

Federal Court



Cour fédérale

Date: 20140331

Docket: T-718-13

Citation: 2014 FC 309

Ottawa, Ontario, March 31, 2014

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

STEVE ALJAWHIRI

Applicant

and

**PHARMACY EXAMINING BOARD OF
CANADA**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision dated August 29, 2012, by the Pharmacy Examining Board of Canada (PEBC), that refused to grant the Applicant an additional fifth attempt to write Part 1 (MCQ) of the PEBC Pharmacist Qualifying Examination (PEBC qualifying exam).

[2] The provinces each have licensing boards to determine if you can practise pharmacy in that province. All of the provinces except Quebec require that you pass the PEBC tests. You can only

write the tests three times and then after completion, of remedial assistance you can attempt with permission a final fourth time which is consistent with a number of the other medical professions.

[3] As a preliminary matter the parties disagree as to whether the court has jurisdiction to hear this application. I asked that the parties argue the jurisdictional issue first and then the application for an extension of time to file the application and finally the merits. I told the parties at the start of the hearing that *ITO - International Terminal Operators Ltd v Miida Electronics Inc*, [1986] 1 SCR 752 (*ITO*) was the applicable authority to determine jurisdiction. Though the parties did not argue it in their written submissions, they were both familiar with it.

Legislative Context

[4] The PEBC is the national certification body that regulates access to the pharmacy profession across Canada, except in Quebec.

[5] The PEBC is a non profit corporation incorporated in 1963 pursuant to a special act of federal parliament, *An Act to Incorporate the Pharmacy Examining Board of Canada*, 1963, SC 1963, c 77, (the PEBC Act). The purpose of the PEBC is set out in section 5 of that act. Among its purposes are to (1) establish the qualifications for pharmacists acceptable to participating provincial licensing bodies, (2) promote enactment of provincial legislation necessary to supplement the act, and (3) administer a fair and equitable examination process to issue certificates of qualification for pharmacists and (4) register certified pharmacists.

[6] The PEBC works in close collaboration with the provincial licensing bodies that establish the education and examination requirements necessary for issuance of a Certificate of Qualification to practice as a pharmacist in the particular province.

[7] In Ontario, section 3 and 4 of the *Pharmacy Act*, 1991, SO 1991, c 36, defines the scope of the practice of pharmacy and the authorized acts a pharmacist can perform.

[8] The regulations adopted pursuant to that act establish the requirements for the issuance of certificates of registration as a pharmacist, including (1) successful completion of the qualifying examination of the PEBC, (2) the number of attempts and limitation periods a candidate can have to write the qualifying examinations and (3) additional requirements imposed on candidates trained from outside Canada (*Pharmacy Act*, 1991, O Reg 202/94, s 6(1)(4), s 6(7), s 6(8) and s 7 (the Regulations)).

[9] With respect to the PEBC qualifying exam, the Regulations oblige applicants seeking a certification of registration to pass the PEBC qualifying exam either within three attempts, or on a fourth attempt following successful completion of further education or training as required by either the PEBC, or a Panel of the Ontario provincial registration Committee (Regulations s 6(7)).

[10] Under the Regulations, applicants that are unsuccessful in four attempts to pass the PEBC exam are required to obtain a new bachelor's degree in pharmacy if they want to begin the PEBC examination process again (Regulations s 6(8)).

Factual Context

[11] The Applicant obtained a Bachelor of Science (Honours) degree in Pharmacy, and a PhD in pharmaceutical microbiology, both from the University of Brighton in the United Kingdom.

[12] In 1999, the Applicant began the qualification process prescribed by the PEBC, with the intention of registering as a licensed pharmacist in the province of Ontario.

[13] The Applicant first wrote the PEBC qualifying exam in the fall of 1999 and on November 15, 1999, he was informed by the PEBC that he had failed his first attempt to pass the qualifying exam.

[14] In December 20, 1999, the Applicant requested his quartile standing in the examination and any other information that would assist him in understanding his score. The PEBC informed the Applicant that PEBC policy did not permit the release of actual examination results but they said that among candidates who failed the exam, he ranked in the 26th to 50th percentile, or within the third 25% from the top.

[15] After failing the first time over the next several years, the Applicant pursued PhD studies in pharmacy in the United Kingdom.

[16] The Applicant attempted the PEBC qualifying exam a second time in the spring of 2007 and on June 27, 2007, the PEBC informed the Applicant by letter he had failed both Parts 1 and 2 of the

PEBC qualifying exam. The parties agreed the Applicant did not request feedback following this failed attempt.

[17] After the second failure the Applicant attempted the PEBC qualifying exam for a third time at the next available sitting, in fall of 2007.

[18] On December 13, 2007, the PEBC informed the Applicant by letter that he had failed both Parts 1 and 2 of the PEBC qualifying exam for the third time. They also explained that as a condition to qualify for a fourth and final attempt to write the exam he needed to complete one of the following three options: (1) one full University course in Pharmacy, or (2) 78 continuing education units in correspondence courses, or (3) 500 hours of practice experience under the supervision of a licensed pharmacist.

[19] In a letter dated February 20, 2008, the Applicant responded to the PEBC letter with an application to attempt for a fourth time the May 2008 PEBC qualifying exam. The Applicant said he would fulfill the condition to write for a fourth time by completing 500 hours working in an accredited pharmacy under the supervision of his brother who was a licensed pharmacist.

[20] On June 26, 2008, the PEBC informed the Applicant that he had failed his fourth attempt to pass the PEBC qualifying exam. Moreover, the PEBC explained that since the Applicant had been made aware that the fourth attempt was his final attempt, he could not proceed towards further PEBC certification.

[21] On July 10, 2008, following receipt of a letter dated July 4, 2008, from the Applicant requesting rescoring of his examination, the PEBC confirmed that the Applicant's examination answer sheets had been rescored and there was no change in the result.

[22] On February 5, 2009, the Applicant requested a meeting with Dr. John Pugsley, Registrar Treasurer of the PEBC, to discuss:

- his status regarding his attempts at obtaining PEBC certification;
- what options were available to him, and
- how to proceed forward to complete the PEBC certification process.

[23] On February 9, 2009, Dr. Pugsley responded by refusing the Applicant's request for a meeting and explaining the position of the PEBC with respect to the Applicant's final fourth attempt at certification. Specifically, Dr. Pugsley, refused to grant the Applicant an additional attempt at writing the exam because, (1) to be fair to all applicants, the PEBC adhered to the limit of four attempts permitted to candidates seeking to pass the qualifying exam, (2) the PEBC had not been in receipt of a letter within 7 days of the Applicant's writing of the May 2008 qualifying exam outlining reasons that could have affected his performance.

[24] On September 30, 2011, the Applicant sent another letter to the PEBC requesting copies of all his previous examination results, and stating he wanted to explore options available to him to achieve licensure.

[25] In response, the PEBC sent copies of its three prior letters sent to the Applicant communicating his failure in each of his second, third and fourth attempts at passing the qualifying exam.

[26] On April 23, 2012, the Applicant sent another letter to the PEBC requesting a fifth attempt to write the PEBC qualifying exam following completion of the International Pharmacy Graduate Program.

[27] Following the failure of the PEBC to respond, the Applicant consulted with legal counsel David Matas in Winnipeg, Manitoba.

[28] On August 2, 2012, the Applicant's counsel wrote to the PEBC, requesting once again an exception to let the Applicant to write the PEBC qualifying exam a fifth time. The Applicant's legal counsel stated that he was aware of the regulations in Ontario specifying that the Applicant had four attempts to pass the PEBC qualifying exam, after which, another attempt required candidates to obtain a new undergraduate degree in pharmacy. The Applicant's legal counsel proposed the Applicant follow the requirements under regulations in Manitoba which they read to have no limits on the number of attempts candidates have to pass the PEBC qualifying exams.

[29] On August 29, 2012, the PEBC responded and refused the Applicant's request to write the exam for a fifth time. The PEBC offered the following as justification for its refusal:

- the limit on four examination attempts to pass the PEBC qualifying exam is a national policy that the PEBC applies consistently across all jurisdictions within its mandate, irrespective of whether provincial regulations specify the four attempt limit or not;
- PEBC adherence to its own policies is necessary so as to ensure fairness to all candidates seeking certification, and in the interest of public protection;
- the Applicant did not follow the PEBC procedure outlined on its website for requesting a additional attempt to rewrite the exam for medical procedures or compassionate grounds if there had been any.

Extension of Time

[30] On March 26, 2013, the Applicant filed a motion with this court seeking leave to issue its Notice of Application beyond the thirty day limit. This Motion was to be dealt with at the hearing. There was disagreement and argument on the date the application should have been filed but they both agreed it was out of date no matter what date was used.

[31] The Applicant claims the delay in meeting the deadline was justified as:

- He retained legal counsel in Ontario with experience in administrative law and regulation of health professionals in Ontario on December 10, 2012;
- The unique nature of the case justified the time required by legal counsel to review the file, investigate the facts, evaluate the merits, and advise the Applicant;

- The Applicant acted diligently and as expeditiously as could be reasonably expected in pursuing his application for judicial review;
- The delay does not prejudice the PEBC, owing to the complexity of the legal and factual issues;
- The Applicant has an arguable case on the merits of his application for judicial review;
- As a matter of fairness and justice, the prejudice to the Applicant and lack of prejudice to the PEBC justifies proceeding on the merits.

Analysis

[32] The question that needs answered first is whether the Federal Court has jurisdiction to hear this application.

[33] The Applicant submits that the PEBC amounts to a federal board, commission, or other tribunal as defined in section 2 of the *Federal Courts Act*, RSC, 1985, c F-7 (Federal Courts Act), that exercises or purports to exercise jurisdiction or powers conferred by or under an Act of Parliament. The Applicant argues the Federal Court has exclusive jurisdiction as counsel would have brought the application in Ontario Divisional court, as there is no time limit there so it would have been easier for them as they would not have had to ask for an extension of time as they did here.

[34] The Applicant relies on *Judicial Review of Administrative Action*, the Brown and Evans loose leaf, (pages 2-50 to 2-52), as authority that Federal Court jurisdiction is determined by the

source of the body's authority and exists where there is a nexus between legal authorization for the impugned administrative action and federal law.

[35] The Applicant argued that the source of Federal authority with respect to the PEBC is the PEBC Act, which apparently was incorporated into the Letters Patent incorporating the PEBC under the Canada Corporations Act, through a reference the Letters Patent Application to the purposes and powers in the PEBC Act.

[36] The Applicant submits the decision at issue is within powers conferred by the PEBC Act and as such amounts to a direct nexus between action and federal law. Specifically, the Applicant points to (1) subsection 5(b), which provides that the purpose of the PEBC includes providing fair and equitable examinations for issuance of certificates of qualification for pharmacists, and (2) subsection 11(c) which grants the authority to the PEBC to establish the terms and conditions under which persons can obtain certificates of qualification.

[37] The Applicant said the Federal Court of Appeal got it wrong in *Rosenbush v National Dental Examining Board*, [1992] 2 FC 692 (FCA) (*Rosenbush*). In *Rosenbush*, the Federal Court of Appeal found the Federal Court did not have jurisdiction over decisions of the National Dental Examining Board. The Applicant said even though the Court of Appeal got it wrong it is still distinguishable since the *Act to Incorporate the National Dental Examining Board of Canada* (the Dental Board Act) does not contain provisions analogous to subsections 5(b) and 11(c) of the PEBC Act. The Applicant's position is that *Rosenbush* is only binding on the National Dental Examining Board.

[38] While the Supreme Court has held that the definition of “federal board, commission, or other tribunal” at section 2 of the Federal Courts Act is sweeping (*Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62, at para 3), nonetheless this list is still limited to decision makers whose activities fall within the jurisdiction of the Federal Court.

[39] For the Federal Court to have jurisdiction, there must be a statutory grant of jurisdiction from Federal Parliament. This follows an interpretation of section 101 of the *Constitution Act, 1867*, as given by the Supreme Court in *ITO*, above.

[40] In my view, before addressing the question raised by the parties as to whether the PEBC amounts to a federal board, commission, or tribunal, under section 2 of the Federal Courts Act, it first requires examining whether the activities of the PEBC are such that they fall within the constitutional limits of the jurisdiction of the Federal Court.

[41] The test for jurisdiction of the Federal Court was established in *ITO* and requires satisfying the following three criteria:

- a statutory grant of jurisdiction by Parliament;
- an existing body of federal law, essential to the disposition of the case, which nourishes the statutory grant of jurisdiction; and
- the law underlying the case must be "a law of Canada" as the term is used in s.101 of the Constitution Act, 1867 (*ITO* at page 760).

[42] While no explicit reference is made in *Rosenbush* to *ITO*, it is apparent from the reasons and the language used that those criteria were applied. Justice Hugessen found in *Rosenbush* that there was no body of federal law serving to nourish the grant of jurisdiction under the Federal Courts Act to review administrative decisions (*Rosenbush* at page 3, 1st para). The Court of Appeal found that decisions of the National Dental Examining Board of Canada could not be reviewed by the Federal Court since the activities of that Board did not amount to activities exercising jurisdiction or powers conferred by an Act of Parliament (*Rosenbush* at page 2, last para).

[43] In “Part 1: Jurisdiction of the Federal Courts: An Overview” and under the “General Principles” section in *Federal Courts Practice* by Saunders, Rennie, and Garton those authors instruct that questions of jurisdiction of the Federal Court require application of the *ITO* test (see page 3 of the 2014 edition).

[44] Brown and Evans in the section titled “Constitutional Limits: Existing body of Federal Law”(pages 2-49), says before a determination of whether a body amounts to a federal board, commission or other tribunal under section 2 of the Federal Courts Act, you need to determine the constitutional limits to jurisdiction using the *ITO* test.

[45] Like in *Rosenbush*, at issue here is whether the decisions of a body involved in administering and evaluating the educational and technical qualifications of aspiring members of the pharmacy profession are subject to review by the Federal Court.

[46] The Federal Court of Appeal in *Rosenbush* concluded there was simply no jurisdiction to review the decisions of the National Dental Examination Board. On those facts there was no body of federal law statutory or otherwise, which served to nourish the grant of jurisdiction under the Federal Courts Act so as to permit to review the decisions of a body testing the qualification of aspirant members of the dental professions, a purely provincial manner.

[47] The distinctions between the PEBC Act and the Dental Board Act are neither material, nor amount to a sufficient basis on which to distinguish the PEBC Act from the Dental Board Act.

[48] There is similarity between subsection 6(d) of the Dental Board Act and subsection 5(c) of the PEBC Act which both provides that the purpose of each Board is to promote enactment of such provincial legislation necessary to supplement the provisions of the Act, and both acts contain references to provincial licensing bodies.

[49] By analogy, it is clear evaluating education and qualification of aspiring pharmacists also amounts to a provincial matter as the parties have pointed to provincial regulations outlining the educational requirements for pharmacists in Ontario (*Pharmacy Act*, 1991, O Reg 202/94: see subsection 6(1)).

[50] With respect to federal law, the Applicant only pointed to subsection 12(1) of the PEBC Act to support their contention that the PEBC Act amounts to a federal law that grants jurisdiction to the Federal Court to review decisions of the PEBC.

[51] In my view this is a limited grant of authority to allow judicial review of only certain removals from the Pharmacy register that PEBC administers where quasi criminal allegations underlie the removal. Consequently, this subsection alone does not amount to a sufficient “body of federal law statutory or otherwise, which serves to nourish the grant of jurisdiction” as required under *ITO* to find that the Federal Court has jurisdiction to review a broader scope of activities of the PEBC. This broader scope would include decisions determining whether applicants fulfilled the educational and testing requirements for listing as a pharmacist on the register.

[52] Applying *ITO* and *Rosenbush*, the activities of the PEBC at issue in this case do not fall within the jurisdiction of the Federal Court.

[53] The Applicant has not persuaded me the Federal Court has jurisdiction to hear this matter.

[54] As the Federal court has no jurisdiction to hear this matter, I will not determine if I would have granted the extension of time nor will I deal with the merits as I have no jurisdiction to do so.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Judicial Review is dismissed;
2. Costs in the amount of \$250.00 is payable by the Applicant forthwith.

"Glennys L. McVeigh"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-718-13

STYLE OF CAUSE: Aljawhiri v Pharmacy Board of Canada

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: December 11, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** Justice McVeigh

DATED: March 31, 2014

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