

IN THE MATTER OF a Panel Proceeding under Article 27 of the
New West Partnership Trade Agreement

BETWEEN:

DR. PATRICK LUM, a resident of British Columbia (Complainant)

- and -

THE GOVERNMENT OF ALBERTA (Responding Party)

- and -

THE GOVERNMENT OF BRITISH COLUMBIA (Intervenor)

Ruling Following a Request for Reconsideration

January 11, 2019

I. INTRODUCTION

The panel (this "Panel") pursuant to paragraph 27(15) of the New West Partnership Trade Agreement ("NWPTA") issued a Report in connection with NWPTA Dispute 2013-001, dated December 6, 2018 (the "Report").

In the Report, the Panel made the following finding with respect to costs:

While Dr. Lum has been unsuccessful in obtaining his desired relief on the issues which were the focus of the hearing and argument, there has been divided results. The Panel therefore finds that it is appropriate that each bear their own costs and the costs of the Panel process be allocated equally between Alberta and Dr. Lum.

II. REQUEST FOR RECONSIDERATION BY ALBERTA

Following receipt of the Report, the Province of Alberta ("Alberta") requested pursuant to paragraph 27(16) of the NWPTA that the Panel reconsider the Report on the issue of the costs award and to fix certain minor typographical errors. On the costs issue, Alberta has asked the Panel to direct that Dr. Lum pay the costs of the Panel and of Alberta.

III. RULING

Pursuant to paragraph 27(17) of the NWPTA, the Panel has considered the submissions of Alberta and Dr. Lum on these issues and makes the following ruling.

While it is true that Dr. Lum was unsuccessful in the primary relief he sought, in the view of the Panel, the hearing involved consideration of novel interpretation issues of the NWPTA, particularly regarding the relationship between paragraph 13(2) and Article 6. Alberta was unsuccessful in persuading the Panel to adopt its preferred interpretation, but given the lack of decisions on point, the Panel's consideration of them is of general public benefit.

The Panel is therefore of the view that there are reasonable circumstances in this case which justify departure from the general rule of costs. The Panel confirms its finding that it is appropriate that each bear their own costs and the costs of the Panel process be allocated equally between Alberta and Dr. Lum.

Regarding the typographical matters, the Panel hereby issues a revised version of the Report.

This ruling of the Panel is made the 11th Day of January, 2019.



Warren N. Sproule, Q.C.



For James D. Horsman, Q.C.



For David J. McKeague, Q.C.

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Report of the Panel

December 6, 2018
(Revised January 11, 2019)

I. REPORT

This is the report of the panel (this "Panel") pursuant to paragraph 27(15) of the New West Partnership Trade Agreement ("NWPTA") in connection with a request made by Dr. Patrick Lum, a resident of British Columbia ("BC"), that measures adopted by the Province of Alberta ("Alberta"), or by an agency for which the Province of Alberta was responsible, in connection with his attempted registration to practice dentistry in Alberta, were inconsistent with the NWPTA.

Dr. Lum seeks to overturn the decision of the Alberta Dental Association and College (the "Alberta College") to deny him registration to practice dentistry in Alberta.

In addition to Dr. Lum and Alberta, the Province of BC and the Province of Saskatchewan ("Saskatchewan") initially intervened in the proceedings. Saskatchewan withdrew in September 2018.

This report follows the oral hearing held on October 25, 2018.

II. FACTS

The relevant facts as found by this Panel are as follows:

- Dr. Lum graduated from the Dentistry program of the University of British Columbia in May, 1999. Shortly thereafter he applied to the College of Dental Surgeons of British Columbia (the "BC College") for registration.
- As part of the registration process with the BC College, Dr. Lum was required to satisfy an assessment of "good character" pursuant to the British Columbia *Health Professions Act*, RSBC 1996, c.183. At that time, he had no record of practice.
- At all relevant times, Dr. Lum was registered with the BC College as a dentist and was entitled to practice as such in BC.
- In September 2011, Dr. Lum applied to the Alberta College to be registered as a dentist in Alberta. As with BC, Alberta required that he provide evidence of good character in order to be registered.
- In the course of assessing Dr. Lum's application, the Alberta College requested and received information from the BC College in February 2012. Included in the information were summaries of 24 complaints that had been made against Dr. Lum in BC between August 11, 2001 and December 14, 2011.
- The complaints generally related to: quality of care, informed consent by patients, billing practices, record keeping, and handling of patients' medical charts.
- The majority of the complaints (two were still outstanding at the time) had been resolved without any formal disciplinary proceedings, but Dr. Lum did sign a Memorandum of

Understanding with the BC College, wherein he in effect acknowledged failings in his practices and promised in future to comply with various professional obligations in issue.

- In March 2012, following consideration of Dr. Lum's complaints history, the Registrar of the Alberta College concluded that Dr. Lum had not provided "satisfactory evidence of good character and reputation" as required by s. 28(1)(e) of the *Health Professions Act*, RSA 2000 c. H-7 ("Alberta HPA") and denied his application for registration (the "Decision").

III. FURTHER PROCEEDINGS

Dr. Lum did not accept the Decision and chose to exercise certain review and appeal rights available to him under Alberta law:

- On April 25, 2012, Dr. Lum filed a request for review of the Decision pursuant to the process set out in the Alberta HPA.
- The request was to the Review Panel of the Council of the Alberta Dental Association and College ("Review Panel") which issued its decision on July 30, 2012. The Review Panel dismissed Dr. Lum's application for review and confirmed the decision of the Registrar.
- Dr. Lum then requested that the governments of BC and Alberta engage in consultations pursuant to the Trade, Investment and Labour Mobility Agreement between British Columbia and Alberta ("TILMA"), the predecessor of NWPTA, in August 2012. In September 2012, Dr. Lum agreed to proceed under the NWPTA between BC, Alberta, Saskatchewan and (later) the Province of Manitoba (the "Parties") instead. Consultations occurred but did not result in a resolution to the dispute.
- In addition, subsequent to the decision of the Review Panel, Dr. Lum applied to the Alberta Court of Queen's Bench for judicial review of the decision of the Review Panel.
- This Panel was initially convened in 2013 and, in a preliminary decision dated April 19, 2013, it determined that it had jurisdiction to hear the dispute, but the proceedings before this Panel were put in abeyance, while the judicial review proceeded.
- On January 7, 2015, the Alberta Court of Queen's Bench dismissed Dr. Lum's application finding, *inter alia*:

[165] Dr. Lum has failed to satisfy me that the Review Panel erred in its selection of the reasonableness standard of review in its review of the Registrar's decision to deny Dr. Lum's registration application. The Review Panel's decision on this point is reviewed on the correctness standard by the court. I conclude that the Review Panel was correct in using the reasonableness standard.

[169] Dr. Lum's submission that the Review Panel was unreasonable by failing to properly reweigh the evidence submitted by Dr. Lum as to his character and reputation is without merit. Re-weighing

evidence is not the role of a review body when their review is based on giving deference to the decision-maker below. Nor is it open to the court on judicial review to reweigh the evidence before the bodies being reviewed.

[170] With respect to the issues Dr. Lum raised about the role of TILMA in Dr. Lum's application, I determined that those issues were to be reviewed on the correctness standard. I found no error in the Review Panel's treatment of TILMA and the obligations of the Registrar to make an individual inquiry into Dr. Lum's character and reputation notwithstanding that he is a dentist in good standing in British Columbia.

- Dr. Lum appealed the decision. On May 13, 2016, the Alberta Court of Appeal dismissed Dr. Lum's appeal. The Alberta Court of Appeal specifically declined to address arguments under NWPTA, finding *inter alia*, that disputes under NWPTA must be resolved under the procedure provided by NWPTA.
- Dr. Lum has now returned to this Panel and seeks again to overturn the Decision, now solely under the provisions of NWPTA.

IV. PRELIMINARY APPLICATION FOR EXCLUSION OF EVIDENCE

Counsel for Dr. Lum raised several preliminary objections concerning evidence that Alberta sought to put before the Panel:

- (a) Dr. Lum objected to Alberta's summary of complaints at Tab 1 of its Book of Documents being considered as a document (the documents setting out the complaints and their disposition speak for themselves) but they were content to have the summary considered as part of Alberta's submission. In the view of the Panel nothing turns on this distinction.
- (b) Any documents prepared or printed after the date of the Decision, which consist of:
 - (i) A letter from the Alberta College which indicates 112 applicants previously registered in other provinces party to the NWPTA have been granted registration by the Alberta College during the previous 5 year period, with only three having been rejected on the basis of character.
 - (ii) Copies of "FAQs" posted to the NWPTA website.
 - (iii) Code of Ethics for the BC College.

The main submission advanced by Dr. Lum was that the Panel proceedings were akin to proceedings for judicial review and that the same evidentiary rules should therefore apply.

The Panel accepted Alberta's submission on this point, that the proceedings before the Panel under the NWPTA are to determine "whether the measure at issue is or would be inconsistent with the NWPTA" and that such proceedings are not "akin to" or a species of judicial review. The Panel has discretion to admit the evidence under paragraph 34(4) of the NWPTA, which it chose to do.

While the Panel chose to permit introduction of the documents in question by Alberta, it should be noted that none of the evidence in issue was considered by the Panel to be necessary to its decision.

The Panel did not find it necessary to rely on the web pages printed from the website of NWPTA and the evidence as to the results of applications by other dentists applying to register in Alberta is most relevant to the question of whether the Decision was a disguised restriction under Article 6, which was not materially in issue.

V. ISSUES

The Panel has framed the issues before it as follows:

1. What is the "measure" within the meaning of the NWPTA?
2. Is the measure inconsistent with Articles 3, 6 and 13 of NWPTA which involves consideration *inter alia* of the following subsidiary matters:
 - (a) Is the requirement that a dentist be of good character a "qualification" within the meaning of the NWPTA?
 - (b) Was there a reverse onus on the Alberta College and, if so, what is its effect?
 - (c) In what circumstances is a party to the NWPTA permitted to impose requirements in addition to those related to qualifications?
3. If the measure is inconsistent, is Dr. Lum therefore entitled, as relief, to be registered as a dentist with the Alberta College?

What is the "measure"?

The definition of "measure" under Part VI of the NWPTA reads as follows:

measure includes any legislation, regulation, standard, directive, requirement, guideline, program, policy, administrative practice or other procedure;

One could observe that it is doubtful that a single administrative decision, such as what is in issue in this case, falls within any of the specific examples set out in the above definition. Although the Panel raised the issue of whether a single administrative decision by a "government entity" should be considered to be a "measure", both Alberta and BC indicated that they accepted that the Decision by the Alberta College was a "measure". The Panel therefore proceeded with its deliberations on the basis that it was, recognizing that the definition is an inclusive one and can include other actions in addition to those specifically set out.

The Panel notes in passing that another way to characterize the dispute would be to consider the requirement imposed by Alberta for an additional character assessment (i.e. in addition to the one done by BC in 2001) to be a measure. Certain of the submissions made by the participants are more easily understood if it is characterized thusly, but the Decision is simply one instance of the exercise of the character requirement and, in the end, on the reasoning of this Panel, whether one characterizes the measure as the Decision or as the character requirement itself makes little difference to the outcome.

The Social Worker Decision

Before considering the issues, it is important to recognize that essentially the same issues before this Panel have already been considered, on very analogous facts, in the previous report of a dispute resolution panel, dated September 28, 2012 entitled the "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" ("Social Worker Decision"). This decision involved interpretation of provision of TILMA but the wording of the provisions in question are very similar to the applicable wording under NWPTA.

The general findings of the panel in the Social Worker Decision are well summarized in the decision of the Alberta Court of Appeal as follows:

The panel who wrote the Article 27 Report concluded that an "individual assessment to determine evidence of good character and reputation" was not inconsistent with TILMA [now NWPTA] but denying registration based on character to an applicant already registered in the other jurisdiction "should only be used in exceptional circumstances". The incoming jurisdiction "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": p 11 (emphasis in original).

In effect, that panel found that there should be a "reverse onus" in the case of character assessments to prevent them being used by a Party as a restriction on trade.

In particular, the panel in the Social Worker Decision found that because the "measure" was consistent with Article 13, it was not inconsistent with Article 3, relying on the wording of Article 10 which gave priority to Article 13 in the event of any inconsistency. They found because "the Measure is consistent with Article 13, it follows that it is not inconsistent with Article 3."

There was a dissenting opinion in the Social Worker Decision, which expressed the view that it "defies logic that Article 13 can be interpreted to narrow the goals of the AIT, TILMA and NWPTA".

Dr. Lum sought to distinguish the Social Worker Decision on the basis that subsequent amendments to the NWPTA have in effect over-ruled it. While this Panel is not persuaded by these arguments, it also does not consider itself bound to follow the Social Worker Decision.

Interpretation of the NWPTA

As a preliminary point, the Panel observes that it was common ground amongst the participants that pursuant to Article 2(1) of NWPTA, Alberta is responsible for the Alberta College's compliance with NWPTA because the Alberta College is a "government entity", as defined by Part VI of NWPTA, that has the delegated authority, pursuant to the Alberta HPA, to govern dentists in Alberta.

The starting point for the Panel's analysis is Article 3, which reads:

Article 3: No Obstacles

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

The Decision, being a measure, would certainly have restricted the mobility of Dr. Lum, although it is hard to see how it could be characterized as a restriction on labour mobility generally.

But not all restrictions on trade and labour mobility are prohibited by the NWPTA. Article 6 provides:

Article 6: Legitimate Objectives

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

- (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.

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

3. No Party shall prohibit or restrict an investment or the import of any good or service from any other Party or the export of any good or service to any other Party for a legitimate objective unless the prohibition or restriction on investment or the import of the like good or service from all Parties and non-Parties or the export of the like good or services to all Parties and non-Parties is similarly prohibited or restricted.

The definition of "legitimate objective" under the NWPTA is:

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

- (a) public security and safety;
- (b) public order;
- (c) protection of human, animal or plant life or health;
- (d) protection of the environment;
- (e) conservation and prevention of waste of non-renewable or exhaustible resources;
- (f) consumer protection;
- (g) protection of the health, safety and well-being of workers;
- (h) provision of social services and health services within the territory of a Party;
- (i) affirmative action programs for disadvantaged groups; or
- U) prevention or relief of critical shortages of goods essential to a Party

considering, among other things, where appropriate, fundamental climatic or other geographical factors, technological or infrastructural factors, or scientific justification;

"Legitimate objective" does not include protection or favouring of the production of an enterprise of a Party;

It is important to observe that Article 6 is part of the general provisions contained in Part II(B) and, on a plain reading, unless other Articles of the NWPTA provide otherwise, any restrictions imposed on trade or labour mobility must meet the tests set out in Article 6.

This is relevant because Alberta and BC both submitted, albeit in differing manners, that the provisions of Article 13 in effect permit them to impose restrictions that do not comply with Article 6. In this, they were following the reasoning adopted in the Social Worker Decision.

Reference must therefore be made to the NWPTA Article 13 on Labour Mobility. Article 13 is contained in Part II(C) which contains a number of more specific provisions concerning particular trade and mobility issues. The relationship of the provisions in Part II(C) to the general provisions in Part II(B) is dealt with in Article 10 which is the opening paragraph of Part II(C). It reads:

Article 10: Purpose

1. The special provisions in this Part II(C) augment and further elaborate upon the general rules in Part II(B).
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. (emphasis ours)

Article 10 makes it clear that Part II(C) does not stand alone and must be read in conjunction with the general provisions and that Article 6 has a special status amongst the other general provisions.

We turn now to Article 13, which reads:

Article 13: Labour Mobility

1. 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 Parties.
2. Requirements imposed on workers to obtain a license, certification, 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, education, experience or examinations are required as part of that registration procedure and registrations are processed on a timely basis.
3. For greater certainty, and without limiting the general application of Part II(B) to such measures, a regulatory authority of a Party may refuse to certify or recognize a worker, or may impose conditions or restrictions on a worker, provided that the refusal or imposition of conditions or restrictions complies with Article 6.

Dr. Lum's Position

The primary position submission of Dr. Lum may be summarized as:

Under the NWPTA, because BC had determined that Dr. Lum was of proper character when he registered in 2001, it was not open to the Alberta College to find that he was not of proper character when he applied to it in 2011, solely on the basis of his record of complaints in BC and, in particular, "... paragraphs 13(1) and 13(2) of NWPTA must be interpreted as creating a presumption that a worker registered by one Party is *prima facie* entitled to registration by another Party."

In the alternative, Dr. Lum submitted that paragraph 13(3) requires that any measure adopted must satisfy the tests in Article 6 and the Decision does not meet those tests.

BC's Position

BC agreed with Dr. Lum in the applicability of paragraph 13(3) and takes no position on whether the measure complies with Article 6. BC differs from Dr. Lum in limiting the scope of review

under Article 6 to what they term "substantive restrictions". The following are key excerpts from BC's submission:

26. While broadly worded and generally intended to have broad application, British Columbia submits that Article 13(3) was not intended to apply to all regulatory refusals. Rather, Article 13(3) must be carefully interpreted and is best understood as applying in situations where a worker's application has been refused or additional requirements or conditions imposed after an application has been substantively considered on its merits. (Thus, in Dr. Lum's situation, his application appears to have been substantively considered by the College of its merits, and was refused. Therefore, Article 13(3) applies and that refusal must be evaluated against the requirements of Article 6.)

27. However, if a worker's application is refused because the worker did not pay the applicable fee or the application as submitted was in some other respect deficient or incomplete, such a refusal will not be based on a substantive consideration of the application on its merits. In such a situation there has been no violation NWPTA Article 13(1) (because the refusal has not been based on the worker's qualifications) and there has been no breach of Article 13(2) (because that Article contemplates the imposition of requirements other than those related to qualifications). Consequently, Article 13(3) would not apply and the regulator's refusal would not need to be justified under Article 6.

28. British Columbia submits that the distinction between refusals based on substantive consideration of an application on its merits and refusals due to matters such as a failure to pay application fees or submitting an incomplete application, though subtle, is important for the proper functioning and administration of NWPTA's labour mobility provisions.

29. British Columbia is concerned that accepting the general interpretation of Article 13 advanced in Dr. Lum's submission -that of a prima facie entitlement to registration - could suggest that some routine administrative requirements will be open to contention by virtue of application of the legitimate objectives test in Article 6 to all regulatory decisions and is not consistent with the Parties' intentions.

30. This is not to say that such administrative requirements would completely free from any disciplines whatsoever. To the contrary, as submitted above, the additional disciplines found in paragraphs (h) and (i) of AIT Article 706(3) are incorporated into NWPTA and would apply to any refusal by a regulatory authority based on a failure to meet administrative requirements.

Alberta, in contrast, submitted that the analysis in this case ends with paragraph 13(2). To quote from their submission:

104. As such, it would be entirely inconsistent with Article 6's purpose to mandate that measures permitted under paragraphs 13(1) and 13(2) be subject to Article 6's requirements.

105. On the plain language used by the Parties, paragraph 13(3) was meant to be construed in light of the two clauses that precede it. The use of the term "For greater certainty" at the outset indicates an intention that paragraph 13(3) is to build upon, and not tear down, the provisions of paragraph 13(1) and 13(2). When read in light of these immediately preceding paragraphs, paragraph 13(3) is best interpreted to mean that the legitimate objectives test only need be met when a Party has refused to certify or recognize a worker in violation of paragraph 13(1) or 13(2).

106. This interpretation allows for both paragraph 13(3) and paragraph 13(2) to be meaningful-paragraph 13(2) can still apply to allow registration requirements such as proof of good character to be imposed, and paragraph 13(3) serves the role of directing satisfaction of the legitimate

objectives test when a Party has breached paragraph 13(1) by having imposed a requirement not permitted by paragraph 13(2).

Or to put it more simply:

- The requirement for character assessment (and therefore the Decision) is permitted under paragraph 13(2); and
- A requirement permitted under paragraph 13(2) does not need to comply with Article 6.

In the alternative, Alberta submitted that the tests under Article 6 can be met.

Acknowledging the able submission advanced by counsel for Alberta, in the view of the Panel, the primary submission of Alberta requires strained interpretations of the provisions of the NWPTA and the more reasonable and logical interpretation is:

- Paragraph 13(1) requires Parties to recognize the qualifications of workers certified by the other Parties. In this respect, it is best viewed as an expansion of the general mobility rights under Part II(B) of the NWPTA and, at worst, a clarification of what the general provisions provide.
- It would be very odd if such a provision ended up limiting worker rights under the general provisions, yet that is what Alberta, and to a lesser extent BC, submit in effect. The Panel recognizes that the majority of the panel in Social Worker Decision came to the same conclusion. With all respect to the majority in that case, the Panel prefers the reasoning of the dissenter on this point.
- In the absence of paragraph 13(2) a worker could argue that any additional requirements, such as licensing, are prohibited by paragraph 13(1) whether or not they comply with Article 6.
- Paragraph 13(2) eliminates this argument but it does so in a quite specific way by **deeming** any such additional restrictions to be consistent with paragraph 13(1). Now deeming is a legal fiction, wherein a thing is considered to be something else, whether or not it otherwise is. So in cases where other restrictions adopted by a Party would otherwise be found to be "not accepting qualifications" as required by paragraph 13(1), then such restrictions are deemed to be consistent. That is all paragraph 13(2) does.
- Alberta would have us read paragraph 13(2) as authorizing the imposition by the Parties of additional restrictions. It could easily have been drafted to do so. But it was not. Paragraph 13(2) speaks only to the question of compliance with paragraph 13(1) by a Party.
- Put another way, the Alberta submission is to the effect that paragraph 13(2) should be read as if it contained the phrase: "Notwithstanding Article 6, a Party may impose restrictions...". In light of the wording of Article 6 and Article 10, this Panel sees no room to imply that it should be read in that way.

- Paragraph 13(3) qualifies paragraph 13(2) by clarifying that refusals of certification and imposition of additional conditions or restrictions are permissible *provided they comply with Article 6*. It is trite to observe that draftspersons use the phrase "for greater certainty", when they did not think they are setting out a new provision, and wished to clarify what they considered to already be there.
- In the view of the Panel it is not necessary to "go through" paragraph 13(3) in order to "get to" Article 6. As we have indicated, paragraph 13(3) operates only "for greater certainty". Article 6 is what authorises the imposition of (compliant) restrictions, not 13(2). Article 6 is a general provision. There is no conflict between paragraph 13(1) and Article 6. There is no conflict between Article 3 and paragraph 13(1) -- which appears to be intended as expansion of the general mobility rights. Paragraph 13(2) operates to limit such expansion of paragraph 13(1), but that would not put it in conflict with either Article 3 or Article 6.
- This Panel chooses not to follow the finding of the majority in the Social Worker Decision that restrictions "compliant with Article 13" do not need to comply with Article 6.
- We note in passing that there are limits on the additional requirements that can be deemed compliant under paragraph 13(2):
 - no material additional training, education, experience or examinations can be required; and
 - registrations are to be processed on a timely basis
- While this is not an issue before this Panel, we do note that by excluding these specific matters from the deeming provision of paragraph 13(2), any Party imposing such excluded requirements would run the risk of being found to be failing to "accept qualifications" under paragraph 13(1). The issue of whether any such restrictions can still be "saved" by compliance with Article 6 is not an issue before this Panel.
- Even if there was found to be a conflict between Article 6 and Article 13, (that paragraph 13(2) permitted restrictions that Article 6 prohibited) then the words "except for Article 6" which appear in Article 10 and the specific wording of Article 6 itself must be given meaning. Article 6 should still prevail.
- The wording in paragraph 13(3) is useful and entirely consistent if one reads it as simply clarifying this issue under paragraph 13(2).

In the view of the Panel, the interpretation advanced by Alberta, namely, that paragraph 13(2) permits restrictions that do not need to comply with Article 6, must fail.

For the same reasoning, the position advanced by BC, although of lesser impact, must also fail on this point. Counsel for BC made a strong submission that there should be a distinction between substantive and administrative requirements and only the former should be subject to the tests under Article 6. But "should" is not "is". Any such distinction would have to be implied, as there is virtually no support for such interpretation to be found in the current wording of Articles 6 or 13.

Nor do we agree that requiring all restrictions on trade and mobility to be measured or tested under Article 6 is calamitous. While we do not have to decide the fate of the examples advanced by BC,

it is not obvious to us that all requirements will necessarily be found to be a "restriction to trade, investment or labour mobility" and/or inconsistent with Articles 3, 4 or 5. For example, a certain level of administrative fees seems clearly to be permitted under paragraph 4(2).

We also note, in the view of this Panel, requiring all restrictions to be tested under Article 6 eliminates the rationale for finding there is a "reverse onus", and we have not relied on this concept in reaching our conclusions.

What are "qualifications"?

No definition of this term appears in the NWPTA.

There was discussion in the oral hearing about the distinction between qualifications (which have to be accepted as is) and other requirements imposed. The participants appeared to largely accept the position that qualifications included the "training, education, experience or examinations" described in the exclusion to paragraph 13(2) but that other requirements were largely not qualifications. The distinction is relevant on the presumption that while a Party cannot question qualifications it can impose other requirements and, in the context of this case, a requirement to be of good character is not a qualification.

While the Panel understands the submissions, on our reasoning, if the requirement to be of good character is not a qualification it still must satisfy Article 6.

For this Panel all roads seem to lead back to Article 6.

In short, the Panel does not need to decide the issue regarding the meaning or relevance of qualifications versus other restrictions in the context of this case.

Article 6

The Panel now turns to Article 6. That Article 6 is the pre-eminent provision is clear. By its terms, it is an exclusion from the operation of Articles 3, 4 or 5 or Part II(C), which contains Article 13. Article 10 makes its pre-eminence even clearer.

Under Article 6 there are three tests, all of which must be met in order for a restriction on labour mobility to be consistent with the NWPTA:

- (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.

The Panel will consider each of these tests, albeit not in order.

Legitimate Objectives

No attempt was made by Dr. Lum to argue that a character requirement generally for licensing was not a legitimate objective. It is clear to the Panel that a character requirement can be considered as consumer protection, or alternatively protection of the human health in the context of this hearing. The Decision itself is a subset or an operation of this requirement and therefore also not open to challenge on this basis.

Disguised Restriction

Again, no attempt was made by Dr. Lum to argue that the Decision or the character requirement itself is a disguised restriction to trade, investment or labour mobility. Given that the same requirement applies to Alberta based applicants, it would have been hard to do so.

The Panel notes in passing that if there had been a true dispute on this issue then the additional evidence of Alberta as to the admissions from other jurisdictions would have been considered relevant.

No more restrictive than necessary

The final issue considered by this Panel is whether the Decision is "not more restrictive to trade, investment or labour mobility than necessary to achieve that legitimate objective".

On a first point: the primary position advanced by Dr. Lum was that, because BC allows him to continue to practice, *prima facie* Alberta should permit registration unless there is sufficient additional evidence available to BC.

We note that paragraph 6(2) of NWPTA reads:

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

In short, there is no guarantee that decisions will be the same under NWPTA. There may be some guarantees of equal treatment, but there is certainly no right to have the same decision made in all jurisdictions.

Furthermore, if one accepts that the specific Decision is a measure, then logic leads one to ask if there was a less restrictive way to achieve the legitimate objective in the context of this case.

Dr. Lum submitted that the Alberta College could have imposed restrictions or conditions on his practice instead of denying him the right to practice in Alberta altogether.

It appears that Dr. Lum made a submission point before the Review Panel:

From the submission of Alberta:

It is notable that during the proceedings before the [Alberta College}, Dr. Lum suggested that a less restrictive means had been available to address the [Alberta College}'s entirely valid concerns posed by Dr. Lum's complaints history. It was argued that Dr. Lum be granted registration with a condition that he maintain his entitlement to practice in BC and continue to meet the requirements of the BC College.

The Review Panel considered and declined this option.

Alberta makes the point, which is accepted by this Panel, that when it comes to matters of public health, a dispute resolution panel under NWPTA should have very clear evidence that any less restrictive alternatives would have met the legitimate objective before finding inconsistency.

There is no basis in the record before us for this Panel to conclude that there were conditions or restrictions that could have been put in place that would have mitigated the risk to the Alberta public health perceived by the Review Panel.

Their decision has been found to have been made on reasonable grounds by three appellate bodies.

We decline to find the Decision was inconsistent with Article 6.

VI. JURISDICTION OF THE PANEL

15. The panel shall, within 45 days of the oral hearing, issue a report to the participants that contains:

- (a) findings of fact;
- (b) rulings on any applicable interpretations and whether the measure at issue is or would be inconsistent with this Agreement;
- (c) any findings as to the possible economic effect of the measure;
- (d) recommendations, if any, to resolve the dispute;
- (e) specification 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; and
- (f) determination as to the amount and apportionment of costs as provided for under Article 32.

The Panel does not have power to directly overturn the decision of the Alberta College which is the primary relief sought by Dr. Lum. At most, it could find the "measure" (i.e. the decision to deny registration) was inconsistent with the NWPTA and make recommendations to resolve the dispute. If it had found in his favour, the most likely end result would be a new application for registration by Dr. Lum and a fresh consideration of the issues. To the knowledge of the Panel, there is nothing preventing Dr. Lum from applying to the Alberta College again, whatever the decision of the Panel.

VII. DECISION

Rulings and Findings of Fact

The Panel finds:

1. Although there was no real dispute amongst the parties as to the actual events leading to the dispute, to the extent the Panel is required to make such findings of fact as part of its report, it finds the facts as set out above under the heading "Facts".
2. The measure, whether considered as the Decision or as the character requirement generally, is restrictive of mobility and must satisfy the tests under Article 6, either directly or, in the alternative, through operation of paragraph 13(3).
3. In respect of Article 6:
 - (a) the purpose of the measure is to achieve a legitimate objective: namely consumer protection and protection of public health;
 - (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;

and the Decision is therefore permissible and sustained under Article 6.

Economic Effect of the Measure

No evidence was presented by any of the parties as to magnitude of the economic effect of the measure and the Panel makes no finding as to the economic effect other than the observation that denial of registration would have had some financial impact on Dr. Lum.

Recommendations, if any, to Resolve the Dispute

As the "dispute" is resolved by the above rulings, there is no basis for the Panel to make formal recommendations to resolve the dispute.

While not making any formal recommendations within the ambit of paragraph 15(d), the Panel does wish to make the following observations which hopefully may be of benefit to the parties:

The Parties to the NWPTA may wish to clarify:

- (a) the extent to which they intend to include individual administrative decisions to be within the scope of review under the NWPTA. If the intention was that "measures" are to include individual administrative decisions, the position urged by BC has merit.
- (b) Whether there is a "reverse onus" applicable to any requirements.

Costs

While Dr. Lum has been unsuccessful in obtaining his desired relief, on the issues which were the focus of the hearing and argument, there have been divided results. The Panel therefore finds that it is appropriate that each bear their own costs and the costs of the Panel process be allocated equally between Alberta and Dr. Lum.

Original dated the 6th Day of December, 2018, revised January 11, 2019.

**List of Attendees, Representatives and Legal Counsel
At Dispute 2013-001 Dispute Hearing**

W Sproule	Chairperson
D McKeague	Panel Member
J Horsman	Panel Member
A Tremblay	Counsel for Dr. Lum
K Dickson -Smith	Counsel for Alberta
C Zelyas	Counsel for Alberta
J Thomas	Counsel for British Columbia
D Collisson	NWPTA Administrator
N Mackay	Court Reporter

Attendees:

Jessica Kind	Articling Student, Field LLP
Jolanta Slaska	Director, Labour, Alberta
Katherine Roy	Saskatchewan Ministry of Justice
Nancy Carlson	Senior Trade Policy Analyst, Saskatchewan
Emily Collins	Trade Policy Officer, Alberta
Lorraine Andras	Internal Trade Representative, Alberta
Richard Skelton	Senior Trade Policy Officer, Alberta