hypothetical situations do not arise from the tribunal's analysis, which was focused squarely on the record before it.

[188] Second, the majority mischaracterized the reasons of the tribunal. Respectful attention to a tribunal's reasons, which is the starting point of reasonableness review, cannot be accorded if the reviewing court mischaracterizes the tribunal's reasons. The reasons of Lederer J. characterize the tribunal as having effectively created a new ground of discrimination not found in the *Code* based on permanent resident status. As I have outlined above, that

was not the basis on which the tribunal found that Imperial had discriminated against the appellant. Nor did the tribunal fail to examine the “plain and ordinary” meaning of “citizenship” and “permanent residence”. The tribunal’s reasons show that it understood the difference between these statuses as a matter of federal immigration law. The tribunal’s finding of discrimination on the basis of citizenship was not based on subsuming the concept of “permanent residence” into citizenship.

[189] Third, the majority of the Divisional Court failed to follow well-established analytical principles for human rights claims. I will highlight two examples of this.

[190] The first is in the reasons of Lederer J. His reasons fail to consider the principle from *Brooks* and subsequent decisions that partial discrimination on a prohibited ground is still discrimination. Indeed, his reasons proceed on a basis that is contrary to this well-established principle. In substance, he found that Imperial did not discriminate on the basis of citizenship *because* it permitted hiring of one sub-group of non-citizens – permanent residents of Canada.

[191] The second failure to follow well-established principles of analysis for human rights claims is the focus in the reasons of Mew J. on the hardship for employers if Imperial’s policy constitutes discrimination on the basis of citizenship. This approach failed to follow the established structure to analysis of human rights claims. Potential hardship to an employer is not considered when assessing

whether a *prima facie* claim of discrimination on a prohibited ground has been established. Rather, it is a matter to be considered after a *prima facie* case of discrimination has been established, as part of a BFOR defence and consideration of an employer's duty to accommodate to the point of undue hardship: see e.g., *Stewart*, at paras. 22-23; *Pieters*, at paras. 64-66.

[192] I note as well two other problems with the focus on employer hardship in the reasons of Mew J. First, as I have noted, Imperial did not pursue the BFOR defence in the Divisional Court. With the issue not having been raised by Imperial, it was unfair to resurrect it as a ground to overturn the tribunal decision.

[193] Second, the record did not support the conclusion that Imperial would suffer undue hardship if it was required to change its policy and consider PGWP-holders for employment. Indeed, the tribunal made specific findings of fact to the contrary. The tribunal considered whether there would be hardship to Imperial if it were required to consider PGWP-holders for employment in its consideration of whether Imperial had established a BFOR defence. Imperial had asserted that being required to hire PGWP-holders would pose a risk to succession planning and to Imperial losing its investment in training of new hires. The tribunal found that this assertion was not borne out on the evidence led by Imperial.

[194] In particular, the tribunal found that, to the extent Imperial had in some cases waived its policy for more senior positions and hired PGWP-holders, there

was “no empirical data” to demonstrate that these PGWP-holders left employment with Imperial at higher rates than Canadian citizens or permanent residents within the two to three years it generally took to obtain permanent resident status, or that those who left within that timeframe did so because of a failure to obtain permanent resident status.

[195] Because Imperial did not challenge the reasonableness of the tribunal’s alternate finding that a BFOR defence was not established, it is not necessary for this court to consider whether the tribunal’s conclusion in that regard was reasonable. However, I flag these issues in relation to the record because they demonstrate that Mew J. did not start his analysis from a posture of respectful attention to the reasons of the tribunal. Rather, he raised concerns about hardship to employers which, as related to the employer before the tribunal, Imperial, the tribunal had found were not supported in the record before it.

[196] What appears to have driven the reasoning of the majority in the Divisional Court was a floodgates concern that if Imperial’s treatment of the appellant constituted discrimination on the basis of citizenship, then, in the view of the majority, any non-Canadian citizen anywhere in the world could claim discrimination in employment on the basis of citizenship if they were not considered for a job in Canada. Both judges in the majority referred to the situation of a hypothetical American who lives in Detroit (just over the Canadian border).

The majority was of the view that the tribunal's analysis of the appellant's claim would have the result that this hypothetical American, with no status in Canada at all, and no legal right to work in Canada, could allege discrimination on the basis of citizenship if they were refused employment by Imperial.

[197] The analogy posited by the majority of the Divisional Court is flawed. It fails to recognize the fundamental distinction between PGWP-holders and other non-Canadian citizens – PGWP-holders have a legal right under federal immigration law to work full-time, for any employer, anywhere in Canada. This distinguishes PGWP-holders from other non-Canadian citizens in terms of their right to work in Canada. The tribunal was clear in its reasons that the central fact that drove its analysis was that when the appellant received his PGWP on graduation (of which there was no doubt based on the tribunal's findings), he would have the right to work full-time, anywhere in Canada, for any employer. The tribunal's reasoning would not extend to a person without an unrestricted right to work in Canada.

[198] This is particularly so given s. 16(1) clarifies that the right to non-discrimination based on citizenship is not infringed "where Canadian citizenship is a requirement, qualification or consideration imposed or authorized by law." Because federal immigration law does not give most non-citizens a right to work in Canada, the hypothetical American living in Detroit without any status in Canada would not have a viable citizenship discrimination claim, as they would not be

authorized by law to work in Canada. Accordingly, the concern of the majority in the Divisional Court that the tribunal's analysis would allow any non-Canadian citizen to allege discrimination in employment is unfounded.

[199] In sum, the tribunal's finding that Imperial discriminated against the appellant on the basis of citizenship was reasonable. The majority of the Divisional Court applied the standard of review incorrectly. When the standard of review is correctly applied, there is no basis for the reviewing court to intervene.

(3) Was the tribunal's finding that Imperial withdrew the job offer because the appellant was not a Canadian citizen or a permanent resident, rather than solely because of his dishonesty in the job competition, reasonable?

[200] Imperial argues that the tribunal's finding that Imperial withdrew the job offer from the appellant at least in part because he was not a Canadian citizen or a permanent resident, rather than solely because of his dishonesty in the job competition, was unreasonable. Imperial submits that the appellant's dishonesty was a reasonable non-discriminatory explanation for withdrawing the job offer that had nothing to do with the fact that he was not a Canadian citizen or permanent resident. Imperial asserts that there was "uncontradicted" evidence from John Blysniuk, a manager at Imperial, that the reason that Imperial withdrew the job offer

was because of the appellant's dishonesty in the job competition about his status in Canada, not because he was not a Canadian citizen or permanent resident.

[201] The appellant argues that the tribunal's factual finding that the reason that Imperial did not hire the appellant was because he was not a Canadian citizen or a permanent resident, and its rejection of Imperial's evidence that it was because he was dishonest about his status in Canada, was reasonable. The tribunal was not obliged to accept the evidence of Mr. Blysniuk in the face of the contradictory documentary record. The tribunal's factual finding is owed deference.

[202] I do not accept Imperial's submission on this issue. In explaining my reasons for this conclusion, I begin with the tribunal's finding and its reasons on this issue.

(a) The tribunal's reasons for finding that Imperial did not withdraw the job offer solely because of the appellant's dishonesty

[203] The tribunal acknowledged in its reasons that the appellant had conceded that he had misled Imperial on a number of occasions during the job competition process about his eligibility to work in Canada on a permanent basis.

[204] The tribunal reviewed the evidence led by Imperial on this issue, including the evidence of Mr. Blysniuk. The substance of Mr. Blysniuk's evidence was that he considered the appellant's file on January 4, 2015, and sent a direction by email that the December 2, 2014 conditional job offer to the appellant should be

rescinded. By this time, the appellant had admitted to Imperial that he could not satisfy the condition in their offer (eligibility to work in Canada as proven by Canadian citizenship or permanent residence), and had requested an exception. Mr. Blysniuk testified that he made this decision on the basis of the appellant's dishonesty and nothing else.

[205] The tribunal rejected Mr. Blysniuk's evidence that the appellant's dishonesty was the *sole* reason that the job offer was withdrawn. In coming to this credibility-based finding of fact, the tribunal placed particular emphasis on two aspects of the documentary record. First, there was no mention in the letter Imperial sent January 8, 2015 withdrawing the job offer that the appellant's dishonesty was a factor in the withdrawal of the offer. The letter expressly stated that the job offer was being withdrawn because the appellant was unable to provide proof of Canadian citizenship or permanent residence to demonstrate his eligibility to permanently work in Canada. Second, there was no evidence in any internal correspondence of Imperial or its communications by phone and email with the appellant that it considered at any time waiving the requirement that to be eligible for the job the appellant had to be a Canadian citizen or permanent resident. In other words, had there been evidence that Imperial considered waiving that requirement, and chose not to do so solely based on the appellant's dishonesty,

that could have supported a conclusion that a discriminatory ground was not a factor in the decision to withdraw the job offer.

[206] In sum, the tribunal found that the documentary record was inconsistent with Mr. Blysniuk's evidence that the *sole* reason the job offer was withdrawn was because of the appellant's dishonesty. The tribunal found that (with the appellant having established a *prima facie* case of discrimination) "there is insufficient evidence to demonstrate on a balance of probabilities that the [appellant's] dishonesty was the *sole* reason for his non-hire" (emphasis in original).

[207] The tribunal then referred to established jurisprudence that discrimination on a protected ground need not be the only factor involved in a decision not to hire, or even the primary factor, citing *Janzen*. The tribunal concluded that Imperial's requirement of eligibility to work in Canada on a permanent basis, as proven by Canadian citizenship or permanent residence, "tainted the hiring process, resulting in discrimination in employment on the ground of citizenship."

[208] The two judges in the majority of the Divisional Court did not address the issues related to the appellant lying about his status in Canada or whether the reason for the dismissal was solely due to the appellant lying about his status in Canada. Sachs J., in dissent in the result, found that the tribunal reasonably found that the appellant's lying about his status was not the sole reason for the withdrawal of the job offer. In her view, despite Imperial's oral evidence from Mr. Blysniuk, the

tribunal's conclusion that there was insufficient evidence to demonstrate that the appellant's dishonesty was the sole reason for Imperial not hiring him was reasonable – particularly because the letter sent to the appellant withdrawing the job offer did not mention his dishonesty, but rather stated that the offer was being withdrawn because the appellant could not provide proof that he was either a Canadian citizen or permanent resident.

(b) The tribunal's finding that Imperial did not withdraw the job offer solely because of the appellant's dishonesty is reasonable

[209] For substantially the same reasons as Sachs J., I am of the view that the tribunal's finding that the appellant's dishonesty during the job competition was not the sole reason that Imperial withdrew the job offer was reasonable and supported by the evidentiary record before it.

[210] As I have noted, Imperial argues that the tribunal's finding that the appellant's inability to fulfil Imperial's requirement of permanent eligibility to work in Canada by proof of citizenship or permanent residency was unreasonable because there was "uncontradicted" evidence from Mr. Blysniuk that the reason that Imperial withdrew the job offer was because the appellant lied about his status in Canada, not because he was not a Canadian citizen or permanent resident.

[211] Imperial is incorrect that Mr. Blysniuk's evidence was uncontradicted.

[212] As the tribunal noted, the letter that Imperial sent to the appellant withdrawing the job offer expressly stated that the job offer was being withdrawn because he was unable to meet the employment condition of permanent eligibility to work in Canada established by proof of either Canadian citizenship or permanent residence. The letter also invited the appellant to re-apply for work with Imperial if he became eligible to work permanently in Canada, and said that if he did so, Imperial "would be pleased to consider [his] application at that time." The letter made no reference whatsoever to the appellant's dishonesty about his status, and the invitation to reapply belies Imperial's reliance on the appellant's lies as the reason for withdrawing the job offer.

[213] Mr. Blysniuk's evidence was contradicted by the documentary evidence – Imperial's own letter.

[214] The tribunal accepted that there was some evidence that the appellant's dishonestly may have played a role in Imperial's decision to withdraw the job offer. But the tribunal did not accept that the lies were the only reason the job offer was withdrawn. The tribunal found that the appellant's citizenship was a factor in Imperial's decision to withdraw the job offer.

[215] It was open to the tribunal to prefer the contemporaneous documentary evidence about the reason for the withdrawal of the job offer over Mr. Blysniuk's after-the-fact explanation.

[216] Further, the tribunal's legal analysis about the impact of the appellant's dishonesty about his eligibility to work permanently in Canada during the job competition was reasonable and consistent with human rights jurisprudence.

[217] The tribunal held that a discriminatory ground (citizenship) was a factor in the decision to withdraw the job offer. The tribunal further held that the fact that a non-discriminatory factor (the lies) may have also played a role did not insulate Imperial's conduct from being discriminatory. As I have outlined above, only if the conduct alleged to be discriminatory was *solely* motivated by non-discriminatory factors can it rebut a *prima facie* case of discrimination.

[218] The tribunal's finding that the appellant's dishonesty was not the sole factor that motivated Imperial to withdraw the job offer was reasonable on the record before it.

(c) The tribunal did not erroneously shift the burden of proof to Imperial during the discrimination analysis

[219] Imperial argues that the tribunal erroneously shifted the burden to it to prove that it did not discriminate against the appellant. Imperial submits that after it produced evidence from Mr. Blysniuk that the decision to withdraw the appellant's job offer was motivated solely by his lies about his status, the appellant then produced no evidence to establish that Mr. Blysniuk's evidence was false or pretextual. Imperial argues that having rebutted the appellant's *prima facie* claim

of discrimination, the burden of proof remained on the appellant to prove on a balance of probabilities that his dishonesty was not the sole reason that the job offer was withdrawn.

[220] I reject this argument. The tribunal discussed the burden of proof at the outset of its discrimination analysis, correctly stating that in human rights cases, the applicant has the onus of proving, on a balance of probabilities, that a violation of the *Code* has occurred. The initial onus is on the applicant to establish a *prima facie* case of discrimination on a prohibited ground on a balance of probabilities. If the applicant does so, an evidential burden shifts to the respondent to establish that there is an applicable statutory defence, or that there is a non-discriminatory explanation that provides the sole basis for the impugned treatment. If the respondent meets the onus to rebut the *prima facie* case of discrimination, then the onus shifts again to the applicant to establish that the respondent's explanation is erroneous or is a pretext for discrimination. The tribunal correctly recognized that while the evidential burden may shift to the respondent during the analysis, the ultimate onus of proving discrimination remains on the appellant. I note that as recently as *Midwives*, this court found a similar application of the burden of proof to be reasonable: *Midwives*, at para. 149.

[221] Imperial takes issue with the following portion of the tribunal's assessment of whether the appellant's dishonesty was the sole reason that the job offer was withdrawn, arguing that it demonstrates an impermissible shifting of the burden:

> 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. [Emphasis in original.]

[222] I do not agree that this demonstrates an improper shifting of the burden of proof. The tribunal followed the established law regarding the burden of proof in discrimination claims. The tribunal found a *prima facie* case of discrimination on the basis of citizenship. Only then did the tribunal shift the burden to Imperial to show a non-discriminatory basis was the sole motivating factor for withdrawing the appellant's job offer – in other words, that the decision was not tainted by discrimination on the basis of citizenship. This is clear throughout the tribunal's reasons, including in the following passage, situated after the tribunal found that the appellant had established a *prima facie* case of discrimination on the basis of citizenship:

> In the Tribunal's view, given that a *prima facie* case has been established [Imperial] was required to provide a response to the allegation of discrimination by way of a *statutory defence and/or credible non-discriminatory explanation for the impugned treatment*. [Emphasis in original.]

[223] The tribunal then reasonably found that Imperial had failed to meet its evidential burden to show that the appellant's dishonesty was the sole factor behind its decision to withdraw the job offer. Imperial provided oral evidence from Mr. Blysniuk to support its argument, but, as above, the tribunal reasonably found that his oral evidence was contradicted by Imperial's recission letter. Accordingly, Imperial did not satisfy its evidential burden to establish a non-discriminatory reason for the impugned treatment, and thus the appellant was not required, at this stage of the analysis, to demonstrate that Imperial's alleged non-discriminatory basis for the appellant's treatment was false or pretextual.

[224] The tribunal's application of the burden of proof was thus reasonable and consistent with the applicable law.

(4) Was the tribunal's decision that the defence under s. 16(1) of the *Code* was not available to Imperial reasonable?

[225] Imperial argues that the tribunal's conclusion that the defence under s. 16(1) of the *Code* was not available to Imperial was unreasonable because no reasons were given for that conclusion. Imperial argues that according to *Vavilov*, reasons "are the primary mechanism by which administrative decision makers show that their decisions are reasonable" and that the absence of reasons raises issues of procedural fairness and whether a decision is substantively reasonable: *Vavilov*, at para. 81.

[226] I reject Imperial's argument. Imperial failed to raise the s. 16(1) defence before the tribunal. It should not be permitted to raise it for the first time on review.

[227] Imperial did not raise a s. 16(1) defence before the tribunal. In its response to the appellant's claim, Imperial pleaded that the appellant did not have standing to bring the claim and that its decision to withdraw the job offer was based on his not being able to work in Canada on a permanent basis and not on the prohibited ground of citizenship.[12] In the alternative, it pleaded a BFOR defence, pursuant to s. 11 of the *Code*. Imperial did not raise a s. 16(1) defence in its response.

[228] Nor did Imperial raise the s. 16(1) defence during the tribunal hearing. On the final day of evidence before the tribunal, prior to an adjournment for hearing of submissions, counsel for the appellant asked whether Imperial was raising a defence under s. 16 of the *Code*, because she did not want to be taken by surprise and because it might require reopening the hearing for more evidence. Counsel for Imperial undertook to notify counsel for the appellant prior to submissions if he was raising a s. 16 defence. When the hearing resumed approximately six weeks later, Imperial did not assert a s. 16 defence in its submissions. Indeed, during submissions, Imperial expressly took the position that it was not relying on the

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[12] At the tribunal hearing, Imperial added as a defence that the reason that the job offer was withdrawn was because the appellant lied to Imperial. However, this was not its position in its written response to the claim.

s. 16(1) defence. Rather, Imperial argued that the appellant did not have standing to bring the claim; that the job offer was withdrawn only because the appellant lied; that if there was discrimination, it was on the basis of immigration status, which is not a prohibited ground; and that if there was discrimination on the prohibited ground of citizenship, Imperial had a BFOR defence.

[229] Imperial attempted to raise the s. 16(1) defence in its application for judicial review. The majority of the Divisional Court did not address s. 16(1). Sachs J., in dissent, held that Imperial should not be permitted to raise the s. 16(1) issue on the review when it had not raised the issue before the tribunal.

[230] It is clear that Imperial's decision not to raise the s. 16(1) defence before the tribunal was a tactical decision. When asked by this court during submissions about the reason for not raising the s. 16(1) defence before the tribunal, counsel for Imperial (who was also counsel before the tribunal) advised that the defence was not raised before the tribunal because raising it would have been inconsistent with and undermined Imperial's position that the sole reason for withdrawing the job offer was the appellant's dishonesty about his status in Canada. Counsel also said the s. 16(1) defence was not raised below because Imperial took the position that the appellant did not have standing to bring his claim and that if there was discrimination it was on the basis of "immigration status" and not the appellant's

citizenship. These are all tactical reasons Imperial chose not to raise the s. 16(1) defence.

[231] I pause to note that there is nothing in the tribunal's *Rules of Procedure,* nor the *Common Rules* of Tribunals Ontario, that prohibits alternate pleadings.

[232] Imperial should not now be permitted to change the footing of its defence on judicial review. In addition to the premise that a party should not ordinarily be permitted to raise a new issue on appeal, particular concerns arise in the judicial review context because of the reviewing court's role vis-à-vis the tribunal.

[233] The legislature made the decision to entrust adjudication of human rights claims to the tribunal, subject to review by the courts. Where an issue is not raised before the tribunal, there is no decision on an issue to review. Further, the premise of judicial review starting with "respectful attention" to an administrative decision-maker's reasons cannot be applied where an issue was not raised below, and the tribunal was not given the opportunity to consider the issue and provide reasons.

[234] One difficulty with allowing Imperial to raise the issue for the first time on judicial review is evident. Imperial faults the tribunal for giving insufficient reasons in rejecting a s. 16(1) defence. This is a mischaracterization of what the tribunal did in relation to s. 16(1).

[235] In two places in its reasons, the tribunal briefly states that Imperial's policy was "not excused" by s. 16(1) of the *Code* and that the defence under s. 16(1) of

the *Code* was “not available”. No reasons were provided for these statements. Given that Imperial had been asked whether it would argue a s. 16(1) defence, and chose not to raise it, these passages can only be read as the tribunal finding that the defence was not available because Imperial chose not to raise it. This interpretation of the tribunal’s reasons has particular force because it would have been Imperial’s burden to establish this affirmative defence in light of the established law about the burden of proof in human rights claims, discussed above. Obviously, Imperial could not meet its burden to establish a defence under s. 16(1) when it chose not to rely on that defence before the tribunal.

[236] In the present appeal, it was reasonable for the tribunal not to consider the s. 16(1) defence, since Imperial chose not to assert it.

[237] Because the s. 16(1) issue was not raised by Imperial at first instance, it is beyond the scope of this appeal to pronounce on the scope of that statutory defence. Further, the court does not have a record before it in this appeal that would permit consideration of the variety of situations in which the s. 16(1) defence may be applicable. The scope of application of the s. 16(1) defence in the context of discrimination in employment on grounds of citizenship appears to be to a large

extent driven by federal immigration law[13] ("imposed or authorized by law"); however, there is no record before the court of what, if any, other types of status in Canada allow an unrestricted right to work.

[238] Neither this court nor the Divisional Court has considered the interpretation of the s. 16(1) defence.[14] In light of the concerns I have discussed about the defence not having been raised before the tribunal and it being an issue of first impression in the courts, the interpretation of the s. 16(1) defence is better left for a case where the issue is raised and considered by the tribunal.

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[13] The text of s. 16 encompasses "a requirement, qualification or consideration authorized or imposed by law", whether the law is federal or provincial. However, in the context of discrimination in employment on grounds of citizenship, it appears that the most likely source would be federal law, in particular, *IRPA*.

[14] Without opining on the correctness of the analysis, I note that the leading decision of the tribunal regarding the interpretation of the s. 16(1) defence in the context of discrimination in employment is *Koenig v. University of Toronto*, 2012 HRTO 767. The s. 16(1) issue in *Koenig* arose in the context of an allegation that the university's job advertisements were discriminatory. The advertisements stated: "All qualified candidates are encouraged to apply, however, Canadians and permanent residents will be given priority." The claimant alleged that the preference for Canadian citizens was discriminatory. The university argued that the s. 16(1) and 16(2) defences applied such that there was no discrimination on the basis of citizenship. The tribunal agreed with the university that the s. 16(1) defence applied (and declined to rule on the s. 16(2) defence). The tribunal accepted the university's argument, based on the record before it, that as a matter of federal law, prior to hiring a foreign national in Canada, the university was required to apply for a Labour Market Opinion from Human Resources and Skills Development Canada. In addition, also as a matter of federal law, there were guidelines for advertising such jobs, including that job postings must include the type of statement about priority for Canadian citizens and permanent residents that the claimant challenged. The tribunal accepted the university's argument that the s. 16(1) defence applied in these circumstances because the priority in the advertisement for Canadian citizens and permanent residents was a requirement imposed by law. I note that the expert evidence before the tribunal in the present appeal was that no Labour Market Opinion (now known as a Labour Market Impact Assessment) is required before an employer can hire a PGWP-holder.

G. CONCLUSION

[239] I am satisfied that the tribunal's decision is reasonable. It demonstrates a coherent chain of reasoning that is justified in relation to the factual record before the tribunal and the legal constraints relevant to the issues before it.

[240] Accordingly, I would allow the appeal, set aside the Divisional Court decision, and restore the order of the tribunal. As agreed by the parties, Imperial shall pay costs of the appeal to the appellant in the amount of $15,000, inclusive of disbursements and applicable taxes.

[241] The parties did not address costs of the Divisional Court proceedings before this court. If the parties are unable to agree on costs of the proceedings before the Divisional Court, they may make written submissions not exceeding three pages each. The submissions of the appellant shall be delivered within 15 days after the release of these reasons. The submissions of Imperial shall be delivered within 15 days after the receipt of those of the appellant.

Released: May 23, 2023 "KMvR"

"J. Copeland J.A."
"I agree. K. van Rensburg J.A."
"I agree. Sossin J.A."