

Agreement on Internal Trade

**Report of the Article 1716 Panel Concerning the Dispute Between
the Certified General Accountants Association of Manitoba
and Ontario Regarding the *Public Accountancy Act*
(*R.S.O., 1990, Chapter P-37*) and Regulations**

October 5, 2001

ISBN 1-894055-32-2

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1. INTRODUCTION

The subject of this report is a dispute brought forward by the Certified General Accountant's Association of Manitoba (CGA Manitoba) under the *Agreement on Internal Trade (Agreement)* regarding the Ontario's *Public Accountancy Act (PAA)* and Regulations and the manner in which they are administered.

A dispute resolution Panel was duly established under the provisions of the *Agreement* to review the dispute.

Under the terms of the *Agreement*, the terms of reference for a Panel are to examine whether the actual measure at issue is inconsistent with the *Agreement*.

The *Agreement* allows for private parties to initiate dispute resolution proceedings to resolve a complaint against a government. This is the first time that a Panel has been established to review a dispute between a private party and a government and the first time that a Panel will review a dispute under the Labour Mobility Chapter of the *Agreement*.

CGA Manitoba alleges that the *PAA* and Regulations and the manner in which they are administered have the effect of restricting labour mobility in a manner that is not consistent with the *Agreement*.

The purpose of the Labour Mobility Chapter (Chapter 7) of the *Agreement* is "... to enable any worker qualified for an occupation in the territory of a Party to be granted access to employment opportunities in that occupation in the territory of any other Party..."

The regulation of public accounting is a provincial responsibility. In Ontario, the practice of public accounting is regulated by the *Public Accountancy Act (PAA)*. The Public Accounting Council for the Province of Ontario (PACO) established under the *PAA* is responsible for administering the provisions of the *Act*.

As provided in Article 1718.2 of the *Agreement* the Panel report "shall contain:

- (a) findings of fact;
- (b) a determination, with reasons, as to whether the actual measure in question is inconsistent with this Agreement;
- (c) a determination, with reasons, as to whether the actual measure has impaired internal trade and has caused injury; and
- (d) recommendations, if requested by either the person or the Party complained against, to assist in resolving the dispute."

2. THE COMPLAINT

The Certified General Accountants Association of Manitoba (Complainant) alleges that the Province of Ontario's *Public Accountancy Act* (R.S.O.,1990, Chapter P-37) and Regulations and the manner in which they are administered by PACO are inconsistent with the labour mobility provisions of the *Agreement*, particularly with Article 707 (Licensing, Certification and Registration of Workers).

Specifically, Complainant alleges that the *PAA* and Regulations effectively limit the right to practice public accounting to Chartered Accountants (CAs). As a result Certified General Accountants (CGAs) who practice public accounting in Manitoba cannot be licensed to provide these services to clients in Ontario.

Complainant argues that Ontario's public accounting licensing measures are inconsistent with the *Agreement* in that they do not relate principally to competence as required by Article 707. Complainant also alleges that the occupational standards for public accounting in Ontario are not readily available and, because the only accepted training and experience are those of a CA, non-CA applicants for licensing have no way of determining their deficiencies, if any, in training and/or experience and how those deficiencies can be remedied.

Complainant asked the Panel to find that:

- “Public accounting “is an occupation and Ontario has an obligation to ensure that qualified workers who are competent to perform this occupation in other jurisdictions are entitled to practice public accounting in Ontario;
- Ontario's current measures are neither in law nor application consistent with Article 707.1 of the *Agreement* because:
 - they do not relate principally to the competence of applicants to perform public accounting and are not assessed according to standards specifically relating to public accounting;
 - there are no accessible and transparent licensing or qualification standards available for people to know what skills are required to perform the occupation of public accounting and how competence to perform these skills will be measured;
 - the measures do not ensure a timely or reasonable process for applicants who wish to practice public accounting in Ontario.
- Ontario is obliged, pursuant to Article 703 of the *Agreement*, to ensure that PACO adopts measures and acts in compliance with Ontario's obligations pursuant to Article 707.1;
- Ontario's measures are not necessary, or in the alternative, not the least trade restrictive possible.

Complainant requested the Panel recommend the following remedies:

- Ontario’s statutory regime must be modified so that the certification of CA or CGA will be treated as a valid proxy to be qualified to practice public accounting in Ontario;
- In the event that Ontario can identify competencies related to licensed public accounting which CGAs do not acquire through their education and training, these must be made explicit and published or otherwise made readily accessible;
- PACO must be restructured and composed of equal numbers of CAs and CGAs (and any other group which Ontario determines legitimately offers a course of training which ensures that their members are qualified to practice public accounting). The role of PACO should be limited to verifying certification as a member of a professional group (such as CAs or CGAs) whose training ensures competence as a public accountant and consideration in limited cases of “special circumstances” where a person might have acquired the relevant skills without following the training offered by a recognized professional group;
- Legislative change to bring Ontario’s measures into conformity with the *Agreement* could include establishing CGA Ontario as a “qualifying body” with authority to determine whether applicants have the competence to practice public accounting in Ontario;
- There must be no limits or conditions attached to a license related to an individual’s professional affiliation or residence;
- Someone given permission to practice public accounting should not be required to associate with a professional accounting body other than his or her own as a condition of that permission being granted;
- The Panel should provide a time frame within which Ontario must bring its measures into conformity with the *Agreement*. Additionally, the Panel should provide a date by which it will conduct a review of the way Ontario has implemented the Panel’s recommendations.

3. THE RESPONSE

Ontario (Respondent) maintains that the *Agreement* does not apply to public accounting because:

- public accounting is a financial service and therefore excluded from the *Agreement* under Article 1806 (Financial Sector);
- public accounting is not an “occupation” within the meaning of Chapter 7 and therefore Article 707 does not apply.

Respondent also argues that the complaint was not filed within two years after the date on which the Manitoba CGAs acquired or should have acquired knowledge of the alleged inconsistent measure as provided under paragraph 4 of Article 1712 (Initiation of Procedures by Persons).

Respondent maintains that the *PAA* and Regulations and the manner in which they are administered are consistent with the *Agreement* and do not violate Article 707 in that the licensing measures are transparent and based principally on competence.

Finally, Respondent argues that, if the Panel finds Ontario's public accounting measures to be inconsistent with the *Agreement*, that those measures are justified as a Legitimate Objective under Article 709.

Therefore, Respondent asked the Panel to find that:

- The *Agreement* does not apply to public accounting, as public accounting is a financial service and therefore exempt, and/or public accounting is not an occupation within the meaning of the *Agreement*;
- Alternatively, Complainant has failed to establish non-compliance with the *Agreement*;
- In the alternative, Ontario's public accounting regime is justified on the basis of legitimate objectives properly protected by Article 709 of the *Agreement*;
- The complaint is time-barred pursuant to Article 1712 of the *Agreement* and not properly before the Panel;
- Complainant has failed to establish any objective and credible basis upon which the Panel could recommend that CGA Ontario become a second qualifying body for public accounting;
- The *Agreement* does not authorize a Panel to "bring forward" a matter at a future date as requested by Complainant.

4. COMPLAINT PROCESS

In accordance with Article 711 (Consultations) of Chapter 7, Complainant requested, by letter dated December 16, 1999, that the Province of Manitoba undertake consultations with Respondent on the issue in question. By letter dated January 19, 2000, Manitoba formally requested consultations with Respondent on behalf of Complainant.

Consultations between Manitoba and Respondent took place over the next few months through meetings and exchanges of correspondence but failed to resolve the issue. In accordance with Article 711.5, by letter dated April 18, 2000, Manitoba requested the assistance of the Forum of Labour Market Ministers (FLMM) in resolving the complaint. In a letter dated June 16, 2000 the FLMM agreed to provide assistance. A subsequent letter dated September 20, 2000 confirmed that FLMM assistance had been provided.

The assistance of FLMM did not resolve the complaint. In accordance with Article 1711 in a letter dated December 11, 2000 Complainant asked Manitoba to initiate a dispute with Respondent under Chapter 17 (Dispute Resolution Procedures) of the *Agreement*. In a letter dated January 3, 2001 Manitoba declined Complainant's request to initiate a Chapter 17 dispute process but acknowledged Complainant's right under Article 1712 to initiate a Person-to-Government dispute under the *Agreement*.

In accordance with Article 1712.3, Complainant provided notice of its intention to pursue a Person-to-Government dispute through a request dated January 31, 2001 to the Manitoba Screener. The Manitoba Screener by letter dated February 8, 2001 gave leave to Complainant to commence the Person-to-Government dispute resolution procedures.

By letter dated March 2, 2001 to the Internal Trade Secretariat, Complainant requested the establishment of a Panel in accordance with Article 1716 (Request for Panel) of the *Agreement*. As permitted by the *Agreement*, Complainant chose to bypass Article 1714 (Consultations) and Article 1715 (Assistance of the Committee).

A pre-hearing conference was held by the Panel on June 11, 2001 in Toronto to discuss with the disputants the form of the hearings, the materials to be provided and other procedural matters related to the hearing. At the pre-hearing conference Respondent maintained that the dispute had not been brought properly before the Panel, given the lack of an opportunity for their input into the screening process and the unilateral decision by Complainant to bypass Articles 1714 and 1715. The Panel ruled that the screening process had complied with the Province of Manitoba screening procedures which are in compliance with the *Agreement* and that the amendments to the *Agreement* allowing Complainant to bypass Articles 1714 and 1715 were in effect when Complainant submitted its Request for Panel.

The Panel found that the dispute was properly before it.

The hearing was held in Toronto on August 20, 2001.

5. APPLICABILITY OF THE AGREEMENT

Respondent alleges that the *Agreement* does not apply to public accounting and put forward two arguments in support of that position. Respondent also argued that the complaint was barred by the expiry of the time limit for complaints stipulated in the *Agreement*.

A) Public Accounting and “Financial Services” under the *Agreement*

Article 1806 (Financial Sector) provides as follows:

“1. Except for measures referred to in paragraphs 7 through 10 of Annex 807.1, nothing in this Agreement applies to measures adopted or maintained by a Party or a

public body that exercises regulatory or supervisory authority delegated by law in relation to financial institutions or financial services.

2. For greater certainty, nothing in this Agreement shall be construed to lessen the scope of the limitation set out in paragraph 1, such limitation prevailing to its full extent over any provision having some connection therewith.

3. For greater certainty, persons shall be considered to be financial institutions only in respect of, and to the extent of, their provision of financial services.”

Further, a definition of “financial institution” and of “financial service” is provided in Article 200 (Definitions of General Application) as follows:

“In this Agreement, except as otherwise provided: ...

financial institution means a person that is subject to, or governed by, a measure adopted or maintained by a Party or by a public body that exercises regulatory or supervisory authority delegated by law, in respect of and by reason of the production or provision of a financial service;

financial service means any service or product of a financial nature that is subject to, or governed by, a measure adopted or maintained by a Party or by a public body that exercises regulatory or supervisory authority delegated by law and includes, but is not limited to:

- (a) deposit-taking;
- (b) loan and investment services;
- (c) insurance;
- (d) estate, trust and agency services;
- (e) securities; and
- (f) all forms of financial or market intermediation including, but not limited to, the distribution of financial products;” ...

It is Respondent’s position that public accounting is exempt from the *Agreement* because public accounting is a financial service within the meaning of Article 1806 which expressly exempts financial services from the application of the *Agreement*.

Complainant argues that Article 1806 does not apply because public accounting does not fall within the meaning of financial service specified in Article 200.

It is the Panel’s view that public accounting is not a “service or product of a financial nature” within the meaning of the definition provided in the *Agreement*. In this regard, the Panel notes that, although the examples provided in the definition of financial services in Article 200 are not intended to be exhaustive, they do provide guidance as to the nature of services intended to fall within the boundaries of the definition. The examples of such services provided in the definition are not, in the Panel’s view, of the same nature as public accounting services. The examples are linked in that they are each a type of service generally provided by a financial institution. Although public

accountants may provide their services to financial institutions, financial institutions do not normally provide public accounting services.

The panel finds that public accounting does not fall within the meaning of financial services under Article 200 and the exemption for financial services under Article 1806 does not apply to public accounting.

B) Public Accounting and “Occupations” under the *Agreement*

Article 713 (Definitions) provides as follows:

“1. In this Chapter: ...

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

2. For the purposes of interpreting the definition "occupation" in paragraph 1, the Parties shall be guided by the classification of occupations contained in the 1993 publication of Employment and Immigration Canada (now called Human Resources Development Canada) entitled National Occupational Classification (the "NOC"). In this regard, "occupation" shall include, where appropriate, any recognized separate and distinct occupation that is described in an occupational title under an occupational unit group listed in the NOC. “

It is Respondent’s position that public accounting is not a separate and distinct occupation within the meaning of Article 713. Rather, public accounting is a scope of practice within the larger accounting occupation. Respondent further argues that not every activity described under an occupational unit group listed in the *National Occupational Classification (NOC)* should be considered an occupation for purposes of the *Agreement*.

Complainant argues that the *PAA* defines a set of functions performed by public accountants that constitute a discrete and definable set of functions within the broader set of functions which may be performed by accountants in general and that the *PAA*, therefore, defines public accounting as an occupation within the meaning of Article 713. Complainant also points to public accounting being listed as an occupational title within the *NOC*.

The Panel is satisfied on all of the evidence and representations before it that public accounting is a distinct occupation within the meaning of Article 713. The Panel notes the inconsistency between the Respondent’s argument that CAs’ training, educational standards and experience in their totality relate principally to competence to practice public accounting and its argument that public accounting is merely one of that ‘set of jobs’ which a qualified accountant or auditor might perform. If public accounting is only one of a set of jobs that a qualified accountant can perform, it is difficult to comprehend why the total training, education and experience of a CA is required to do it. The Panel can accept that the training, education and experience of CAs qualify them to be public accountants. It does not necessarily follow that public accountants require all of the

training, education and experience of a CA or its equivalent to be qualified in that occupation.

The Panel notes that Ontario, as well as some other provinces, has chosen to regulate public accounting as distinct from accounting. Further, the Panel does not believe any compelling argument has been provided as to why, in this situation, it should not be guided as specified in Article 713.2 by the *NOC* which lists public accounting as a separate occupational title in association with Unit Group 1111 or why it would not be appropriate to include public accounting as a separate and distinct occupation by virtue of its listing as an occupational title in the *NOC*.

The Panel finds that public accounting is a distinct occupation within the meaning of Article 713 and is subject to the provisions of the Agreement.

C) The Time Limitation for Initiation of Proceedings by Persons

Article 1712 provides as follows:

“

4. A person may not commence proceedings under this Article if the person has failed to:

- (a) request a Party to initiate dispute resolution proceedings under Article 1711(1);
- (b) request a contact point to initiate dispute resolution proceedings under Article 513(5) (Bid Protest Procedures - Province); or
- (c) commence any applicable dispute avoidance and resolution process listed in Annex 1701.4 that may be invoked by the person;

within two years after the date on which the person acquired, or should have acquired, knowledge of the alleged inconsistent measure and knowledge that the person incurred loss or damage or suffered a denial of benefit.”

It is Respondent's position that the Complainant did not initiate proceedings within the two year time limit prescribed by Article 1712.4. In its submissions Respondent dates correspondence from Complainant asking Manitoba to initiate consultations under Article 711 (Consultations) as December 16, 2000 and cites several pieces of correspondence to show that Complainant knew of the alleged inconsistent measure prior to December 16, 1998.

Complainant points out that CGA Manitoba asked Manitoba to initiate consultations with Respondent under Article 711 through correspondence dated December 16, 1999.

A narrow reading of Article 1712.4(c) would mean that to be in breach of the time limits under the Article, Complainant would have had to been aware of the alleged inconsistent measure prior to December 16, 1997. Respondent has provided no

evidence that would indicate that Complainant was aware of the alleged inconsistency prior to that date.

The Panel finds that the complaint was initiated within the two year time limit provided in Article 1712.4(c).

Although not material to its finding in this case, the Panel would bring to the attention of the Parties to the *Agreement* a potential problem with the interpretation of Article 1712.4(c). Narrow, technical readings of this Article could lead to interpretations of when the two year time frame begins which could significantly affect the ability of persons to access the dispute resolution mechanism under Chapters 17. A worker could be aware for some time of a measure that is potentially inconsistent with the *Agreement* without knowing that a complaint with respect to that measure can be made under the *Agreement*. Further, Parties to the *Agreement* encourage workers to attempt to resolve labour mobility issues with other Parties through informal means before initiating a formal dispute under the *Agreement*. Either of these situations, and potentially others, could, through no fault of the worker, place him or her outside the two year time frame.

6. PUBLIC ACCOUNTING IN ONTARIO

This section of the report describes the Panel's understanding of how licensing of non-CA public accountants from other jurisdictions is currently administered in Ontario. It is based on the Respondent's written original submission, written counter submission and verbal presentation at the hearing.

A) Public Accountant

The *PAA* defines a public accountant as:

... "a person who either alone or in partnership engages for reward in public practice involving,

- (a) the performance of services which include causing to be prepared, signed, delivered or issued any financial, accounting or related statement, or
- (b) the issue of any written opinion, report or certificate concerning any such statement,

where, by reason of the circumstances or of the signature, stationary or wording employed, it is indicated that such person or partnership acts or purports to act in relation to such statement, opinion, report or certificate as an independent accountant or auditor or as a person or partnership having or purporting to have expert knowledge in accounting or auditing matters, but does not include a person who engages only in bookkeeping, or cost accounting or in the installation of bookkeeping, business or cost systems or who performs accounting or auditing functions exclusively in respect of,

- (c) any public authority or any commission, committee or emanation thereof, including a Crown company,

- (d) any bank, loan or trust company,
- (e) any transportation company incorporated by Act of the Parliament of Canada, or
- (f) any other publicly-owned or publicly-controlled public utility organization;"

B) Institute of Chartered Accountants of Ontario (ICAO)

The PAA designates the ICAO as the single qualifying body for gaining a license to practise public accounting under the *Act*. The ICAO is responsible for setting the training and education standards that public accountants must meet in order to be licensed. The ICAO has chosen the training and education standards for Chartered Accountants as the standard for public accountants. At the Panel hearing, this equating of the two standards was referenced in the presentation by Mr. Robert Peck, ICAO Counsel: "what you need to qualify as a CA is what you need to do to practice public accountancy in Ontario".

C) Public Accountants Council for the Province of Ontario (PACO)

The PAA established PACO as the body responsible for administration of the *Act*, including granting or refusal of a license.

The PAA specifies that PACO shall consist of 15 members. The ICAO council appoints 12 of the 15 members. The other 3 members are elected by persons licensed under the *Act*. All 15 members must hold a license under the *Act*.

There are three main conditions under which PACO can grant a public accountant's license to a person:

- 1) a person is a member of ICAO (subsection 14(1));
- 2) a person is not a member of ICAO but can demonstrate "special circumstances" (subsection 14(2));
- 3) a person is not a member of ICAO but has a license to practice public accounting from another province or state (subsection 14(3)).

Except for 5 specific situations, decisions by PACO require a simple majority vote. An exception is the granting of a license under subsection 14(2) which requires a three-quarters vote. Another exception is licensing under subsection 14(3) which requires a two-thirds vote. Mr. Peck described these exceptions as: "another clear indication that the legislature wanted those appointed by the qualifying body to not be outvoted by others."

D) Subsection 14(3) of the *Public Accountancy Act*

With respect to subsection 14(3) of the *PAA*, beginning on page 18 of its original submission¹ Respondent states:

“58. Section 14(3) of the *Public Accountancy Act* grants the Public accountants Council for Ontario (the “Council”) the authority to prescribe by regulation the terms and conditions for licensing individuals who are licensed to practice public accountancy in other jurisdictions, exempting them from the requirements for licensing to which Ontario residents are subject.

59. Council has passed a regulation under Section 14(3), which states:

“Anyone who is licensed to practice accountancy in any state or province other than Ontario shall be exempted from the conditions set forth in clauses (a), (b) and (c) of subsection (1) of Section 14 of the *Public Accountancy Act*, provided that Council is satisfied the applicant possess training and education standards equivalent to those of the qualifying body.”

60. Section 14(3) of the *Act* only applies where an applicant is licensed to practice public accountancy in his or her home jurisdiction, and thus may only be used by a practitioner when he or she comes to Ontario from a jurisdiction that issues licenses for the practice of public accountancy. In Canada, these jurisdictions are Prince Edward Island, Nova Scotia and Newfoundland.”

E) Subsection 14(2) of the *Public Accountancy Act*

Except for non-CA public accountants from Prince Edward Island, Nova Scotia and Newfoundland, the “special circumstances” provision of subsection 14(2) of the *Act* is the only possible avenue by which non-CA public accountants from other jurisdictions within Canada can become licensed to practise public accounting in Ontario.

According to the May 9, 2001 Guidelines of the Public Accountants Council for Applications under Subsection 14(2) of the *Public Accountancy Act*:

- the onus is “upon the applicant to demonstrate “special circumstances””;
- PACO’s discretionary power to grant licenses under this provision is severely constrained by the *Act* in that PACO can not deviate from the ICAO standard as the baseline measurement for licensing: “this equivalency guideline ... (is) a starting point in its assessment”;
- there is no definition of “special circumstances”;
- PACO does not want “to impose a strict analytical framework when considering “special circumstances” which might unnecessarily restrict a future Council in the exercise of this discretionary power” to grant licenses under this provision;

¹ Document P054 listed in Appendix B

- in 7 of the 12 categories of “special circumstances” listed by PACO, “special” means “superior”, “extensive” or “extraordinary”;
- “it will be appropriate In most circumstances for the applicant to undergo a “Public Accounting Practice Assessment” ... to provide an independent assessment of the scope, diversity and quality of an applicant’s existing practice...”.

Respondent’s original written submission² also addresses a number of these areas. Beginning on page 19 of its original submission Respondent states:

“64. The *Act* states that the “qualifying body” for gaining a license to practice public accountancy is the ICAO. Accordingly, the base measure that has been adopted in Ontario, relating to whether a person practicing public accountancy outside Ontario shall be licensed to so practise in Ontario, is the training and educational standards set by the ICAO. When a person from outside Ontario seeks to be licensed pursuant to either subsection 14(2) or 14(3), his or her training, experience and education will be assessed to determine whether that training, experience and education would be said to provide them with the background competencies equivalent to those which must be demonstrated by a person in order to become a member of the ICAO.

67. ... Both Council and the *Act* have taken the position that under certain limited circumstances, persons who are not CAs can be licensed to practice public accountancy. However, the Act clearly reserves such licensure for exceptional cases.”

Documentation provided by Respondent at the hearing indicates that of 489 applications for licensing under subsection 14(2) between 1962 and 2000:

- 49 (10%) were granted licenses;
- of these 49, 31 were granted within the first two years after the *PAA* came into effect;
- only 1 license has been granted since 1977;
- no license has been granted under this provision in the last 15 years;
- of the 6 applicants in the past 25 years from other jurisdictions within Canada, none have been licensed.

7. FINDINGS

In this section the Panel addresses the key issues of the alleged inconsistency between the *Agreement* and the *PAA* and Regulations and the manner in which they are administered and whether or not, if an inconsistency exists, it can be justified under the legitimate objectives provision of the *Agreement*.

² Document P054 listed in Appendix B

A) Alleged Inconsistency with the Agreement

Article 707 (Licensing, Certification and Registration of Workers) provides as follows:

“1. Subject to Article 709, each Party shall ensure that any measure that it adopts or maintains relating to the licensing, certification or registration of workers of any other Party:

- (a) relates principally to competence;
- (b) is published or otherwise readily accessible;
- (c) does not result in unnecessary delays in the provision of examinations, assessments, licences, certificates, registration or other services that are occupational prerequisites for workers of any other Party; and
- (d) except for actual cost differentials, does not impose fees or other costs that are more burdensome than those imposed on its own workers. ...”

Article 708 (Recognition of Occupational Qualifications and Reconciliation of Occupational Standards) provides as follows:

“Subject to Article 709, each Party undertakes to mutually recognize the occupational qualifications required of workers of any other Party and to reconcile differences in occupational standards in the manner specified in Annex 708. ...”

Annex 708 (Occupational Qualifications and Standards) provides as follows:

“6...The occupational analysis will not consider differences in training methods since it is recognized that competencies and abilities can be acquired through different combinations of training and experience. ...”

Complainant alleges that the *PAA* and Regulations are not consistent with Article 707 in that they are not based principally on competence and the standards that PACO applies to determine the eligibility of non-CA applicants are not published or otherwise accessible.

More specifically, Complainant alleges that by limiting the licensing of public accountants to CAs or to persons with training and education equivalent to that of CAs, Ontario is denying licenses to persons qualified as public accountants by the Province of Manitoba on the basis that their training is different from CAs. Complainant alleges that a licensing system that precludes the consideration of alternative means of acquiring competencies through a combination of training and experience cannot relate principally to competence and, therefore, is not consistent with Article 707.1(a).

In addition, Complainant alleges that Ontario’s measures violate Article 707.1(b) and (c) as there is no published or otherwise readily accessible information which describes precisely what competencies a Manitoba CGA must demonstrate in order to be granted the right to practice public accounting in Ontario. Complainant argues that in applying the special circumstances provision of section 14(2) of the *PAA* which allows PACO to exempt a person from one or more of the conditions that must normally be met for

licensing, PACO has equated special circumstances to mean training equivalent to CAs, as evidenced by the very small number of non-CAs who have been granted a license under this provision in the last 27 years. Moreover, PACO has not defined the criteria that would be used to determine equivalency.

In view of this and because the *PAA* legislates that 12 of the 15 members of PACO must be appointed by the Institute of Chartered Accountants of Ontario (ICAO), Complainant alleges that the objectivity of the process in assessing equivalency is open to question.

Finally, Complainant alleges that Manitoba CGAs who have applied to practise public accounting in Ontario have not had their applications dealt with in a timely manner.

Respondent agrees that the basis for determining whether a person is qualified to practice public accounting in Ontario is whether they have met the training and education standards established by the ICAO for membership in that body or their equivalent. Respondent argues that those standards are the competencies required to practice public accounting in Ontario and that, in determining whether or not these standards relate principally to competence, they must be assessed in their totality, not on a standard by standard basis.

Respondent argues that all applicants for licensing as public accountants in Ontario, both CAs and non-CAs, are assessed in the same manner against these standards. A person practising public accounting in another province who is licensed in that province and demonstrates equivalency to the ICAO standards will be licensed in Ontario. Only persons from Prince Edward Island, Nova Scotia and Newfoundland can currently meet both the condition of being licensed and being able to demonstrate equivalency. Persons practising public accounting in another province who do not meet these two conditions could be licensed under the special circumstances provisions of the *PAA* by demonstrating equivalency to the ICAO standards. Respondent concedes that licensing in this manner is reserved to exceptional cases; however, Respondent argues that licenses have been granted to CGAs under the special circumstances provisions of the *PAA* and non-CAs are fairly assessed against the standards.

Respondent asserts that its public accounting measures are transparent in that they are published and available on a website. In addition, Guidelines for applications under the special circumstances provisions of the *PAA* were published in May 2001 providing further information on the requirements that must be met to be licensed under these provisions. Respondent asserts that recent applications by Manitoba CGAs for licensing in Ontario have been dealt with in a timely manner.

The Panel acknowledges the importance placed by Respondent on protecting consumers and the Ontario capital markets and, flowing from that, the policy imperative Ontario has placed on ensuring that public accountants practising in Ontario are adequately qualified. In pursuing that policy imperative, Ontario has chosen the training and education standards for Chartered Accountants as the occupational standards for licensing as a public accountant in Ontario and the ICAO as the single qualifying body. The Panel notes that similar standards have been adopted by some other provinces. In addition, the Panel does not believe that it has been demonstrated that the selection of

the occupational standard for public accounting in Ontario or the selection of ICAO as the single qualifying body are in themselves a barrier to mobility.

The Panel finds that the selection of the CA occupational standard as the occupational standard for public accounting and the selection of ICAO as the single qualifying body are not inconsistent with the Agreement.

The Panel notes that the *Agreement* presents another policy imperative that as a Party to the *Agreement*, Ontario is bound to respect in that the *Agreement* requires Ontario to recognize equivalent competencies in the occupation of public accounting acquired by accountants in other provinces. This obligation flows from the combination of:

- the purpose of the Agreement which is "... to enable any worker qualified for an occupation in the territory of a Party to be granted access to employment opportunities in that occupation in the territory of any other Party...";
- the requirement in Article 707 to ensure that any measure related to licensing "relates principally to competency";
- the requirement in Article 708 to "recognize the occupational qualifications required of workers of any other Party"; and
- the assertion by the Parties in paragraph 6 of Annex 708 that "it is recognized that competencies and abilities can be acquired through different combinations of training and experience."

Taken together these statements require a Party to the *Agreement* to recognize the occupational qualifications of a worker from any other jurisdiction where those qualifications have already been recognized by that jurisdiction, through licensing or other means, and to objectively assess the competencies of a worker against its own occupational standard in a manner that recognizes that competencies can be acquired by different means.

The Panel finds that the PAA and Regulations and the manner in which they are administered are inconsistent with Article 707 and Article 708 of the Agreement.

More specifically, with regard to the "special circumstances" provision of subsection 14(2), the Panel notes from Respondent's submissions and presentation at the hearing that PACO has chosen to interpret "special" to mean "exceptional". The Panel can find nothing in the *PAA* to require this interpretation. This interpretation compels an accountant who has practised public accounting in another jurisdiction to meet requirements that go beyond demonstrating competency in relation to the standards set by Ontario. As indicated earlier in this report, a review of the record of non-CAs public accountants from other jurisdictions within Canada who have been successful in obtaining licenses under this provision underscores that they are very "exceptional".

Furthermore, the assessment process focuses on demonstrating equivalency to the training, education and experience of a CA and does not give adequate recognition to the fact that the competencies required to be a public accountant can be acquired through a variety of combinations of training, education and experience. In other words, although the standards set by Ontario may in themselves relate principally to competence, the manner in which the qualifications of non-CAs from other jurisdictions is assessed against those standards does not relate principally to competence.

Moreover, it is the view of the Panel that it would be reasonable to expect that a non-CA public accountant who has a number of years of successful practice in Manitoba or another province would have acquired through that experience many, if not all, of the competencies required to be licensed as a public accountant in Ontario that he or she may have lacked as a result of his or her training. Although it may not be reasonable to expect that Ontario would license experienced non-CA public accountants from other jurisdictions without some assessment, it is equally unreasonable to make such individuals go through the lengthy assessment process currently required by Ontario.

The Panel can only conclude that subsection 14(2) does not provide a genuine avenue by which non-CA public accountants from other jurisdictions within Canada can have their qualifications objectively assessed against the standards for licensing in Ontario. As subsection 14(2) represents the only avenue open to non-CA public accountants from other jurisdictions (except Prince Edward Island, Nova Scotia and Newfoundland) to become licensed in Ontario, in effect the *PAA* and the manner in which it is being administered, does not provide for the recognition of the occupational qualifications of workers qualified by another Party as required by the *Agreement*.

The Panel finds that subsection 14(2) of the PAA and the manner in which it has been interpreted and administered by PACO is inconsistent with Article 707.1(a) and Article 708.

The Panel notes that Ontario's public accounting measures are published and that the recently published Guidelines for applications under section 14(2) provide further information on the requirements that must be met to be licensed under this provision. In publishing the Guidelines PACO implicitly recognized the inadequacy of the available information and the Panel commends PACO's effort to remedy this situation. While the Guidelines represent an important step forward, the Panel does not believe that, even with the Guidelines, non-CA applicants to practice public accounting in Ontario would have sufficient information to know the specific competencies they must meet, the criteria used to assess their qualifications against those competencies and the assessment process used.

The Panel finds that subsection 14(2) of the PAA is inconsistent with Article 707.1(b) of the *Agreement*.

The Panel considers that subsection 14(3) of the *PAA* is too restrictive in limiting recognition to public accountants who have been "licensed" by another jurisdiction within Canada. This eliminates from consideration potentially qualified public accountants on the basis that the jurisdiction in which they live has chosen to recognize

their qualifications by some manner other than licensing. The obligations of the *Agreement* are not limited to workers who are licensed. Article 701 refers to workers “qualified for an occupation.” The *Agreement* does not specify that the form of recognition of a worker’s qualifications to perform an occupation must be specific legislation to regulate that occupation with an accompanying licensing regime. It is the view of the Panel that the recognition by a Party that a worker is qualified in an occupation can be by other means, including statutes that allow workers with membership in a certain professional association to practice that occupation.

The Panel further notes that subsection 14(3) does not require PACO to specify the terms and conditions that will be used by PACO to determine if a public accountant licensed by another Party will be licensed under this provision. PACO is given the discretion to specify these terms, or not, as it sees fit.

The Panel finds that subsection 14(3) is inconsistent with 707.1(b) and Article 708 of the *Agreement*.

The Panel also notes that a process to assess the qualifications of applicants against a clear set of competencies required to practice public accounting must be administered in a manner that is, and is seen, to be objective. It is clear from Respondent’s written submissions and presentation at the hearing that the *PAA* does not give PACO, as the licensing body, the latitude it would require to make an objective assessment of the competencies of non-CA applicants from other jurisdictions against the ICAO standard. Further, the *PAA* legislates that members of PACO must hold a license under the *Act* which results in a body consisting primarily of CAs. While the members of PACO from time to time doubtlessly attempt to be objective in their assessments, the record of licensing of non-CA applicants does not inspire confidence in PACO’s objectivity. As a matter of proper public administration, a licensing body that is to consider the competency of the members of several professional associations should not be dominated by one of the associations.

The Panel finds that the provisions of the *PAA* as they relate to the structure of PACO unduly constrain or appear to unduly constrain PACO’s ability to objectively assess the competencies of non-CA applicants from other jurisdictions are inconsistent with Article 707.1(a) of the *Agreement*.

B) Justification on the Basis of a Legitimate Objective

Article 709 (Legitimate Objectives) provides as follows:

“1. Where it is established that a measure is inconsistent with Article 706, 707 or 708, that measure is still permissible under this Chapter where it can be demonstrated that:

- (a) the purpose of the measure is to achieve a legitimate objective;

- (b) the measure does not operate to impair unduly the access of workers of a Party who meet that legitimate objective;
- (c) the measure is not more mobility-restrictive than necessary to achieve that legitimate objective; and
- (d) the measure does not create a disguised restriction to mobility. “

Further, a definition of “legitimate objective” is provided in Article 713 (Definitions) as follows:

“1. In this Chapter: ...

legitimate objective means one or more of the following objectives pursued within the territory of 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) consumer protection;
- (f) protection of the health, safety and well-being of workers;
- (g) affirmative action programs for disadvantaged groups;
- (h) provision of adequate social and health services to all its geographic regions; and
- (l) labour market development. ...”

Respondent asserts that, if the *PAA* and Regulations are found to be inconsistent with the *Agreement*, it is still permissible under Article 709 as a Legitimate Objective for the protection of the public and preservation of Ontario's capital markets.

It is the Panel's strong view that, if the *Agreement* is to have any meaning, a Party must do more than simply assert that it has a legitimate objective to meet whenever it wishes to maintain a measure that is inconsistent with the *Agreement*. The onus must be on the Party to demonstrate clearly that there is a legitimate objective related to the public good and that there are no less mobility restrictive means of meeting that objective.

The Panel recognizes that the availability of reliable financial statements is unquestionably critical to the protection of the consumer and to the efficient operation of capital markets and that Ontario's capital markets are extremely important and must be protected. That said, Ontario's capital market can be accessed today by companies incorporated under federal legislation and the legislation of other provinces as well as by foreign corporations, none of which is necessarily required to have their financial statements audited by a public accountant licensed by Ontario.

Respondent has also not provided evidence that less mobility restrictive means of meeting its objective of protecting Ontario's capital markets were considered and found to be inadequate. It is the view of the Panel that such an analysis of alternatives to meeting a legitimate objective is essential in order for a Party to adequately demonstrate that the chosen measure meets the test specified in Article 709.1(b), (c), and (d). Further, Respondent has not provided any argument that the public and/or capital markets have been endangered through the practice of public accounting by CGAs under federal statutes or the statutes of other provinces.

Finally, the Panel is of the view that the remedies that would be required to bring Ontario's public accounting licensing measures into conformity with the *Agreement* would do nothing to undermine Ontario's capital markets. The inconsistent measures relate solely to the process of recognition of public accountants from other jurisdictions, which necessarily only affects a marginal part of public accounting activities in Ontario.

The Panel finds that Ontario's public accounting measures that have been found to be inconsistent with the *Agreement* can not be justified under the provisions of Article 709.

8. DETERMINATION OF INJURY

Complainant alleges that Ontario's public accounting measures have impaired internal trade in Canada by restricting the mobility of Manitoba CGAs through a licensing regime that prevents qualified public accountants from offering their services to clients in Ontario. As these restrictions deny access to a major component of the Canadian market for public accounting services, complainant alleges that Manitoba CGAs have suffered injury.

Respondent asserts that the special circumstances provisions of the *PAA* provide Manitoba CGAs with the opportunity to be licensed as public accountants in Ontario and that Ontario's public accounting measures do not, therefore, restrict the mobility of Manitoba CGAs, nor cause injury to them.

In reviewing the statistics related to the application of the special circumstances provision of the *PAA* since its coming into force, the Panel is of the view that this provision and the manner in which it has been applied do not adequately mitigate the restriction to mobility presented by the *Act*.

Although this restriction may be presumed to have caused injury to Manitoba CGAs, the evidence presented to the Panel does not permit the Panel to determine if and to what extent Manitoba CGAs have been injured by the measure.

9. PANEL DETERMINATION

The Panel finds that Ontario's *Public Accounting Act* and Regulations and the manner in which they are interpreted and applied by PACO are inconsistent with Articles 707 and 708 of the *Agreement* and the inconsistency is not justified by the use of the legitimate objectives provisions in Article 709.

In making this determination, the Panel refers to four specific areas which give rise to inconsistency with the *Agreement*:

- 1) The overly narrow restriction under subsection 14(3) of the *PAA* that allows recognition only of public accountants licensed by other Parties thus excluding the recognition of potentially qualified public accountants practising in a jurisdiction that has chosen to recognize competency through a mechanism other than licensing;
- 2) The very restrictive interpretation and application of the "special circumstances" provision of subsection 14(2) of the *PAA* which results in a process for assessing an applicant's qualifications that is not based principally on competence;
- 3) The insufficient flexibility apparently granted to PACO under the *PAA* to recognize qualified public accountants from other jurisdictions and the composition of PACO which significantly hampers the objective evaluation of the competencies of non-CAs from other jurisdictions;
- 4) The failure to meet the transparency provisions of the *Agreement* by not providing to applicants for licensing sufficient information to know the specific competencies they must meet, the criteria used to assess their qualifications against those competencies and the assessment process used.

For greater certainty, it must be noted that the Panel is not making a finding as to whether or not Manitoba CGA's are qualified to practice public accounting in Ontario. Such a finding is both beyond the mandate and competence of the Panel. Further, the Panel is of the view that a finding on this issue is not necessary in order for the Panel to fulfill its terms of reference which is to determine whether the measure at issue, the *PAA* and Regulations and the manner in which they are administered, is inconsistent with the *Agreement*.

By entering into the *Agreement*, the Parties thereto agreed that past legislative or policy action may no longer be appropriate and that changes to measures which are inconsistent with the *Agreement* may be required.

The Panel recommends that Respondent take whatever steps are necessary to ensure that the *PAA* and Regulations and the manner in which they are administered with respect to the licensing of public accountants recognized as qualified to practice public accounting by other Parties are made consistent with the *Agreement*.

Although not material to the findings in this report, the Panel notes the significant differences in occupational standards for public accounting among the Parties to the *Agreement* and the significant differences in the manner in which a worker's occupational qualifications are assessed and recognized relative to those standards. Given the potential for this situation to present barriers to the mobility of public accountants in Canada, the Panel encourages the Forum of Labour Market Ministers to consider according a high level of priority to the harmonization of practices in Canada as regards public accounting. However, implementation of the Panel's recommendations with respect to Ontario's *PAA* and Regulations and the manner in which they are administered should not be delayed pending the outcome of any harmonization process.

Costs

Rule 52 of Annex 1706.1 (Panel Rules of Procedure) stipulates that operational costs shall be divided equally between disputants. Operational costs are defined as "all per diem fees and other disbursements payable to panellists for the performance of their duties as panellists including costs incurred by the panel for retaining legal counsel to provide advice on procedural issues."

Article 1718.3 of the *Agreement* gives a Panel the discretion to award costs to a successful person in a proceeding.

The Panel declines to make such an award and the operational costs shall be divided equally between the disputants.

APPENDIX A

Participants in the Panel Hearing

The Panel

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