BC's legislative history re massage therapy

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Dear Ms. Young:

Subject: Legislative history of the regulation of massage therapy in British Columbia

Peter Behr, the immediate past president of the College of Massage Therapists of British Columbia, has asked me to respond to your recent emails sent to Kevin Moffitt. As I have not been privy to the information that has already been sent to you, some of what I wi11 set out in this email to you may have already be in your possession.

If not, you may at least appreciate the perspective I bring to the issues you have raised. I will send a copy of this email to Peter and Kevin, for their edification, and a copy to the CTMBC office for its files.

A useful summary of the history of the regulation of massage therapy in British Columbia can be found in the February 1999 scope of practice review preliminary report of BC's Health Professions Council, titled: "Massage Therapists Scope of Practice (Preliminary Report)". (References to the "HPA" is to the current Health Professions Act, the "HPC" is the Health Professions Council, an advisory body to the Minister of Health
that is appointed under the HPA.)

QUOTE.

C. THE REGULATION OF MASSAGE THERAPY IN BRITISH COLUMBIA
Massage therapists were initially governed under one act with physiotherapists. The first provincial enactment was the Physiotherapists and Massage Practitioners Act, S.B.C. 1946, c. 59. It created the Association of Physiotherapists and Massage Practitioners of British Columbia, the regulatory body, as well as the Board of Physiotherapists and Massage Practitioners. The first enactment defined massage and physiotherapy and restricted the use of the following reserved titles: chartered physiotherapists, physiotherapists, massage practitioner, and masseur.

In 1954, the Physiotherapists and Massage Practitioners Amendment Act,1954, c.32, provided for several amendments. The Board of Physiotherapists and Massage Practitioners was renamed the Council of Physiotherapists and Massage Practitioners,and was given the power to

make regulations respecting applications, cancellations, suspensions, and reinstatement of members. Educational

qualifications were re vised while the requirements of a school to be able to teach massage were defined. Registered physiotherapists and masseurs were given the exclusive right to practice their respective fields and the Council was given authority to approve all schools teaching physiotherapy and massage. The Physiotherapists and Massage Practitioners Amendment Act 1957, c.48 made it illegal for a hospital employee, other than a registered physiotherapist or massage practitioner, to provide massage of any kind for patients. An amendment was made to exempt from the prohibition certain hospitals, particularly those which were too small to employ a physiotherapist or massage practitioner.

In 1972, the Physiotherapists and Massage Practitioners Act, 1972,c.42, eliminated the reference to the Trade-School Regulation Act and the teaching of physiotherapy as well as the requirement that standards of education of the Canadian Physiotherapy Association applies under the Act.

In 1979, the statute was renamed the Physiotherapists Act, R.S.B .C. 1979, c.327. The Health Statutes Amendment Act, 1984, c. 19, rem oved the specific reference to the minimum academic requirements for registration as a massage therapist and allowed the Minister and the Council to determine the requirements.

In 1987, the Health Statutes Amendment Act, 1987, c. 55, revised educational and training qualifications for registration as a physiotherapist to include training as a remedial gymnast. The educational qualifications for registration as a masseur were likewise revised. While the act repealed the power of the Lieutenant Governor in Council to make regulations prescribing educational qualifications and requirements for temporary registration, it permitted the Minister to request an amendment to a rule. Subsequently, the Health Professions Statutes Amendment Act, 1993, c. 50, set out the duties and objects for
the regulatory body and Association of Physiotherapists and Massage Practitioners. It mandated for the requirement of public representation in the association while enhancing the association's investigatory and suspension powers.

Finally, the Health Professions Statutes Amendment Act, 1994, c. 42 repealed the Physiotherapists Act, R.S.B.C. 1979, c. 327, as the professions of Physiotherapists and Massage Practitioners were designated under the HPA in December, 1994. The designation was pursuant to the Lieutenant Governor in Council's power to designate a health profession under section 12 of the HPA without directing the Council to conduct an investigation. Under the HPA two separate colleges were established: the College of Physical Therapists of British Columbia and the College of Massage Therapists of British Columbia.

In Ontario, massage therapy is regulated under the Massage Therapy Act. The title "massage therapist" is reserved to members of the College of Massage Therapy, however, massage therapists have been

granted no controlled acts under the Regulated Health Professions Act. In Quebec, the Office des professions du Quebec

conducted an extensive consultation process to determine whether massage therapy should be regulated under the Code des professions. Their report was issue in 1992 and determined that massage therapy did not meet the criter is required for this type of professional regulation. In particular "the gravity of the prejudice or damage which might be sustained by those who have recourse to the services of such persons because their competence
or integrity was not supervised by the order" did not meet the 1evel required. The report found at page 10 that "In general, the techniques utilized in massage do not present acute risk" to the public and would therefore, not be regulated under the Code des professions. No other provinces have granted massage therapy self-regulating status or title protection.

END OF QUOTE

I have a few comments to add to the above quote from the HPC preliminary.

First, in 1990, the physical therapists lobbied the Royal Commission on Health Care and Costs to recommend to government that they be established as a profession separate and apart from massage therapists. I was Assistant Legal Counsel to the Royal Commission at the time and responsible for the subject of professional regulation, but I cannot recall a decade later whether or not a similar request had been made by the massage therapists. Regardless, in its 1991 landmark report, "Closer
to Home", the Royal Commission did recommend that all health professions in BC be designated under the HPA, a recommendation which necessarily required that the stand-alone statues, such as the Physiotherapists Act of 1979, be repealed. This is what happened in late 1994.

Second, massage therapy has been a regulated profession in BC for over fifty years. When the profession was first regulated back in 1947,I think it is safe to conclude that the government of the day felt that it was in the public interest to regulate the profession by way of government action. As far as I am aware, no private member's bil1 has been proposed.

Third, the massage therapy profession can expect major changes t
Its current scope of practice definition and practice monopolies. If the government accepts the HPC's final recommendations (which are not anticipated until the fall or winter of 2000), the definition of what constitutes massage therapy will change dramatically. Also, the current broadly-stated legislative monopoly over all forms of massage therapy will shrink, possible to nothing, leaving it open to the public to provide any form of massage therapy without fear of prosecution. There may also be changes in the occupational titles currently granted to the profession. I cannot provide you with further details on these

legislative changes, as we have not yet seen the HPC's final report and, perhaps more importantly, do not know if the government will accept all of those final recommendations.

Fourth, it is my view that the Quebec 1992 report has made a fundamental error in resting their decision not to regulate the profession of massage therapy on the basis that massage therapy does not constitute a sufficient risk to public safety to warrant legislation. In its report on the designation of traditional Chinese medicine under the HPA , the HPC had the following to say on the issue of why governments should regulate any health profession.

QUOTE.

The Public Interest Criteria contained in s. 5(1) of the [Health Professions] Regulation provide the context in which the Council will analyze the risk of harm in the applicants' practice. While the Council may also consider the s.5(2) criteria in making its designation decision, these criteria do not address risk of harm. If the Council decides that the profession should be designated, the Council wi11 determine an appropriate scope of practice statement for the profession. The Council will then determine which aspects of the scope of practice have been shown to present a significant risk of harm. These wil1 be defined as reserved acts, as directed in s.10(3)(b)(v) of the HPA and the Council's Terms of Reference. Any other aspects of the scope of practice of a health profession are considered to be capable of being shared with other health practitioners and the general public. There is a distinction between analyzing risk of harm for the purposes of s.5(1) and for reserved acts. The s.5(1) analysis is broadly based and looks at the extent of the risk of physical, mental or emotional harm to the health, safety or well being of the public in the practice of the profession. This analysis looks generally at the services performed by practitioners, the technology used, the invasiveness of procedures or treatments and the degree of regulation or supervision of practitioners, as directed in s.5(1)(a), (b), (c) and (d).

The Council will make its determination of whether the profession should be designated on the basis of this analysis together with the analysis of the criteria contained in s.5(2) of the Regulation. After it is determined that the profession should be designated, a more narrowly focused risk of harm analysis is conducted to determine whether the health profession will be granted one or more reserved acts.

The Council emphasizes that it is not necessary for a health profess ion to be granted any reserved acts in order to be designated. However, once the decision to designate is made, the Council will look at whether there are acts or activities within the profession's scope of practice which present such a significant risk of harm that they must be designated reserved acts, as directed in s.10(3)(b)(v) of the HPA. In the Shared Scope of Practice Working Paper issued by the Council in January 1998, reserved acts have been restricted primarily to physical acts which carry a significant risk of harm.

END OF QUOTE

From this, I have concluded that is clear the Council now believes that there are two distinct types or levels of harm that justifies professional regulation in general.

The first or lower level of harm analysis considers whether it is in the public interest to designate a profession and grant it some form of title protection. Granting a profession only title protection is useful if there are no serious risks of harm that can be reasonably associated with the provided services, but where it is necessary to help the public to distinguish between certified and non-certified persons; i.e. those who are members of a professional regulatory body and those who are not.

Commonly, certified professionals must abide by a code of ethics and their regulatory body can investigate their conduct, even if they quit the profession. Thus, title protection provides the public with some assurance that the professional who is using an exclusive title has agreed to abide by a code of conduct and is accountable to an authority for any breaches thereof. Under this framework, the public is free to purchase services from a certified professional or from anyone else providing those services, because no practice monopoly is granted to a profession under a title protection scheme.

The second or higher level of risk of harm analysis considers a different type of public interest leading to designation of a profession. This addresses the granting of an exclusive occupational title and some form of practice monopoly (e.g. a reserved act, the terminology used in BC to describe a practice monopoly sanctioned by legislation). If a profession is granted a reserved act, this limits public choice, as only that profession (and others who may also be granted that reserved act) would be allowed to provide those restricted services. Those who have not also been granted that reserved act could be subject to injunction or prosecution for contravention of the reserved act.

Going further than title protection and granting a profession a reserved act is useful if a serious risk of harm can be reasonably associated with the service, in particular if such harm is likely to result if the service is provided by those who are not suitably trained, etc. The CMTBC has proposed to the HPC that massage therapists be granted some reserved acts. It is too early to tell whether the Council will accept those proposals and make similar recommendations to the Minister of Health. I have every confidence that massage therapy will always be regulated in BC, at least on the basis of the first level risk of harm analysis.
I trust the above will be of assistance to you.

George K. Bryce, BA, BSc, MHA, LLB

Public Representative on the CMTBC