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Psychotherapy Takeover Fears DISCUSSION PAPER

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A few natural health practitioner groups have approached me about the regulation of psychotherapy in Ontario. This discussion paper is meant to add to the discussion and dispel misinformation that is circulating, it should not be construed as legal advice.

Issue

Ontario is in the process of regulating various health modalities, one of which is psychotherapy. The *Psychotherapy Act* is currently drafted to make the practice of psychotherapy a controlled activity. In other words, only members of the College of Psychotherapists of Ontario (CRPO) and other specified regulated professions (MDs, nurses, OTs, psychologists, social workers) will be allowed to practice psychotherapy.

Some natural health practitioners and counsellors are worried that they will no longer be able to practice their modality because psychotherapy is defined too broadly. An exception for counselling already exists in the legislation but neither definition provides much guidance given the significant overlap between psychotherapy and counselling. Individuals cannot determine exactly what is and is not prohibited. It is also unclear to what extent counselling could be subsumed by psychotherapy techniques or specialties.

The following pages detail the law, the Transitional Council for the CRPO's (TC) position, consequences of contravening the legislation, and steps you may wish to take if you feel the regulatory scheme will negatively impact your practice.

Existing and Proposed Law

The controlled act of psychotherapy is drafted as follows:

3. The practice of psychotherapy is the assessment and treatment of cognitive, emotional or behavioural disturbances by psychotherapeutic means, delivered through a therapeutic relationship based primarily on verbal or non-verbal communication.
4. In the course of engaging in the practice of psychotherapy, a member is authorized, subject to the terms, conditions and limitations imposed on his or her certificate of registration, to treat, by means of psychotherapy technique delivered through a therapeutic relationship, an individual's serious disorder of thought, cognition, mood, emotional regulation, perception or memory that may seriously impair the individual's judgement, insight, behaviour, communication or social functioning.¹

Other controlled acts are defined under s. 27(2) of the [Regulated Health Professions Act, 1991 \(RHPA\)](#). It is important to note that an exception is set out for counselling under s. 29(2):

- (2) Subsection 27(1) does not apply with respect to a communication made in the course of counselling about emotional, social, educational or spiritual matters as long as it is not a communication that a health profession Act authorizes members to make.

There is also an exception for "treating a person by prayer or spiritual means in accordance with the tenets of the religion of the person giving the treatment" under s. 29(1)(c). Unless a member of a regulatory college, aboriginal healers and midwives are exempt when providing services to aboriginal persons or members of an aboriginal community under s. 35 of the *RHPA*.

¹ *Psychotherapy Act, 2007*: <http://canlii.ca/t/1krm>.

Making Sense of the Definition

The elements of the controlled act of psychotherapy have not been defined. For example, there is no definition for “psychotherapy technique”, “therapeutic relationship”, “serious disorder” or “seriously impair”. This means courts will have to interpret the meanings over time unless the legislation is amended to clarify the terminology’s breadth.

In responding to recent criticism of the proposed regulatory scheme, the TC suggests there is no cause for worry because general and faith-based counselling is exempt under the *RHPA*.² In its information for applicants, the TC relies on the HPRAC’s *New Directions* report to clarify the issue. The report distinguished between psychotherapy and counselling as follows:

Psychotherapy is most often characterized by an intense client-therapist relationship which often involves the examination of deeply emotional experiences, destructive behaviour patterns and serious mental health issues.

The practice of psychotherapy is distinct from both counselling, where the focus is on the provision of information, advice-giving, encouragement and instruction, and spiritual counselling, which is counselling related to religion or faith-based beliefs.³

Based on this interpretation, the TC signals to applicants that counsellors whose work falls outside the scope of practice of psychotherapy need not apply.⁴

This solution is enticing because it is more reasonable. The problem is that the HPRAC report is not binding on the future CRPO or the courts. While legislative intent is an important part of legal analysis, Queen’s Park did not adopt the report. Consider it research and commentary outside the regulatory bubble. As mentioned above, the *RHPA* does provide an exception for counselling but it does not define or elaborate on the practice either.

To compound the problem, section 11 of the *Psychotherapy Act* gives government *carte blanche* to make regulations:

11. Subject to the approval of the Lieutenant Governor in Council and with prior review by the Minister, the Council may make regulations prescribing therapies involving the practice of psychotherapy, governing the use of prescribed therapies and prohibiting the use of therapies other than the prescribed therapies in the course of the practice of psychotherapy.⁵

Regulations are laws that are made by way of publishing notice on the Government of Ontario’s e-Laws website and in the Ontario Gazette. Think of regulations as add-ons to existing legislation, it is easier and quicker to make amendments this way. The opportunity to comment and debate is eliminated because the proposed bill does not go through legislature.⁶

² CRPO Response to "Stop Psychotherapy Takeover" dated August 8, 2014:

<http://archive.constantcontact.com/fs107/1110759861961/archive/1118157950303.html>.

³ Health Professions Regulatory Advice Council, *Regulation of Health Professions in Ontario: New Directions*:

http://www.health.gov.on.ca/en/common/ministry/publications/reports/new_directions/new_directions.pdf beginning on page 206.

⁴ CRPO, Information for Applicants (General): <http://www.crpo.ca/home/info-for-applicants/>

⁵ *Psychotherapy Act, 2007*, *supra* note 1.

⁶ For more information on how laws are made, visit:

<http://www.ontla.on.ca/lao/en/media/laointernet/pdf/bills-and-lawmaking-background-documents/acts-and-regulations-en.pdf>

All of this means that the current definition of psychotherapy must be read as drafted and could change at any time by way of regulation without opportunity for public comment. It is so broad that it could reasonably be interpreted as a catch-all because counselling and psychotherapy overlap.⁷ This is why critics argue that natural health practitioners and counsellors could run afoul of the legislation. My reading of the *RHPA* sees protection for faith-based counsellors though they too could potentially run into problems with overlapping scope.

Future Standards of Practice and Titles

Regulatory colleges play an important role in establishing standards of practice for a profession. This is usually based on feedback from stakeholders. These standards combined with expert testimony on guidelines have credible weight in court but would only be part of a court's analysis in determining what the impugned legislation means.

On review of the Hansard committee transcripts,⁸ I came across Ms. Joyce Rowlands' presentation to the Standing Committee on Social Policy in 2009. At that time, she argued that the "holding out" clause in the *Psychotherapy Act* should include the title "therapist" because it could be combined with words relating to the specialty of psychotherapy. Unqualified individuals could choose to avoid regulation by using titles such as "family therapist". She argued that the loophole could "undermine the intent of the *Psychotherapy Act*".⁹

Does this mean that the CRPO would sanction "family therapists" but not "family counsellors"? What is the difference between the two? Would nutritionists be protected by the counselling exclusion if they are giving simple advice on diet? What about a homeopath treating depression? If Ms. Rowlands argued for a broad interpretation of psychotherapy, critics' fears may well be justified. Only a clarification of the legislation will give real answers and allow practitioners to understand where they stand.

Admission and Educational Requirements

Critics are stating that admission to the CRPO will require a Masters' degree. This is false. I do not wish to shift the focus of the discussion paper, however, admission requirements are readily available on the CRPO website.¹⁰

Potential Consequences of Contravening the Legislation

Persons found guilty of performing a controlled act without authorization face a fine of not more than \$25,000 and/or up to one year in jail for a first offence and a fine of up to \$50,000 and/or up to one year in jail for a second or subsequent offence.¹¹

⁷ A letter dated November 27, 2013 from Carol Cowan-Levine, president of the TC, to a stakeholder, also relies on the HPRAC report and acknowledges "considerable overlap between counselling and psychotherapy": <http://www.crpo.ca/wp-content/uploads/2014/03/CRPO-response-to-Shepell-letter-of-Oct10-13.pdf>.

⁸ Hansard is the transcript of proceedings and debates at the Ontario Legislature.

⁹ Committee Transcripts: Standing Committee on Social Policy - 2009-Sep-28 - Bill 179, Regulated Health Professions Statute Law Amendment Act, 2009:

http://www.ontla.on.ca/web/committee-proceedings/committee_transcripts_details.do?locale=en&Date=2009-09-28&ParlCommID=8875&BillID=2189&Business=&DocumentID=24344.

¹⁰ See: http://www.crpo.ca/home/info-for-applicants/regular-applicants/#ed_trng_requirement_details and <http://www.crpo.ca/home/info-for-applicants/grandparentinginfo/> for grandparenting.

¹¹ *RHPA*, s. 40: <http://canlii.ca/t/524jd> (and s.10 of the *Psychotherapy Act*, 2007).

State of the Law

The *Psychotherapy Act* is mostly in draft form, it has not been proclaimed and is not yet law. A June 17, 2014 newsletter from the Ontario Society of Psychotherapists (OSP) explained that the proposed legislation has hit a snag. Proclamation may or may not happen because of an issue with the Registered Mental Health Therapists title. At the time of writing, I had no further updates on this and welcome corrections or news.

Practically speaking this makes it a good time to voice your concerns to your MPP and the Ministry of Health. This is not a case of the legislation simply going through its approval process. There is a problem with it and your voice may stand a greater chance of being heard.

Potential Action Steps

To review, the law as drafted is ambiguous and overbroad. Changes can be made by way of regulation, bypassing opportunity for public review and comment. It is impossible to say what direction regulation will take but practitioners need to have a clearer idea of whether or not they risk facing prosecution by the CRPO.

Consider the key and incidental practices in your interaction with clients. It is difficult to imagine a natural health or counselling practice where the practitioner is never addressing what a layperson might understand as a “serious disorder”. Would counselling of self-limiting depression be permissible while treatment of chronic depression allowable only under the controlled act of psychotherapy? Perhaps it should depend only on the severity of the depression? Or maybe all types of depression are deemed serious. What about conditions like fibromyalgia that are often both mental and physical? Ubiquitous complaints of anxiety? I do not have any answers but encourage you to reflect on your practice and how the regulation of psychotherapy may affect you.

Again, I emphasize that the legislation itself is not a “done deal” based on the OSP’s June newsletter. Make your voice heard, outline how the legislation may create problems for you and your clients. If you are in a rural or northern area, there may also be concerns that restrictions to your practice would leave the community without any services at all. Those who value regulation may simply state the problems they risk facing and ask that the definitions be clarified. Others who oppose regulation may prefer to ask that proclamation of the CRPO on or about October 1, 2014 be delayed or stopped.

If you belong to an association, raise the issue with your group as well. I note the National Guild of Hypnotists’ informed response and creative guide for its members.¹² They have outlined a professional code of ethics, standards of practice and recommended terminology to clarify hypnosis.¹³ Your association may be able to provide similar guidance.

If you belong to a regulated profession and feel that your group should be allowed to practice the regulated act of psychotherapy, contact your regulatory college to see if that is being or has been discussed.

Get legal advice specific to your practice and circumstances. Another option is to contact the CRPO itself. They should have an idea of whether your practice is likely to attract their attention. Ask their opinion in writing for future reference.

¹² National Guild of Hypnotists, Letter to Members Regarding the New Psychotherapy College, dated June 18, 2014: http://mississauganghchapter.ca/mississauganghchapter.ca/Psychotherapy_College.html.

¹³ The Code of Ethics of the National Guild of Hypnotists, 2014 Edition: <http://www.ngh.net/downloads/CodeEthicsStandards.pdf>.