

Trade, Investment and Labour Mobility Agreement

**Report of the Article 27 Panel Concerning the Dispute Between Alberta and
British Columbia Regarding a Measure by the British Columbia College of Social
Workers**

September 28, 2012

TABLE OF CONTENTS

EXECUTIVE SUMMARY	i
DEFINITIONS AND ABBREVIATIONS	ii
1. INTRODUCTION	1
2. COMPLAINT PROCESS	1
3. THE COMPLAINANT’S POSITION.....	2
4. THE RESPONDENT’S POSITION.....	5
5. PANEL FINDINGS.....	7
5.1 Article 2(2).....	7
5.2 Article 13.....	8
5.2.1 Mandatory Nature of Article 13(1).....	9
5.2.2 Individual Assessment.....	10
5.2.3 Use of Individual Assessment to Deny Certification.....	11
5.2.4 The Specific Case under Consideration.....	11
5.2.5 Findings on Article 13.....	12
5.3 Article 2(2) and Article 3.....	13
5.4 Article 6.....	13
5.4.1 Article 6(1)(a).....	14
5.4.2 Article 6(1)(b).....	15
5.4.3 Article 6(1)(c).....	15
6. DETERMINATION OF ECONOMIC EFFECTS	16
7. SUMMARY OF FINDINGS	16
8. PANEL RECOMMENDATIONS	17
9. ALLOCATION OF COSTS	17
10. DISSENTING OPINION	17
APPENDIX	22

EXECUTIVE SUMMARY

The dispute that is the subject of this Panel proceeding involves an individual who was certified by the Alberta College of Social Workers (ACSW) and subsequently denied certification by the BC College of Social Workers (BCCSW). As a consequence, Alberta initiated proceedings under Part IV (Dispute Resolution Proceedings) of the Agreement.

Alberta's position is that, once an individual has been certified to practice in the jurisdiction of one of the Parties, there is a mandatory obligation that the other Party grant certification without any substantial additional requirements or assessments.

BC asserts that the "mandatory obligation" of TILMA applies only to recognition of the individual's qualifications (i.e. education, experience or training). Any Party to the Agreement retains the right to undertake an individual assessment to establish evidence of good character and to obtain an up-to-date criminal background check.

The Panel finds that:

- 1. The BCCSW is a government entity under TILMA, that TILMA consequently applies to the BC College and that BC, as a Party to TILMA, is responsible for ensuring that the BC College complies with TILMA;**
- 2. An individual assessment to establish evidence of good character is consistent with a Party's obligations under TILMA;**
- 3. Denial of certification to an applicant already certified by another Party carries with it a reverse onus obligation; the second Party must show evidence of lack of good character to justify such denial;**
- 4. In the case that is the subject of this dispute, BCCSW did not contravene Article 13 of TILMA in denying certification to the Applicant;**
- 5. The Measure is not inconsistent with, or in contravention of, Articles 2(2) and 3 of TILMA; and**
- 6. In the specific case under consideration, the Measure is consistent with Article 6.**

The Panel recommends that the Parties take steps to implement the Panel's considerations in 5.2.3 with respect to limitations on the use of individual assessment to establish evidence of good character and to ensure that their government entities comply with this direction.

A dissenting opinion concluded that the BC Measure is inconsistent with Article 13 of TILMA and cannot be justified as necessary to achieve a legitimate objective. The dissenting opinion expresses the view that it defies logic that Article 13 can be interpreted to narrow the goals of the AIT, TILMA and NWPTA. Concerning legitimate objective, the position of the dissenting opinion is that the ACSW had already considered the applicant's past, had imposed conditions on conditional certification and, when the conditions were met, granted full certification. No character problems or complaints by anyone against the applicant in Alberta have arisen since 2006.

DEFINITIONS AND ABBREVIATIONS

AB	Alberta
ACSW	Alberta College of Social Workers
Agreement	Trade, Investment and Labour Mobility Agreement (TILMA)
AIT	Agreement on Internal Trade
Applicant	The individual that is the focus of this dispute
BC	British Columbia
BCCSW	British Columbia College of Social Workers
FAQs	Frequently Asked Questions
Measure	The actions taken and the decisions made by the BCCSW with respect to the Applicant
NWPTA	New West Partnership Trade Agreement
Panel	The Panel established to address this dispute
TILMA	Trade, Investment and Labour Mobility Agreement

1. INTRODUCTION

This is the report of the dispute resolution panel (the “Panel”) established under the Trade, Investment and Labour Mobility Agreement (the “Agreement” or “TILMA”) to address a dispute brought forward by Alberta (the “Complainant”) under Part IV (Dispute Resolution Proceedings) against British Columbia (the “Respondent”) concerning the decision of the British Columbia College of Social Workers (BCCSW) to deny certification to an individual previously certified by the Alberta College of Social Workers (ACSW).

In April 2006 the Governments of Alberta and British Columbia signed the Trade, Investment and Labour Mobility Agreement. The Agreement came into force in April 2007. The objective of TILMA was to “eliminate barriers that restrict or impair trade, investment or labour mobility” between Alberta and British Columbia and to build on the Agreement on Internal Trade (AIT) entered into by the federal, provincial and territorial governments of Canada in 1994.

TILMA came into force in April of 2007; however, provisions of Article 13: Labour Mobility were subject to a two-year transition period and did not enter into force until April 1, 2009. In general terms, Article 13 provides that a “worker certified for an occupation by a regulatory authority of a Party shall be recognized as qualified to practise that occupation by the other Party”. A list of occupations covered by the Agreement, including social worker, was agreed by the Parties.

The dispute that is the subject of this Panel proceeding involves an individual who was certified by the ACSW and subsequently denied certification by the BCCSW. As a consequence, Alberta initiated proceedings under Part IV (Dispute Resolution Proceedings) of the Agreement.

As provided under Article 27.9 of TILMA, this Panel Report contains:

- a) findings of fact;
- b) rulings on any applicable interpretations and whether the measure at issue is or would be consistent with the Agreement;
- c) any findings as to the possible economic effect of the measure;
- d) recommendations, if any, to resolve the dispute; and
- e) specifications of a reasonable period of time for implementation of the Panel’s recommendations, which shall be no longer than one year from the issuance of the report.

2. COMPLAINT PROCESS

In May 2006 the Applicant central to this dispute applied to the BCCSW for certification in BC. He had previously been granted (March 2006) provisional certification in Alberta. In February 2008, his BC application was denied.

On April 1, 2009, the day the provisions of Article 13: Labour Mobility of TILMA came into force, the Applicant submitted a second application to the BCCSW. In January 2011, following an extensive review process, he again was denied certification.

On February 22, 2011, Alberta initiated the dispute resolution procedures under Part IV of TILMA with respect to the Applicant's 2009 application, requesting consultations with BC under Article 25. Meetings and discussions took place between officials of both Parties but no resolution was reached.

On June 20, 2012, Alberta requested the establishment of a Panel under Article 26.2 of the Agreement. The Panel was constituted on July 11, 2012.

On July 13 B.C requested that the Panel order Alberta to disclose documents relating to the ACSW consideration of the Applicant's application and ultimate certification by the ACSW and that the hearing be postponed to allow B.C to review those documents. That request was denied on July 20, 2012.

On August 17 the Panel met in Victoria, BC to hear oral presentations by the Complainant and the Respondent. In light of the personal nature of the dispute, the hearing was conducted *in camera*.

3. THE COMPLAINANT'S POSITION

This dispute pertains to the actions taken and the decisions made ("Measure")¹ by the BCCSW to deny the application² for registration by a social worker ("Applicant") who is certified and in good standing with the ACSW.

The BCCSW has been granted the power and authority to certify social workers in BC and is a "non-governmental body that exercises authority delegated by law" and is a "government entity" and "regulatory authority" that is covered by TILMA. BC is responsible to ensure its government entities are in compliance with the Agreement.³

Under Article 13: Labour Mobility of the TILMA, any worker certified for an occupation by a regulatory authority of a Party shall be recognized as qualified to practice that occupation by the other Party. This is a mandatory obligation and is intended to take away the discretion of

¹TILMA defines a "measure" in Part VI General Definitions as "measure includes any legislation, regulation, standard, directive, requirement, guideline, program, policy, administrative practice or other procedure". The actions taken by the BC College (including its appellate bodies) in respect of the Applicant's application for registration and the decisions to deny the application constitute an "administrative practice or procedure" under the definition of "Measure".

²The Applicant first applied to the BCCSW on May 23, 2006. That application was denied on March 12, 2008. In 2009, a second application was made. This dispute pertains to the second application, made on April 1, 2009, the date the TILMA labour mobility provisions came into force.

³Part IV: General Definitions and Articles 2(1) and 2(2) of TILMA

the regulatory authority in respect of registration of a worker already certified in the other jurisdiction. The refusal of the BC College to recognize the Applicant's certification as a social worker by the Alberta College is contrary to BC's obligations under the labour mobility provisions of the TILMA, which require the recognition of the certification by Alberta as a basis for licensing in BC.

No separate individual assessment of the applicant can be undertaken by the regulatory authority in the second jurisdiction as a basis for granting or refusing certification. The corollary of the mandatory requirement to issue certification and the prohibition on the use of discretion is that an independent examination or assessment of the applicant is also prohibited.

The Applicant's application for registration with the BC College was rejected on the basis that he failed to provide "evidence satisfactory of the good character of the person consistent with the responsibilities of a registrant and the standards expected of a registrant".⁴ This decision was based on an extensive individual assessment conducted by the BCCSW.

It is Alberta's position that the obligation of Article 13(1) has not been met with respect to the Applicant's application for registration with the BCCSW. Further, the total processing time, including appeals, took over 20 months and was clearly not processed on a timely basis as required by Article 13(2).

Article 2(2) requires BC to ensure that the BCCSW meets its obligations under TILMA, which it failed to do. The Measure restricts labour mobility between the Parties and, thus, BC has failed to live up to obligations in Article 3.

Article 6: Legitimate Objectives, permits a measure to contravene Part II(C) of the TILMA (which includes Article 13: Labour Mobility) if a Party satisfies all three requirements of Article 6(1)⁵. As the actions and decisions of the BC College in this case are contrary to Article 13, Article 6(1) might be raised to assert that the BC College's measure is consistent the TILMA.

The CGA Panel Report, in examining Article 708 of the AIT (the corresponding provision to TILMA Article 6) stated that the legitimate objectives provision is an exception to the obligations under the Labour Mobility Chapter of the AIT and "its use should be narrowly

⁴ BCCSW Bylaws, Bylaw 41(1)(c)

⁵ Article 6(1)

A Party may adopt or maintain a measure that is inconsistent with Articles 3, 4 or 5, or Part II(C) provided that the Party can demonstrate that:

- (a) the purpose of the measure is to achieve a legitimate objective;
- (b) the measure is not more restrictive to trade, investment or labour mobility than necessary to achieve that legitimate objective; and
- (c) the measure is not a disguised restriction to trade, investment or labour mobility.

construed and strictly applied."⁶ Further, it stated that "the bar to justify exceptions should be a high one".⁷

Presumably, BC will argue that "public security and safety" and/or "consumer protection", would be the applicable legitimate objective(s) listed in TILMA Part VI General Definitions, on the basis of a need to protect potential patients/clients of social workers.

Both the BC College and the Alberta College have a very similar registration process for first time applicants. In particular, the Alberta College investigates and considers the character and reputation of the applicant as part of the process. Furthermore, registration with the BC College is not a requirement for social workers to practice their occupation in BC. The regulations to the BC *Social Workers Act*⁸ provide that social workers who are employed by a number of agencies do not have to be registered with the BC College. If registration is not mandatory to work as a social worker in those situations, then registration itself is not necessary for public security and safety or to protect human life or health or protect consumers. Accordingly, the purpose of the Measure could not have been to achieve a legitimate objective.

BC must also prove how the Measure is not more restrictive to trade, investment or labour mobility than necessary to achieve that legitimate objective, under Article 6(1)(b). The BC College's decision to refuse registration was the most restrictive option. The provisional registration granted by the Alberta College in 2006 is an example of a course of action that is less trade restrictive.

The Measure cannot be a "disguised restriction to trade, investment or labour mobility" as required by Article 6(1)(c). Clearly, the Measure is an intentional and overt, as opposed to disguised, restriction on the Applicant's labour mobility rights.

In conclusion, by conducting an individual assessment and refusing to register the Applicant based on the Applicant's registration in Alberta, the BC College and BC have failed to comply with their obligations under Articles 2, 3 and 13 of the TILMA. In order to justify the Measure as a legitimate objective, BC must satisfy all three elements of Article 6. None of the elements of Article 6 are satisfied in this case. Accordingly, BC has breached its obligations under the TILMA.

Alberta requests that the Panel make the following recommendations pursuant to Article 27(9) of the TILMA:

- (a) The BC College immediately issue full and unconditional registration to the Applicant;
- (b) The BC College recognize registration of social workers in Alberta as the basis for registration in BC; and

⁶ *Report of Article 1703 Panel Regarding the Dispute between Manitoba and Ontario regarding Ontario's Notice of Measure with respect to Public Accountants*, 13 January 2012, at page 10.

⁷ *Ibid.* at page 6.

⁸ *Social Workers Regulation*, BC Reg. 323/2008 at section 4(2)(a).

- (c) BC ensure compliance by the BC College with the recommendations of the Panel within a period of 60 days from the date of the report issued by this Panel being considered final under Article 27 of the TILMA.

4. THE RESPONDENT'S POSITION

British Columbia submits that this dispute, and Alberta's primary complaint, is that the Applicant should not be subject to the application of those provisions of section 41 of the BC Bylaws which require all applicants to the BC College, including those registered in Alberta, to submit "...satisfactory evidence of the good character of the person consistent with the responsibilities of a registrant and the standards expected of a registrant." In its simplest form, Alberta complains that the mere application of these good-character requirements to the Applicant are inconsistent with BC's obligations under TILMA Article 13 and cannot be saved by the "legitimate objectives" exception in Article 6.

BC submits that the Applicant's character is a fundamental aspect of this case. BC has knowledge of a long history of issues concerning the Applicant:

- he has declared personal bankruptcy on three separate occasions;
- he has been found guilty of three criminal offences;
- on at least four separate occasions he has either been terminated from his job, or has had a job offer revoked, due to his ethical violations and/or his failure to disclose his previous ethical violations and/or criminal offences to the employer;
- his actions (by way of investigation, application or appeal) have directly given rise to at least nine separate, and in many cases lengthy, proceedings undertaken by Canadian social worker regulators. In seven, the Applicant's application or appeal was refused with one resulting in significant sanctions against him.

BC agrees with Alberta's position that the BC College is a BC "government entity" under TILMA, that TILMA consequently applies to the BC College and that BC, as a Party to TILMA, is responsible for ensuring that the BC College complies with TILMA.

BC disagrees with Alberta's interpretation of what the obligations of Article 13⁹ specifically entail. The term "certified" must be compared and contrasted to the phrase "qualified to practice". BC submits that the Parties used two different terms in paragraph 1 specifically because they intended to convey two different meanings. The intent in paragraph 1 was to

⁹ Article 13

1. Subject to paragraph 4, any worker certified for an occupation by a regulatory authority of a Party shall be recognized as qualified to 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 of that registration procedure and such registrations are processed on a timely basis.

eliminate those barriers to labour mobility that relate to immaterial differences in the education, training and experience required to practice a given occupation. Under paragraph 2, other requirements that might be imposed on a worker relating to registration or certification (that do not relate to education, training or experience) continue to be specifically permitted. Requirements relating to good character and criminal background checks fall within the scope of paragraph 2, and are thereby permitted, because they do not relate to, and do not involve any individual assessment of, an applicant's "qualifications" – that is, the applicant's education, experience or training.

To further support this interpretation of Article 13, one of the "FAQs" on the TILMA website¹⁰ provides as follows:

"What registration requirements are allowed?"

Under TILMA, registration requirements are permitted so long as they are not material or discriminatory. Certified workers may be asked to complete registration requirements such as:

.....

- **Providing evidence of good character** and good standing from their home province¹¹

It appears reasonably clear that BC is able to conduct an individual assessment and make its own determination concerning an applicant provided that such an assessment does not relate to an applicant's "qualifications" (that is, to the applicant's education, experience or training).

With respect to BC's obligations under Article 3 of TILMA (No Obstacles), BC submits that the special paramountcy rule of Article 10(2) applies, meaning that where there is an inconsistency between the rights and obligations of Article 13, and those of Article 3, the rights and obligations of Article 13 will prevail to the extent of that inconsistency.

It is BC's position that the Measures are fully consistent with BC's obligations under Articles 13 and 3. However, if the Panel determines that the Measure is inconsistent with one or both of Articles 13 or 3, BC submits that the Measure is then fully "saved" by the legitimate objectives exception of Article 6¹². Legitimate objectives are defined in relevant part to mean:

¹⁰ http://www.tilma.ca/faq_professional_tradesperson.asp

¹¹ BC Submission, at pages 28 and 29

¹² Article 6

1. A Party may adopt or maintain a measure that is inconsistent with Articles 3, 4 or 5, or Part II(C) provided that the Party can demonstrate:
 - (a) the purpose of the measure is to achieve a legitimate objective;
 - (b) the measure is no more restrictive to...labour mobility than is necessary to achieve that legitimate objective; and
 - (c) the measure is not a disguised restriction to...labour mobility.
2. Subject to paragraph 1, Parties may establish the level of protection necessary to achieve a legitimate objective."

- “...any of the following objectives pursued within a Party:
- (c) protection of human, animal or plant life or health;
 - (f) consumer protection...”

BC submits that the BC College’s good character assessment generally, and its specific application to the Applicant, meets the requirements of paragraph (a). The relevant legitimate objectives at issue here are the “protection of human...life or health” and “consumer protection”. Social workers often work with some of the most vulnerable and broken people in modern society. They rapidly come to deeply depend on their social worker. Because of the nature of much of the social work clientele, the BC College plays an essential role as regulatory “gatekeeper” to the profession, to ensure that only those individuals who are competent and who are completely honest, trustworthy and ethical are certified. In light of the above, BC submits that it is clear that the purpose of the Measure is to achieve a legitimate objective. The fact that the *Social Worker Act* exempts certain highly sophisticated employers does not in any way undermine BC’s position that the clear purpose of the Measure is to achieve a legitimate objective.

With respect to Article 6(1)(b), the BC College is applying the least mobility restrictive alternative available to it in the circumstances that still allows it to achieve its desired level of protection. The alternative of conditional licensing would still allow applicants of questionable character (including the Applicant) to practice within the province and thereby have access to vulnerable clientele. Not only did Nova Scotia specifically fully consider and dismiss conditional licensing for the Applicant, it considered and rejected any form of licensing for the Applicant, forever.

Finally, under subparagraph (c) of Article 6(1), the Measure is not a disguised restriction to labour mobility. It is and was fully transparent and openly and overtly applied to the Applicant with complete administrative fairness. It is the only instance when an Applicant has been denied certification in the BCCSW on the basis of failure to provide evidence of good character.

5. PANEL FINDINGS

5.1 Article 2(2)

Article 2: Scope and Coverage reads as follows:

1. This Agreement applies to measures of the Parties and their government entities that relate to trade, investment and labour mobility.
2. Each Party is responsible for compliance with this Agreement by its government entities.
3. The benefits of this Agreement accrue only to the Parties and their persons.

The particular provision applicable to this dispute is Article 2.2. The Panel must determine if the British Columbia College of Social Workers is a “government entity” under TILMA.

Part VI: General Definitions, in part, defines government entity as follows:

government entity means a Party's:

-
(e) **non-governmental bodies that exercise authority delegated by law;** (Emphasis added)

The BC *Social Workers Act* (SBC 2008) Chapter 31 establishes the BCCSW with the authority to register persons as members of the College.

The Respondent agrees that the BC College is a BC “government entity” under TILMA.

The Panel finds that the BCCSW is a government entity under TILMA, that TILMA consequently applies to the BC College and that BC, as a Party to TILMA, is responsible for ensuring that the BC College complies with TILMA

5.2 Article 13

A central issue in this dispute is the scope of Article 13 of TILMA, particularly Articles 13(1) and 13(2).¹³

Alberta contends that the obligations of 13(1) are mandatory and non-discretionary. Once a person has been certified to practice within the jurisdiction of one Party, the other Party must grant certification to that person within its jurisdiction, subject only to minor, non-material requirements, such as completing an application and paying a registration fee. Alberta does acknowledge that a criminal background check can be required, but its use should be limited to determining if the applicant has incurred any criminal convictions subsequent to registration in the home jurisdiction.¹⁴ However, it does not accept any other requirement, such as an individual assessment to determine evidence of good character, since the home jurisdiction will have satisfied itself in that respect on its initial decision to certify the person.

British Columbia adopts a narrower interpretation of the scope of Article 13. It points to the use of “certified” in the first part of Article 13(1) compared to “qualified to practice” in the second part. Its interpretation is that the mandatory nature of Article 13.1 is limited to an individual’s qualifications, defined as education, training and experience. BC points to Article 13(2) which specifically removes any discretion by the second Party to require additional training or examinations. In its view, that supports its position that the mandatory nature of Article 13(1) should be more narrowly interpreted to apply to qualifications, that is, education,

¹³ 13(1) Subject to paragraph 4, any worker certified for an occupation by a regulatory authority of a Party shall be recognized as qualified to practice that occupation by the other Party.

13(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 of that registration procedure and such registrations are processed on a timely basis.

¹⁴ Transcript of the August 17, 2012 Hearing, at page 197.

training and experience. In particular, BC contends that nothing in Article 13 of TILMA limits the BCCSW from undertaking an individual assessment to determine whether an individual meets its own standard of “good character”.

The key issues the Panel is required to consider therefore are:

- a) the scope of the mandatory nature of Article 13(1);
- b) whether a Party can undertake an individual assessment to establish “evidence of good character” of an Applicant already certified by the other Party;
- c) if an individual assessment is permitted, whether and how the findings of that assessment can be used to deny certification by the second Party.

5.2.1 Mandatory Nature of Article 13(1)

The two Parties have quite fundamentally different interpretations of Article 13(1). As referenced previously, AB considers certification in the jurisdiction of one Party to require mandatory certification in the other. BC considers that Article 13(1) is only mandatory with respect to a person’s qualifications (i.e. education, training and experience).

Article 13(2) references requirements that a Party can impose on Applicants, including those certified by the other Party. The specific reference that removes discretion is to “material additional training or examinations”.

The first three “frequently asked questions” (FAQs) included in the TILMA website relating to labour mobility¹⁵ are the following:

What is labour mobility under TILMA?

Labour mobility is the movement of workers between jurisdictions without requirements for additional examinations or training to practice their occupation.

What are the benefits of labour mobility?

Labour mobility provides choice and opportunity for workers and employers. When workers are required to undergo additional training or examinations to practice an occupation that they are already certified to practice, the worker, their families and employers who are trying to staff positions suffer from the uncertainty, additional costs and time that it takes to re-certify.

How does TILMA improve labour mobility between BC and Alberta?

TILMA obligates the Alberta and British Columbia governments to remove barriers to the free movement of workers between the provinces. TILMA also requires Alberta and BC regulatory authorities to recognize each others' certified workers as qualified without requiring material additional training or examinations.

All make reference to “training” and “examinations” and only to “training” and “examinations”. Further in this section of the website, another FAQ states:

¹⁵ http://www.tilma.ca/faq_professional_tradesperson.asp

What requirements are considered material?

Under TILMA, material requirements are situational and are generally defined by access, location, duration, frequency and content. For example, an online, open book, 25 multiple question exam is typically not considered material. A two week course culminating in a one hour exam offered only once per year in a classroom setting is considered material.

Again, the example relates to education.

The FAQs are important in considering the scope of the mandatory nature of Article 13(1). Only documents that have been specifically agreed by both Parties can be posted on the TILMA website.

From the reference in Article 13(2) and those in the FAQs, the Panel agrees with BC that the mandatory, non-discretionary nature of Article 13(1) relates to qualifications, generally defined as education, training and experience.

5.2.2 Individual Assessment

AB stated in its oral presentation that "...the second regulatory authority cannot undertake an in-depth examination and assessment of the applicant as part of the application process..."¹⁶ BC interprets Article 13.2 as allowing a Party to do so as long as the assessment does not apply to the applicant's qualifications (i.e. education, training, experience).

In Article 13(2) and in the previously cited FAQs the phrase "training or examinations" is used. In each of these instances, it is clear that the term "examination" is used in reference to qualifications, specifically training.

The Panel concludes that the term "examination" in the Agreement should be interpreted to apply to qualifications and not to any other assessment.

There is no disagreement that a criminal background check can be undertaken by a regulatory body of an applicant certified in the jurisdiction of the other Party. A criminal background check can be classified as a form of assessment.

One of the FAQs on the TILMA website is directly relevant to the issue at hand.

What registration requirements are allowed?

Under TILMA, registration requirements are permitted so long as they are not material or discriminatory. Certified workers may be asked to complete registration requirements such as:

- An application or registration form;
- Paying a fee, such as a licensing or registration fee;
- **Providing evidence of good character** and good standing from their home province; or
- A non-material jurisprudence course or exam related to the laws and rules governing the occupation in the receiving jurisdiction.

¹⁶ Transcript of the August 17, 2012 Hearing, at page 7.

(emphasis added)

An individual assessment is the normal way in which a Party can determine “evidence of good character”. The Panel concludes that an individual assessment designed to provide evidence of good character is permissible under TILMA, just as a criminal background check is permissible.

5.2.3 Use of an Individual Assessment to Deny Certification

An individual assessment to determine evidence of good character, while it may delay the decision on certification, is not, in and of itself, inconsistent with the labour mobility objective of TILMA. The decision of the regulator to grant or deny certification is the critical issue.

The Panel recognizes the importance of the issues raised in this matter to the integrity of TILMA and the labour mobility provisions therein. The Panel is concerned that a broad, open-ended use of the good character consideration could create an unintended loophole that could serve to detract from the objective of labour mobility sought by TILMA.

Protection of the public is a principle imbedded in the fundamental objectives of all regulatory authorities. The due diligence exercised by the regulatory authority of one party in granting certification to an individual cannot simply be ignored by the other Party. Nevertheless, an individual assessment to establish evidence of good character may uncover certain anomalies that also cannot be disregarded. An applicant’s actions since the initial certification might be uncovered. Furthermore, an individual assessment might uncover information that was missed in the assessment by the authority in the home jurisdiction, or not disclosed at the time of the initial consideration.

The Panel believes that an action to deny certification based on character to an applicant already certified by a regulatory authority in the jurisdiction of another Party should only be used in exceptional circumstances. In the Panel’s view, the actions of the second Party should be subject to a reverse onus obligation. It should be required to show evidence of lack of good character rather than a subjective consideration of good character that might be the standard for certification of an individual making application for the first time. In other words, the bar should be higher. Its processes should also be conducted in a timely fashion and not result in excessive delays.

5.2.4 The Specific Case under Consideration

AB has challenged both the use of an individual assessment and the denial of certification by the BCCSW in the case of the Applicant who submitted an application to the BCCSW on April 1, 2009.

This is a unique case. The Applicant had previously applied to the BC regulatory authority in 2006, prior to TILMA and the labour mobility provisions entering into force. From that first application process, over 1,100 pages of information were available to the BCCSW in its

consideration of the 2009 application. This information revealed a disturbing history, prior and subsequent to the Applicant's certification by the ACSW in 2006. In addition, there is a suggestion, supported by some evidence, that the Applicant did not fully disclose information to the ACSW in 2005 and 2006 and did not follow through on commitments made.

The issue of whether the BCCSW should have considered the information it possessed from the 2006 application process in its consideration of the 2009 application was raised. The Panel is of the view that it is not reasonable to suggest that any regulatory authority would, in good conscience, simply ignore 1,100 pages of information that directly relates to evidence of character.

The Panel also sought information concerning decisions made by the BCCSW historically based on "evidence of good character". In an email to the TILMA Secretariate dated August 21, 2012, BC provided the following information:

The BCCSW commenced collecting information on applications by extra-provincially registered social workers in 2010. The previous body responsible for the regulation of social workers in British Columbia (the British Columbia Board of Registration for Social Workers) did not maintain such records.

Since 2010 the College has received forty-seven (47) applications from Alberta. Forty-three (43) of those applications have been approved, two applications have been closed (due to the applicants choosing not to complete the application process), and two are in progress.

The Applicant is not included in the BCCSW numbers because his application was received prior to 2010. The College has confirmed, however, that it has not denied registration to any social worker other than the Applicant on the basis of character. That includes all applicants going back to approximately 2008 regardless of whether application was made from another jurisdiction or from British Columbia.

The Panel is satisfied that the case before it is unique and not symptomatic of general use of an individual assessment to provide evidence of good character to deny certification to social workers already certified by another regulatory authority, particularly AB.

The Panel believes that the decision by the BCCSW to deny certification to the Applicant meets the tests it has established under 5.2.3 and is not inconsistent with its obligations under Article 13 of TILMA. While not changing its decision in this regard, the Panel feels that the time between the April 1, 2009 application and the ultimate conclusion of the process (20 months) does not reflect "timely consideration" and should not re-occur with future applications.

5.2.5 Findings on Article 13

The Panel finds that:

- a) an individual assessment to establish evidence of good character is consistent with a Party's obligations under TILMA;**

- b) denial of certification to an applicant already certified by another Party carries with it a reverse onus obligation; the second Party must show evidence of lack of good character to justify such denial; and
- c) in the case that is the subject of this dispute, BCCSW did not contravene Article 13 of TILMA in denying certification to the Applicant.

5.3 Article 2(2) and Article 3

AB contends that the Measure does not comply with the requirements of Article 2(2)¹⁷ and Article 3¹⁸ of TILMA.

Turning first to Article 3, the Panel agrees with BC that Article 10(2)¹⁹ is relevant. Article 10(2) clearly states that, in the event of an inconsistency between Part II(C), which includes Article 13, and the general provisions in Part II(B), which includes Article 3, the provisions in Part II(C) shall prevail. Since the Panel has found that the Measure is consistent with Article 13, it follows that it is not inconsistent with Article 3.

In a similar vein, although not subject to Article 10(2), since the Panel has found that the Measure is not inconsistent with Article 13, and therefore is not inconsistent with Article 3, BC is not in contravention of Article 2(2).

The Panel finds that the Measure is not inconsistent with, or in contravention of, Articles 2(2) and 3 of TILMA.

5.4 Article 6

The Panel has determined that, in this particular dispute, the actions of the BCCSW and BC are consistent with Articles 13, 3 and 2(2) of the Agreement. Therefore, it may not be necessary to consider whether the Measure is consistent with Article 6. Nevertheless, the Panel feels it is useful to explore the potential application of Article 6 to the Measure.

Article 6 reads, in part, as follows:

Article 6: Legitimate Objectives

1. A Party may adopt or maintain a measure that is inconsistent with Articles 3, 4 or 5, or Part II(C) provided that the Party can demonstrate that:
 - (a) the purpose of the measure is to achieve a legitimate objective;
 - (b) the measure is not more restrictive to trade, investment or labour mobility than necessary to achieve that legitimate objective; and
 - (c) the measure is not a disguised restriction to trade, investment or labour mobility.

¹⁷ Article 2(2): Each Party is responsible for compliance with this Agreement by its government entities.

¹⁸ Article 3: Each Party shall ensure that its measures do not operate to restrict or impair trade between or through the territory of the Parties, or investment or labour mobility between the Parties.

¹⁹ Article 10(2): Except for Article 6, where a provision in this Part II(C) is inconsistent with a provision in Part II(B), the provision in this Part shall prevail to the extent of the inconsistency.

2. Subject to paragraph 1, Parties may establish the level of protection necessary to achieve a legitimate objective.

Legitimate objective is defined, in part, as:

legitimate objective means any of the following objectives pursued within a Party:

...

(c) protection of human, animal or plant life or health;

(f) consumer protection;

The Panel is mindful of, and agrees with, the comments expressed by the AIT Panel in the Panel Report on the Dispute between Manitoba and Ontario regarding Public Accountants. In that Report, the Panel stated that the use of the legitimate objectives provision of the AIT should be “narrowly construed and strictly applied”²⁰. The legitimate objectives exception is a powerful tool and should only be used when the evidence clearly is supportive. The Panel will apply that principle in its consideration of this dispute.

5.4.1 Article 6(1)(a)

BC contends that “the BC College’s good character assessment generally, and its specific application to the Applicant, meets the requirements of paragraph (a)”²¹. It points to the “protection of human...life or health” and “consumer protection” as the purpose the Measure achieves.

BC argues that the clients of social workers are an “extremely vulnerable clientele” that can come to “deeply depend on social workers”. As a result, the regulatory authority is justified in ensuring that “only those individuals who are competent and completely honest, trustworthy and ethical are certified”.²²

AB contends that the processes and considerations of the ACSW are not dissimilar to those of the BCCSW. ACSW did, however, grant full certification to the Applicant after a three year provisional period. Therefore, there can be no “purpose” to the BC decision since protection of human life or health and consumer protection were part of the ACSW considerations.

The question then centers on whether different Parties can adopt different standards with respect to levels of protection.

TILMA does recognize that different Parties might establish different levels of protection (Article 6(2))²³. Furthermore, the FAQs on the TILMA website recognize the ability of provinces

²⁰ Report of Article 1703 Panel Regarding the Dispute between Manitoba and Ontario Concerning Ontario’s *Notice of Measure* with respect to Public Accountants, *Agreement on Internal Trade*, at page 10

²¹ BC Submission, paragraph 65, page 47

²² *ibid*

²³ Article 6(2): Subject to paragraph 1, Parties may establish the level of protection necessary to achieve a legitimate objective.

to set their own standards, particularly to achieve a legitimate objective.²⁴ Parties may differ somewhat in their respective approaches to risk. One might establish a slightly lower risk tolerance than the other.

Adoption of a different level of protection can be considered with respect to scope of practice or, as in this case, certification of a specific individual. In both instances, the application of a standard to achieve a legitimate objective must be narrowly construed and strictly applied.

In the case at hand, the Panel is satisfied that, given the evidence available to it, the BCCSW decision can be justified as achieving the legitimate objective of protecting human life or health and consumer protection. Future decisions of this nature will have to be decided on the specific circumstances of the case.

5.4.2 Article 6(1)(b)

AB contends that the BCCSW could have adopted a less trade restrictive solution than outright denial of certification. It could have granted certification subject to conditions similar to the provisional certification granted by AB to the Applicant in 2006.

BC counters that any decision that allowed the Applicant to have access to vulnerable clients would be counter to the College's objective of a "zero tolerance" level of protection. While the Panel does not believe "zero tolerance" is either a realistic or practical objective, some different levels of risk tolerance could be considered on a case by case basis.

Given the specific circumstances of this case, the Panel accepts that denial of certification was a reasonable decision designed to achieve the legitimate objective identified.

5.4.3 Article 6(1)(c)

The Measure (individual assessment and denial of certification to the Applicant) as BC states, is "fully transparent and openly and overtly applied to the Applicant"²⁵. Given the information contained in the email from BC cited earlier, it is clear that the decision to deny certification to

²⁴ http://www.tilma.ca/faq_professional_tradesperson.asp

Are the provinces allowed to continue regulating occupations as they see fit?

A fundamental part of labour mobility is the obligation of the Alberta and British Columbia governments, and their regulated bodies, to review and reconcile the different approaches to regulating occupations. However, each province retains the right to set its own standards under the TILMA for legitimate objectives such as to ensure the protection of the public, consumers and the environment.

What impact will labour mobility have on maintaining standards?

Regulatory bodies for almost all professions have reported that occupational standards in Alberta and BC were very consistent before the TILMA. In many cases, there will be no changes to current practices, while in other cases Alberta and BC have agreed upon a higher standard. If a province does have concerns, it is entitled to maintain additional measures so long as it can justify the measures as serving a legitimate objective.

²⁵ BC Submission, paragraph 85, page 55

the Applicant was the only instance in which a measure of this nature was used. As a result, the Panel concludes that the Measure was not a disguised barrier to labour mobility.

The Panel finds that, in the specific case under consideration, the Measure is consistent with Article 6.

6. DETERMINATION OF ECONOMIC EFFECTS

While the Measure may have had a particular economic impact on the Applicant, the Panel has found that the Measure is not inconsistent with the provisions of TILMA.

Based on the information provided by BC, there is no evidence that other similar applications for certification have been denied. Given the specific nature of this dispute, the Panel doubts there will be any pattern of use of a similar measure in the future. As a result, the economic effects of the Measure under consideration are minimal and not material in the context of the objectives of the Agreement.

7. SUMMARY OF FINDINGS

The summary of findings below is provided for convenience only. The actual findings in the Report above and the reasoning and context within which they are made should be considered authoritative. Accordingly, the Panel makes the following findings:

- 1. The Panel finds that the BCCSW is a government entity under TILMA, that TILMA consequently applies to the BC College and that BC, as a Party to TILMA, is responsible for ensuring that the BC College complies with TILMA**
- 2. The Panel finds that:**
 - a) an individual assessment to establish evidence of good character is consistent with a Party's obligations under TILMA;**
 - b) denial of certification to an applicant already certified by another Party carries with it a reverse onus obligation; the second Party must show evidence of lack of good character to justify such denial; and**
 - c) in the case that is the subject of this dispute, BCCSW did not contravene Article 13 of TILMA in denying certification to the Applicant.**
- 3. The Panel finds that the Measure is not inconsistent with, or in contravention of, Articles 2(2) and 3 of TILMA.**
- 4. The Panel finds that, in the specific case under consideration, the Measure is consistent with Article 6.**

8. PANEL RECOMMENDATIONS

The Panel recommends that the Parties take steps to implement the Panel’s considerations in 5.2.3 with respect to limitations on the use of individual assessment to establish evidence of good character and to ensure that their government entities comply with this direction.

9. ALLOCATION OF COSTS

Article 32(1) gives the Panel discretion to allocate costs. The Panel considers an equal sharing of costs between the two Parties to be a fair allocation.

10. DISSENTING OPINION

James D. Horsman - Dissent

I disagree with my colleagues except with 5.1-Article 2(2) that BCCSW is a Government entity.

In this case, the BCCSW seeks to protect its decision to deny certification to the Applicant. British Columbia seeks to protect its entity from the application of BC’s obligations as a partner of the TILMA. The integrity, intent and spirit of TILMA are thereby negated by the BC position.

Article 13

I concur with the Alberta interpretation of the meaning of “qualified to practice” and reject BC’s narrow interpretation of that phrase contained in TILMA Article 13. Upon review of all the additions to the AIT since 1994 together with TILMA and the New West Partnership Trade Agreement, each was directed by the parties towards the goal of further trade, investment and labour mobility liberalization. Panel decisions have also directed parties to remove barriers to mobility.

Reliance on the Agreement on Internal Trade to clarify the terminology requires the parties to recognize that the new Chapter Seven states as its purpose in Article 701:

“The purpose of this Chapter is to eliminate or reduce measures adopted or maintained by the parties that restrict or impair labour mobility in Canada and, IN PARTICULAR, to enable any worker certified for an occupation by a regulatory authority of one party to be RECOGNIZED AS QUALIFIED FOR THAT OCCUPATION BY ALL OTHER PARTIES.”

In the 13 January 2012 CGA decision, the panel concluded at page 16 amongst other findings that:

3) Certification by one party should be accepted by all other parties.

It therefore defies logic to find that Article 13 can be interpreted to narrow the goals of the AIT, TILMA and the NWPTA.

LEGITIMATE OBJECTIVE

In order to accomplish BC's protective goals, they must demonstrate that the refusal to certify is to achieve a legitimate objective. In this case BC claims it is necessary to provide consumer protection or the protection of health safety and well being of workers.

The integrity of the Alberta certification process has been attacked in both the BC written and oral submissions.

The Agreement on Internal Trade, the Trade, Investment and Labour Mobility Agreement and the New West Partnership Trade Agreement have been developed since the mid-1990s to eliminate barriers within Canada to the free movement of persons, goods, services and investment. All successive improvements since the original AIT have been for the purpose of further liberalizing the original agreement. Any conflict between the operation of the agreements is to be determined in favour of the least restrictive provision to free trade.

In this case, the past serious misdemeanors of the Applicant were considered by the Alberta College of Social Workers in granting conditional certification in 2006. These four stringent conditions were imposed:

1. a minimum of 6 months counseling with a counselor approved by the Alberta College, with the requirement that the counselor verify that the Applicant addressed the core issues identified in the psychological assessment that had been undertaken as part of the Alberta College consideration of the Applicant's application.
2. supervision by a registered social worker approved by the Alberta College for three years (with an option for a fourth as determined by the Alberta College) with a further requirement that the supervisor is to report to the Alberta College every 3 months.
3. requirement of disclosure of his ethical violations to any potential employers in Alberta.
4. completion of a university course in social work on ethical requirements for professional boundaries with the requirement that the Applicant provide evidence to the Alberta College that the Applicant has successfully completed the course.

The applicant complied with all conditions and was granted full practice certification on December 7, 2009 and was therefore "qualified to practice". No character problems or complaints by anyone against the applicant in Alberta have arisen since 2006. I cannot agree that there has been a disturbing history subsequent to that date nor is there valid evidence that the Applicant did not fully disclose information to the ASCW in 2005 and 2006 as alleged by BC.

The Alberta submission claims “The Alberta College had been provided with the same information that was provided to the BC College. The Alberta College conducted a thorough assessment of qualifications and character history.” (ALBERTA SUBMISSION para: 45, page 20.)

The Applicant’s efforts to gain certification in BC have been without success. The BCCSW has made it clear in all its decisions and the BC presentation to this panel that under no circumstances will the applicant be certified to practice social work in BC. Consider the following:

1. March 12/08 - Reasons for Decision of the Board of Registration for Social Workers British Columbia - Para: 16 – “While the Board has considered these provisional registrations **it is certainly not bound to register(the applicant) in BC merely because he managed to get registered in other jurisdictions**” (Tab 11)
2. June 4/10 - Registration Committee - Reasons for Decision
“However, in the Registration Committee’s view, although of some relevance, *the applicant’s Alberta registration is not determinative of his application in British Columbia*” (Tab 16)
3. Jan 20/11 - Registration Appeals Committee - Reasons for Decision
“The Registration Appeals Committee agrees with the analysis and conclusions of the Registration Committee” (Tab 17)
4. Panel Hearing transcript: page 162
Questions by Panel of Government of BC
“THE CHAIR: Could I just-- sorry. You say that -- you said that, if the applicant can prove good character, we will licence you.
MR THOMAS: Correct
THE CHAIR: Now you’ve said he’s crossed the Rubicon. That means to me that there is no turning back--
MR.THOMAS: Correct
THE CHAIR:--and that would be under no conditions whatsoever that he would be licenced.
MR. THOMAS: Correct”

Clearly BC has imposed the most restrictive measure to achieve the “legitimate objective”.

In the unlikely event, given the clear animus demonstrated by the BCCSW that the Applicant somehow became certified in BC, he would be under the closest and most intrusive scrutiny imaginable given the “zero tolerance” policy described in the BC submission. Any breach of conduct in BC could result in the decertification of the applicant.

The ACSW process for certification requires the same evidence of “good character” as does the BCCSW. BC acknowledges that fact:

Statement of Defence - Submitted by the Government of British Columbia Para: 67 page 48.

“BC also notes that the Alberta College also applies similar requirements to ALL SOCIAL WORKER APPLICANTS , including those from BC. Presumably this is because Alberta also believes that such good character requirements are an important precondition to practicing social work in that province and an important regulatory tool to ensure protection of human life or health and consumer protection in Alberta”.

BC then proceeds in Paras: 73-80 to DISCREDIT the Alberta College process to assess the character requirements for the registration of Alberta Social Workers.

They cannot have it both ways. In order to discredit the ACSW procedures BC alleges that ASCW did not have sufficient evidence of the applicant’s character to grant certification. The onus falls on the respondent to justify its measure. In doing so it must do more than allege or surmise. The onus is not on the complainant to prove they have an adequate system in place to protect consumer interests.

The FAQ on the TILMA website has been raised with reference to the requirements such as: “..... providing evidence of good character and good standing from their home province...”

In my view, the requirements are not severable. The Applicant provided suitable references from reputable persons as to his character from the date of his certification in Alberta.

The majority decision in this case recommends:

7.2(b) “denial of certification to an applicant already certified by another party carries with it a reverse onus obligation; the second party must show evidence of lack of good character to justify such denial”.

One must ask to whom, such evidence must be presented? Will dispute panels be required to determine the “good character” of applicants for certification in all dispute circumstances? That concept is problematic at best.

Conclusion:

1. The BC measure is inconsistent with Article 13 of TILMA
2. The measure cannot be justified as necessary to achieve a legitimate objective

For the Majority

R. Lorne Seitz

Phyllis Smith

Dissenting Opinion

James D. Horsman

APPENDIX

Participants in the Panel Hearing

Panel

James D. Horsman (Chair)

R. Lorne Seitz

Phyllis Smith

For Alberta

Shawna Vogel

Shawn Robbins

For British Columbia

Jeffrey Thomas

Danielle Park

Michael Nielsen