

CHAPTER 6: IMPROVING LABOUR MARKET INTEGRATION AND INTERPROVINCIAL MOBILITY FOR IMMIGRANTS HOLDING FOREIGN CREDENTIALS

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While interprovincial labour mobility is beneficial to Canadians in general, it is especially so for immigrants who possess foreign credentials. Despite the fact that Canada's immigrants now possess more education than their Canadian-born counterparts,¹ they still have an elevated unemployment rate² and are more likely to have low incomes compared to those holding Canadian credentials.³ In addition to these problems, the historic trend of immigrants narrowing the earnings gap between themselves and Canadian-born workers as the immigrants spend more time and gain more experience in Canada is beginning to disappear.⁴

Some significant measures that can be taken to address this problem include the development or improvement of laws and mechanisms to facilitate the proper recognition of foreign credentials and ensure substantive fairness with respect to access to the regulated professions in Canada. An additional aspect of the solution is to ensure interprovincial labour mobility in Canada's regulated occupations, in compliance with chapter seven of the Agreement on Internal Trade.⁵ This will allow those possessing foreign credentials, once they have undergone the arduous process of obtaining licensure in a regulated occupation in one Canadian jurisdiction, to have the opportunity to pursue employment

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¹ Danielle Zietsma, "Immigrants Working In Regulated Occupations" (2010) 11 Perspectives on Labour and Income 13 at 13, online: Statistics Canada <<http://www.statcan.gc.ca/pub/75-001-x/75-001-x2010102-eng.pdf>>.

² *Ibid* at 14.

³ *Ibid* at 13.

⁴ Diane Galarneau & Rene Morissette, "Immigrants' education and required job skills" (2008) 9 Perspectives on Labour and Income 5 at 5-6, online: Statistics Canada <<http://www.statcan.gc.ca/pub/75-001-x/75-001-x2008112-eng.pdf>>.

⁵ *Agreement on Internal Trade Consolidated Version*, 2010, online: Agreement on Internal Trade <<http://www.ait-aci.ca>> [AIT].

opportunities in every other jurisdiction, without having to prove their qualifications again.

This type of labour mobility creates a larger pool of candidates for employers to consider, and a larger pool of employers for Canadians to consider. More competition from across Canada for the services of skilled immigrants may drive their incomes higher. The increased number of job opportunities these people would be able to pursue also creates the potential of reducing the unemployment rate of this disadvantaged group.

To encourage compliance with the interprovincial labour mobility provisions of the Agreement on Internal Trade (AIT), and to secure a stronger job market for both internationally and domestically-trained individuals:

- *Regulated occupations in Canada that are not yet compliant with the labour mobility provisions of the AIT should consider developing inter-jurisdictional agreements similar in nature to the one created by Engineers Canada.*

To promote the most fair and efficient interprovincial labour mobility possible in Canada:

- *The new AIT model of mutual recognition of credentials should be maintained, with limited exceptions. It is acceptable for provinces to agree on a “gold seal” standard that guarantees mobility in all cases, but this should supplement the mutual recognition scheme rather than becoming a prerequisite to mobility.*

To promote fairness in labour mobility in the skilled trades covered by the Interprovincial Standards Red Seal Program (Red Seal Program):

- *As far as is practical, the Red Seal Program should ensure that its written and clinical examinations are appropriate for both internationally and domestically-trained and experienced workers.*

I. INTRODUCTION

Throughout Canada’s history there have been barriers to interprovincial trade in goods and services. Regarding labour mobility specifically, Canadian workers are generally able to work in any province or territory they want, however this is not always the case for those employed in regulated occupations.⁶ There is often a large degree of similarity across jurisdictions regarding requirements to enter regulated occupations, but in many cases “workers have

⁶ “Labour Mobility Coordinating Group”, online: Agreement on Internal Trade <<http://www.ait-aci.ca>> [Labour Mobility Coordinating Group].

encountered barriers when they move from one jurisdiction to another because of differences in certification requirements.”⁷

The *Canadian Charter of Rights and Freedoms* guarantees Canadians’ mobility rights. The right to pursue gainful employment anywhere in the country is granted to both Canadian citizens and permanent residents.⁸ Additionally, the recently amended chapter 7 of the *Agreement on Internal Trade (AIT)* attempts to ensure more efficient and expansive labour mobility in Canada, “enabl[ing] 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.”⁹ The *AIT* also makes it possible for the provinces and territories to create exceptions to labour mobility for given occupations in some circumstances.¹⁰

All provinces and territories in Canada except Nunavut are parties to the *AIT*,¹¹ but complete compliance with the labour mobility provisions by all parties has remained elusive. Labour mobility in Canada is “a key element of labour market efficiency [which] contributes to sustaining economic growth, innovation, productivity and Canada’s competitiveness in an increasingly knowledge-based global economy.”¹² Interprovincial labour mobility allows easier access to jobs for workers in regulated occupations, while creating stronger pools of talent for employers who are seeking skilled workers. Labour mobility also facilitates the labour market integration of immigrants in a similar way. Once an immigrant goes through the demanding process of having foreign credentials recognized in a Canadian jurisdiction, and obtaining certification to practise in a regulated occupation, there will be substantial benefits to that immigrant, and to the country as a whole, if there are employment opportunities for her across the country instead of only in one jurisdiction.¹³

II. AGREEMENT ON INTERNAL TRADE

A. Overview

In order to “eliminate barriers to” interprovincial trade in goods, services and investments, the federal government and “Canada’s First Ministers” signed the *Agreement on Internal Trade (AIT)* on 1 July 1995.¹⁴ The original agreement included a chapter dealing with labour mobility, but challenges

⁷ *Ibid.*

⁸ *Canadian Charter of Rights and Freedoms*, s 6(2)(b), Part I of the *Constitution Act*, 1982, being schedule B to the *Canada Act 1982* [U.K.], 1982, c 11 [*Charter*].

⁹ *AIT*, *supra* note 5, art 701.

¹⁰ *Ibid.*, art 708.

¹¹ “Introduction”, online: Agreement on Internal Trade <<http://www.ait-aci.ca>>.

¹² Labour Mobility Coordinating Group, *supra* note 6.

¹³ *Ibid.*

¹⁴ Office of the Prime Minister, News Release, “Agreement on Internal Trade” (16 January 2009) online: Office of the Prime Minister <<http://pm.gc.ca>>.

continued to arise. In August 2007 the premiers of the provinces “agreed to strengthen the AIT through a five-point action plan.” One of these points was “full labour mobility,”¹⁵ and in August 2009 the labour mobility chapter of the *AIT* was amended.¹⁶ Implementation of the newly amended chapter (chapter 7) involves a multitude of key players. These players include both federal and provincial/territorial governments and numerous occupational regulatory bodies across Canada.¹⁷

In August 2009, the Forum of Labour Market Ministers (FLMM) released guidelines to aid regulatory bodies in the understanding of chapter 7 of the *AIT*, and “how to comply with its obligations.”¹⁸ The parties to the *AIT* have now agreed that because 15 years have elapsed since the *AIT* was first introduced, “the reasonable period of time initially set out for achieving compliance has expired. Compliance is now mandatory.”¹⁹ The parties must now ensure that regulatory bodies and regional governments within their borders are compliant with the labour mobility chapter of the *AIT*.²⁰

B. The AIT’s General Rules: Chapter Four

Chapter 4 of the *AIT* sets out six “general rules” which apply to all of Part IV of the *AIT* unless otherwise specified, which includes chapters 5 through 15.²¹ These general rules were not amended when the provisions specific to labour mobility were, but which rules are applicable to the labour mobility chapter of the *AIT* did change. The general rules provided in chapter four are Reciprocal Non-Discrimination, Right of Entry and Exit, No Obstacles, Legitimate Objectives, Reconciliation, and Transparency.²² The Legitimate Objectives and Reconciliation rules identified in chapter 4 do not apply to chapter 7, but the remaining four rules do.²³ Before the amendments, the Reciprocal Non-Discrimination, Right of Entry and Exit, and No Obstacles rules did not apply to chapter seven.²⁴ For the purposes of chapter 7, if any references are made to the Legitimate Objectives section of chapter 4 within any of the

¹⁵ *Ibid.*

¹⁶ *Agreement on Internal Trade (1995)*, art 700, online: Agreement on Internal Trade <http://www.ait-aci.ca/index_en/ait.htm> [*Original AIT*].

¹⁷ Labour Mobility Coordinating Group, *supra* note 6.

¹⁸ Forum of Labour Market Ministers, *Guidelines for Meeting the Obligations of the Labour Mobility Chapter*, (Labour Mobility Coordinating Group, 2009) at 14, online: Agreement on Internal Trade <http://www.ait-aci.ca/labour_en/pdf/Labour%20Mobility%20Guidelines.pdf> [Guidelines].

¹⁹ *Ibid* at 16.

²⁰ *Ibid* at 17.

²¹ *AIT*, *supra* note 5.

²² *Ibid*, arts 402-406.

²³ *Ibid*, art 700.

²⁴ *Original AIT*, *supra* note 16.

general rules that are applicable, it is to be construed as a reference to the Legitimate Objectives section of chapter seven.²⁵

The Reciprocal Non-Discrimination general rule requires each party to the *AIT* to treat the “persons, services and investments of any other Party ... no less favourabl[y] than the best treatment it accords” its own services, persons and investments, or the best treatment any other jurisdiction receives in those areas, whether a party to the *AIT* or not.²⁶ The Right of Entry and Exit general rule simply restricts any party from having measures in place that prevent the interprovincial movement of persons, services, or goods.²⁷ The No Obstacles general rule requires that all Parties “ensure that any measure it adopts or maintains does not operate to create an obstacle to internal trade.”²⁸ The Transparency general rule requires all parties to make all “legislation, regulations, procedures, guidelines, and administrative rulings” accessible if they relate to the *AIT*. If a party intends to adopt or alter a measure that will affect another party in relation to the *AIT*, the affected party must be notified of the measure.²⁹ All four of these general rules are subject to article 708 (Legitimate Objectives) when they are being considered in relation to chapter 7.³⁰

C. The *AIT*'s Labour Mobility Provisions: Chapter Seven

Under the current *AIT*, in addition to the general rules discussed above, articles 705 (Residency Requirements) and 706 (Certification of Workers) also apply subject to the legitimate objectives in article 708.³¹ What qualifies as a legitimate objective is basically the same in the amended *AIT*, with one exception. In the original labour mobility chapter, “labour market development” was included in the definition of legitimate objectives,³² but it is not included in the post-amendment definition.³³

The Residency Requirements article in chapter seven restricts a party from requiring that a person be a resident of the province or territory in which employment is sought to be eligible for employment or certification for an occupation.³⁴ A party may, however, “require that a person reside within a certain distance” of the workplace for reasons of “safety or response time.”³⁵

²⁵ *AIT*, *supra* note 5, art 700.

²⁶ *Ibid*, art 401.

²⁷ *Ibid*, art 402.

²⁸ *Ibid*, art 403.

²⁹ *Ibid*, art 406.

³⁰ *Ibid*, arts 401-403, 406, 700.

³¹ *Ibid*, art 708.

³² *Original AIT*, *supra* note 16, art 713.

³³ *AIT*, *supra* note 5, art 711.

³⁴ *Ibid*, art 705.

³⁵ Guidelines, *supra* note 18 at 23.

Chapter 7's Certification of Workers article is a key provision with respect to labour mobility, and states that generally, if a person is certified to work in a given occupation in a jurisdiction controlled by a party, then that person "shall, upon application, be certified for that occupation by each other Party which regulates that occupation without any requirement for any material additional training, experience, examinations or assessments."³⁶ Additional non-material requirements may be imposed, and each party will "determine what additional measures it deems as material."³⁷ A non-material requirement may be signing a document swearing one has read certain legislation, whereas a material requirement would be to require one to pass an examination based on that legislation.³⁸ This article applies whether the worker in question is domestically-trained or possesses international credentials. Once a worker is certified by one party, that party indicates that the person "has met the occupational standard that identifies the necessary abilities, skills, and knowledge," and as a result "an internationally-trained individual ... cannot be treated any differently for certification purposes than a domestically-trained worker."³⁹ This article also specifies that all persons with certification endorsed by the Red Seal Program⁴⁰ shall be deemed qualified to work in any party's jurisdiction.⁴¹

Article 707 deals with Occupational Standards. Parties have the right to develop, implement and maintain any occupational standard deemed necessary to establish appropriate levels of public protection, however parties agree to reconcile these standards where it is practical.⁴² Occupational standards that are implemented by a party should be based on interprovincial standards, like the Red Seal Program, or "international standards."⁴³ If a party is going to establish, implement or alter occupational standards, then they have to inform the other parties of such intent, and "afford them an opportunity to comment on the development of those standards."⁴⁴ Article 707 is not subject to the Legitimate Objectives article. In meeting article 707 requirements, parties "should continue or initiate interprovincial/territorial dialogue to explore, where appropriate, the adoption of interprovincial standards."⁴⁵

Chapter 7's Legitimate Objectives section states that if a measure adopted or maintained by a party is inconsistent with any of the articles mentioned

³⁶ *AIT*, *supra* note 5, art 706.

³⁷ *Guidelines*, *supra* note 18 at 25.

³⁸ *Ibid.*

³⁹ *Ibid* at 26.

⁴⁰ "Red Seal 1999-2009", online: Red Seal: The Interprovincial Standards Red Seal Program <<http://www.red-seal.ca/>> [Red Seal].

⁴¹ *AIT*, *supra* note 5, art 706.

⁴² *Ibid*, art 707.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Guidelines*, *supra* note 18 at 32.

above, except article 707, that provision is still permissible if it meets the test set out in article 708. To satisfy this test (i) “the purpose of the measure [must be] to achieve a legitimate objective,” (ii) “the measure [must not be] more restrictive to labour mobility than necessary to achieve that legitimate objective” and (iii) “the measure [must] not create a disguised restriction to labour mobility.”⁴⁶ In order to maintain an exception to labour mobility, a party “must provide written justification of why the measure is necessary to meet a legitimate objective.”⁴⁷

Regarding the certification of workers, if two provinces have different requirements for “academic credentials, education, training, experience, examinations, or assessment methods” for licensure in an occupation, that will *not* justify additional certification requirements in those areas as required to meet legitimate objectives. For additional requirements to be justified to meet a legitimate objective, an “actual material deficiency in skill, area of knowledge or ability” must be shown.⁴⁸ An example where “additional education, training or experience requirements may be justified” is if there is a considerable difference in the “scope of practice” of an occupation from one jurisdiction to another, and that due to this difference, a “worker lacks a critical skill, area of knowledge or ability required to perform the new scope of practice.”⁴⁹ If a party decides to use a legitimate objective to justify additional requirements, that party must notify the Forum of Labour Market Ministers of the measure, informing them of the justification for, and duration of, the provision.⁵⁰

The legitimate objectives which can be used to justify additional requirements under article 708 are listed in article 711, the Definitions section. There are eight legitimate objectives listed: (i) “public security and safety,” (ii) “public order,” (iii) “protection of human, animal or plant life or health,” (iv) “protection of the environment,” (v) “consumer protection,” (vi) “protection of the health, safety and well-being of workers,” (vii) “provision of adequate social and health services to all its geographic regions,” and (viii) “programs for disadvantaged groups.”⁵¹ If a dispute arises in relation to chapter 7, it is handled in accordance with the *AIT*'s dispute resolution section, chapter 17.⁵²

For a jurisdiction to set and maintain an exception, it must specify the legitimate objective it is attempting to achieve, identify the additional requirement(s), which other jurisdiction(s) it is going to apply to, the justification for the extra requirement, and the “[d]uration of the additional

⁴⁶ *AIT*, *supra* note 5, art 708.

⁴⁷ Guidelines, *supra* note 18 at 33.

⁴⁸ *AIT supra* note 5, art 708.

⁴⁹ Guidelines, *supra* note 18 at 33.

⁵⁰ *AIT*, *supra* note 5, art 708.

⁵¹ *Ibid*, art 711.

⁵² *Ibid*, art 710.

requirement(s).⁵³ Through its own mechanisms, the province or territory must approve the exception, at which point the party will inform the Forum of Labour Market Ministers, and the exception and relevant information will be posted on the *AIT* website.⁵⁴

D. Currently Held Exceptions to the AIT

Currently nine provinces and two territories have exceptions posted on the *AIT* website, Nova Scotia being the only party with no exceptions posted. Of those with posted exceptions, Alberta has the most with exceptions for ten occupations, while the Northwest Territories, British Columbia, and Prince Edward Island each have only one exception posted.⁵⁵ An example of a labour mobility exception that all parties except Nova Scotia and New Brunswick have posted is for lawyers (as of July 2011). The common law jurisdictions of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Prince Edward Island, Newfoundland and Labrador, the Yukon and the Northwest Territories all cite this exception.⁵⁶ Each of these jurisdictions creates an exception to labour mobility for lawyers certified in Quebec, using the legitimate objective of consumer protection.⁵⁷ The rationales provided by these common law provinces are all quite similar. To provide an example, Ontario's justification is that "[t]here are significant differences in the foundational legal systems and in the way the law is developed and codified," and people qualified to practise law in Quebec's "civil law system will not possess the necessary knowledge or expertise to practice in a common law system."⁵⁸ The relevant exceptions from each of these provinces are limited to lawyers with Quebec credentials. Quebec has a similar exception which applies to all other parties to the *AIT*, and provides a similar justification.⁵⁹ The expected duration for all of these exceptions is indefinite.⁶⁰

⁵³ Guidelines, *supra* note 18 at 37.

⁵⁴ *Ibid* at 34-35.

⁵⁵ "Exceptions to Labour Mobility", online: Agreement on Internal Trade <<http://www.ait-aci.ca>> [Exceptions].

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ "Notice of measure to achieve a legitimate objective under Chapter 7 of the Agreement on Internal Trade – Approved by the Government of Ontario", online: Agreement on Internal Trade <http://www.ait-aci.ca/labour_en/exceptions_on/Lawyer.pdf>.

⁵⁹ *Ibid.*

⁶⁰ Exceptions, *supra* note 55.

III. NEW WEST PARTNERSHIP TRADE AGREEMENT

Originally in 2006 the *Trade, Investment and Labour Mobility Agreement (TILMA)* was signed by Alberta and British Columbia.⁶¹ The general rule in *TILMA* regarding labour mobility was that “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.”⁶² The revised provisions in chapter seven of the *AIT* “largely duplicate the labour mobility provisions of *TILMA*.”⁶³ *TILMA*’s labour mobility provisions dealt with two main principles: (i) “no obstacles” and (ii) “non-discrimination.” No obstacles meant that government measures could not “operate to restrict or impair trade between or through the territory of the Parties,” and non-discrimination meant that workers from one province should not be given preferential treatment over workers from the other.⁶⁴ *TILMA* established that if a worker was certified in one province, that worker had to be certified to work in the other. The British Columbia and Alberta governments were also expected to “mutually recognize or otherwise reconcile their existing standards and regulations that operate[d] to restrict ... labour mobility.”⁶⁵

Beginning on 1 July 2010, the *New West Partnership Trade Agreement (NWPTA)* between British Columbia, Alberta and Saskatchewan came into effect, replacing *TILMA*.⁶⁶ Regarding labour mobility, there will be no changes under the *NWPTA* as opposed to *TILMA* for British Columbia or Alberta. For Saskatchewan, labour mobility provisions will be the same, with the exception of “full labour mobility for financial services occupations,” which “will be implemented by 1 July 2013.”⁶⁷ In exercising control over their own jurisdiction’s regulations, these “governments must ensure that their measures are non-discriminatory and do not impose any more restrictions on trade, investment and labour mobility than absolutely necessary.”⁶⁸ While the *NWPTA* is a significant agreement for achieving labour mobility between these three provinces, it is important that its parties still put forth efforts to comply with the *AIT*, and not be satisfied with only *NWPTA* compliance.

⁶¹ “Trade, Investment and Labour Mobility Agreement”, online: *TILMA* <<http://www.tilma.ca>> [*TILMA*].

⁶² *Trade, Investment and Labour Mobility Agreement, 2009*, art 13.1, online: *TILMA* <http://www.tilma.ca/pdf/TILMA_Agreement_April2009.pdf> [*TILMA 2009*].

⁶³ “Labour Mobility Q & A”, online: Government of British Columbia <http://www.aved.gov.bc.ca/labourmobility/docs/qa_labourmobility.pdf>.

⁶⁴ *TILMA 2009*, *supra* note 62, arts 3-4.

⁶⁵ *Ibid*, art 5.1.

⁶⁶ *TILMA*, *supra* note 61.

⁶⁷ “New West Partnership Trade Agreement”, online: Canada’s New West Partnership <<http://www.newwestpartnershiptrade.ca>>.

⁶⁸ “NWPTA – FAQs”, online: Canada’s New West Partnership <<http://www.newwestpartnershiptrade.ca>>.

IV. LAYERS OF LABOUR MOBILITY IN CANADA

There are three distinct layers of labour mobility in Canada: (i) the “province-by-province certification approach,” (ii) the “mutual recognition approach” and (iii) the “gold seal approach.” Each layer affords different levels of efficiency and simplicity to the interprovincial movement of services.

The province-by-province certification approach ensures that each jurisdiction in the country has its own requirements for particular types of work. If a person is certified to work in a given occupation in one jurisdiction and wants to work in that occupation in another jurisdiction, the person will have to meet the requirements of, and obtain certification from, the new jurisdiction. This approach results in high barriers to interprovincial mobility.

Under the mutual recognition approach, the certification of a worker in one jurisdiction is automatically recognized in all other jurisdictions, subject to certain exceptions. This is the approach taken in the *AIT*, and it is desirable because it guarantees that once a person has met the minimum requirements in one jurisdiction, he will automatically be able to obtain certification in any other jurisdiction, unless there is a legitimate reason to create an exception in the circumstances. This allows for efficient labour mobility, because it provides open access to job markets across Canada for workers in each jurisdiction. It is based on trust between jurisdictions, that their minimum requirements are sufficient to ensure the safe and competent delivery of services to Canadians across the country. This approach also respects provincial autonomy by permitting parties to post exceptions when it is reasonable to do so.

In the “gold seal” approach, a person who is already certified for a given occupation in one jurisdiction can obtain a further qualification which will guarantee certification in other Canadian jurisdictions without being subject to any exceptions. An example of such an approach in Canada is the Red Seal Program. In this program, a person who is certified in a skilled trade in a Canadian jurisdiction can take a Red Seal examination, and upon successful completion of this examination, that individual will receive a Red Seal endorsement. The Red Seal endorsement then allows the person to obtain certification in any jurisdiction without having to meet any further requirements.⁶⁹

It is important to distinguish between the mutual recognition and passport approaches. When regulated occupations are attempting to comply with the *AIT* and achieve the requisite labour mobility, the mutual recognition approach should consistently be used, with the “gold seal” approach serving as a possible supplementary means of promoting mobility. What should be avoided is attempts by consortiums of provincial regulators to use the “threat” of interprovincial

⁶⁹ *AIT*, *supra* note 5, art 706.

mobility as an excuse to insist that all provinces should adopt a new and unnecessarily heightened set of requirements for certification; similar requirements are typically visited on new entrants, whereas existing practitioners are grandfathered. Provinces should presumptively be able to trust each other's certification standards because it is unreasonable to assume that provincial governments would risk the safety of their own consumers by adopting unreasonably low standards. Professional self-regulatory bodies, for reasons of economic and prestige-oriented protectionism, are likely to err on the side of recommending or imposing excessively onerous requirements. The "safety valve" permitted by the AIT creates a transparent mechanism which a province can invoke if it has legitimate reasons to reject the certification mechanism of another province.

V. INTERPROVINCIAL MOBILITY IN SPECIFIC PROFESSIONS AND COMPLIANCE WITH THE *AIT*

All regulated occupations in Canada have not achieved *AIT* compliance, but there is substantial work currently underway to comply in a number of these occupations.⁷⁰ In an attempt to address concerns that "the enforcement of panel rulings of non-compliance with the AIT [was] weak," the government of Canada introduced the *Improving Trade Within Canada Act* on 25 November 2010.⁷¹ This legislation, which was still before Parliament at dissolution in 2011,⁷² would allow for financial penalties of up to \$5 million for "[n]on-compliance with AIT obligations."⁷³ The possibility of facing such a penalty may mobilize the parties to spur faster action from the regulatory bodies within their own jurisdictions. Even in the absence of these penalties however, given the advantages of interprovincial labour mobility discussed above, it is in the interest of the parties and of Canada generally to attain *AIT* compliance as soon as is reasonably possible.

⁷⁰ See e.g. "AIT Annual Report 2010-2011 Labour Mobility (Chapter 7)" at 3, online: Agreement on Internal Trade <<http://www.ait-aci.ca>> (compliance in occupations falling under the financial services sector is planned to be complete by July 2011); see also The Canadian Press, "Provincial borders still barriers to doctors" *CBC News* (1 August 2011) online: CBC News <<http://www.cbc.ca>> [Physician Mobility, CBC].

⁷¹ Industry Canada, News Release, "Harper Government Introduces Bill to Remove Barriers to Interprovincial Trade" (25 November 2010) online: Canada News Centre <<http://news.gc.ca>> [Industry Canada].

⁷² Bill C-57, *An Act to amend the Agreement on Internal Trade Implementation Act and the Crown Liability and Proceedings Act*, 40th Parl, 3rd Sess, 2011 (first reading 25 November 2010).

⁷³ *Industry Canada*, *supra* note 71.

A. The Engineering Profession

The engineering profession has been one of the more progressive regulated occupations in terms of complying with the *AIT*'s labour mobility provisions. According to Engineers Canada, “[p]rofessional engineers in Canada enjoy full mobility between [provinces and territories] under the federal government’s *Agreement on Internal Trade*.”⁷⁴ The *AIT* has overtaken the former labour mobility agreement which was in place in the engineering profession, the *Agreement on Mobility of Professional Engineers within Canada (AMPEC)*.⁷⁵ The engineering profession is complying with the *AIT* in the absence of a separate agreement between the various jurisdictional regulatory bodies, but this is not the case for all regulated occupations across Canada.

Formerly, under the *AMPEC*, engineers were able to move within Canadian jurisdictions and obtain licensure “with relative ease.”⁷⁶ In the first nine years of the agreement, 17,000 engineers in Canada applied for certification in a new province or territory, with licensure being refused though the *AMPEC*'s notwithstanding clause only 238 times.⁷⁷

The *AMPEC* was signed by regulatory bodies representing ten provinces and two territories, excluding only Nunavut. The stated objective of the *AMPEC* was simply “to achieve and maintain mobility among associations/Ordre.”⁷⁸ The *AMPEC* stated that a professional engineer in a Canadian jurisdiction had to be certified in any other jurisdiction upon application, as long as that person met five stated criteria.⁷⁹ These criteria included that the applicant had to be “in good standing” with her or his current jurisdiction and the person must not have been professionally disciplined in the past. Additionally, the applicant had to provide information pertaining to these conditions, and allow her current jurisdictional regulatory body to release this information. All information that a regulatory body normally required also had to be provided, and any “continuing competence/continuing professional development requirements” in the new jurisdiction would have to be met.⁸⁰

The *AMPEC*'s notwithstanding clause allowed any of the regulatory bodies that were parties to the agreement to “review the qualifications of any applicant from another Canadian jurisdiction.” The regulatory bodies could then “assign

⁷⁴ “National Mobility”, online: Engineers Canada <<http://www.engineerscanada.ca>>.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ Ontario Centre for Engineering and Public Policy & Lorne Sossin, “Towards the Best Policy Directions for Engineering Regulators” (2010) at 6, online: Professional Engineers of Ontario <<http://members.peo.on.ca>> [Sossin].

⁷⁸ Canadian Council of Professional Engineers, *Agreement on Mobility of Professional Engineers Within Canada* at 2, online: Engineers Canada <http://www.engineerscanada.ca/e/files/iama_eng.pdf>.

⁷⁹ *Ibid.* at 3.

⁸⁰ *Ibid.*

additional requirements for admission they deem[ed] necessary, consistent with their admission procedures.”⁸¹

This agreement was clearly effective given that the notwithstanding clause was only invoked in 1.4% of cases in the first nine years the agreement was in effect.⁸² To truly attain *AIT* compliance with such an agreement, exceptions would have to be posted for situations where the notwithstanding clause could be invoked. Additional exceptions would also have to be posted with respect to some of the additional requirements that were part of the *AMPEC*. For example, the legitimate objective of consumer protection could be used to post an exception for those who are not in good standing with another regulatory body. This would ensure that anytime certification is denied, it can be justified. This agreement, with slight modifications, is an excellent example of the admmissive approach to labour mobility. Regulatory bodies governing other occupations that are not yet compliant with the *AIT* should consider negotiating and adopting agreements at a pan-provincial level that are similar in nature to *AMPEC*.

Although the *AMPEC* is no longer utilized in the engineering profession, this type of agreement is a clear and effective path to follow to attain *AIT* compliance. It provides a simple framework that allows for ease of licensure across jurisdictions so long as several reasonable requirements are met. At the same time, it also allows each jurisdiction to invoke the notwithstanding clause in order to assign additional requirements where necessary. Both interprovincial mobility and provincial autonomy are respected in this type of agreement. Such an agreement ensures mobility based on certification within a jurisdiction, not based on a common national examination that all workers in a given field must complete. Labour mobility under an agreement like the *AMPEC* is based on trust between regulatory bodies, and is a good form of agreement to consider when a regulated occupation is attempting to achieve *AIT* compliance.

B. Labour Mobility and Physicians

Some in Canada’s medical community were initially skeptical, but many have since altered their positions regarding interprovincial labour mobility for physicians. Traditionally, most physicians certified in one Canadian jurisdiction have been able to obtain certification in other provinces, but there was some apprehension when the amendments to chapter seven of the *AIT* were first passed.⁸³ The amended *AIT* concerned some because it does not allow for additional barriers, such as examinations, to be imposed on physicians certified in other jurisdictions. An example of the foreseen problem is that a person

⁸¹ *Ibid* at 4.

⁸² Sossin, *supra* note 77.

⁸³ Trevor Theman, “Agreement on Internal Trade and what it means for the Medical Council of Canada”, *Echo: The Medical Council of Canada Newsletter* (January 2010) 2 online: Medical Council of Canada <http://www.mcc.ca/pdf/Echo_Jan_10_en.pdf>.

certified as a physician in Alberta, which does not require the Licentiate of the Medical Council of Canada (LMCC), can move to a jurisdiction where the LMCC is required, and must be certified without obtaining the LMCC.⁸⁴ It was feared that this would result in “the jurisdiction with the most flexible standards for registration becom[ing] the *de facto* standard for registration in Canada.”⁸⁵

Despite prior disagreement in the medical community over whether or not this direction is desirable, the community in general has realized that having varying registration requirements for doctors across the country is not sensible, given that there are “at least 120 different registration categories in Canada.”⁸⁶ Accepting that there is a complex problem that needs to be addressed in this area is an important step in favour of moving toward compliance with chapter seven of the *AIT*.

Many foreign-trained doctors working in Canada have restrictions on their licences which limit mobility out of remote locations, at least for a prescribed period of time. International medical graduates account for 22% of physicians in Canada, and 53% “of new physicians starting practice in rural or remote areas.”⁸⁷ Dr. Bryan Ward, the President of the Federation of Medical Regulatory Authorities of Canada, argues that there are two severe consequences “if the federation cannot agree on common standards and unfettered mobility is actually permitted.”⁸⁸ First, Ward asserts that there will be an exodus out of these remote areas by doctors who were formerly bound to stay there, and second there would be “no systems to monitor their practice as there might have been in the jurisdiction where they registered.”⁸⁹ This worry seems unfounded. Article 706 of the *AIT* does allow placing conditions on a licence if a similar condition was already on it in the original jurisdiction. A jurisdiction is also able to refuse licensure if there is a condition on a person’s certification in another jurisdiction and no similar condition is available.⁹⁰

The medical community is considering a proposal to create “a set of criteria for one national ‘gold standard’ for full medical licensure for independent practice.”⁹¹ This proposal seems to be straying from the admmissive approach to labour mobility in favour of the passport approach. Pan-Canadian recognition of certification from all jurisdictions should be the goal, as opposed to raising minimum standards in order to achieve labour mobility. Jurisdictions must be able to trust each other’s minimum requirements to be sufficient to ensure the

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid* at 2-3.

⁸⁷ Ann Silversides, “Physician Mobility Remains a ‘Moving Target’” (2009) 181 Can Med Assoc J 191 at 191-192 (Lexis).

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *AIT*, *supra* note 5 at article 706.4(d).

⁹¹ *Silversides*, *supra* note 87.

safe delivery of services, even if a jurisdiction's requirements are different. There may still be a place for a "gold standard" type program however, if it works in a way akin to the Red Seal program. If interprovincial mobility is guaranteed subject to certain legitimate, posted exceptions to the *AIT*, then it may be reasonable to have an *optional* "gold standard" designation available that would allow a person to avoid those exceptions. Such a designation should be optional, and not be required for labour mobility generally.

Certificate-for-certificate recognition is complicated by a number of factors. One such complication is that there are many different certification categories across Canada, and they often differ from one jurisdiction to another. There has been consideration for "a national set of restrictions and conditions on full licensure," and a "national route for those licensed with restrictions and conditions to make the transition to a full license."⁹² These potential national sets of restrictions, conditions and routes to full licensure could substantially benefit physician mobility in Canada. There would be no need for licensure in one jurisdiction to be refused due to a restriction that is on a person's licence in another jurisdiction. An additional, and potentially advantageous, undertaking is to consider reconciling registration categories across jurisdictions. This would alleviate any issues arising with respect to scope of practice in a given category. High levels of cooperation are required in the case of physician mobility and, in order for compliance to be attained, the country's regulators will need to "trust one another."⁹³

Labour mobility across Canada for physicians has gained significant ground recently. The Federation of Medical Regulatory Authorities of Canada (FMRAC) is a body made up of all of Canada's jurisdictional medical regulatory authorities. Its mission is to "consider, develop and share positions and policies on matters of common concern and interest."⁹⁴ The FMRAC has developed an "Agreement on National Standards," which was most recently updated in February 2011.⁹⁵ This agreement is intended to facilitate interprovincial labour mobility among physicians by "set[ting] the tone and basis for the work to be done by FMRAC and its Members." Specifically, it relates to the "document[ation] and standardiz[ation], to the greatest extent possible, [of] the various practices used by the provincial and territorial medical regulatory authorities for registration and licensure."⁹⁶ Great care must be taken by these

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ "About Us", online: Federation of Medical Regulatory Authorities of Canada <<http://www.fmrac.ca>>.

⁹⁵ College of Physicians and Surgeons of Ontario, *FMRAC Agreement on National Standards*, online: College of Physicians and Surgeons of Ontario <http://www.cpso.on.ca/uploadedFiles/CTAs/Internal_CTAs/registration/FMRAC_Agreement.pdf>.

⁹⁶ *Ibid* at 1.

regulatory authorities when attempting to standardize registration and licensure procedures across Canada not to raise current minimum standards. Rather, common standards should be adopted only to a level that is necessary to ensure the safe and competent delivery of services to Canadians.

In addition to important developments with inter-jurisdictional cooperation, provincial legislatures have been working to establish *AIT* compliance. In Manitoba for example, the *Regulated Health Professions Act* specifies that “[i]n approving an application for registration, the registrar or the board of assessors ... must comply with the obligations under Chapter 7 (Labour Mobility) of the [*AIT*].”⁹⁷ It is also specified that all regulations made under the *Act* must comply with chapter seven.⁹⁸ The College of Physicians and Surgeons of Ontario states that applications for licensure by someone who is licensed in another Canadian jurisdiction (except Nunavut) “will be assessed under the labour mobility provisions in Ontario’s *Regulated Health Professions Act* relating to the *Agreement on Internal Trade*.”⁹⁹ “These *AIT*-related provisions enable application on the basis of holding a current Canadian out-of-province license ... however ... the usual credentialing requirements ... still apply.”¹⁰⁰ Ontario’s *Regulated Health Professions Act (RHA)* specifies that “[t]he *Ontario Labour Mobility Act, 2009*, except sections 21 to 24, does not apply to any College.”¹⁰¹ This effectively ousts the general legislation adopted by Ontario to conform to the *AIT*, but provisions within the *RHA* are present for the purpose of “support[ing] the Government of Ontario in fulfilling its obligations under Chapter Seven of the” *AIT*, and “to eliminate or reduce measures established or implemented by the College that restrict or impair the ability of an individual to obtain a certificate of registration when the individual holds an equivalent out-of-province certificate.”¹⁰²

These legislative provisions appear to be steps in the right direction, but they are very new amendments and their application in practice is what is important. There still appears to be significant hurdles to complete compliance with the *AIT*’s labour mobility provisions for physicians. This is particularly true with respect to those with restricted or provisional licences,¹⁰³ who are very often immigrants with foreign credentials. Despite recent encouraging steps, it is clear that continued work, funding and cooperation are required as the profession moves toward compliance.

⁹⁷ *The Regulated Health Professions Act*, SM 2009, c 15 s 32(3).

⁹⁸ *Ibid*, s 221(6).

⁹⁹ “General Information”, online: College of Physicians and Surgeons of Ontario <<http://www.cpso.on.ca>>.

¹⁰⁰ *Ibid*.

¹⁰¹ *Regulated Health Professions Act*, SO 1991, c 18 s 5.2.

¹⁰² *Ibid*, s 22.16.

¹⁰³ Physician Mobility, CBC, *supra* note 70.

C. The Interprovincial Standards Red Seal Program

The Red Seal Program was established in 1959,¹⁰⁴ long before the *AIT* was first signed in 1994. A tradesperson (an apprentice who has completed her training and received certification) can obtain a Red Seal endorsement on her certificate by passing a Red Seal exam. The Red Seal endorsement is placed on a person's provincial or territorial certificate, and is meant to ensure certification anywhere in Canada without further examination.¹⁰⁵

The Red Seal Program is industry-driven. There are more than 300 apprenticeship programs in various Canadian jurisdictions, and Red Seal endorsements are available for fifty-two trades.¹⁰⁶ About ninety percent of Canada's 300,000 registered apprentices work in one of these occupations.¹⁰⁷ The Canadian Council of Directors of Apprenticeship (CCDA) administers the program, and is continuously seeking expansion of the program into new areas.¹⁰⁸ Within the CCDA, the Interprovincial Standards and Examination Committee (ISEC) works out national standards for each trade on a case by case basis, and these standards are "regularly reviewed and adapted as required."¹⁰⁹ A Red Seal examination is designed to determine if a person meets these established "national standard[s] in a particular Red Seal trade."¹¹⁰

With the revised labour mobility chapter in the *AIT*, workers certified in one province must be certified in any other upon application, regardless of whether a person has a Red Seal endorsement, subject to exceptions.¹¹¹ It may initially seem that this diminishes the value of Red Seal, but advantages to obtaining a Red Seal endorsement remain. The *AIT* states that "each Party shall recognize any worker holding a jurisdictional certification bearing the Red Seal endorsement under the Interprovincial Standards Red Seal Program as qualified to practice the occupation identified in the certification."¹¹² In addition, although a Red Seal endorsement is not required for certification in a new jurisdiction, certification does not guarantee employment. The Red Seal endorsement signals that a person has met national standards as determined by industry,¹¹³ and may provide a person with an advantage in a competitive job market.

¹⁰⁴ Red Seal, *supra* note 40.

¹⁰⁵ *Ibid.*

¹⁰⁶ "About the Program", online: Red Seal <<http://www.red-seal.ca>> [About Red Seal].

¹⁰⁷ "The Interprovincial Standards Red Seal Program", online: Saskatchewan Apprenticeship and Trade Certification Commission <<http://www.saskapprenticeship.ca>> [Red Seal - SATCC].

¹⁰⁸ About Red Seal, *supra* note 106.

¹⁰⁹ Red Seal - SATCC, *supra* note 107.

¹¹⁰ "Interprovincial Red Seal Examinations", online: Red Seal <<http://www.red-seal.ca>>.

¹¹¹ *AIT*, *supra* note 5, c 7.

¹¹² *Ibid.*, article 706.

¹¹³ *About Red Seal*, *supra* note 106.

Although a Red Seal endorsement is not required for labour mobility, obtaining a Red Seal endorsement may allow one to avoid any exceptions to *AIT* labour mobility posted by a jurisdiction. This “passport approach” may be a desirable route for some workers, particularly if there is a relevant *AIT* exception posted that could be avoided, or a real possibility of one being posted. Because of the important role that the Red Seal Program continues to play, it should be ensured as much as possible that all Red Seal examinations are appropriate for both domestically and internationally educated and trained workers, so as to ensure that those holding credentials obtained abroad are afforded the same advantages as those trained in Canada.

VI. CONCLUSION

Efficient interprovincial labour mobility in Canada holds substantial benefits for both employees and employers across the country. When workers in a profession are able to pursue suitable work in any jurisdiction, there are more opportunities for workers and a larger talent pool for potential employers to choose from. This is a great advantage for Canadian businesses and Canadian workers, particularly those trained abroad who often have more difficulty finding appropriate employment.

The federal government should use the *AIT* as a model to reduce barriers to entry to the regulated professions. The agreement provides an existing framework with a proven record of success for lowering such barriers and improving inter-provincial mobility. Subsequent meetings involving Canadian agencies, including the self-regulating professions, have achieved significant progress in this regard. The *AIT* is well-suited to generate measures to reduce barriers to entry to the occupations for foreign workers as this is simply an extension of what it already does.

The right to pursue employment anywhere in the country is guaranteed, to a very limited extent, by the *Charter of Rights and Freedoms*, but this guarantee is subject to laws enacted by the provinces, and is silent regarding the recognition of certification from other Canadian jurisdictions.¹¹⁴ This essentially opens the door for governments to establish laws that hinder labour mobility within Canada. The *Agreement on Internal Trade* was developed by the federal government and all Canadian jurisdictions except Nunavut, and the labour mobility provisions within it attempt to facilitate full labour mobility across Canada, while allowing for reasonable exceptions to be created by provinces where appropriate.

¹¹⁴ See generally Peter W Hogg, *Constitutional Law*, loose-leaf (consulted on 3 November 2011), (Toronto: Carswell, 2010), ch 46 at 7 (“[w]hile Canadians are unrestricted by law...in their freedom to move to and take up residence in any province...the power “to pursue the gaining of a livelihood” is a different story”).

Some professions are still struggling to bring themselves into compliance with the *AIT*. The *AMPEC* agreement made in the engineering profession is an excellent model to use as a template for an agreement between occupational regulatory bodies that would establish *AIT* compliance. An agreement stating that certified workers in one jurisdiction will be certified in each other jurisdiction upon request is a simple and effective way to comply with the *AIT*. The notwithstanding clause in the *AMPEC* would have to be altered to be *AIT* compliant. This is simply because the clause in the agreement allows for “material additional training, experience, examinations or assessments” without an approved exception published on the *AIT* website. If the notwithstanding clause is altered to allow additional material requirements only where there is an approved exception created by a jurisdiction, the profession will be *AIT* compliant with a simple and effective agreement. Such an agreement is a desirable way for professions to achieve *AIT* compliance using the admissive approach, because of its uncomplicated nature and demonstrated effectiveness.