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BACKGROUND

ECONOMIC GROWTH AND INNOVATION

Who Can Work Where:

Reducing Barriers to Labour Mobility
in Canada

Robert Knox



In this issue...

Why and how Canadian governments should better fulfill their commitments to reduce barriers to labour mobility in Canada.

THE STUDY IN BRIEF

THE AUTHOR OF THIS ISSUE

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Barriers to labour mobility for regulated professions and skilled trades remain a problem in Canada. Canadian governments have tried to reduce them through the Labour Mobility Chapter of the Agreement on Internal Trade, which all governments signed in 1994.

There are nearly two million of these workers, or about 11 percent of Canada's workforce. Restrictions on their ability to work anywhere in the country have negative implications for the country's productivity, labour supply and future economic prospects.

In 2009, Canadian governments decided to revise the Labour Mobility Chapter to eliminate remaining barriers to mobility for workers in Canada. All Provinces and territories have now agreed that a worker certified for an occupation in one province or territory would be recognized as qualified for that occupation by all other provinces and territories.

This is an innovative initiative in Canadian domestic trade policy. If Canadian governments apply the revised Chapter rigorously, they should accomplish their objective.

There are still problems, however, including the limited scope of the Chapter. In addition, governments can exclude some occupations from the Chapter unilaterally. There is no easy way to challenge these exclusions. There are still differences in occupational standards, as well as some professions that are recognized in some jurisdictions but not others.

The *Backgrounder* makes several recommendations:

- The Chapter should apply to all government measures that restrict worker mobility;
- Canadian Governments should apply the advice of the Competition Bureau and take steps to ensure that the level of regulation of professions and skill trades does not hinder competition so that consumers have access to the broadest range of services at the most competitive prices;
- An independent adjudicator should review any proposal to exempt a measure from the coverage of the Labour Mobility Chapter, to ensure that the exemption achieves a legitimate objective; and
- Governments should establish a national Administrative Appeal Tribunal to resolve disputes between applicants and regulators. The Tribunal should be accessible, transparent, low cost and quick.

Like the rest of the world, Canada will face a labour crunch in the next 10 years. Unless Canada ensures that its professionals and skilled workers can work anywhere in the country, it could limit our ability to attract the people our economy needs.

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INDEPENDENT • REASONED • RELEVANT

Canada has a labour mobility problem: not all provinces necessarily recognize the credentials of professionals and skilled workers qualified in other Canadian jurisdictions. This matters, because barriers to labour mobility for these workers, who represent a significant share of Canada's labour force, have negative implications for the country's productivity, labour supply and future economic prospects.

Regulated professions represent nearly two million workers, or about 11 percent of the Canadian work force (Grady and Macmillan 2007). They are critical, as their skilled resources are essential to a productive and competitive Canadian economy and society. Measured another way, regulated professions comprise up to one-fifth of Canada's service economy. They account for 7 percent of the total hours worked in Canada's business sector (Competition Bureau 2007). The bad news is that productivity of this sector is approximately half that of the regulated professions in the United States and in the bottom fifth for labour productivity among Canadian industries.

At least some of this shortfall is the result of differences among provinces in the regulation of professions and skilled trades. Productivity loss that is not justified by legitimate public interests should not be tolerated by Canadian governments and that is what makes labour mobility an important policy issue. Like the rest of the developed world, Canada

will face a labour crunch in the next 10 years (McNiven and Foster 2008). Unless Canada ensures that its professionals and skilled workers can work anywhere in the country, it could limit our ability to attract the people our economy needs and we could lose professionals and skilled workers to competing markets.

The 2009 update to the chapter on labour mobility in Canada's Agreement on Internal Trade (AIT) attempts to deal with certification issues for workers who cross provincial borders. It is part of the solution, as I discuss below. However, to be more effective, the scope of the chapter on labour mobility needs broadening, because diverse certification and occupational standards are not the only factors that can restrict mobility. Provinces sometimes seek exceptions to the general application of the agreement, with respect to recognizing certification. When they do, an independent adjudicator should review any proposal to escape the mobility chapter's coverage. Also, governments should establish a national appeal tribunal to resolve disputes between applicants and regulators.

With these measures in place, workers in regulated professions will see improved opportunities to deploy their skills and, in doing so, will make most Canadians better off.

Background and Overview

Canadian provinces¹ are primarily responsible for regulating their labour markets and workers (Howse 2008).² There are 60 regulated professions and 50 skilled trades in Canada (HRSDC 2009, Labour Mobility) most, but not all, with a regulating authority in every province and territory in Canada (Box 1). This structure has all the impediments that

The author has provided advice and consulting assistance on issues and policies discussed in this paper; the views expressed are his own.

- 1 In this paper, the term provinces includes territories and the phrase Canadian governments includes provinces, territories and the federal government.
- 2 The Canadian Constitution does not specifically assign responsibility for regulating labour markets and workers to provincial governments. The Judicial Committee of the Privy Council established provincial responsibility by default through decisions particularly in the late 19th century.

In simple terms, if Canada's Constitution does not expressly assign an area of law to federal or provincial jurisdiction, judicial decisions can assign it to one or the other or both. Section 91, the Peace, Order and Good Government (POGG) clause, establishes federal residual jurisdiction. Provincial residual jurisdiction is found in the Property and Civil Rights clause in s. 92(10) of the *1867 Constitution Act*.

The principle is that a Court will assign an area of law to the jurisdiction to which it most closely relates. Some believe that the federal government should have some authority for regulating the inter-provincial mobility of workers under the trade and commerce power in s. 91 of the Constitution, but the regulation of workers is solidly entrenched in provincial jurisdiction, and this is unlikely to change.

The original default finding by the Judicial Committee of the Privy Council that worker regulation belongs within provincial jurisdiction has been repeatedly affirmed and never reopened by the Supreme Court of Canada, despite significant political, social and economic change in Canada and in the world that might justify reconsideration of the issue (Howse 2008).

Box 1. Regulated and Skilled Trades in Canada

There are **60 regulated professions** in Canada. Fifty-one of them are regulated in two or more jurisdictions. People working in regulated occupations include doctors, nurses, engineers, architects and accountants, among others.

Each regulated profession has a legally established regulating body in the jurisdiction where the profession is recognized. Members are allowed to provide services to the public using a legal designation such as MD, PEng, RN, CA or CGA.

Regulating bodies establish and apply qualification standards and certify their members as qualified for the occupation defined by the profession's occupational standards.

There are also approximately **50 skilled trades** where certification is compulsory in at least one jurisdiction. Examples of trades that require licensing/certification in most jurisdictions include electricians, plumbers and automobile mechanics.

Licensing /certification is usually provided by governments based on training provided by colleges or other recognized institutions on the completion of examinations set by government agencies.

Occupational standards are developed by provincial and territorial governments in consultation with the private sector, technical experts and, in most cases, national bodies and other governments.

The **Red Seal Program** has been established by Canadian governments to provide mobility for skilled trades. Through the program, workers who are trained and certified for their trade can obtain a Red Seal endorsement by successfully completing an Inter-provincial Standards Examination.

Provincial and territorial governments are responsible for establishing occupational standards within their own jurisdiction. They have no obligation to reconcile occupational standards or to adopt common national standards.

Source: Information available on the Human Resources and Skills Development Canada web site.

multiple regulators and differences in qualification standards, regulations and occupational requirements can create.

At the national level, many professions have national associations to ensure the commonality of standards and enable some degree of inter-jurisdictional mobility (LMCG 2001). Canadian governments have also established a national program for qualifying skilled trades (HRSDC 2009, Red Seal).

All the same, a survey by Canadian officials found that 35 percent of about 13,000 regulated workers who moved to different provinces in 2004 did not have their qualifications recognized by the regulators in the receiving province (FLMM 2005). The problem is that there is no certainty that a professional or skilled worker who is qualified in one jurisdiction can work in another and no statutory mechanism to ensure they can.

Canadian governments have been applying the Agreement on Internal Trade to attempt to resolve

mobility issues. The AIT came into force in 1995: it is a political undertaking by Canadian governments to establish an open, efficient, and stable domestic market (AIT 1995, Article 100). The AIT is “political” in the sense that it does not change the constitutional and legislative powers of Canadian governments (AIT 1995, Article 300) and it has no supporting statutory structure to ensure its undertakings are implemented and respected.

While the AIT has many shortcomings, owing to its complexity, inaccessibility and unenforceability (CGA 2006, Knox 2001), the Labour Mobility Chapter (AIT 1995-Chapter Seven, AIT 2009-Chapter Seven-Revised) is one of its strengths. Through the Labour Mobility Chapter, governments agreed that any worker qualified for an occupation in a province or territory should have access to employment in that occupation in all other provinces and territories (AIT 1995, Article 701). The mechanism for accomplishing this objective was through mutual recognition of occupational qualifications and

Box 2. What Are Occupational Standards and Certification Requirements?

An **occupation** is a set of jobs which, with some variation, are similar in their main tasks or duties or in the type of work performed.

Occupational Standards describe and define an occupation and the competencies required for that occupation. Specifically an occupational standard is the skills, knowledge and abilities required for an occupation as established by a recognized body and against which the qualifications of an individual in that occupation are assessed;

Certification Requirements are the knowledge, skills, abilities and experience established by regulatory body or authority as the basis for certifying that a person is qualified for an occupation.

"Governments agree that there can be different pathways for a worker to acquire the necessary skills, knowledge and abilities required for certification in a regulated occupation. As such, Chapter Seven specifies that a provincial/territorial difference related to, for example, the type or length of education/training required for certification, should not "in and of itself" be a justification to deny certification to a worker who is already certified in another province/territory."

Finding of an Internal Trade concerning Ontario's Public Accounting Licensing System, October 16, 2001, page 16 of the Panel's report.

"The Labour Mobility Chapter of the Agreement on Internal Trade requires Provincial Governments and their self-regulating professional bodies "[...]to recognize the occupational qualifications of a worker from any other jurisdiction where those qualifications have already been recognized by that jurisdiction, through licensing or other means, and to objectively assess the competencies of a worker against its own occupational standard in a manner that recognizes that competencies can be acquired by different means."

Sources: Guidelines For Meeting The Obligations of The Labour Mobility Chapter, July 2009, Forum of Labour Market Ministers (FLMM) and The Labour Mobility Coordinating Group (LMCG), page 7.

reconciliation of occupational standards (AIT 1995, Article 708, Annex 708). (See Box 2).

In the First Ministers' Social Union Framework Agreement in February 1999, Canadian governments agreed to resolve all outstanding barriers to mobility by July 1, 2001 (LMCG 2001). However, governments failed to meet that commitment because the process for resolving differences in occupational qualifications and standards was too complex and there was no mechanism to ensure that regulating bodies respected the obligations established by the AIT (CGA-Canada 2005).

In September 2006, ministers responsible for internal trade (CIT 2006; CIT 2007) agreed to revise the Labour Mobility Chapter of the AIT (Chapter Seven) by April 1, 2009 to resolve remaining barriers to mobility. They proposed to change the Chapter so that governments would recognize any worker certified for an occupation by a regulatory authority of one province or territory as

qualified for that occupation in all other provinces and territories. Effectively, they proposed to use "mutual recognition" to replace the complex and time consuming reconciliation requirements in the original chapter.

In doing so, the ministers were following national and international precedents. British Columbia and Alberta adopted the mutual recognition principle in their Trade, Investment and Labour Mobility Agreement (TILMA), which they signed in April 2006 (TILMA 2006, Macmillan and Grady 2007, Knox and Karabegovic 2009). Other federations and common markets, including the European Union and Australia, also use mutual recognition to enable open trade in goods as well as worker mobility. When it came into force in August 2009, (AIT 2009, Ninth Protocol of Amendment), the revised Labour Mobility Chapter of the AIT henceforth applied the mutual recognition principle to regulated professions and occupations in Canada. Canadian governments maintain that this will resolve

remaining barriers to mobility in Canada. It should, but will it?

The remainder of this paper reviews the issues surrounding labour mobility in Canada and analyses the revised Labour Mobility Chapter of the AIT to determine if it will achieve the premiers' objective of removing all barriers to worker mobility in Canada.

The Problem

Canadians often move around the country, and between 1 and 2 percent of the population moves to different provinces each year, usually for economic reasons (Statistics Canada 2009).

This statistic may not tell the whole story. A significant number of regulated workers regularly go to other provinces to work or provide services on a temporary basis. There is no statistical information concerning these workers or the extent to which they encounter restrictions, but there are issues. For example, geologists, engineers, architects, lawyers and accountants, among others, commonly work in more than one province. Having their qualifications recognized in other jurisdictions may not always be possible, or simple, so many workers maintain certification in more than one province (Box 1).

Occupational and Qualification Standards

There are two standards associated with each profession and regulated occupation (skilled trade):

- (i) an occupational standard defines the occupation and determines the skills, knowledge and abilities or competencies required for the occupation; and
- (ii) certification requirements establish the requirements for certification or entry into the practice of an occupation (Box 2).

OCCUPATIONAL STANDARDS: Provincial governments are responsible for occupational standards, not self-governing professional bodies. Therefore, if a self-regulating body maintains an occupational standard, the provincial government is responsible for ensuring it does not impair mobility in that occupation. But occupations change with the needs of society and technology. There are constantly evolving occupational standards that change at

different rates in different jurisdictions. In turn, governments usually delegate the process for establishing and maintaining occupational standards to self-governing professional bodies. And professions tend to adopt and adapt standards developed by national or international bodies for the particular occupation.

Some occupations have separate organizations dedicated to establishing standards that operate at arm's length from the regulatory bodies and involve other stakeholders in the standard-setting process. For example, the Auditing and Assurance Standards Oversight Council (AASOC) appoints the Auditing and Assurance Standards Board (AASB). Both the Council and the Board are part of the Canadian Institute of Chartered Accountants (CICA). Both operate at arm's length from the CICA.

Any accountant in Canada who provides public accounting services, whether he or she is a Chartered Accountant (CA), Certified General Accountant (CGA) or Certified Management Accountant (CMA), does the work established for public accounting set by the Auditing and Assurance Standards Board.

The important point is that occupational standards can be different among provinces, and these differences can result in barriers to mobility. Furthermore, not all provinces recognize and regulate the same designations in the same professional area. For example, Registered Psychiatric Nurse (RPN) is a recognized profession separate from Registered Nurse in the western provinces and the northern territories, but not east of Manitoba. Another example: there are two kinds of foot specialists who are not medical doctors, chiropodists and podiatrists. They have somewhat different occupational standards and training and, consequently, different scopes of practice. Some provinces recognize one but not the other.

The revised Labour Mobility Chapter (AIT 2009, Article 707) says provinces can adopt or maintain any occupational standard and determine the appropriate level of protection for the standard within its jurisdiction. However, if a difference between occupational standards restricts mobility, the Chapter requires the restriction to be justified by a legitimate objective such as consumer protection. The difference in standards that causes the restriction

must be material and a qualified worker must lack critical skills, an area of knowledge or ability required to perform the occupation.

Provinces have agreed to try to reconcile occupational standards and avoid differences that might impede mobility. Provinces have not agreed to establish common occupational standards or to ensure that all Canadian jurisdictions regulate the same occupations. As a result, continuing barriers to mobility exist.

CERTIFICATION REQUIREMENTS: Certification requirements establish the training, education, experience and exams to certify that a person has the skills, knowledge and ability for a profession or an occupation (skilled trade).

For professions, those that use a protected designation or title such as MD, CA, CGA or RN signifying membership in a legally established self-regulating professional body such as a college, institute or association in a province, must meet prescribed certification requirements.

As discussed, being qualified in one jurisdiction does not establish practice rights in all provinces and territories. To practice in another jurisdiction, a professional or a skilled worker has to be recognized as qualified by the regulating body in that jurisdiction. A regulatory body can require additional experience, successful completion of qualifying exams and possible additional academic training before certification. It could reject or ignore previous training, experience, or examinations and require complete re-qualification by an applicant, effectively restricting mobility for qualified workers and professionals.

The revised Labour Mobility Chapter addresses these issues by requiring governments to recognize anyone who applies for certification as qualified if he or she is qualified for an occupation by a legally established regulator in another province. Such applicants do not have to meet additional certification requirements or be resident in the province where they want to be certified.

Skilled trades also have certification requirements. Government departments or agencies responsible for education, training and apprenticeship in each jurisdiction develop and apply these standards. Some trades have associations that participate with

governments in developing qualification requirements and occupational standards but membership in these associations is not a condition for licensing.

Self-governing professional bodies also establish and police ethical and performance standards and maintain the competence of their members through mandatory continuing education and practice reviews. These mechanisms and requirements are essential to protect the consumers and the public.

WHY STANDARDS? Certification requirements and occupational standards are intended to protect the public. They establish the scope of an occupation, the competencies required for an occupation and the education, experience and exams required for certification for an occupation.

A person working or practicing in more than one province has to be certified in each province. Generally, a person qualified for an occupation in one province will be recognized as qualified in others. If the province has different occupational standards, the differences must result in actual deficiency in a critical skill, area of knowledge or ability for the person not to be certified. The receiving province has to show that these deficiencies are real and material. On the other hand, competencies can be acquired through different combinations of education, training and experience, experience can be acquired in different ways and certification exams can also be different. In effect, certification requirements can be different for those practicing the same occupation in different provinces or even in the same province if there are different regulating bodies for the same occupation.

Entry qualifications should be the minimum that will reasonably ensure consumer protection; qualification requirements that go beyond what is necessary to establish competence and protect consumers and the public may limit access to professions and occupations. This could limit mobility, impair competition, restrict the supply of professionals and increase costs (Competition Bureau 2007).

A study of professional regulation in Canada by the Competition Bureau published in 2007 said the following:

“Self-regulating professions must acknowledge that the private interest of its members will inevitably be at odds with the common good at some times. Therefore, it follows that regulators-comprising provincial and territorial governments and self-regulating organizations-must follow certain principles to ensure regulation is in the overall public interest, based on well-defined and specific objectives, subject to regular and ongoing review, and not unnecessarily restrictive of freely competitive markets.”³

MUTUAL RECOGNITION: Workers and professionals can acquire competencies and abilities through different combinations of training and experience and they can acquire experience in a variety of ways. Hence, different certification requirements should not be a barrier to mobility as long as workers have the skills, knowledge and abilities for the occupation. This assumption is the basis for the mutual recognition principle (Australian Office of Regulation Review 1997, Australian Productivity Council 2003).

Mutual recognition does not impair or reduce the quality or effectiveness of certification requirements. Such requirements can be different for the same occupation but they always have the same purpose: to ensure the competence of the person they qualify to perform the occupation.

Mutual recognition does not require the establishment of new bureaucracies. It can reduce duplication and administrative costs and help generate competition among jurisdictions and result in a better and more efficient regulatory environment in the long term. And it can accommodate and encourage experimentation and innovation in regulatory arrangements.

By removing impediments to mobility, mutual recognition can reduce business costs and prices, and improve the efficiency of resource allocation. It can also lead to a more dynamic and responsive economy to improve Canada’s productivity and international competitiveness. But the benefits of mutual recognition may be limited if its administration is not effective and issues are not resolved quickly and at reasonable costs.

It should also be understood that mutual recognition will not fix the problems and costs that result from inappropriate or excessive regulation.

Only governments can do that by establishing rules and processes that ensure that self-regulating bodies operate in the public interest.

The Extent of Barriers to Mobility

The extent of barriers to mobility for regulated professions and workers in Canada is unclear. To address this, the Labour Mobility Coordinating Group, a committee of officials representing all Canadian governments reporting to the Forum of Labour Market Ministers (FLMM), which is responsible for monitoring the effectiveness of Canada’s labour market, surveyed regulatory bodies in 2004/2005 (FLMM 2005).

As mentioned above, the survey found that 35 percent of the roughly 13,000 regulated workers who moved to different provinces in 2004 did not have their qualifications recognized by the regulators in the receiving province. For internationally trained workers, the rejection rate was estimated at 49 percent (FLMM 2005). The survey also asked regulatory bodies to explain why they declined to register applicants. At least 8 percent required applicants to be resident in their jurisdiction. Another 18 percent said they had not changed regulations to accommodate all applicants who were qualified in other jurisdictions (FLMM 2005).

The original Labour Mobility Chapter did not allow residency to be a condition of licensing or certification (AIT 1995, Article 706) and provinces were required to ensure that their regulating bodies were in compliance with the requirements of the Chapter (AIT 1995, Article 703). In other words, 10 years after the AIT came into force, a significant number of regulators had ignored their obligations in the original Labour Mobility Chapter and provincial governments had not sought their compliance as they had undertaken to do.

A survey published in September 2004 (COMPAS Inc. 2004) found that business leaders believe that barriers to labour and professional mobility are causing harm to the Canadian economy and the standard of living of Canadians. More than two-thirds of those polled thought that impediments to labour mobility were serious or very serious, with 72 percent scoring the issue at 5 or more on a 7-point scale of seriousness.

3 “Self-regulated Professions: Balancing Competition and Regulation,” Competition Bureau, 2007, Conclusion, page 133.

The most important reason for fixing mobility issues in Canada is the impending labour crunch. Sometime in the next 10 years, there will not be enough workers in Canada to fill the jobs available. Typically, Canada has been able to meet the shortfall in its supply of workers, including skilled workers and professionals, through immigration. In the future, this will be more difficult since most other countries, including those that provide the workers Canada needs, will be experiencing labour shortages at the same time as this country (McNiven and Foster 2008).

Canada will make adjustments to bolster its labour force, including improving productivity and introducing incentives to extend labour force participation, but Canada should also make the national labour market more efficient and more attractive to foreign workers. The best way to do this is to eliminate unnecessary barriers to mobility for professionals and skilled trades in Canada and ensure that there are no unnecessary barriers to internationally trained workers once they are in Canada. We should make these changes now, not when labour shortages occur.

Will the New Labour Mobility Chapter Fix Canada's Labour Mobility Problems?

Canadian governments decided to amend the Labour Mobility Chapter to make it more effective. They did not intend to change the obligations or intent of the original Chapter, and they have not.

An Internal Trade Panel on Ontario's Public Accountant Licensing System (Internal Trade Panel 2001) said that the original Labour Mobility Chapter requires provincial governments and their self-regulating professional bodies:

[...]to recognize the occupational qualifications of a worker from any other jurisdiction where those qualifications have already been recognized by that jurisdiction, through licensing or other means, and to objectively assess the competencies of a worker against its own occupational standard in a manner that recognizes that competencies can be acquired by different means.⁴

The new Labour Mobility Chapter has the same obligation as the original Chapter; that is, mutual recognition of those qualified for the same occupation in different provinces.

If the obligations of the revised Chapter are the same as the original, then why will the new one succeed if the old one failed?

Why the New Labour Mobility Chapter Should Resolve Most Barriers to Worker Mobility

It is not certain that the revised Chapter will resolve all barriers to labour mobility but it will likely be more effective than the original one. The original and the revised chapters may have the same obligations but there are fundamental differences in approach that will make the new Chapter work a lot better.

AN UNAMBIGUOUS BASIC OBLIGATION THAT IS EASY TO IMPLEMENT. The obligation on governments in the revised Chapter is clear, absolute and does not require reconciliation or analysis. To certify an applicant, a regulator only need know that the applicant is certified for the occupation by a legal authority for the occupation in another province.

One of the weaknesses of the original Chapter was that governments agreed to remove barriers within an undefined "reasonable period of time." It also required the analysis and reconciliation of occupational qualifications to resolve differences in the standards (AIT 1995, Article 708 and Annex 708).

This process was used effectively many times, particularly in the health and engineering professions, but it was treated as voluntary. It required the cooperation of all interested parties and significant time and resources to be effective. Probably the process would have been unnecessary in some cases if those involved had accepted that differences in certification requirements and occupational standards do not necessarily affect competence.

The wording in the revised Chapter is clear that mutual recognition is now the default position for all professions and trades, unless a government puts

⁴ Report of the Article 1716 Panel concerning a dispute between the Certified General Accountants Association of Manitoba and Ontario regarding the *Public Accountancy Act* (R.S.O., 1990, chapter p-37) and Regulations, October 5, 2001, page 16.

forward a specific exception to maintain a barrier along with a justification of the need for that barrier.

ENABLING STATUTES: Some provinces have passed or are in the process of passing legislation to implement the revised Labour Mobility Chapter. Therefore, unlike the original Chapter, there will be a statutory means for governments to ensure that regulators apply the revised Chapter.

THE GENERAL RULES APPLY: The AIT includes clear and specific rules in Chapter Four: General Rules that define what constitutes a barrier to trade or mobility. These rules did not apply to the original Chapter on labour mobility, but they apply in the revised Chapter. This will make it easier to establish if a government measure is a barrier to mobility.

Specifically, the rules in Chapter Four establish that government measures are considered barriers to mobility: (i) if they discriminate (AIT 2009, Article 401(2): Reciprocal Non-discrimination); (ii) if they prevent a person from crossing provincial boundaries in order to work (AIT 2009, Article 402: Right of Entry and Exit); or (iii) if the measures operate as an obstacle to mobility (Article 2009, No Obstacles).

The revised Chapter covers residency and qualification requirements and occupational standards (AIT 2009, Article 702). If any of these measures in any province prevent qualified professionals or skilled workers from practicing or working in another province they could be challenged using the dispute resolution procedures in Chapter Seventeen of the AIT.

There would be greater certainty if the Chapter applied to any and all government measures that restrict labour mobility but, for reasons that are not clear, governments chose not to make the Chapter's coverage comprehensive.

Why the New Labour Mobility Chapter May Fail

Although the provisions of the new Labour Mobility Chapter seem clear, the main problem for governments is bound to be reaching a consensus on interpretation and application. Unfortunately, there are no ready mechanisms in the Chapter, and only cumbersome and complicated Dispute Resolution Procedures in Chapter Seventeen, to help them to

resolve these issues. Governments need to address this problem urgently

LEGITIMATE OBJECTIVE EXCEPTIONS WITHOUT VALIDATION: The Legitimate Objective provision (AIT 2009, Article 708 and Article 711) allows governments to exclude measures from the Chapter if they are necessary to achieve a legitimate objective. This provision is essential to the Agreement on Internal Trade. It provides assurance that measures necessary to protect consumers, public health, security and the environment will not be considered an impediment to worker mobility.

Even if a government excludes a measure that restricts mobility for what the Chapter defines as a legitimate purpose, the measure excluded must not be more restrictive than necessary to accomplish its purpose and must not operate as a disguised barrier to trade. In addition, any government claiming an exception must show that differences in qualification requirements and occupational standards are material and result in a deficiency of critical skills, knowledge or abilities necessary for the occupation (AIT 2009, 708(2)). Finally, any government claiming an exception must give written notice justifying the exception and indicating how long it will remain in place.

The AIT also makes it clear that the onus is on any government claiming an exception to establish that it is justified (AIT 2009, Annex 1813(11)). The problem is there is no formal process to validate exceptions before they are posted as an official exception by the government making the claim.

Once the exception is posted, the only choice for a government or person who believes that an exception is not justified is to challenge the exclusion through the dispute resolution procedures in Chapter Seventeen of the AIT. This is not a reasonable option.

These procedures are complex, costly, time consuming and ultimately difficult to enforce (AIT 2009, Chapter Seventeen, CGA Canada, 2006). Consultations alone require a minimum of four months and, if the issue cannot be resolved, it would take as long as 18 months from the date when the complaint was initiated to obtain a panel ruling.

The Labour Mobility Chapter needs an independent and automatic adjudication process to review any exception that is not acceptable to all governments. Decisions of the adjudicator should be binding and the process should only be accessible by

governments. Exemptions accepted through this process should be time limited: if professionals or workers from other jurisdictions are a genuine threat to consumers or public health and safety because they have been qualified using different certification requirements in another province, it stands to reason that they would create the same risk in the jurisdiction where they are from. There are necessary differences in occupations in various provinces but if differences in certification requirements put consumers or the public at risk, governments should eliminate the risks. If there is no risk, there is no need for an exemption.

HOW HAS THE LEGITIMATE OBJECTIVE EXEMPTION WORKED SO FAR? Provinces and territories were supposed to identify their legitimate objective exceptions by the end of November 2009. Six did. They claimed 29 exceptions for 14 different occupations. This does not mean there will be no more exceptions claimed, but there are two pieces of good news in this process.

The effectiveness of the chapter on labour mobility depends on not just the number of exceptions, but how many workers are affected by the exception. So far, the number of exceptions and, more importantly, the number of workers affected by them are not that significant. The first accomplishment is that governments appear to have resisted requests from many regulatory bodies for exemptions.

The second piece of good news is that governments have based almost all of their exceptions on clear differences in occupational standards. This means that those certified for the occupation in other jurisdictions do not necessarily have the skills, knowledge and abilities for the occupation in the province claiming the exemption.

It will be interesting to see how governments resolve these differences. More interesting still is an exception that does not meet the conditions of the legitimate objective provision – Ontario's claim of an exception for the province's public accountant licensing system.

ONTARIO'S PUBLIC ACCOUNTANT LICENSING SYSTEM: Public Accounting is a regulated occupation for accountants who do audits and provide assurance concerning financial information.

It is a national and international occupation that is essential to commercial activities. Other jurisdictions that have commercial relations with Canada accept Canadian standards for public accounting. However, Ontario will not accept as qualified public accountants from other provinces, even though they do the same work to the same standards as public accountants in Ontario.

There are three recognized accounting designations in Canada, Certified General Accountants (CGAs), Certified Management Accountants (CMAs) and Chartered Accountants (CAs). These accounting designations compete with one another. All have legal regulating bodies in all provinces. Generally, there are no mobility issues for accountants, public or otherwise. Ontario is the exception. It requires licences for public accountants that are separate from the certification provided by accounting regulating bodies.

Ontario's public accountant licensing system does not recognize the qualifications of accountants certified to practice public accounting in other provinces unless they are CAs. Ontario has claimed an exception for its licensing system because, it maintains, restrictions are necessary to protect consumers. This is a longstanding issue: Ontario has restricted public accounting to CAs since 1962. In 1999, CGAs asked the government of Manitoba to challenge Ontario's restrictions using the AIT. And in 2001, a panel (Internal Trade Panel 2001) found that Ontario's public accountant licensing system was a barrier to mobility.

In response to the panel report, Ontario changed its public accountant licensing system so that anyone from any of the three accounting bodies could be licensed as public accountants. Despite this, 10 years since CGAs made their original complaint, CAs are still the only accountants who can be licensed to practice public accounting in Ontario.

The problem is simple. The qualifying requirements adopted by Ontario's licensing body, the Public Accountants Council of Ontario, are based on CA requirements. Different accounting bodies in other jurisdictions use different qualifying requirements as the basis for certifying public accountants.

Ontario's public accounting licensing system does not clearly comply with the revised Labour Mobility Chapter and the mutual recognition principle.

Ontario will not license public accountants qualified by a legal regulator in other jurisdictions. Instead of changing its public accountant licensing system so that it conforms to the revised Labour Mobility Chapter, Ontario has decided to exclude Ontario's Public Accountant licensing system from the revised Chapter (Notice of Inconsistent Measure, November 2009).

In 2001, Ontario told the Internal Trade Panel that it excluded public accountants from other provinces from practice in Ontario because it was necessary "[...] for the protection of the public and preservation of Ontario's capital market" (Internal Trade Panel 2001, page 19). This is the same justification that Ontario is using now, nine years later, to maintain the same restrictions that were found to be inconsistent with their AIT obligations in 2001.

The panel disagreed with Ontario's claim in 2001 for a number of reasons including that "[...] Ontario's capital market can be accessed today by companies incorporated under federal legislation and the legislation of other provinces as well as by foreign corporations, none of which is necessarily required to have their financial statements audited by a public accountant licensed by Ontario" and that Ontario "[...] has not provided any argument that the public and/or capital markets have been endangered through the practice of public accounting by CGAs under federal statutes or the statutes of other provinces" (Internal Trade Panel 2001, page 19-20).

Nothing has changed since 2001, hence Ontario's decision limits the credibility of Canadian governments' commitment to resolving mobility issues in Canada. According to Ontario, the province will only remove the exemption for its public accounting licensing system when "other Provinces/Territories adopt equivalent entry to practice standards" to Ontario's (Notice of Inconsistent Measure, November 2009). In other words, Ontario wants other provinces to adopt its qualification requirements for public accounting and will restrict access to the Ontario market until they do. This does not seem like a legitimate objective.

WHAT HAPPENS WHEN REGULATORS DON'T RECOGNIZE QUALIFICATIONS? What happens if a regulator refuses to register or accept a person who is qualified for a profession or a skilled trade in another

province? The absence of a single, accessible appeal body to adjudicate the situation is a critical shortcoming of the revised Labour Mobility Chapter.

Restrictions on mobility that do not comply with the revised Chapter are invisible until a person encounters them. The best way to identify them is through a readily accessible mechanism for resolving specific issues; that is, an Appeal Tribunal.

There is currently an active informal process for dealing with individual issues. A person can complain to the Labour Mobility Coordinator in the province concerned. The Labour Mobility Coordinator will investigate the issue and, if warranted, will negotiate a resolution on behalf of the individual. This process is not transparent, accessible, clear or formal enough to be effective.

In theory, the dispute resolution process in Chapter Seventeen of the AIT could be used to deal with these kinds of issues but in practice it can't be. Those using the Labour Mobility Chapter are individuals who wish to move to another province for work. They have neither the resources nor the time to use a complex, costly, lengthy process designed to deal with policy differences between governments, and they won't (CGA Canada 2006, MacMillan/Brady 2006).

The AIT's system for resolving disputes is modelled on those used by international trade agreements. This kind of arrangement doesn't work well for mobility of individual professionals and skilled workers where the problem will always be differences in entry or occupational standards.

A tribunal such as the Administrative Appeal Tribunal established by the Australian *Mutual Recognition Act, 1992* for occupations (Productivity Commission 2003, Australia) would be a more effective model. According to evaluations of Australia's Act, the Administrative Appeals Tribunal is transparent, relatively low cost, quick and appears to be working well in resolving disputes between applicants and occupation registration boards (Productivity Commission 2003, Australia).

There is nothing in the revised Labour Mobility Chapter to prevent each province from establishing a mechanism for appeal, although a single national body would be better. British Columbia, for example, has defined an appeal process in their *Labour Mobility Act* that implements the revised Labour Mobility Chapter. BC uses the appeal bodies

associated with their regulatory organizations as the first step in the appeal process and allows the decision of these bodies to be referred to the BC Supreme Court for review.

Ontario's *Labour Mobility Act* has no formal appeal system but it establishes ministerial-level "monitors" to oversee regulators' application of the Chapter. The legislation assumes that the AIT's dispute resolution process will be used for formal appeals of regulatory bodies' certification decisions even though this is unlikely in most circumstances.

The fact that people who are prevented from working in their occupations in other provinces do not have access to a low-cost and quick appeal tribunal means that the new Labour Mobility Chapter will not be as effective as it ought to be.

BARRIERS TO MOBILITY ARE STILL PART OF THE SYSTEM: The new Labour Mobility Chapter does not deal with two problems: (i) provinces can have different occupational standards for the same occupation; and (ii) not all provinces have occupational standards for the same professions and occupations (AIT 2009, Article 707).

Provinces can adopt any occupational standard and establish the level of protection considered appropriate for, presumably, a legitimate objective. Provinces agree to a conditional and voluntary commitment to reconcile differences in standards (AIT 2009, Article 707) but Canadian governments' record in respecting their commitments to reconciliation (AIT 2009, Article 405) is not very good based on the disputes that have been considered by the relevant panels.

The same problem applies to occupations that are regulated in some provinces but not others.

The commitment of Canadian governments to resolve these issues is voluntary and unclear. It is hard to understand why. It is possible there are vested interests among self-regulating professions that hinder resolution or that they are motivated by a desire to protect the public. Still, it is hard to imagine that the needs of Canadians in each province are so different as to justify significant differences in occupational standards and in certification requirements for the regulated professionals and skilled workers that provide these services.

According to officials, many regulators are taking steps to harmonize standards on their own because they understand the inherent value associated with greater consistency. The federal government, through Human Resources and Social Development Canada (HRSDC), provides funding support to the professions taking these initiatives and will continue to do so.

Australia has a similar problem that it is trying to resolve through a combination of deregulation, where regulation is unnecessary, and adopting occupational standards where several jurisdictions have a substantial number of workers in a field whose regulation could be beneficial.

In 1997, the Australian Office of Regulation Review (Australian Office of Regulation Review 1997) commented on Canada's "administrative" approach to dealing barriers to trade and worker mobility. Referring to Canada's Agreement on Internal Trade the report said Canada's approach:

[...] requires strong political and bureaucratic commitment to ongoing reform in order to be successful. Its main disadvantage is that it can generate time-consuming administrative processes and therefore can be difficult to achieve. While such negotiations are taking place, this approach can also create uncertainty about the regulatory environment.⁵

The point is that in trying to resolve barriers in the domestic market, Canadian governments tend to rely on processes rather than clear commitments and rules to remove restrictions to trade and mobility.

The new Labour Mobility Chapter illustrates this approach. On one hand, it establishes clear rules to provide for mobility for those who are qualified for an occupation in a jurisdiction. On the other hand, it qualifies these rules with an open-ended process for introducing exceptions, with no dedicated appeal mechanism for cases when regulators reject applications and voluntary, uncertain commitments to resolve barriers resulting from difference in occupational standards and inconsistent regulatory frameworks from province to province.

⁵ "Impact of Mutual Recognition Schemes: A Preliminary Assessment," Office of Regulation Review, Canberra, January 1997, Page 4.

Problem Solved?

Will the revised Labour Mobility Chapter in the Agreement on Internal Trade achieve the premiers' objective of removing all barriers to worker mobility in Canada? Probably not, but applying the mutual recognition principle is the best and probably the only way to come closer to an open and efficient labour market in Canada, given the nature of the federation.

There are always exceptions and limitations to schemes to resolve labour mobility issues in federations and common markets. The European Union and Australia use mutual recognition as the best means to resolve mobility issues in an environment where there are regulators in each jurisdiction, but they both have exceptions.

Canadian governments have done well in developing the revised Labour Mobility Chapter. They could make it better still. For example, the best way to deal with decisions by regulators who reject applications for certification might be through a national Administrative Appeal Board like Australia's. However, this could require the federal government to engage indirectly in the regulation of professionals and skilled workers.

Also, the federal government might be in the best position to lead a process to establish consistent national occupational standards, to de-regulate where regulation is unnecessary and to propose new occupational standards where it would benefit the national labour market. This, however, is unlikely to happen.

The new Labour Mobility Chapter with its commitment to mutual recognition is a good step forward. Here are some reforms that might make the Chapter more effective:

- The scope and coverage of the Chapter should apply to all government measures except those identified in Article 702 (2) of the revised Chapter. Certification requirements and occupational standards are not the only measures that can restrict mobility;
- Canadian governments should apply the advice of the Competition Bureau and take steps to ensure that the level of regulation of professions and skilled trades does not hinder competition so that consumers have access to the broadest range of services at the most competitive prices and that there is an incentive to reduce costs as much as possible (Competition Bureau 2007);
- An independent adjudicator should review any proposal to exempt a measure from the coverage of the Labour Mobility Chapter. The province claiming the exception must demonstrate clearly that there is a legitimate objective related to the public good and that there are no less mobility restrictive means of meeting that objective; and
- Governments should establish a national Administrative Appeal Tribunal to resolve disputes between applicants and regulators. The Tribunal should be accessible, transparent, low cost and quick.

As always, the devil will be in the details. Much depends on how governments implement the Chapter, how they engage their regulators and how well the provisions of their enabling legislation reflect the undertakings of the Labour Mobility Chapter. The current Labour Mobility Chapter is a significant accomplishment by Canadian governments and a major step forward in establishing an open, efficient, accessible and predictable labour market in Canada. It could be better yet.

References

- Agreement on Internal Trade. 1995. http://www.ait-aci.ca/index_en/ait.htm
- Agreement on Internal Trade. 2009. Consolidated to include all Protocols of Amendment including the revised Chapter Nine Ninth Protocol of Amendment. http://www.ait-aci.ca/index_en/ait.htm
- Australian Office of Regulation Review. 1997. *Impact of Mutual Recognition on Regulations in Australia*. Canberra. January
- Australian Productivity Council. 2003. *Evaluation of the Mutual Recognition Schemes: Research Reports*, Canberra. October.
- Certified General Accountants Association of Canada (CGA). 2006. *Making Trade Dispute Resolution in Canada Work: Certified General Accountants' Experience with Canada's Agreement on Internal Trade*.
- Committee of Internal Trade (CIT). 2006. "Progress achieved on an action plan to improve internal trade." Communiqué. Halifax, Nova Scotia. September 7.
- Committee of Internal Trade (CIT). 2007. "Progress on Action Plan." Communiqué. St. John's, Newfoundland and Labrador. June 7, 2007.
- COMPAS Inc. 2004. "Inter-Provincial Trade Barriers: Seriously Damaging to the Economy and Standard of Living and Almost as Harmful as Canada-U.S. Trade Barriers." BDO Dunwoody/Chamber Weekly CEO/Business Leader Poll in the Financial Post. September 13, 2004.
- Competition Bureau. 2007. *Self-regulated professions: Balancing competition and regulation*. Ottawa.
- Forum of Labour Market Ministers (FLMM). 2005. "Report of Survey Results: Inter-Provincial Labour Mobility in Canada – 2004/05."
- Government of Ontario. 2009. "Notice of inconsistent measure to meet a legitimate objective under Chapter 7 of the Agreement on Internal Trade." <http://www.edu.gov.on.ca/eng/tcu/labourmobility/accountants.pdf>
- Grady, Patrick, and Kathleen Macmillan. 2007. "Inter-Provincial Barriers to Labour Mobility in Canada: Policy, Knowledge Gaps and Research Issues." Working Paper 2007-10, Industry Canada, IC 60408, Pp. 13-15.
- Howse, Robert. 2008. *The Effect of Jurisdictional Issues on the Application and Administration of Part III [of the Canada Labour Code]*. Ottawa: Human Resources and Social Development Canada.
- Human Resources and Social Development Canada. 2009. Web site reference: Labour Mobility. How does the AIT affect Canadian's workers? Ottawa.
- Human Resources and Social Development Canada. 2009. Web site reference: Red Seal. Ottawa
- Internal Trade Panel. 1998. "Report of the Article 1704 Panel concerning a dispute." Internal Trade Secretariat, June 12.
- Internal Trade Panel. 2001. "Report of the Article 1716 Panel concerning a dispute between the Certified General Accountants Association of Manitoba and Ontario regarding the Public Accountancy Act (R.S.O.,1990, Chapter p-37) and Regulations." Internal Trade Secretariat, October 5.
- Knox, Robert. 2001. *Canada's Agreement on Internal Trade: It can work if we want it to*. Certified General Accountants of Canada. Vancouver.
- Knox, Robert, and Amela Karabegovic. 2009. "The Myths and Realities of TILMA." Studies in Trade Policy. Vancouver: Fraser Institute. February.
- McNiven, J.D., with Michael Foster. 2008. "The Developing Workforce Problem: Confronting Canadian Labour Shortages in the Coming Decades." Halifax: Atlantic Institute of Market Studies.
- Labour Mobility Coordinating Group (LMCG). 2001. *Report on Implementation of the Labour Mobility Chapter of the Agreement on Internal Trade*.
- Macmillan, Kathleen E., and Patrick Grady. 2007. "A New Prescription: Can the BC-Alberta TILMA Resuscitate Internal Trade in Canada?" C.D. Howe Institute Backgrounder No. 106, October.
- Statistics Canada. 2008. *Canada's Changing Labour Force, 2006 Census*. Ottawa.
- Statistics Canada. 2008. *Report on the Demographic Situation in Canada, 2005 and 2006*. Ottawa.
- Trade, Investment and Labour Mobility Agreement. April 2006. An Agreement between British Columbia and Alberta. April.

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