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August 11, 2008

File: 122.15

Dr. Jim Browne
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SENT BY EMAIL

Dear Jim:

Subject: **Implications of the pending changes to the labour mobility provisions of the *Agreement on Internal Trade***

You have asked me to describe the changes that the Premiers announced in mid-July to the labour mobility provisions of the Agreement on Internal Trade (AIT) and to discuss the implications of those changes for the BC Task Group for Counsellor Regulation concerning the designation of counselling therapy here in BC, if not also for the regulation of the profession across all of Canada.

I will leave it to you to forward this commentary to the Task Group and other interested parties.

What did the Premiers announce?

In mid-July of this year, the media reported that the provincial Premiers had reached an agreement to improve labour mobility across Canada. On July 18th, the Council of the Federation released the following statement concerning what the Premiers had agreed to do:¹

Trade: Building on our Strengths in Canada and Abroad Labour Mobility

Emphasizing the critical importance of full labour mobility for all Canadians, Premiers directed Internal Trade ministers to amend the Agreement on

¹ This is an extract from a July 18th Council of the Federation statement that was released by the Premiers. For a copy of the full statement, please see: www.ait-aci.ca/index_en/links.htm

Internal Trade (AIT) by January 1, 2009 to reach this goal.

These amendments will provide that:

- Any worker certified for an occupation by a regulatory authority of one province or territory shall be recognized as qualified to practice that occupation by all other provinces and territories; and
- Such recognition shall be granted expeditiously without further material training, examinations or assessment requirements.

Premiers further directed that any exceptions to full labour mobility would have to be clearly identified and justified as required to meet a legitimate objective such as the protection of health or public safety.

Premiers directed that, by the summer 2009 meeting of the Council of the Federation, these amendments will result in mutual recognition of occupational credentials between all provinces and territories. This will also benefit Canada's labour market since once certified in Canada, qualified foreign-trained workers will enjoy the same mobility rights as qualified Canadian workers.

Premiers noted that the AIT's enhanced dispute resolution mechanism, and their willingness to legislate, if necessary, will ensure full labour mobility rights for all Canadians.

On July 28th, BC's Deputy Minister of Technology, Trade and Economic Development, Don Fast, sent a letter to the registrars of every regulatory body in BC. In that letter, Mr. Fast explained the Premiers' earlier announcement in these terms:

To ensure labour mobility, Premiers agreed to amend the AIT by January 1, 2009. The amendments will provide that any worker certified for an occupation by a regulatory authority of one province or territory shall be recognized as qualified to practice that occupation in all other provinces and territories. Premiers further directed that "any exceptions to full labour market mobility will have to be clearly identified and justified as necessary to meet a legitimate objective such as the protection of public health or safety". Each province will have to identify any measures it wants to retain with a report on such measures provided to Premiers at the August 2009 meeting.

As of the date of this commentary, the provincial and territorial governments have not released the details of the changes to the AIT that will be made to implement the Premiers' policy announcements. As such, we do not yet know what specific amendments will be made to the labour mobility provision of Chapter 7. However, what is clear from the information available thus far is that things are going to change dramatically for regulatory bodies across Canada. To appreciate the scope of this change, it is useful to start by looking at what the AIT currently states in relation to the professional registration requirements.

What does the AIT currently say about labour mobility?

The labour mobility provisions of the AIT are set out in its Chapter 7. The ones most applicable to this commentary are summarize under separate sub-headings.

(a) General purpose

The general purpose of Chapter 7 is described in Article 701: “The purpose of this Chapter is to enable any worker qualified for an occupation in [a province or territory] to be granted access to employment opportunities in that occupation in ...any other [province or territory], as provided in this Chapter.”

(b) Competency-based registration criteria

The Task Group is familiar with Article 707(a), which directs that each jurisdiction “shall ensure that any measure that it adopts or maintains relating to the licensing, certification or registration of workers ... relates principally to competence.” This article has been the foundation for the Group’s work on preparing a competency profile for counselling therapy.

(c) Mutual recognition and reconciliation

One provision that has not received much consideration to date is Article 708, which states (in part) that the provinces will “mutually recognize the occupational qualifications required of workers of any [province or territory] and [will] reconcile differences in occupational standards.” A mechanism for achieving this objective is set out in Annex 708.

Annex 708 has the effect of requiring regulatory bodies that exist for a profession in two or more provinces to collectively identify the common features and differences in their entry-to-practice requirements each has established, and to then develop processes to accommodate substantial differences.

While they were not mandated within Annex 708, the end product of this process has often a multi-party agreement commonly referred to as a Mutual Recognition Agreement (MRA). The various MRAs for different professions set out a summary of the results of an inter-jurisdictional comparison and described any accommodation mechanisms that the parties agree need to be applied to address substantial differences in their respective registration requirements so as to facilitate labour mobility.

Article 708 and Annex 708 have not been given close scrutiny by the counselling profession across Canada because, to date, only Quebec has enacted legislation to regulate the profession and, therefore, there are no other jurisdictions for Quebec regulators to deal with in terms of establishing a mutual recognition agreement for counselling.² It is therefore useful to summarize the steps that were commonly taken by other professions, leading to the drafting of their profession-specific MRAs. This will provide a foundation for understanding the significance of the mid-July announced changes.

The process of creating a MRA for any particular profession first involved identifying and describing *bona fide* occupational requirements across the different jurisdictions. The next step was to reconcile those requirements that are substantially different and legitimate. If

² While Ontario has passed legislation (the *Psychotherapy Act, 2007*) to regulate psychotherapy and to license Psychotherapists and Mental Health Therapists, the Transitional Council for the new College of Psychotherapist is not – at this writing – fully operational. I anticipate that it will take the new Council at least a year to be in a position to then start talking with the Quebec regulators about mutual recognition and the movement of counsellors and psychotherapists between the two provinces.

this further analysis identified that there was a high level of commonality across the jurisdictions for the entry requirements, then - generally speaking - a professional registered in one province would be free to move and be registered in another, without the need for further education, licensing examination or other assessment processes. The resulting MRA for that profession would then be a fairly short document.

Under Article 708 and Annex 708, only substantial and *bona fide* differences can become the basis for additional registration requirements that a province can impose on professionals registered in another province who want to move to the new province. The MRAs that result from these more time-consuming assessments are longer and more complex documents.

For example, if only BC allows a profession to perform a certain risky service (“reserved activity” under the *Health Professions Act*) and the BC regulatory body has established a competency-based assessment process to ensure that applicants possess the necessary skills to perform safely those risky services, then members of that profession registered in another province that does not regulate that same set of services would have to be assessed by the BC body for those additional competencies if those non-assessed professionals choose to move to BC. The manner that the BC regulatory body would assess the transferring professionals would be set out in the MRA for that profession.

In relation to accommodations that are described in an MRA, some professions created a limited licensing system. A limited license allows a professional registered in one province to be registered in the second province, but without being allowed to perform certain specific services for which the first province did not assess competencies. Once the professional with the limited license had upgraded his or her skills in that area and passed a special examination, the second province would then grant that professional full registration.

(d) Newly regulated professions or changes to existing requirements

There is one final aspect of Chapter 7 that needs to be summarized because it has implications for emerging professions like counselling.

Part 2 of Annex 708 sets out the steps that a province must administer in relation to new regulatory bodies that have not yet developed their statutory-based registration standards. This part has the effect of requiring new regulatory bodies to take certain steps if registration standards already exist in other province for that profession. Specifically, this part requires the new regulatory body to develop its standards in a way that will “facilitate future reconciliation” between the old and the new regulatory bodies. This wording does not mean that the existing registration standards of the older regulatory body would become the *de facto* standard for the new jurisdiction. This requirement is simply saying that the existing standards for that profession established in other jurisdictions must be taken into account when the new regulatory body sets its standards. Any resulting MRA would most likely recognize and accommodate any differences.

This part also imposes a similar requirement if an existing regulatory body wants to substantially change its registration criteria from what was (most likely) addressed in a MRA for that profession.

Why is Chapter 7 being amended?

The Premiers did not explain why they decided to change the AIT labour mobility provisions. However, based on my experience and from what I have heard about other professions, there were numerous problems with the current model.

For some health professions, it was not a difficult process for their regulatory bodies to achieve a MRA that allowed for fairly free mobility, once a professional was registered in one province. This is because those professions had developed a set of common, national standards for registering applicants to the profession that all the regulatory bodies for that profession had adopted. These professions also employed a national registration examination process. Examples of such professions are: medicine, dentistry and physical therapy. Other professions, however, did not share their experience with AIT.

Some health professions had great difficulty in negotiating their MRAs. Some professions put into place rather cumbersome and often difficult mechanisms within their MRAs to accommodate members of their profession who were moving from one province to another. Others developed mechanisms that probably would not have survived a challenge under the AIT. For example, some regulatory bodies re-assessed transferring applicants or placed additional registration requirements that introduce delays and extra costs for applicants. These are not consistent with the concept of "mutual recognition".

Finally, a few professions had not completed their initial occupational analysis and, by all accounts, were a long way from sitting down with their regulatory counterparts to negotiate accommodation mechanisms, let alone to draft a MRA for their profession.

In brief, the territories and provinces were unable to achieve full labour mobility of their numerous professions by the prescribed deadlines. Despite the fact that the governments repeatedly delayed full implementation, the AIT's labour mobility model was simply not working as it was originally intended.

What changes are likely to be made to the AIT?

While the details of the specific amendments to Chapter 7 have not been released, it is likely that Article 708 and Annex 708 will change dramatically. I expect both will be replaced by new provisions that will completely transform the current processes.

While we do not yet know what the new labour mobility provisions will say,³ a fairly recent inter-provincial agreement provides us with a likely template.

(a) Setting the policy objective

In 2006, BC and Alberta signed the *Trade, Investment and Labour Mobility Agreement* ("TILMA"). Labour mobility between these two provinces was addressed in Article 13 of TILMA, and it is useful to quote the opening provisions of that provision:

Article 13 : Labour Mobility

1. .. [Any] worker certified for an occupation by a regulatory authority of a Party [being either BC or Alberta] shall be recognized as qualified to

³ The Premier's directed their labour market ministers to come-up with new articles for Chapter 7 to implement their policy directives. In turn, government officials are now negotiating the wording for the proposed changes.

practice that occupation by the other Party.

2. For greater certainty, requirements imposed on workers to obtain a license or to register with a Party or one of its regulatory authorities prior to commencing work within the territory of that Party shall be deemed to be consistent with paragraph 1 provided that no material additional training or examinations are required as part that registration procedure and such registrations are processed on a timely basis.

In my view, we are likely to see Article 708 and Annex 708 of the AIT replaced with new provisions that will be similar to Article 13 from TILMA. Such wording would commit each province or territory to take the necessary steps to ensure that, once an applicant is registered by a regulatory body in one jurisdiction, that registered professional is free to later move to another province or territory which also regulates that same profession, and be automatically granted registration in the second jurisdiction without the need for that professional to take any further training, pass any new examinations or fulfill any accommodation requirement.

This requirement would apply to registered professionals who were grand-parented into that profession, and to those registrants who trained for their profession in offshore educational programs. This rule would have the effect of eliminating the current practice of individual assessments of transferring professionals, which was a problem with the current approach.

(b) ... but taking into consideration legitimate differences

Despite the objective of full mobility, there will still be a need to be able to take into consideration legitimate differences in registration standards, and – again – we can turn to TILMA for how this can be worded.

The BC-Alberta Agreement provides a mechanism that allows the regulatory authority in one province to maintain a particular registration requirement, even if it is not one that the other province employs. It is possible to maintain or establish an additional registration requirement so long as it can be proven that it is “necessary to achieve a legitimate objective”(Article 13.5(a)).

In the information released following the Premier’s mid-July announcement, language similar to that found in TILMA was used to describe how legitimate differences in registration requirements from one province to another could be maintained.

It would therefore appear the provincial or territorial governments will amend the AIT by the end of 2008 to commit the governments to adopt a new model for achieving full labour mobility. As the provinces have exclusive constitutional authority to regulate professions, these new policies are likely to be pursued by each province and territory taking a further step.

(c) The need for provincial and territorial legislation

To enact the new model in an amended AIT, in particular to ensure that it is fully operational by next summer, the provinces and territories are most likely going to have to pass legislation that would apply to all professions within their jurisdiction. This new legislation would apply the full mobility policy of the amended AIT to each jurisdiction’s regulatory bodies. So, for example, a province could declare in its legislation that, once someone is registered in a profession in another jurisdiction, that registered professional is deemed to be registerable for that profession in that province and does not have to take any additional

training or examination to become registered.

To deal with legitimate differences that may exist across the country for any particular profession, the provincial or territorial governments could also set out in their legislation a mechanism that would permit their regulatory bodies to require a transferring registrant to take some additional training, examination, etc. However, the legislation would also likely decree that an additional requirement can only be imposed so long as the regulatory body can prove that it is a legitimate requirement. I expect that the legislation would declare that a requirement can only be found to legitimate if it can be demonstrated that it ensures or improves public health or safety, and that it can also be defined in terms of differences in *bona fide* competencies. The legislation could state that, until such time as the government accepts the regulatory body's additional requirement, a registrant of that profession moving from another jurisdiction is deemed to be automatically registerable in the province. More likely, the legislation would state that a regulatory body cannot impose its additional requirement without the government's prior approval.

(d) Changes for newly regulated professions

Given that the Premiers' recent policy directive appears to move Canada away from a mutual recognition and reconciliation process, I expect that part 2 of Annex 708 of the AIT will also be changed. Rather than requiring a process that is aimed at reconciliation of potentially different standards that could be developed for new professions, this part could be amended so as to encourage the existing and new provincial regulatory bodies to work toward creating a common set of registration standards for their growing profession. If numbers warrant, those standards could lead to the creation of a single, common, national registration process.

What are the implications of the AIT changes for Canadian professions generally

As explained above, the current AIT wording allows the regulatory bodies from each province to work together to identify areas of *bona fide* differences in scope of practice, entry requirements, etc.,. The bodies can then develop their own mechanisms to accommodate those identified differences when a registrant in one jurisdiction wants to work in another. This then leads to a MRA for the profession which all the regulatory bodies sign.

In my view, the anticipated changes to the AIT, however worded, will effectively reverse the onus of current process that has developed under Chapter 7 to date. I expect that Canada will move from (a) a process-orientated Mutual Recognition model that allows for numerous exceptions to be accommodated under MRAs to (b) a Deemed Equivalency model that will only allow exceptions to the automatic registerable rule for legitimate and demonstrable differences that are necessary to ensure public safety, etc.

Under the new automatic registerable model in an amended AIT, the regulatory bodies will shoulder the burden and will have to over-come a much higher threshold of proof to justify their different registration criteria than they faced when protecting their differences under the current model.

The changes to the AIT are also likely to have other results. An underlying but not stated assumption of the new automatic registerable model is that every regulatory body for any particular profession should have the same registration requirements. If they do not, then any regulatory body imposing different requirements will have to prove that its additional

standards are legitimate before they can be applied to registrants transferring from another province where they are registered. This is a clear reversal of the current approach, which allows differences to continue so long as they are reasonably accommodated.

Under the new approach, we will no longer see MRAs developed for Canada's various professions. Any provincial regulator that wishes to maintain a different registration requirement that creates a barrier to true mobility will have to first prove to its government that such a requirement is justified. Without government-sanctioned proof, the deemed equivalency rule will mandate full mobility of that profession from province to province without any strings or pre-conditions.

What are the implications of the AIT changes for Canadian regulatory bodies?

The world is going to shift dramatically for regulatory bodies across Canada that have not already adopted a common registration criteria and process as part of their current MRAs. Such professions would be wise to start now to plan for the inevitable change that is coming.

To meet the changes to the AIT that are coming into force next year, I would suggest that professional regulatory bodies that have not done so should start work immediately to establish a set of common registration requirements that will allow true mobility of members of that profession from one province to another. In my view, the best route that the regulatory bodies could take to meet this new objective would be to create a set of common competencies and a single national registration process, which could include a national registration examination of identified competencies.⁴

I would suggest that moving toward a common, national set of registration requirements for any profession would be much easier and a quicker process than if each provincial regulator devoted its limited resources to defend its unique registration requirements as a legitimate objective under the amended AIT.

To date, a number of professions have established a common set of registration requirements, and compel their applicants (regardless of jurisdiction) to pass a national registration examination. Those professions that have not taken this path would be wise to consider doing so in face of the pending changes to the labour mobility provisions of the AIT.

What are the implications of the AIT changes for the regulation of counselling across Canada?

As I have noted above, Quebec is the only province with a fully operational regulatory structure for its different counselling professions. Ontario is still developing its structure, and – at the date of this commentary – its Transitional Council has not been appointed so it may be some time before Ontario begins to develop its registration criteria.

⁴ I recognize that it is unlikely that the AIT amendments will go so far as to make the development of a national registration program mandatory for all professions. Even the current TILMA agreement does not require harmonization of registration requirements between BC and Alberta professions. However, if the recently announced changes do not have the desired effect within the next five years, I would then expect that the governments would again amend the AIT, this time to make it mandatory for the regulated professions to adopt a national registration program.

The AIT process permits non-statutory bodies (like the BCACC or the Task Group) to participate in the initial assessment process, the development of mutual recognition and reconciliation, and even to be signatories to a MRA, albeit as “observers”. I expect this aspect of the current requirements will remain in place, although the end product will no longer be a MRA.

Therefore, despite the fact that at the present there is only one province with a functional mechanism for regulating counselling, there are associations across Canada that are active and, I expect, more than willing to participate in a dialogue with the regulated province(s). I believe there is currently in Canada a foundation for looking to the future and to prepare for the new labour mobility provisions of the AIT. The Canadian counselling profession does not have to wait until 2009 to begin the task of creating a national registration examination process that could be adopted by the regulated provinces if not also by the professional associations in the non-regulated jurisdictions. They could start that process now.

Recommendations for BC

I would encourage the BC Task Group to consider working with the national and provincial organizations, and the Quebec colleges and the Ontario Transitional Council, with the objective of developing a set of common, national competencies for counselling (including psychotherapy and any other related mental health therapies). With such a set of nationally-recognized competencies in hand, it should then be possible to develop a single mechanism to assess applicants to want to become registered as counsellors or psychotherapists in Quebec, Ontario or elsewhere across Canada.

The Canadian Counselling Association has recently submitted a proposal to the federal government, apparently to seek funding to begin a national dialogue on regulating the counselling profession and setting national standards. While the BC Task Group has not been provided with a copy of the CCA submission, if funding is provided to the CCA to continue the dialogue that was initiated in 2006 at the National Symposium in Vancouver, it would be useful to include as part of that process a discussion on the implications of the major changes to the labour mobility provisions of the AIT.⁵

Perhaps by the time a follow-up conference is held we will have the actual amendments to Chapter 7 in hand. I have little doubt that those amendments will point the counselling profession away from developing a MRA and toward developing a national registration and examination program.

⁵ Given the Premiers’ recent announcement to amend the AIT, I would go so far as to suggest that the CCA’s funding request will either be rejected or put on hold, pending the adoption of the final amendments to the AIT. If the CCA’s funding request was aimed at creating a MRA for counselling and psychotherapy, then it is most likely to be rejected as no longer being a viable option.

I trust this commentary will be of assistance. I would be pleased to discuss this commentary or the issues it raises with the full Task Group or others as may be required.

Yours truly,

A handwritten signature in black ink, appearing to read 'G. K. Bryce', with a stylized flourish at the end.

George K. Bryce

cc D. Cane, consultant