

# INTRODUCTION

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BRYAN SCHWARTZ \*

Canada's prosperity in the twenty-first century will largely depend on its ability to attract immigrants and to capitalize on their talents, training and aspirations when they arrive. Canada needs an influx of skilled immigrants whose tax contributions will offset the social costs of an aging population and the rising costs of government programs. However, immigrants are not mere instruments for promoting prosperity for the rest of the Canadian community; law and public policy must value them as free and equal individuals respectively. Both the public and immigrants benefit when immigrants are free to use their skills and training to achieve meaningful and prosperous lives.

Unnecessary barriers to occupational practice can profoundly impair programs designed to attract immigrants. Barriers weaken the freedom, dignity and wellbeing of newcomers by preventing them from fully and fairly harnessing the competencies they have gained through education, training and experience in their places of origin. Immigrants frequently face excessive legal obstacles to practise their occupations. Laws enacted directly by Parliament or provincial legislatures and governments, or by occupational bodies holding delegated authority, can often stand in the way. For example, a college of physicians might not recognize a foreign-acquired medical degree or residency. A dental college might require a highly experienced practitioner to pass a newly created examination designed for freshly minted graduates, while concurrently "grandfathering" established local professionals who might similarly find it difficult or impossible to pass.

There are sound reasons for public regulation of many occupations. Economists cite two main justifications for occupational regulation: informational asymmetry and third-party costs.<sup>1</sup> Informational asymmetry occurs when a given service is so highly specialized that potential consumers of that service are unable because of cost, experience or expertise to know whether a service provider is competent and rendering reasonable value for the price. The cost of a mistaken choice may be intolerable; for example, surgical malpractice can inflict extreme suffering. In many contexts, it is unacceptable to allow

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\* LL.B. (Queen's), LL.M. (Yale), J.S.D. (Yale). Asper Professor of International Business and Trade Law, University of Manitoba.

<sup>1</sup> See e.g. George A Akerlof, "The Market for "Lemons": Quality Uncertainty and the Market Mechanism" (1970) 84 *Quarterly Journal of Economics* 488 at 500; Thomas G Moore, "The Purpose of Licensing" (1961) 4 *JL & Econ* 93.

incompetence to be detected and subsequently rooted out merely by the reports of those who suffer at the hands of the inept or unethical. Incompetent, exploitative, or unethical practice can inflict costs on third parties as well. For example, a consumer who hires an incompetent air pilot for a charter flight may end up contributing to the injury or death of someone on the ground if the plane crashes.

Governments may directly regulate occupations, or they may delegate regulatory authority to occupational bodies. The determination of whether to permit a group of service providers to “self regulate” can be influenced by a number of factors, such as whether the existing cohort is perceived as having a high level of expertise and ethics, and thus in some ways is better able than politicians and bureaucrats to define and enforce competence and fair dealing. The decision to delegate can also proceed from more pragmatic motives, such as transferring the costs and burdens of oversight and regulation from governments to occupations. Occupations may also gain powers of self-regulation from effective lobbying by members of the occupation, who may have a mix of noble and self-interested motives in wanting to police themselves.

The literature on self-regulation tends to distinguish between “licensing” and “certification”. Where licensing is akin to granting a monopoly, certification is comparable to granting a trademark. Licensing limits the ability to practise an occupation or an aspect of it to one particular group; for example, by limiting the performance of surgery to surgeons. Certification grants a group the exclusive right to use a particular name. An example of this is that only people certified by a body of certified public accountants can use that name, even though there are few legal restrictions on the ability to carry out accounting tasks such as bookkeeping and tax preparation. The “certification” model acquires the exclusionary aspects of a “licensing” model if the exclusive right to the use of a particular name carries with it the exclusive right to respectability. People might want medical advice and treatment only from someone who is called a medical doctor, even if there are aspects of medical treatment and advice that could be competently delivered by individuals without a medical doctor designation, such as nurses, nurse practitioners or sports trainers.

Empirical studies into the economics of the licensing model tend to find its use problematic. The elimination of competition can adversely impact consumers. The quantity of practitioners is reduced, prices rise, and some consumers are unable to meet the protected market price or find a provider. Limits to entry to licensed occupations do not necessarily contribute to improved performance among those who are admitted. Even when entry requirements are correlated with a higher quality of service, their costs outweigh their benefits when they are unnecessarily stringent. Those who can neither afford a platinum-calibre service provider nor find one at any price may receive no service whatsoever. A shut-out consumer may also provide the service to himself—often

ineptly—or resort to a substitute occupation that is more available but less skilled, unskilled, or dangerous. For example, where there is a shortage of medically trained mental health providers, people suffering from mental illness may try to treat themselves. They may self-medicate through alcohol, recreational drugs or illegally obtained prescription drugs, or by turning to alternatives such as self-described counsellors who may lack skills or ethical training to provide effective treatment. Economists call the denial of services from excessively stringent licensing requirements the “Cadillac effect”. One empirical study from the 1970s found that restrictive licensing measures for electrocutions led to a lower density of electricians, which was correlated with an increase in accidental electrocutions.<sup>2</sup>

The problem of mandating “the highest standard of excellence” extends to imposing requirements that do not actually improve the quality of services provided. Unnecessary requirements for additional training or apprenticeships may not contribute to excellence, but they may exclude those who lack the financial resources or emotional stamina to endure an unnecessarily protracted training period. A demand that a professional obtain an undergraduate degree before specializing may exclude prospective first-rate practitioners who would rather learn and apply directly relevant information than spend years immersed in books. The challenge is to define credentials and reliably measure competence in a manner that genuinely serves the public interest.

The certification model has some advantages over the licensing model. Members of a non-monopoly have an interest in maintaining the reputation of the occupational designation under which they practise because the price premium they demand derives solely from that reputation. For example, registered massage therapists may enjoy enhanced prestige and income only if the “registered” certification is held in high repute by the public, even though anyone may administer massages. The certification model delivers the high level of service normally found in the licensing model while allowing customers to purchase lower-quality and less expensive substitutes when they choose. Certification maintains an important sense of group affiliation. Members of a group may become loyal to its traditions and ideals, accompanying a heightened desire to serve competently and conscientiously, and to identify, correct or expel members who fall short of the group’s standards. An occupational body can be an independent advocate for values that may be given insufficient sway by politicians or bureaucrats who propose to regulate in an area. For example, physicians might rely on their professional experience and ethics to resist a cost-cutting measure by government if the measure does a disservice to patients.

There are potential drawbacks to allowing a body to regulate itself, particularly if the body has *de jure* or *de facto* licensing or monopolistic powers.

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<sup>2</sup> Sidney L Carroll & Robert J Gaston, “Occupational Restrictions and the Quality of Service Received: some Evidence” (1981) 47:4 Southern Economic Journal 959 at 965.

The group might consciously or unconsciously establish barriers to entry that are motivated by the desire to restrict competition, and thereby increase prices. Human beings are motivated by more than material reward; the pursuit of social standing and prestige can distort self-regulating decisions no less than material avarice. A group might seek to enhance the social status of its members by portraying itself as an elite body which very few have the talent and achievements to join.

The protectionism of self-regulating professions is often unwittingly counterproductive. New entrants to a profession may not always lower prices; rather, they may enhance the visibility of a profession, introduce more people to the services that it provides, and increase market demand to the benefit of existing practitioners. New entrants may also increase the political clout of a profession. The addition of capable people to the cadre of a profession may enhance its stock of ideas, techniques, and pool of administrators and visionaries.

In practice, motive is difficult to detect. Empirical studies in several contexts, however, show that self-regulating bodies have imposed barriers to entry that have borne little to no impact on quality, but that have increased the prices and reduced the availability of services.<sup>3</sup>

Additional factors distort the recognition of the credentials and substantive competencies of foreign-trained professionals. Barriers to entry may not only be the product of protectionism with respect to money and prestige, but also the result of ignorance, stereotypes, and biases about the nature and quality of training, education and testing in other countries. Studies suggest that barriers to entry for foreign-trained practitioners pose an extremely serious problem in Canada. These barriers can destroy the dreams of newcomers and prevent them from productively using their talents and training. Barriers to entry can also deprive the public of the benefit of new ideas and techniques that talented and inspired newcomers acquire abroad, while denying occupational groups the opportunities to qualitatively and quantitatively strengthen themselves.

There are several possible approaches to addressing barriers to entry to foreign-trained practitioners. Chapter One of this collection explores the use of human rights legislation to eliminate unjustified discrimination resulting from differential and adverse treatment of foreign-trained workers compared with their Canadian-trained counterparts. Provincial human rights statutes prohibit discrimination and permit individuals to bring complaints and obtain legally

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<sup>3</sup> See Morris M Kleiner, *Licensing Occupations: Ensuring Quality or Restricting Competition?* (Kalamazoo: W E Upjohn Institute for Employment Research, 2006); Timothy R Muzondo & Bohumir Pazderka, "Income-enhancing effects of professional licensing restrictions: a cross-section study of Canadian data" (1983) 28:2 *The Antitrust Bulletin* at 397; but see Marc T Law & Sukkoo Kim, "Specialization and Regulation: The Rise of Professionals and the Emergence of Occupational Licensing Regulation" (2005) 65:3 *Journal of Economic History* 723.

binding remedial orders from independent bodies. There have been a number of successes through this route, namely, cases where a challenger brought a complaint which was investigated by a human rights commission and then upheld by a human rights body and ultimately by the courts.<sup>4</sup> However, these cases might only represent the tip of the iceberg. The law reports do not record cases that were abandoned or never brought. In my experience as an advocate, I encountered many foreign trained professionals who, when faced with unjustifiable barriers to entry, found the cost of battle too daunting to begin, or too burdensome and painful to sustain.

Immigrants who are barred from practising the occupation which they practised in their home country can feel demoralized and humiliated. The sting of injustice can be especially severe if they justifiably believe that they are eminently qualified, that their training in their country of origin was at least as demanding as the Canadian standard, and that they were respected in their home community for providing a high level of service. The financial burden of pursuing a remedy can be especially difficult if they have just endured the costs of moving from their home country to a new land, and have not had a chance to accumulate any kind of financial security through their practice in Canada.

The emotional price of the struggle for recognition can be intolerable. The warfare is asymmetric. The occupational body that resists immigrants' entry may be governed by people who feel no great personal emotional investment in the matter; in their minds, they are just applying rules or upholding standards, and it is "nothing personal". The occupational body may draw from deep pockets to defend its fortress; it may have staff administrators and experts to prepare and articulate the case against the applicant, and it may have the resources to hire additional lawyers and expert witnesses; it may also draw from a large body of institutional experience which it gained by fighting many similar cases. Foreign-trained applicants may be struggling to make ends meet, unable to spend large amounts of money and time on a protracted dispute. To pursue the struggle, applicants must be prepared face public adjudication, and to have eminent regulators or experts in the profession testify as to the alleged limits of the training and competence of the applicants. Those heading up the professional body are unlikely to be singled out or embarrassed if the applicant ultimately prevails.

This study particularly focuses on the challenge of recognition of the credentials and competencies of foreign-trained workers. Some potential remedies, such as reforms to human rights legislation, might aim to eliminate discrimination of such workers in comparison with the treatment of people trained in Canada. This path to reform might leave entry requirements in place while eliminating barriers that may result from evaluation criteria that either use

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<sup>4</sup> See e.g. *Bitonti v British Columbia (Minister of Health)* (1999), 36 CHRR D/263 (BCCHR); *Keith v Newfoundland Dental Board* 2005 NLTD 125, 37 Admin LR (4th) 106 [*Keith*].

unfounded assumptions or stereotypes about foreign training or which are due to a lack of resources and procedures to evaluate equivalency of foreign credentials to those required by Canadian jurisdictions. Other potential reforms, such as enforceable “fair access” legislation, would aim to ensure that occupational entry requirements are substantively necessary and administered in a fair and transparent manner for all workers, whether they are trained in Canada or abroad.

Foreign-trained professionals who seek redress through human rights statutes face a difficult legal path. Applicants must demonstrate that an injustice is “discriminatory” according to the technical meaning of that word under the particular provincial human rights code they invoke. Rejected applicants for admission must show that the alleged discrimination falls within one of the grounds of discrimination recognized by the statute, and that an exclusion distinguishes between them and local applicants “on the basis” of that discriminatory factor.<sup>5</sup> Even if applicants clear these hurdles they must contend with the defence that any discrimination is justified by considerations such as public protection. The cases that show up in the law reports show that professional bodies sometimes dispute every element in discrimination cases, and that it can take years to fight a case through all the levels of human rights commissions, human rights tribunals, and even courts.<sup>6</sup> An overriding limitation of human rights statutes is that they cannot provide a remedy where foreign- and locally-trained applicants are equally subjected to unfair treatment. Rank injustice is irrelevant to human rights proceedings if it is visited equally on everyone.

One option for enhancing human rights regimes in removing barriers to entry could be amending human rights statutes so that “place of training, practice and evaluation” would be a clearly prohibited ground of discrimination. This would eliminate costly disputes over whether discrimination on such grounds falls within the catalogue of prohibited bases of discrimination under various provincial human rights statutes. If provincial legislatures did amend their statutes, they would broadcast a strong message that they are serious about remedying discrimination against foreign-trained workers. The effectiveness of the human rights route is limited. It should be refined and improved, but other dimensions of law reform are necessary.

Chapter Two of this study explores “fair access” legislation at the provincial level that would address unnecessary barriers to entry for both newcomers and applicants of Canadian origin. Several provinces, including Ontario, Manitoba

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<sup>5</sup> See e.g. *Law Society of British Columbia v Andrews* [1989] 1 SCR 143, 56 DLR (4th) 1 at para 37.

<sup>6</sup> *Keith*, *supra* note 4.

and Nova Scotia have now enacted such laws.<sup>7</sup> Ontario's statute, the *Fair Access to Regulated Professions Act*, illustrates the potential of these efforts, and their current limitations.<sup>8</sup> The *Fair Access to Registered Professions Act*:

- Requires the regulated professions to maintain admission practices that are “transparent, objective, impartial and fair”;
- Requires the professions to conduct an audit of their practices and report to an independent commissioner;
- Mandates that the report address substantive barriers to entry, as well as procedural errors, specifically, “the extent to which the requirements for registration are necessary for or relevant to the practice of the profession”;
- Mandates that the report address the treatment of internationally trained individuals; and
- Establish a centre to conduct research and inform foreign-trained individuals about registration practices.

The Ontario statute is progressive only if it amounts to a first attempt at incremental reform. It will fail if it continues unimproved. A truly effective fair access statute must:

- Establish that the standards override other statutes, including those that delegate authority to the regulated professions;
- Provide an independent appeal body to which individuals and the Commissioner can bring complaints, and which can issue legally binding decisions;
- Require professions to develop adequate mechanisms to assess the credentials and substantive competencies of foreign-trained practitioners, rather than relying only on assessment of paper qualifications; and
- Require professions to establish and maintain bridging programs in order for foreign-trained individuals to overcome deficits in proficiency that are identified as a result of fair evaluation of their credentials and competencies.

The review mechanism under the first wave of “fair access laws” such as Ontario's is limited to having self-regulating professions review their own practices or having an “audit” conducted by a government-appointed official. These laws lack a mechanism that would allow affected individuals to make a formal complaint that, unresolved, would benefit from an external investigative process. Specific cases can be among the most effective means of identifying and

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<sup>7</sup> *Fair Access to Regulated Professions Act*, SO 2006, c 31 [*Fair Access Act*]; *The Fair Registration Practices in Regulated Professions Act*, SM 2007, c 21; *Fair Registration Practices Act*, SNS 2008, c 38.

<sup>8</sup> *Fair Access Act*, *ibid.*

understanding the real nature and extent of problems. Individuals will have no incentive to bring forward complaints if doing so will draw attention to their humiliation without reasonable prospects of correcting the issue. The independent appeal body must, like the human rights tribunal, have the authority to make legally binding decisions, and the fair access statute itself, like a human rights act, must override other statutes in case of conflict.

Some regulated professions would undoubtedly resist any measures they perceive as curtailing their autonomy; however, under the laws of Ontario, entry standards are already largely established by public laws and regulations. To the extent that professional bodies have the authority to set their own standards that authority is limited by a statutory duty to act in the public interest, and setting standards may involve the approval of the provincial government as well as the professional body. The establishment of independent oversight bodies and appeal commissions would ensure consistent, province-wide norms concerning the elimination of unnecessary barriers to entry that would be administered by independent bodies. The creation of the regime proposed here would not result in a categorical change to the degree of intrusiveness over the activities of the regulated professions in a jurisdiction like Ontario; rather, it would somewhat shift the means of public oversight and control of professional regulation to independent bodies such as a fairness commissioner and an independent appellate body. These latter authorities would apply known standards based on evidence submitted by the profession, complainants, or the independent commissioner.

Professional bodies would be more willing to fully and promptly comply with fairness mandates if they were provided with governmental assistance in doing so. Mechanisms to assess credentials and test substantive proficiencies could require considerable study and expense to establish and implement. Fair access laws should therefore include the establishment of dedicated funds to which these bodies could apply for assistance in achieving full compliance with the requirements of the legislation.

Ideally, there would be a high level of cooperation between the provinces and the federal government. Economies of scale could be achieved by establishing centres in each profession that could advise occupational self-regulatory bodies on setting fair entry standards, conducting proper evaluations of professions generally, and putting in place the bridging programs and evaluation techniques needed to achieve justice for foreign trained individuals. An enlightened province, however, will not stand still if efforts at pan-Canadian cooperation are unrealized. It will instead invest in becoming a national leader in ensuring fair access. By doing so, it will attract and retain foreign- and domestically-trained human capital from across Canada and the world. As other provinces choose to follow suit, cutting edge provinces could recover their

investment costs by providing the expertise and institutions they will have established.

Chapter Three of this study reviews the prospect of using existing or amended federal competitions law to address barriers to entry to the regulated occupations. Addressing anti-competitive practices in the regulated occupations would serve vital federal interests, including the promotion of nationwide economic prosperity. This is consistent with “Going for Growth”, a report by the Organisation for Economic Co-operation and Development (OECD) on promoting economic prosperity in Canada, recommended enhancing competition in the professions as one of a handful of top priority policy initiatives.<sup>9</sup>

Federal intervention in the competitions area has been limited by the “regulated industries defence”. Courts have found an implied exemption to the application of some quasi-criminal provisions under the federal *Competition Act*.<sup>10</sup> The courts reason that Parliament did not intend to classify and punish activity as an “undue” lessening of competition if a body is acting within its statutory authority under provincial law to regulate an occupation in the public interest. For example, if a provincial statute authorizes a law society to decide whether advertising by lawyers is permitted, a decision to ban advertising is exempt from the application of the *Competition Act* restriction on conspiracies to unduly lessen competition.<sup>11</sup>

There is little case law on the issue of whether the regulated conduct defence also applies to the provisions of the federal competition statute that provide for civil remedies, such as orders that a practice cease or that there be compensation for a party victimized by it. The federal competition bureau might attempt enforcement action with respect to some civilly enforceable provisions of the federal competition statute. It would try to convince a court that the regulated conduct defence is inapplicable to that particular provision.

Chapter Three of this study proposes that Parliament amend the federal *Competition Act* to make it clear that at least one of its civilly-enforced provisions addresses the activity of occupational regulators in establishing unnecessary barriers to entry, and that the regulated conduct defence is not a shield in such cases. The existing *Competition Act* contains a provision on “abuse of dominant position” in a market sector which appears to provide a particularly useful platform upon which to base any amendments.<sup>12</sup>

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<sup>9</sup> OECD, *Economic Policy Reforms 2010: Going for Growth – Canada* (Paris: OECD, 2010).

<sup>10</sup> *Competition Act*, RSC 1985, c C-3419 (2nd Supp) [*Competition Act*].

<sup>11</sup> *Garland v Consumers’ Gas Co*, 2004 SCC 25 at paras 77-79, [2004] 1 SCR 629; *Canada (AG) v Law Society of British Columbia* [1982] 2 SCR 307 at 348-361, 137 DLR (3d) 1.

<sup>12</sup> *Competition Act*, *supra* note 10, s 72.

There might be constitutional or political objections to the assertion of federal authority over occupational regulation, which is ordinarily regulated by the provinces. These sensitivities ought to be addressed by:

- Tailoring legislative reform specifically to reduce barriers to entry, rather than attempting to intervene in other aspects of occupational regulation;
- Establishing a single, simple, across-the-board norm, namely, a provision regarding abuse of a dominant position in a sector by establishing unnecessary barriers to entry; there should be no attempt to micro-regulate through detailed and occupation-specific provisions;
- Framing the proposed reform as a refinement of an existing Anti-Competition Act provision, rather than as any radical departure from the status quo;
- Following the example of the federal privacy statute, the Personal Information Protection and Electronic Documents Act [PIPEDA],<sup>13</sup> by giving the provinces a grace period in which to enact their own “fair access” legislation. To the extent that a province does so, the “abuse of dominant position” provisions would not apply;
- Possibly allowing a much narrower version of a defence based on provincial mandate, as in the US model; anti-competitive conduct would be exempt from the application of the amended “abuse of dominant position” provision if the regulatory body were required by provincial law to take such action; by contrast, the existing regulated conduct defence applies when a particular anti-competitive choice merely falls within the range of regulatory actions that the body is permitted to carry out under provincial law.

Decisive federal action to amend the *Competition Act* might persuade the provinces to act much more rigorously to amend their laws in order to foster competition in the regulated occupations. In the absence of federal inducements, the provinces have historically avoided widespread and determined action in this direction.

If Canada’s federal or provincial governments are effective in removing barriers to entry, even temporarily, Canada will be in a much stronger position to enter into international treaties that commit Canada to fairly recognize the credentials and competencies of immigrants.

The public international law dimension of occupational freedom for newcomers is addressed in Chapter Four, which primarily considers the *General Agreement on Trade in Services* [GATS]<sup>14</sup>—part of the World Trade Organization family of global trade agreements that liberalize trade. Canada may enter into commitments that permit, among other liberalizing steps, the temporary entry of foreign nationals to provide services in various occupations.

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<sup>13</sup> SC 2000 c 5.

<sup>14</sup> *General Agreement on Trade in Services*, 15 April 1994, 1869 UNTS 183, 33 ILM 1167 (entered into force 1 January 1995), being Annex B to the *Agreement Establishing the World Trade Organization*, 15 April 1994, 33 ILM 1143 (entered into force 1 January 1995).

Canada should continue to expand its openness to temporary entry by adding more occupations to its schedule of *GATS* commitments and expanding the scope of existing commitments. Expanded breadth may be achieved through consultation with the provinces by removing some of the reservations Canada has made with respect to the freedoms offered in its existing schedules. Progress on temporary entry will have useful spill over effects by broadening general recognition of foreign credentials. Visitors who are able to practise in Canada temporarily may decide to immigrate, or at least spread the word to others that Canada is a welcoming place to live and work. Furthermore, if Canada would consult with the provinces and self-regulating bodies to ensure that promises of occupational freedom to temporary entrants would be honoured in practice, improved principles and practices concerning the recognition of foreign-acquired credentials and competencies could be developed. These new, and arguably more appropriate refinements would apply to visitors and then could be applied (with any necessary adaptations) to professionals who plan to come to Canada on a long-term or permanent basis.

Canada can also work with other states to develop “disciplines” that apply to the recognition of qualifications in various occupations in order to move ahead in the *GATS* context. A discipline is a set of principles that encourages states to permit fair access to occupational practice for temporary visitors. An exemplary discipline has been developed by the *GATS* council with respect to the accounting profession.<sup>15</sup> The disciplines facilitate access to occupations by ensuring that domestic regulations are only as restrictive as required to protect public safety.

States must be prepared to justify restrictive domestic regulations and only those regulations that meet the disciplines’ definition of a legitimate objective should be permitted. According to the accountancy discipline, legitimate objectives include protecting consumers, maintaining quality of service, ensuring professional competency and preserving the integrity of the profession.

Licensing and qualification requirements must be pre-established, accessible and objective. Objectivity would oblige occupational bodies to consider and evaluate foreign credentials and competencies on a standard of equivalency, which is assisted by technical standards that each country must develop, enact and utilize relating to the accountancy profession.

Although Canada’s ability to liberalize is limited by the willingness of its provinces to co-operate, any steps it takes to permit even temporary entry might succeed in attracting more capable immigrants. Another method of attracting immigrants is for Canada to enter into reciprocal agreements with countries that promise fair access to the regulated occupations in their domestic markets. Canada is already a party to numerous regional trade agreements such as

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<sup>15</sup> WTO, *Disciplines on Domestic Regulation in the Accountancy Sector*, Council for Trade in Services, S/L/64 (17 December 1998), online: WTO <<http://docsonline.wto.org>>.

NAFTA that provide for a temporary entry procedure similar to the GATS'; however, developing broader mutual recognition agreements would further facilitate labour mobility. A promising model is the Quebec-France agreement, under which members of certain regulated occupations will be free to move and practise in both jurisdictions.<sup>16</sup> Other countries also partake in successful recognition agreements, notably the EU member countries within the *Lisbon Convention* and other directives.<sup>17</sup> Canada could also use such agreements as a benchmark for its own domestic policies. Canada's well-established policy of attracting skilled workers is being frustrated by barriers at the provincial level. This is another powerful reason to use levers such as the federal *Competition Act* to spur the provinces to remove unnecessary legal barriers to practise.

Chapter Five of this study suggests a number of options to restructure Canada's immigration laws and practices, including refining the "point" system for evaluating the strength of applications for immigration. The formula should emphasize the extent to which applicants' home country credentials would actually be recognised when they arrive in Canada. Canada should also increase transparency by informing immigrants of the extent to which their credentials and competencies are likely to be recognized.

Chapter Five also addresses concerns about the morality of Canada's policy of attracting highly-skilled foreign workers. Is it right for Canada, a wealthy country, to attract immigrants whose talents derive from the extensive investments which their frequently less-developed home countries have made? Defenders of this arrangement point to the counterbalancing benefit to Canada; others contend that Canada has a limited ability to integrate immigrants in a given year, so those who can contribute the most should receive priority. If Canada closes itself to talented foreign workers, they will not necessarily remain in their home countries but instead migrate to more accommodating societies. Although counterintuitive, the best defence of immigration policies similar to Canada's is that they can benefit immigrants' home countries. Skilled workers who arrive here may remit a large part of their enhanced incomes to family and friends in their home countries. Some immigrants may use their combined knowledge of Canada and their country of origin to promote economic and cultural exchanges between the two, which benefits both societies. Immigrants may also return home, temporarily or permanently, and spur the growth of local enterprises with the knowledge and capital they acquired in Canada. Global competition for talent, moreover, can encourage local authorities to improve

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<sup>16</sup> *Québec-France Agreement on the Mutual Recognition of Professional Qualifications*, 17 October 2008, online (in French): Ministère des Relations internationales <<http://www.mri.gouv.qc.ca/fr/informer/ententes/pdf/2008-12.pdf>>.

<sup>17</sup> *Convention on the Recognition of Qualifications concerning Higher Education in the European Region*, 11 April 1997, Lisbon, European Treaty Services, Number 135, 11.IV.1997, online: Council of Europe <<http://conventions.coe.int/Treaty/en/Treaties/Html/165.htm>>.

occupational and overall living conditions in order to retain more of their skilled workers.

Chapter Six describes one area where Canada has progressed through concerted efforts by government and the private sector at promoting the recognition of credentials and competencies of migrant workers: interprovincial mobility. The *Canadian Agreement on Internal Trade* (“AIT”) was amended several years ago to greatly improve its approach to recognition of credentials.<sup>18</sup> Provinces must now presumptively recognize and accept credentials from other provinces, although they have recourse to the “safety valve” of demanding objectively justifiable additional qualifications.

Various types of occupational associations have collaborated on agreements concerning the mutual recognition of credentials within the framework of the AIT. For example, the “Red Seal” program conducts tests to certify worker credentials that are recognized nationwide. The “Red Seal” program can enhance mobility without prejudicing other paths to mobility, such as the establishment of regimes for mutual recognition of credentials.

Progress made under the AIT should inform the discussion on addressing international mobility. It might be useful to integrate some interprovincial programs, such as the “Red Seal” program, within a new cross-Canada effort to promote fair access to occupations for immigrants.

Chapter Seven catalogues most of the existing government and private sector programs that facilitate the entry to occupations of immigrants to Canada. The general conclusion of this study is that the “admitted but excluded” problems deserve recognition as a matter of high national priority. Progress will require vigorous efforts with respect to law reform by Canada, the provinces and the self-regulated professions, and the development and implementation of many practical institutions and programs, such as centres to better assess the qualifications and substantive competencies of newcomers to Canada. There is a need for national leadership in not only developing new federal laws and institutions, but also in inspiring, coordinating and contributing to the funding of similar initiatives by the provinces and self-regulating bodies.

Some initiatives, such as amendments to human rights statutes and fair access legislation, can be effectively conducted by provinces on an individual basis. Others, such as establishment of effective institutions and programs to evaluate foreign credentials and test substantive competencies, would benefit from cooperation between the provinces and the federal government. The latter might play a useful role in coordinating initiatives and contributing funding to subsidise testing and evaluation programs or to financially support immigrants who must invest time and money in additional testing and training.

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<sup>18</sup> *Agreement on Internal Trade Consolidated Version*, 2010, online: Agreement on Internal Trade <<http://www.ait-aci.ca/>> [AIT].

The federal government holds coercive tools beyond subsidies and moral persuasion to induce the provinces into action. It should actively pursue amendments to the *Competition Act* to directly address unnecessary barriers to occupational entry. The mere threat of direct federal regulation might spur provinces to finally take effective action so that they can maintain their autonomy in the area of occupational regulation. The federal government might also reform its own policies by updating its immigration practices to better inform prospective immigrants about the practical prospects of having their credentials recognized, and by assigning points for qualifications and credentials that reflect realities on the ground.

A far-sighted provincial government could liberalize its labour market, even in the absence of coordinated federal-provincial reform. Provinces that take the lead in establishing fair access to the occupations may sustain short term costs. They will have to overcome political pressure from some self-regulating bodies that feel their autonomy is being undermined, or that their income or prestige will be diluted by liberalization. Cutting edge provinces may also have to sustain the costs of establishing and operating programs to assess foreign credentials, evaluate substantive competence, and provide bridging training to overcome deficits. However, they would likely obtain a spectacular return on their investment. Enhanced occupational freedom can be achieved in a measured manner that respects public safety. Removing unnecessary barriers to entry would permit more individuals of Canadian origin to make the best use of their talents and training, and it would attract individuals from other provinces and abroad who are happy to find an environment that welcomes their abilities, rather than implementing unnecessary and demeaning barriers. Consumer underwriters of services, including governments in areas such as health care – would find that choice, accessibility, and cost of services improve. The public treasury would benefit from the contributions of more high skilled workers, and these resources could be used to provide better public services and programs. “Admitted and included” is a far more just and socially beneficial scenario than continuing the status quo, which wastes talent, training, competence, and dreams.

Ideally, the federal government would lead a coordinated effort to reduce barriers to entry to regulated occupations. The vehicle for effecting change is unclear, but models exist. The *Agreement on Internal Trade* has developed an institutional framework and a set of federal-provincial agreements that have already lowered barriers to trade and improved occupational mobility within the country. Early in the *AIT* process, a First Ministers Conference was convened to focus senior political attention on the challenge. A series of ministerial conferences has produced a wide-ranging set of agreements among federal and provincial governments. Under the umbrella of the *AIT*, follow-up meetings and

agreements by Canadian non-government organizations such as self-regulating professions have contributed to the overall progress of the system.

A similar model, beginning with a First Ministers Conference, could be used to address occupational access for immigrants. Indeed, one option would be to task the existing *AIT* system with this additional mandate. The *AIT* system has already been addressing issues such as internal occupational mobility and tasking it with also ensuring fair access for immigrants could be inherently efficient. To facilitate internal migration the *AIT* process has developed principles, policies and institutions which could be adapted to address integration of foreign-trained workers into the regulated occupations in Canada.

This volume explores various policy options that could facilitate liberalization of the regulated professions, so that foreign-trained workers are no longer prevented from practising their occupations. Canada's provincial and federal governments must cooperate now to ensure that foreign-trained workers are no longer "admitted *but excluded*".