

## CHAPTER 3: THE APPLICATION OF COMPETITION LAW TO FOREIGN CREDENTIAL RECOGNITION

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*Self-regulating bodies in the provinces play a significant role as gatekeepers to professions and trades. There is important societal value in having reasonably autonomous entities use their expertise and ethical traditions to safeguard the quality of services provided to the public. At the same time, there is a real risk—often realized with respect to the recognition of foreign credentials—that professional bodies will erect unnecessary barriers to new entrants, including foreign-trained individuals. Motives for doing so can include economic protectionism, the attempt to enhance the social prestige of existing practitioners by restricting admission to a few. When the restrictions are applied to foreign-trained potential entrants, bias and stereotypes concerning foreign training and standards or foreign nationals can be a factor. Unnecessarily restrictive entry barriers can prevent Canadian residents, whether immigrants or of Canadian origin, from deploying their training and talents in the service of our society, while increasing the price and reducing the domestic choice and availability of services. This article reviews the extent to which federal competition law can reduce or eliminate unnecessary restrictions on access to the professions and trades. A review of the current legislation shows that many open competition norms in the Competition Act are inapplicable to self-regulating professional or vocational bodies, or are ill-suited to the specific challenges associated with regulating their anti-competitive activity relating to entry barriers.*

*Provincial legislatures have been very slow to adopt legislation that effectively ensures fair access to professions and trades, and federal intervention is called for.*

- *The general recommendation is that the Competition Act be amended so that at least one provision directly addresses the activities of self-regulating bodies.*

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*Specifically, it is recommended that the Abuse of Dominant Position provision be amended to make it clear that s 79 applies to actions of self-regulating professions and trades that prevent or lessen competition in a market over which they have substantial or complete control. The recommendation is to:*

- *Add “unnecessary regulatory restrictions for the purpose of impeding or preventing a competitor’s entry into, or eliminating him from, a market” as an anti-competitive act under s. 78. Out of deference to the roles of the provincial legislatures, however, an amended provision should only apply in provinces that have failed, after a three year grace period, to adopt reasonable and legally enforceable fair access legislation.*

*To promote transparency and accountability, and to aid the Competition Bureau in assessing whether or not to bring a matter before the Competition Tribunal:*

- *It is recommended that each self-regulatory body create a policy guideline clearly explaining the rationale for its entry requirements and demonstrating that it has considered and employed less anti-competitive alternatives where appropriate.*

## I. INTRODUCTION

In the twenty-first century Canada’s population is growing primarily through immigration. Each year newcomers arrive in Canada looking to put their training and expertise to use in their new country. Many are among the brightest and best educated in their home countries. However, once in Canada many well-educated newcomers perform low-paying unskilled jobs in order to provide basic necessities for their families; this is often because their credentials have not been recognized, and the additional training required by organizations overseeing their professions or vocations is too costly and lengthy. Across the country, self-regulating professional and vocational bodies made up of practising professionals are fully or partially responsible for setting these requirements. Therefore, power to determine the qualifications newcomers must obtain in order to practise their professions or vocations is placed, at least to some extent, in the hands of those against whom they are seeking to compete for market share. Individuals with experience from other places or who were trained from a different point of view have valuable contributions to make, and they may also have insight into how to improve professional practice in Canada. Canadian society is missing out on their knowledge and innovation. Significant obstacles hampering entrance to self-regulated professions lead to underuse of human capital.

The issue of lowering barriers to entry for foreign-trained professionals is an important one in its own right; however, the issue forms one part of the larger

challenge in Canada of ensuring that all competent individuals have fair access to participate in self-regulating occupations. This paper proposes that reforms to the definition and enforcement of federal competition law address the issue of barriers to entry generally, rather than being confined to issues of discrimination against foreign trained individuals seeking entry to an occupation.

This paper will examine how the federal *Competition Act*<sup>1</sup> (the *Act*) may serve to ensure self-regulating organizations do not require more of foreign trained professionals than is reasonably necessary to ensure the safe and effective delivery of services to the public. It will consider the applicable provisions as recently amended, and suggest further amendments so that the *Act* may more effectively oversee self-regulatory actions.

### A. The Purpose of Regulation

According to the Canadian Competition Bureau, self-regulation of certain professions and vocations is intended to correct two kinds of market failure that occur when professional services are offered in an open market: (1) asymmetric information; and (2) externalities.<sup>2</sup> Asymmetric information means that the knowledge imbalance between supplier and consumer of a service is so great that consumers “cannot accurately assess the quality of the services” they are purchasing.<sup>3</sup> In such circumstances, consumers may be harmed by incompetent providers, or charged high prices for low-quality services.<sup>4</sup> Externalities occur where a consumer’s choices impact parties other than the consumer and supplier. A consumer who chooses an incompetent or unethical lawyer may contribute to considerable harm and injustice being inflicted on third parties with whom that party is negotiating or litigating. Furthermore, the court system may find its resources unnecessarily diverted to dealing with the delay, confusion or complications resulting from the participation of inept counsel.

To maintain confidence in a profession, consumers must feel sure they will receive a competent level of service. However, since the average consumer cannot monitor service quality, the provincial governments have exercised their constitutional power over matters of property and civil rights to correct this market failure by ensuring a minimum standard of service through regulation.<sup>5</sup> In the case of professions and vocations the provinces have passed this regulatory

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<sup>1</sup> *Competition Act*, RSC 1985, c C-3419 (2nd Supp) [*Competition Act*].

<sup>2</sup> Canada, Competition Bureau Canada, *Self-Regulated Professions: Balancing Competition and Regulation* (Gatineau: Competition Bureau, 2007) at 18 [Bureau, *Regulated Professions*].

<sup>3</sup> *Ibid.*

<sup>4</sup> See generally *ibid* at 18-19.

<sup>5</sup> *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92(13) reprinted in RSC 1985, App II, No 5 [*Constitution Act, 1867*].

responsibility and authority on to members of the professions, resulting in self-regulation.<sup>6</sup>

Economic studies of regulated occupations often overlook subtle advantages of self-regulation. Members of a group who are responsible to a considerable extent for their own governance and reputation may develop and subscribe to shared values such as competence, honesty and commercial fair dealing. As well, self-regulation limits the extent to which government is unilaterally able to impose its own priorities on professional practice and creates organized bodies which can counterbalance government demands that reflect a lack of expertise by politicians or bureaucrats, or a desire to court popularity at the undue expense of other values. The positive features of self-regulated occupations, however, can often be achieved by granting them the exclusive power to issue a particular designation or certification. This approach occurs in the accounting profession, where only qualified people may call themselves chartered accountants. In contrast, the legal profession has licensing authority, meaning that it maintains the exclusive right to provide a particular service, regardless of the name under which the service is provided. Furthermore, sound public policy can give scope to the value of self-regulating bodies without giving them *carte blanche* to act on their worst instincts, including economic protectionism. While significant scope for self-regulation might be justified in the context of certain occupations, the status quo is inefficient. A 2007 Competition Bureau (the Bureau) report stated the troubling statistic that Canada's regulated professions have half the productivity of their U.S. counterparts.<sup>7</sup> The Organization for Economic Co-Operation and Development (OECD) believes that the best chance for increasing labour productivity in the self-regulating professions is to promote competition by reducing regulation.<sup>8</sup> The findings of a 2008 report commissioned by the Bureau supported this. It found that "10 years after the introduction of Australia's National Competition Policy, the country had experienced significant

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<sup>6</sup> *Canada (Attorney General) v Law Society (British Columbia)*, [1982] 2 SCR 307 at 335, 137 DLR (3d) 1 (SCC) [*Jabour*] (There are both advantages and disadvantages to self-regulation. The benefits include "familiarity of the regulator with the fields, expertise in the subject of the services in question, [and] low cost to the taxpayer" since the administrative agency must "recover its own expenses without" provincial funding. However, the downsides include "conflict of interest, an orientation favourable to the regulated, and the closed shop atmosphere"). The first positive result is that those in the profession best understand what skills and knowledge are necessary to practice competently and have a vested interest in ensuring that service quality, and consequently the public confidence in the profession remains high. Those outside the profession do not have the specialized knowledge needed to properly assess competence. Regulation from within the profession allows those most qualified to set licensing requirements. The highly-trained, specialized nature of certain professions justifies self-regulation. A negative effect is that members of the profession have a personal interest in keeping the profession's membership from expanding too quickly, limiting supply of the service, so that it is in demand and can be charged at a higher rate.

<sup>7</sup> Bureau, *Regulated Professions*, *supra* note 2 at 5.

<sup>8</sup> *Ibid.*

productivity ‘surges’ and growth in household incomes.”<sup>9</sup> One of the ways in which regulation could be reduced and competition increased is by re-examining and revising the current approach to licensing foreign trained professionals.

Removing all entry requirements except those which are reasonably necessary to ensure safe and effective delivery of services to the public would achieve minimum restriction of competition, allowing the maximum use of human capital without sacrificing the public interest in quality control. This would encourage individuals of Canadian origin and newcomers to practise in their fields of training and minimize the time they spend in transition. Not only would this be best for individuals seeking to develop and apply their talents, it would also allow the Canadian public to benefit from their skills and expertise. As more qualified individuals enter the profession there is more competition, which should drive down prices and increase diversity, choice and quality of service, benefitting Canadian consumers. This would also reduce the costs to governments of providing social programs such as healthcare, legal advice and pharmaceutical dispensing, which are large consumers of professional services. Government savings from lower professional costs would benefit the public, either through lower taxes, increased services or both.

## B. Problems with the Current Self-Regulatory Model

Canada has adopted the policy that “competition in a free market system protects both consumers and service providers better than any other alternative.”<sup>10</sup> Therefore it is not legitimate public policy to stifle competition unless “the benefits of regulation demonstrably outweigh the benefits of competition alone.”<sup>11</sup> However, one of the weaknesses of the current system is that self-regulating bodies are granted “very wide” powers without needing cabinet or legislature approval for specific regulations.<sup>12</sup> Currently there is no independent body with legal authority to review the entrance requirements set and to enforce change if required. This raises the concern that “unfounded quality of service arguments may be used to artificially restrict access to the market in which the professionals compete,” where “one group of professionals is reliant on another group of competing professionals for the ability to practise its profession”.<sup>13</sup>

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<sup>9</sup> Melanie L Aitken, “Remarks to the Economic Club of Canada” (Speech delivered in Toronto, 4 May 2010), online: Competition Bureau Canada <<http://www.competitionbureau.gc.ca>> [Aitken, 4 May 2010].

<sup>10</sup> Bureau, Regulated Professions, *supra* note 2 at v.

<sup>11</sup> *Ibid.*

<sup>12</sup> Todd-Jeffrey Weiler, “Professional Self-Regulation and Federal Competition Policy: the Calarco Case” (1997) 7 WRLSI 119 at 126.

<sup>13</sup> Letter from The Competition Bureau to the Paralegal Standing Committee (Ontario) (25 January 2007), online: Competition Bureau <<http://www.competitionbureau.gc.ca>> [Bureau, Letter to the Paralegal Standing Committee].

Even if self-regulatory bodies were only required to act in the members' interests,<sup>14</sup> and could justify onerous entrance requirements to protect their membership, there is no need for such misguided economic protectionism. In Canada there tends to be under-servicing in most professions, particularly in rural and northern communities.<sup>15</sup> In addition, practitioners tend to create their own markets, so there is room for innovation and expansion within professions. The Canadian public wins as it benefits from increased variety and availability of services. This mitigates the effect of the lower prices created by competition on professionals.

Despite this, given the high numbers of foreign-trained professionals who are not working in their fields of expertise, there is concern that self-protectionism has unconsciously crept in, in the form of higher entrance standards than necessary to ensure service quality.<sup>16</sup> In 2007, after surveying six self-regulated professions, the Bureau found that there were circumstances where regulatory bodies had "imposed rules and regulations that...go beyond protecting the public interest and into the protection of professional self-interest."<sup>17</sup> While self-regulation of entrance requirements clearly plays a valuable role in protecting the public from incompetent potential practitioners, it is important to ensure that each professional organization chooses the "regulatory tool" that most "directly targets" the problem and "has the least effect on competition."<sup>18</sup>

### C. The Role of Federal Competition Law

Since the provinces have delegated their power to self-governing entities without creating an independent body to oversee the use of that power, there is a gap in oversight. However, the *Competition Act* (the *Act*) includes three provisions under which the Bureau could effectively fill the legislative hole. This could be done by monitoring and assessing the anti-competitive effects of

<sup>14</sup> *Law Society of Saskatchewan v Nolin*, [2008] LSDD NO 158 [*Nolin*] (a self-regulating body's "paramount" duty is "to protect the public and the public's confidence in the ... profession's ability to govern itself" at para 105).

<sup>15</sup> See e.g. Raymond W Pong & J Roger Pitblado, *Geographic Distribution of Physicians in Canada: Beyond How Many and Where*, (Ottawa: Canadian Institute for Health Information, 2005) at 16-17, 26-27, 35-37, online: Canadian Institute for Health Information <[http://secure.cihi.ca/cihiweb/products/Geographic\\_Distribution\\_of\\_Physicians\\_FINAL\\_e.pdf](http://secure.cihi.ca/cihiweb/products/Geographic_Distribution_of_Physicians_FINAL_e.pdf)>; see also David Hay, Judi Varga-Toth & Emily Hines, *Frontline Health Care in Canada: Innovations in Delivering Services to Vulnerable Populations*, (Ottawa: Canadian Policy Research Networks, 2006) at v, 16-22, 25-26, online: Canadian Policy Research Networks <<http://www.cprn.org/documents/45652.en.pdf>>.

<sup>16</sup> See Danielle Zietsma, "Immigrants Working In Regulated Occupations" (2010) 11 Perspectives on Labour and Income 13 at 15, online: Statistics Canada <<http://www.statcan.gc.ca/pub/75-001-x/75-001-x2010102-eng.pdf>>.

<sup>17</sup> "Competition Bureau Study Report – Summary of Findings", online: College of Opticians of Ontario <<http://coptont.org>> [Summary of Bureau Report].

<sup>18</sup> Bureau, Regulated Professions, *supra* note 2 at 34.

entrance barriers, and determining whether they are the minimum necessary to achieve their purpose. The *Act* provides a useful mechanism to prevent the closed-shop atmosphere and self-protectionist behaviour, which is an inherent risk of self-regulation; unlike provincial Fair Access legislation, the *Act* allows an independent body to step in not only with suggestions for improvement, but also to enforce change through litigation if the anti-competitive effects of self-regulators' decisions outweigh the public benefit. When recommending the application of federal law to a matter that appears to be under provincial authority, a discussion regarding the constitutionality of the proposed amendment is necessary. This issue is considered below.

## II. THREE POTENTIALLY APPLICABLE PROVISIONS OF THE COMPETITION ACT

The first of the three relevant provisions is s. 45 which makes it a criminal offence to conspire to “fix, maintain, control, prevent, lessen or eliminate the production or supply of [a] product.”<sup>19</sup> The second, s. 79, is a civil provision prohibiting an entity that “substantially or completely control[s]...any area...of business” from “engaging in a practice of anti-competitive acts” that, in past, present or future, “lessen[s] competition substantially in a market.”<sup>20</sup> The third relevant provision, the recently enacted s. 90.1, can prevent “an agreement or arrangement” between “competitors” that does or “is likely to prevent or lessen, competition substantially in a market”.<sup>21</sup>

The ability to monitor entrance standards for self-regulating professions under the *Act* lies almost exclusively with the Bureau. Only it can bring a matter before the Competition Tribunal (the Tribunal). If a newcomer believes the barriers set on his entry to a profession are unnecessarily high, lessening competition, he may make an Application for Inquiry to the Commissioner of the Bureau, or bring an action under section 36 before the Federal Court.<sup>22</sup> In this way, the *Act* provides a mechanism for filtering complaints so that amending it to more clearly apply to self-regulating bodies should not cause an unreasonable surge in litigation.

### A. Elements Common to these Three Sections

Whichever provision the Bureau chooses, some of the same elements must be proven. These will be considered first, followed by the differences between the

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<sup>19</sup> *Competition Act*, *supra* note 1, s 45(1)(c).

<sup>20</sup> *Ibid*, s 79(1).

<sup>21</sup> *Ibid*, s 90.1(1).

<sup>22</sup> *Ibid*, ss 36(1), (3).

provisions which make them more or less appropriate for assessing whether entrance requirements are anti-competitive.

**i. “Product” and “Competition”**

These sections are applicable to the provision of professional services because “product” includes a “service of any description.”<sup>23</sup> In addition, the term “competitor” includes potential competitors, those “who it is reasonable to believe would be likely to compete with respect to a product in the absence of” an agreement.<sup>24</sup> Therefore an individual with valid credentials from another jurisdiction who applies to a professional body for a licence to provide professional services is clearly a potential competitor for provision of a product.

**ii. “Agreement or Arrangement”**

The phrase “conspire, combine, agree or arrange” in section 45 encompasses the idea of competitors “mutual[ly] arriving at an understanding or agreement ... to do the acts forbidden.”<sup>25</sup> Since a self-regulating body is a single entity, a provision requiring agreement between more than one individual does not appear to fit. However, if the professional members of the governing body are considered as individuals, then setting entry requirements may be considered an agreement, arrived at together, to perform an anti-competitive act. This coincides with the Bureau’s interpretation of the word “agreement” in s. 45, which may include “[r]ules, policies, by-laws or other initiatives enacted and enforced by an association with the approval of members who are competitors.”<sup>26</sup> The association would be party to the offence under the *Criminal Code* aiding and abetting provision.<sup>27</sup>

This interpretation of the word “agreement” matches Estey J’s view in *Jabour* that the conspiracy provision’s language is “broad enough to include all the Benchers acting as a group or individually or the Law Society as a corporate entity.”<sup>28</sup> However, his concern with applying the provision to regulated actions is that the provincial legislation is “coercive,” meaning that the Benchers are

<sup>23</sup> *Ibid*, s 2(1) (“[P]roduct’ includes an article and a service,” and “‘service’ means a service of any description” including a “professional” one).

<sup>24</sup> *Ibid*, ss 45(8), 90.1(11).

<sup>25</sup> *Regina v Armo Canada Ltd and 9 other corporations*, (1977) 13 OR (2d) 32 at 41.

<sup>26</sup> Canada, Competition Bureau Canada, *Competitor Collaboration Guidelines*, (Gatineau, QC: Competition Bureau, 2009) at 8, online: Competition Bureau <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf/\\$FILE/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf/$FILE/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf)> [Bureau, Competitor Collaboration Guidelines] (in their sample scenario “members of the [manufacturing a]ssociation” would “very likely ... be considered competitors” for purposes of these provisions (at 46). The key difference between this example and professional entrance requirements is that entry barriers are generally not voluntary nor can individuals “engage in the supply of the relevant product outside of the agreement” at 26).

<sup>27</sup> *Ibid* at 8; *Criminal Code*, RSC 1985, c C-46 s 21.

<sup>28</sup> *Jabour*, *supra* note 6 at 354.

required to regulate the legal profession, whereas the competition conspiracy provision is aimed at “voluntary combinations and agreements.”<sup>29</sup> This argument would be more convincing if the enacting legislation required a specific means of regulating entry to the profession. Since it merely gives broad power to regulate, the Benchers are free to choose a means of regulation that does not unreasonably conflict with federal competition law. If they choose more anti-competitive means than are necessary they should be held accountable for the decision as would other competitors, or at the very least, the federal law should be paramount.

As in s 45, the Bureau interprets “agreement” in s 90.1 as encompassing “all forms of agreements and arrangements,” including rules and regulations created by “members of a trade or industry association ... with the approval of members who are competitors.”<sup>30</sup> Since this is not a criminal provision the regulatory body would not be a party to the offence, but could instead be joined as the members’ principal, using agency principles.

## B. Section 45 – Conspiracy Provision

Since s. 45 was amended as part of Bill C-10, coming into force in March 2010,<sup>31</sup> for an act to be anti-competitive under the provision, it must fall into one of three categories. It must relate to an agreement to (a) “fix prices;” (b) “allocate markets,” or (c) “restrict output.”<sup>32</sup>

Entry barriers would fit into subsection (c) because unnecessarily high requirements maintain and control the supply of a service.<sup>33</sup> While not strictly reducing the current offering of services, excessive regulation limits expansion because compliance with standards will require more time and expense. Fewer people will comply, particularly newcomers who have the added expense of settling into a new country. The result is fewer entrants to the profession, protecting those currently practicing from new competitors who may innovate, raising service quality or lowering prices in order to break into the market, thereby forcing those in the profession to respond in order to maintain their market share.

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<sup>29</sup> *Reference re The Farm Products Marketing Act (Ontario)*, [1957] SCR 198 at 219-20 [*Farm Products*], cited in *ibid* at 355.

<sup>30</sup> Bureau, Competitor Collaboration Guidelines, *supra* note 26 at 19-20.

<sup>31</sup> Competition Bureau Canada, News Release, “New Laws for Competitor Agreements” (23 March 2010), online: Competition Bureau Canada <<http://www.competitionbureau.gc.ca>> (amendments to the *Competition Act* were part of the Budget Implementation Act, 2009, c 2 – Bill C-10 which received royal assent 12 March 2009).

<sup>32</sup> Bureau, Competitor Collaboration Guidelines, *supra* note 26 at 1; *Competition Act*, *supra* note 1, s 45(1)(a),(b),(c).

<sup>33</sup> Bureau, Competitor Collaboration Guidelines, *supra* note 26 at 12.

One of the significant changes to s. 45 is that the “undue standard” has been removed.<sup>34</sup> The former wording prohibited an agreement from “prevent[ing] or lessen[ing], *unduly*, competition in the...supply of a product.”<sup>35</sup> It was a high standard, requiring proof of “economic harm” beyond a reasonable doubt in order to obtain a conviction.<sup>36</sup> This was difficult to establish and “involve[d] a complex factual, legal and economic analysis.”<sup>37</sup> The new section creates what the Bureau considers a *per se* offence, and is limited to “agreements that are so likely to harm competition,” with “no pro-competitive benefits,” that they “are *per se* unlawful.” These offenses lead to “significant criminal sanctions” and are “deserving of prosecution without a detailed inquiry into their actual competitive effects.”<sup>38</sup>

A significant reason for changing s. 45 was that it was out of date and did not match what Canada’s “major trading partners” were doing.<sup>39</sup> Another goal was to eliminate “a chill from the old law” because it applied to “all forms of competitor collaboration” even “legitimate” ones which might “discourage firms from engaging in [potentially] beneficial alliances.”<sup>40</sup> The application of the amended section is narrow, limiting s 45 to cases of very serious anti-competitive behaviour. If it is not an “egregious” agreement, nor a merger, then the Bureau will consider whether ss 90.1 or 79 will apply.<sup>41</sup>

While it can be argued that s 45 is relevant to the issue of unnecessarily restrictive or discriminatory entry requirements, it is not the most appropriate section to utilize. The provision of criminal or quasi-criminal penalties in these circumstances seems too draconian, given that regulatory bodies should be able to make errors in judgment with respect to whether their registration or certification practices go beyond what is reasonably necessary to protect consumer health and safety. A civil provision of the *Act*, along with its remedies, would be more appropriate to these circumstances.

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<sup>34</sup> Omar Wakil, *The 2010 Annotated Competition Act* (Toronto: Thomson Reuters Canada, 2009) at 99-100.

<sup>35</sup> *Competition Act*, *supra* note 1, s 30; *Competition Act*, 1991, c 47, s 714, s 45(1)(c) [emphasis added] [Former *Competition Act*].

<sup>36</sup> Wakil, *supra* note 34 at 99-100.

<sup>37</sup> *Ibid* at 100.

<sup>38</sup> Bureau, Competitor Collaboration Guidelines, *supra* note 26 at 6; *ibid* (the fact that the Bureau considers this a *per se* offence is supported by the fact that, according to Wakil, it had “suggested” the former s 45(1)(b) was a *per se* offence because it did “not require ... undue lessening of competition,” but he also points out that “this position” was not “fully judicially tested” at 96).

<sup>39</sup> Melanie L Aitken, “The Senate Banking, Trade and Commerce Committee Hearings Regarding *Competition Act* Amendments” (Speech delivered in Ottawa, 13 May 2009), online: Competition Bureau Canada <<http://www.competitionbureau.gc.ca>> [Aitken, 13 May 2009].

<sup>40</sup> *Ibid*; Aitken, 4 May 2010, *supra* note 9.

<sup>41</sup> *Ibid*; see Bureau, Competitor Collaboration Guidelines, *supra* note 26 *Fundamentals of Canadian Competition Law*, 2d ed (Toronto: Canadian Bar Association, 2010) at 306.

### i. Regulated Conduct Defence

While the *Act* may apply to self-regulated occupations, their governing bodies may attempt to raise the Regulated Conduct Defence (RCD). The RCD removes “liability under the criminal provisions of the *Competition Act* provided the other legislation under which a party has acted is validly enacted, the conduct falls within the scope of the legislation and is required or at least authorized under that legislation.”<sup>42</sup> In other words, if a regulatory body is acting pursuant to, and within the scope of, valid provincial legislation, the RCD may be applicable.

When the *Act* was amended in 2010, the common law RCD doctrine was codified, becoming s. 45(7).<sup>43</sup> In *Garland*, the SCC stated that in order for the RCD to guard an action against criminal sanctions, the provision of the *Act* that is at issue must confer “leeway to those acting pursuant to a valid provincial regulatory scheme.” Specifically, the provision would have to include language such as “unduly” or “the public interest.”<sup>44</sup> By using such language, Parliament would provide “leeway” for the provision only to apply when the action at issue is against the public interest.<sup>45</sup> Since conduct undertaken pursuant to valid provincial legislation cannot “result in an action contrary to the public interest,”<sup>46</sup> the RCD could protect regulated conduct from criminal law in such circumstances. However, since a criminal provision is not the most appropriate way to address barriers to entry, the application of the RCD to civil provisions of the *Act* is more relevant for the purposes of this paper. The RCD’s potential application to s. 79 specifically is considered below.

## C. Section 79 – Abuse of Dominant Position

The second provision of the *Act* which could be used to monitor entrance barriers created by self-regulating professional bodies is s. 79.<sup>47</sup> This is a civil reviewable matters provision, enacted under the federal power over trade and commerce. The significant difference between the criminal and civil provisions is that behaviour assessed under a civil provision is “not inherently anti-competitive,” and is only prohibited after “the Competition Tribunal determines it is anti-competitive.”<sup>48</sup> As a result, the remedies are not punitive, but generally “limited to forward-looking” preventative or corrective measures.<sup>49</sup> To obtain an order under s. 79 there are three elements that must be proven: (i) substantial

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<sup>43</sup> *Competition Act*, *supra* note 1, s 45(7); *ibid* at 307-308.

<sup>44</sup> *Garland v Consumers’ Gas Co*, 2004 SCC 25 at paras 77-79, [2004] SCR 629.

<sup>45</sup> *Ibid* at para 79.

<sup>46</sup> *Jabour*, *supra* note 6 at 348-349.

<sup>47</sup> *Competition Act*, *supra* note 1, s 79(1).

<sup>48</sup> *Wakil*, *supra* note 34 at 211.

<sup>49</sup> *Ibid* at 212.

control in a market, (ii) that there is an intent to harm competitors, and (iii) that there is a substantial lessening of competition.

**i. Substantial Control in a Market**

First, “one or more persons” must “substantially or completely control,” in any particular area of Canada, “a class or species of business.”<sup>50</sup> Control in this context means having market power, which “is the ability to earn supra-normal profits by reducing output and charging more than the competitive price for a product.”<sup>51</sup> There are two major factors that indicate whether an entity has market power.<sup>52</sup> The first is market share. A self-regulating entity has market power *prima facie* because by law it has a monopoly on deciding who can provide those professional services in a given jurisdiction.<sup>53</sup> Its members collectively have 100% of the market share. This can be seen either by considering the regulatory body as a single entity that has a monopoly on regulating the profession or by viewing the body as acting on behalf of professional members who share “joint dominance,” meaning that they “collectively possess market power.”<sup>54</sup>

The second major indicator of market power, barriers to entry, may be used to rebut the “*prima facie* finding of market power.”<sup>55</sup> In *Canada (Director of Investigation and Research) v D & B Co of Canada Ltd*, the respondent, who had a 100% share of the market, was required to show that there were no barriers to entry to rebut the *prima facie* finding, and in *Canada (Directors of Investigation and Research) v Tele-Direct (Publications) Inc*, the Tribunal required “ease of entry” in order to show that the respondents, who held at least an 80% market share, did not have market power.<sup>56</sup> Barriers to entry are important because if new competitors can easily enter the market, any anti-competitive behaviour on the part of the dominant entity will be corrected by market forces.

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<sup>50</sup> *Competition Act*, *supra* note 1, s 79(1)(a).

<sup>51</sup> *Canada (Director of Investigation and Research) v Laidlaw Waste Systems Ltd* (1992), 40 CPR (3d) 289 at 325, [1992] CCTD No 1 [*Laidlaw*].

<sup>52</sup> *Canada (Director of Investigation and Research) v NutraSweet Co* (1990), 32 CPR (3d) 1 at 28, [1990] CCTD No 17, [*NutraSweet*].

<sup>53</sup> *Laidlaw*, *supra* note 51 at 325; *Wakil*, *supra* note 34 at 210 (there is no “*prima facie* finding of dominance” if the market share is below 50%. In practice each section 79 ruling has involved a market share of over 80%).

<sup>54</sup> Canada, Competition Bureau Canada, *The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)* (Draft for Public Consultation, January 2009) at iii, online: Competition Bureau Canada <<http://www.competitionbureau.gc.ca>> [Bureau, Abuse of Dominance Guidelines].

<sup>55</sup> *Ibid* at 13, n 27.

<sup>56</sup> *Canada (Director of Investigation and Research) v D & B Co of Canada Ltd* (1995), 64 CPR (3d) 216 at 255, [1995] CCTD No 20 [*Nielsen*]; *Canada (Directors of Investigation and Research) v Tele-Direct (Publications) Inc* (1997), 73 CPR (3d) 1 at 83, 85, [1997] CCTD No 8 [*Tele-Direct*].

An analysis of barriers to entry considers “how easily a new firm can establish itself as a competitor.”<sup>57</sup> Two of the deterrents to entry that are relevant to foreign credential recognition are “regulatory barriers” and “sunk costs.”<sup>58</sup>

Sunk costs can “constitute a significant barrier to entry.”<sup>59</sup> They are costs that “are not recoverable if the firm exits the market.”<sup>60</sup> For a professional these would include any time or expense spent gaining additional training, taking exams, waiting to find out what further qualifications will be required, and duplicating any practical experience. Sunk costs also include the time and expense needed to build a reputation, which is particularly important because “services are an important element of the [professional] product.”<sup>61</sup> Therefore due to the nature of the business, entry barriers can be significant deterrents to entering the market, lessening the potential supply of the professional service.<sup>62</sup> Since the problem is that the current self-regulatory barriers increase the sunk costs incurred in entering the market, making it difficult for foreign-trained individuals to establish themselves as competitors, this reinforces the conclusion that a Law Society, for example, has market power and is in a dominant position.

In assessing market power, the Bureau will look to see if the combined effect of the barriers would likely prevent competitors not only from entering but also from becoming profitable competitors within two years.<sup>63</sup> Since it is unlikely that the process of credential recognition, additional testing or courses, and developing a client base and reputation would occur within two years, both market share and entry barriers reinforce the fact that regulatory bodies can exercise market power in relation to their respective occupations.

## ii. Exclusionary Purpose – Intent to Harm Competitors

Second, the persons in the dominant position must “have engaged in or [be] engaging in a practice of anti-competitive acts.”<sup>64</sup> The Tribunal determines

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<sup>57</sup> *Laidlaw*, *supra* note 51 at 325.

<sup>58</sup> Bureau, Abuse of Dominance Guidelines, *supra* note 54 at 14.

<sup>59</sup> Canada, Competition Bureau Canada, *Merger Enforcement Guidelines*, (September 2004), at 28, online: Competition Bureau Canada <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/2004%20MEGs.Final.pdf/\\$file/2004%20MEGs.Final.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/2004%20MEGs.Final.pdf/$file/2004%20MEGs.Final.pdf)> [Bureau, Merger Enforcement Guidelines].

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.* at 29.

<sup>62</sup> Michael J Trebilcock, “Regulating the Market for Legal Services” (2008) 45:5 *Alta L Rev* 215 at 220 (entry barriers are not equally anti-competitive across all self-regulating professions because in some cases applicants enter the profession by certification rather than licensure. Certification means that the qualified individual receives a certificate showing they have completed certain training but people without the certificate can still compete in the market (e.g. accounting). Licensure means that the individual must have a particular licence in order to practice the profession (e.g. law)).

<sup>63</sup> Bureau, Abuse of Dominance Guidelines, *supra* note 54 at 14, n 31.

<sup>64</sup> *Competition Act*, *supra* note 1, s 79(1)(b).

whether a practice is anti-competitive by looking at its purpose, which must be “an intended predatory, exclusionary or disciplinary negative effect on a competitor.”<sup>65</sup> The Bureau may establish proof of purpose “directly by evidence of subjective intent.”<sup>66</sup> However, it may not be necessary to prove that the self-regulators actually intended the effect of the barriers to be negative or to exclude individuals because this subjective intent may also be established indirectly.<sup>67</sup> It is assumed that an act was “intended to have the effects which actually occur” unless there is “convincing evidence to the contrary.”<sup>68</sup> Deterring foreign-trained individuals from entering a regulated occupation may be “the reasonably foreseeable or expected objective” outcome of requiring significant retraining or exams, and subjective “intention may be deemed” from this.<sup>69</sup> After the 2007 Bureau recommendations to selected professions, indirect intent should be easily established if those professions fail to address the anti-competitive effects of their entry barriers.<sup>70</sup>

To help determine whether a practice is anti-competitive under s. 79, s. 78 provides examples.<sup>71</sup> While regulation of entrance requirements does not fit well within any of the s. 78 examples, several subsections do target acts done to bar “entry into ... a market.”<sup>72</sup> All but s. 78(1)(f) describe “exclusionary” conduct that increases market power.<sup>73</sup> Entrance barriers could be considered analogous because they help to maintain market share, increase the time it takes to become established as a competitor, and may deter potential competitors from entering the market at all. The Bureau does not have to point to just one specific act, rather a “practice of anti-competitive acts” can be a pattern of behaviour that, added together over time, has an “intended negative effect on... competitor[s].”<sup>74</sup> To save the Bureau from spending time arguing that entrance barriers are analogous to one of the listed examples, it is recommend adding it to s. 78 as an anti-competitive act.

### iii. Business Justification

If the Bureau brought an application under s. 79, the self-regulatory body would likely try to demonstrate a business justification for the action. A business

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<sup>65</sup> *Canada (Commissioner of Competition) v Canada Pipe Co*, 2006 FCA 233 at para 66, [2007] FCR 3 [*Canada Pipe*].

<sup>66</sup> Bureau, Abuse of Dominance Guidelines, *supra* note 54 at 16.

<sup>67</sup> *Ibid* at 5; *Canada Pipe*, *supra* note 65 at para 72.

<sup>68</sup> *Laidlaw*, *supra* note 51 at 343.

<sup>69</sup> *Canada Pipe*, *supra* note 65 at para 67.

<sup>70</sup> See Bureau, Regulated Professions, *supra* note 2.

<sup>71</sup> *Competition Act*, *supra* note 1 at s 78; *Wakil*, *supra* note 34 at 206 (the word “includes” indicates that the list is non-exhaustive. In addition, the Court has recognized that other non-enumerated acts qualify as anti-competitive).

<sup>72</sup> *Competition Act*, *supra* note 1, s 78(1).

<sup>73</sup> *Wakil*, *supra* note 34 at 207.

<sup>74</sup> *NutraSweet*, *supra* note 52 at 35.

justification, while not a defence, is a factor to consider with regard to proving intent. It is a “credible efficiency or pro-competitive rationale for the” impugned act that “counterbalances the anti-competitive effects and/or subjective intent of the acts.”<sup>75</sup> If the self-regulator can show that the “overriding purpose” of the entrance barriers is to improve service quality or consumer safety then it could negate the inferred intent to negatively affect potential competitors.<sup>76</sup> This is similar to the efficiency exception in section 90.1 where, as long as the entity can show that the requirements are necessary, positively impacting quality of service in the profession, i.e., there is a “valid business rationale” for their actions, the Bureau will probably not pursue the matter.<sup>77</sup>

The purpose of s. 79 is to provide a “market framework within which all firms have an opportunity to either succeed or fail on the basis of their ability to compete.”<sup>78</sup> It applies to foreign credential recognition because if Canada invites newcomers to reside here they should have equal opportunity to succeed or fail within their chosen occupations provided they meet the minimum competency requirements necessary to maintain public confidence in the profession.

#### iv. Substantial Lessening of Competition

The third and final element to prove is that the impugned behaviour does or is likely to substantially lessen competition in the market.<sup>79</sup> This subsection is concerned with the relative difference in competition between the market with and without the impugned act. To determine this, ask: “but for” the alleged anti-competitive act “would the relevant markets – in the past, present or future – be substantially more competitive?”<sup>80</sup>

The court in *Canada Pipe* laid out several factors to consider including whether “entry or expansion” would otherwise be faster, “prices...lower”, or service quality “substantially greater.”<sup>81</sup> One of the reasons the Tribunal found that an order was not justified in that case was that the anti-competitive program “had not deterred entry by foreign and domestic suppliers.”<sup>82</sup> Here, it is precisely those foreign suppliers who are deterred from entering the market

<sup>75</sup> *Canada Pipe*, *supra* note 65 at para 73; Bureau, Abuse of Dominance Guidelines, *supra* note 54 at 17 (the Bureau describes an “efficiency or pro-competitive rationale” as including “activities that improve a firm’s product, service or some other aspect of the firm’s business).”

<sup>76</sup> *Canada Pipe*, *supra* note 65 at para 73.

<sup>77</sup> Bureau, Abuse of Dominance Guidelines, *supra* note 54 at 18; *Laidlaw*, *supra* note 51 at 341 (although “long-term exclusive contracts” did not necessarily “raise significant anti-competitive issues” on their own, they were found to be anti-competitive because “there was no credible explanation for many of the provisions other than to create barriers to entry for would-be competitors”).

<sup>78</sup> Bureau, Abuse of Dominance Guidelines, *supra* note 54 at 1-2.

<sup>79</sup> *Competition Act*, *supra* note 1, s 79(1)(c).

<sup>80</sup> *Canada Pipe*, *supra* note 65 at paras 36, 38.

<sup>81</sup> *Ibid* at para 58.

<sup>82</sup> *Wakil*, *supra* note 34 at 214; see *ibid* at para 52.

because of the significant cost in terms of time, money and lost productivity. Furthermore, studies have found that fees are higher in regulated industries with greater entry requirements, suggesting that without the barriers prices would likely be lower.<sup>83</sup> As with the telephone directory advertising market in *Tele-Direct*, since professions have “distinct [markets] without close substitutes,”<sup>84</sup> even “smaller impacts on competition” may substantially lessen competition because of the significant market power.<sup>85</sup>

**v. Future of Section 79**

Section 79 appears to be the most useful mechanism for ensuring competitiveness in self-regulated occupations. It is more easily established than s. 45 because the Bureau can easily prove that self-regulators have market power and the impugned conduct need not be inherently anti-competitive. Section 79 also has the intrinsic advantage that comes with being a civil provision: a s. 79 order will not carry the stigma or punitive penalties of a criminal provision.

Although self-regulating bodies are clearly in a dominant position regarding entrance to and practice of a regulated occupation, being a monopoly does not automatically result in an order under s. 79. Section 79 is not offended simply because prices are higher and “levels of service and choice” are lower “than would be expected in a more competitive market.”<sup>86</sup> According to government policy, lessening competition is not necessarily bad when it protects the public interest in safety and quality. Since the purpose of s. 79 is to “strike a balance by preventing anti-competitive conduct without deterring firms from aggressive competition,” it could help determine whether a self-regulating body has crossed over into unacceptable restraints on competition.<sup>87</sup> Current Bureau policy is to “vigorously pursue” possible abuse of dominant position infractions, so if a newcomer can show how the three required elements are satisfied this may be a good way to remove any unnecessary or discriminatory anti-competitive barriers.<sup>88</sup>

However, while s. 79 could apply to self-regulated professions as is, it is presently not ideally crafted to fit regulatory acts. First, high entrance requirements for foreign-trained professionals do not appear to fit into any of the types of anti-competitive behaviour described in s. 78. Since s. 78 is non-exhaustive, the Tribunal may consider acts not explicitly listed in the section but it would be clearer that the provision applies if anti-competitive regulatory acts are explicitly enumerated.<sup>89</sup>

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<sup>83</sup> Bureau, Regulated Professions, *supra* note 2 at 27.

<sup>84</sup> *Tele-Direct*, *supra* note 84 at 17.

<sup>85</sup> *Ibid* at 247.

<sup>86</sup> Bureau, Abuse of Dominance Guidelines, *supra* note 54 at 1.

<sup>87</sup> *Ibid* at iv.

<sup>88</sup> *Ibid* at 3.

<sup>89</sup> *Ibid* at 6.

The list of anti-competitive practices in s. 78 should be supplemented with an item that encompasses measures by bodies that issue professional or vocational designations in a manner that is unnecessarily restrictive or discriminatory. Parliament should also include a proviso that the conduct of a body, acting pursuant to its lawful directions, is exempt from the application of this new item where the actions of the body are subject to appeal to an independent body that has authority to remedy decisions that are unnecessarily restrictive or discriminatory. The impact of such an amendment on provincial authority would thereby be minimized. An analogy to this approach is to the *Personal Information Protection and Electronic Documents Act (PIPEDA)*,<sup>90</sup> where federal protection of privacy does not apply where provinces have enacted substantially similar legislation.

Such a change could come into effect immediately for self-regulation occurring under federal jurisdiction. However, the provision would not come into effect with regard to entities under provincial jurisdiction for three years. At that time, any province with fair access legislation that met the specified criteria, substantially complying with the federal legislation, would be exempt from the new provision. In order to be exempt, the fair access legislation would have to, at minimum, be legally enforceable and provide an independent review of an impugned decision. Three years would give the provinces time to enact or amend legislation so that it would fulfill the same function as federal competition law. It would also enable each province to decide whether they want to supervise the self-regulated professions or allow the Bureau to do so. In the latter case, the self-regulating organization would maintain authority to enact rules and regulations but the Bureau would assess their effects to determine when an independent legal body, the Tribunal, should review the decision.<sup>91</sup>

As noted above, the federal government has previously filled a legislative gap by bringing legislation into effect in stages, giving provinces the option of creating their own legislation. It enacted *PIPEDA* in 2000.<sup>92</sup> *PIPEDA* was created to balance protection of personal privacy with organizations' increasing ability to collect and use personal information.<sup>93</sup> Due to technological advances this was a quickly changing area and the majority of provinces had failed to sufficiently address the issue through legislation. By legislating in this area, the federal government ensured that there was law in place to protect individuals, while allowing provinces to control the aspect of the subject that overlapped with their jurisdiction if they chose to do so.

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<sup>90</sup> *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 [*PIPEDA*].

<sup>91</sup> Richard F Devlin and Porter Heffernan, "The End(s) of Self-Regulation?" (2008) 45:5 *Alta L Rev* 169 at 201-202 (this is similar to some of the current international reforms).

<sup>92</sup> *PIPEDA*, *supra* note 90.

<sup>93</sup> *Ibid*, s 3.

On coming into force on 1 January 2001, *PIPEDA* applied to “personal information” related to the “commercial activities” of federal entities and any other organizations under federal jurisdictions.<sup>94</sup> Three years later implementation of Part 1 was completed on 1 January 2004 when the legislation applied to privacy of personal information related to any “commercial activity” under provincial jurisdiction.<sup>95</sup> It is recommended that the federal government adopt the same approach to amending s. 78. This would give the provinces time to create compliant legislation without forcing them to create a new oversight scheme, because they could choose to leave it to the Bureau.

**vi. The Regulated Conduct Defence and Section 79**

Currently it is unclear whether self-regulating bodies may rely on the RCD in connection with s. 79.<sup>96</sup> Since reviewable conduct is not presumed to be against the “public interest’ or unlawful” it is not necessarily a problem to find that valid provincial law results in conduct violating a civil provision.<sup>97</sup> The defence has only been successful in one reviewable matters case, *Law Society of Upper Canada v Canada*, where it was applied with no analysis about why or how it might apply but merely because the parties and Director had agreed that it would.<sup>98</sup> This is important because in all previous regulated industries defence cases the leeway “language of ‘the public interest’ and ‘unduly’ limiting competition has always been present,” and because it was not there in *PHS* the defence was unavailable.<sup>99</sup>

The Competition Bureau, “[i]n the absence of further judicial guidance...is of the view that the RCD may immunize conduct from these provisions in appropriate circumstances.”<sup>100</sup> Because the proposed amendment is specifically identifying certain regulated conduct as anti-competitive, it would be clear that the fact that the conduct is regulated cannot be used as a defence. Additionally, the proposed amendment should be enacted without leeway language. This

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<sup>94</sup> Canada, Office of the Privacy Commissioner, *Your Privacy Responsibilities: Canada's Information Protection and Electronic Documents Act*, (Ottawa, Office of the Privacy Commissioner, 2009) at 3, online: Office of the Privacy Commissioner, <[http://www.priv.gc.ca/information/guide\\_e.pdf](http://www.priv.gc.ca/information/guide_e.pdf)> (health information was excluded in the first stage. The following year, 1 January 2002, health information was covered by the act as the second stage of coming into force).

<sup>95</sup> *Ibid.*

<sup>96</sup> Bureau, Competitor Collaboration Guidelines, *supra* note 26 at 5; see Bureau, Abuse of Dominance Guidelines, *supra* note 54 at 28; Musgrove, *supra* note 42 at 308-309.

<sup>97</sup> Competition Bureau Canada, Technical Bulletin, “Technical Bulletin on ‘Regulated’ Conduct” (29 June 2006) at n 7, online: Competition Bureau Canada <<http://www.competitionbureau.gc.ca>>.

<sup>98</sup> *Ibid* at nn 12, 21.

<sup>99</sup> *PHS Services Society v Canada (Attorney General)*, 2010 BCCA 15 at para 144, [2010] BCJ No 57.

<sup>100</sup> Musgrove, *supra* note 42 at 308.

would make it clear that this is not an “appropriate circumstance” for the RCD to apply to a reviewable matter provision.

In the United States, the State Action Doctrine is comparable to Canada’s RCD. The State Action Doctrine exempts actions from the *Sherman Act* where the action is both authorized *and* supervised by a state, as opposed to the RCD which does not require oversight or supervision.<sup>101</sup> The approach taken in the United States seems particularly appropriate with respect to entry barriers set by self-regulating professions, because of the desirability of minimizing any conflict of interest between the regulators’ dual roles: representing themselves and their colleagues and representing the public interest.

Canadian provinces have been reluctant to provide such supervision. Few provinces have Fair Access legislation. Those that have, Ontario, Manitoba and Nova Scotia, declined to create an independent body to which individuals could apply for a second opinion on decisions and which could intervene even without an instigating complaint.<sup>102</sup> In addition, the legislation that exists lacks effective enforcement mechanisms. Instead of waiting for the provinces to fill the oversight gap it is reasonable to allow the Bureau to take on a supervisory role because these matters overlap into its jurisdiction. The *Act* already has mechanisms in place to enforce compliance. It would be more cost effective than each province creating a new entity to supervise self-regulators and could begin operating more quickly. Provinces that do not wish to incur the extra expense of an independent body might allow the *Act* to fill the gap on a long term basis. The proposed amendment to s. 78 would essentially have the effect of requiring a particular provincial action to be both authorized and supervised to exempt it from s. 79 of the *Act*. While another option would be to amend the RCD itself to require supervision of regulated conduct generally, aligning it more closely with the State Action Doctrine, such an amendment would require a broader debate, bringing it beyond the scope of this paper.

#### vii. Constitutionality of the Proposed Amendment to s. 78

In *City National Leasing*, the *Competition Act* (then the *Anti-Combines Act*) was upheld under the general branch of the federal trade and commerce power.<sup>103</sup> The SCC adopted the three indicia of federal competency under this

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<sup>101</sup> Brian A Facie & Dany H Assaf, *Competition & Antitrust Law: Canada and the United States* 3d ed (Markham, Ont: LexisNexis Canada, 2006) at 442; see *California Retail Liquor Dealers Assn v Midcal Aluminum, Inc* (1980), 445 US 97 for articulation of the test that must be met for the State Action Doctrine to apply.

<sup>102</sup> See George M Thomson, *Review of Appeal Processes from Registration Decisions in Ontario’s Regulated Professions*, (Report to the Ontario Minister of Citizenship and Immigration), (Toronto, Queen’s Printer for Ontario, 2005) online: Legislative Assembly of Ontario <<http://www.ontla.on.ca/library/repository/mon/13000/257188.pdf>> at viii-ix.

<sup>103</sup> *General Motors of Canada Ltd v City National Leasing Ltd*, [1989] 1 SCR 641 at para 2, [1989] SCJ No 28 [*City National Leasing*].

branch of the federal trade and commerce power from *Vapor*, and added two more indicators.<sup>104</sup> These factors were intended to “ensure that federal legislation does not upset the balance of power between the federal and provincial governments.”<sup>105</sup> The listed indicia are not exhaustive, and the presence or absence of any one factor is not determinative of overall constitutionality.<sup>106</sup>

The first two indicia are present in the case of the proposed amendment as a result of the structure of the *Act* itself, as was found in *City National Leasing*.<sup>107</sup> Particularly, when describing the *Act* (then the *Anti-Combines Act*), Dickson CJ stated that there is “a regulatory scheme” present in the *Act*, and it “operates under the watchful gaze of a regulatory agency.”<sup>108</sup>

With respect to the third indicator of validity, the proposed amendment to s. 78 would impact “trade as a whole,” and not only “a particular industry.”<sup>109</sup> Unnecessary entry barriers to regulated occupations can have a significant and negative impact on the Canadian economy as a whole. The economy is increasingly dominated by services, including those provided by the regulated professions. Anti-competitive practices in these regulated professions can impair the price and quality of these services, and many of these professions are integral to wider economic pursuits. For instance, accountants and lawyers provide services to many other business enterprises, often interprovincially, and the price and quality of these services is integral to the best possible functioning of those businesses. As a result, the Canadian economy as a whole is impeded from functioning optimally when there are anti-competitive barriers to these occupations.

Additionally, the amendment would affect a very broad range of bodies. In addition to bodies holding exclusive jurisdiction over controlling entry to an occupation, it would also apply to bodies which merely control access to a designation that adds prestige or credibility, while not being *sine qua non* of carrying on a business, occupation or trade. The amendment would also apply a single broad competition norm—avoiding the abuse of a dominant position—across industries generally; the provision’s impact would be to avoid unnecessary or discriminatory exclusion across all regulated occupations, and would not open the door to regulation of minute aspects of any particular occupation.

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<sup>104</sup> *Ibid* (“[f]irst, the impugned legislation must be part of a general regulatory scheme. Second, the scheme must be monitored by the continuing oversight of a regulatory agency. Third, the legislation must be concerned with trade as a whole rather than with a particular industry” at para 32. The new factors added were that “the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and (ii) the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country” at para 34).

<sup>105</sup> *Ibid* at para 34.

<sup>106</sup> *Ibid*.

<sup>107</sup> See *ibid* at paras 56-57.

<sup>108</sup> *Ibid*.

<sup>109</sup> See *ibid* at para 32.

The final two *City National Leasing* factors form the “provincial inability test.”<sup>110</sup> The first aspect of this test is that the provinces should “be constitutionally incapable of enacting” the legislation. The second part of the test requires the determination of whether the operation of the scheme in a jurisdiction would be hindered if any other jurisdiction were not included in it.<sup>111</sup> While the provinces may constitutionally be able to address these issues, for example through Fair Access legislation, very few provinces have enacted such laws. The provinces which have enacted these laws neglected to include appropriate remedies and enforcement mechanisms, significantly reducing their effectiveness.<sup>112</sup>

While the operation of the scheme in a given jurisdiction may not be hindered *per se* if another jurisdiction is excluded from the scheme, such an exclusion would cause repercussions across the country. Workers in regulated occupations do offer services to people in other jurisdictions, and the price and quality of the available services would be negatively affected if there are unnecessary barriers to entry to regulated occupations. These barriers can also impede the economic integration of immigrants, which is a substantial federal concern. Professional immigrants may have a particularly difficult time overcoming unnecessary or discriminatory barriers, and this can have wide ranging negative effects.<sup>113</sup> The integration of immigrants across the country is something that is in the interests of all Canadians, even if the immigrants in question are in a different province.

The five indicia of federal competency under the general branch of the federal trade and commerce power are not exhaustive in determining the constitutionality of a federal initiative. Courts also consider whether the federal government is attempting to meet its international obligations, such as the Lisbon Recognition Convention.<sup>114</sup> Expressly adding barriers to entry to the

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<sup>110</sup> Peter W Hogg, *2009 Student Edition Constitutional Law of Canada* (Toronto: Carswell, 2009) at 530.

<sup>111</sup> *City National Leasing*, *supra* note 103 at para 34.

<sup>112</sup> See Chapter 2, Effective Foreign Credential Recognition Legislation: Recommendations for Success.

<sup>113</sup> See Chapter 5, Improving Foreign Credential Recognition through Reform in Immigration Law and Policy.

<sup>114</sup> See e.g. *R v Hydro-Quebec*, [1997] 3 SCR 213 at para 127, [1997] SCJ No 76; One factor that might weigh in favour of the constitutionality and advisability of using the *Competition Act* to spur provincial action is that doing so may better place Canada in a position to fully adopt emerging international standards, for example, by ratifying the *Lisbon Recognition Convention*. Ratification would require Canada to either recognize foreign qualifications, such as university degrees, that are not significantly different from corresponding Canadian degrees, or to have in place fair processes for assessing foreign credentials. It may also place Canada in a better position in relation to adopting international norm that already exist, such as those under the *General Agreement on Trade in Services (GATS)*. *GATS* is discussed in detail in Chapter 4, All Talk and No Action: Access to Canadian Markets under the *General Agreement on Trade in Services*; see *Convention on the Recognition of Qualifications concerning Higher Education*

occupations to the Competitions Act would place Canada in a better position to enter into and implement international agreements on the mutual recognition of qualifications.

There is also the possibility that the proposed amendment could be upheld under the federal criminal law power. *Reference re Assisted Reproduction Act* cautions that the criminal law power is not a blank cheque for the federal government to regulate provincial matters.<sup>115</sup> The competition norm proposed here however, could be justified because it is aimed at prohibiting an evil—unnecessary or discriminatory barriers to entry to regulated occupations—rather than attempting to regulate activities that are intrinsically positive from a social perspective (such as providing professional assistance with reproductive issues for patients).

### viii. Paramourcy and Interjurisdictional Immunity

While the federal law may be constitutional, it is clear that provincial regulation of barriers to entry to regulated occupations is also constitutional. If a barrier to entry were to be considered anti-competitive within the meaning of the amended section 78, the result would be two valid, contradictory laws. Where valid provincial and federal laws conflict, considerations regarding paramourcy and interjurisdictional immunity are required.

Hogg describes interjurisdictional immunity as a way to protect the heads of power constitutionally granted to the federal and provincial governments by “attacking a law that purports to apply to a matter outside the jurisdiction of the enacting body ... [by] acknowledg[ing] that the law is valid in most of its applications, but ... should be interpreted so as not to apply to the matter that is outside” the body’s jurisdiction.<sup>116</sup> If successfully argued, the law’s application would be limited by being read down.<sup>117</sup> While it may seem that this doctrine could be used to read down any amendment to federal legislation related to entry barriers to self-regulated occupations, the doctrine of federal paramourcy is more likely to apply in these circumstances.

Canadian law expressly recognizes only the interjurisdictional immunity of federal entities vis-à-vis provincial laws. Even this recognition is now being confined by the Supreme Court of Canada in the interests of permitting flexibility for provincial orders of government to regulate in the public interest. In *Canadian Western Bank v Alberta*, the SCC considerably narrowed the doctrine of interjurisdictional immunity. Justices Binnie and LeBel wrote that “interjurisdictional immunity is of limited application and should in general be

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*in the European Region*, 11 April 1997, Lisbon, 11.IV.1997, online: Council of Europe <<http://conventions.coe.int>>.

<sup>115</sup> *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 SCR 457.

<sup>116</sup> Hogg, *supra* note 110 at 392.

<sup>117</sup> *Ibid* at 392.

reserved for situations already covered by precedent.”<sup>118</sup> They went on to assert that “[i]f a case can be resolved by the application of a pith and substance analysis, and federal paramountcy where necessary, it would be preferable.”<sup>119</sup> As a result, the paramountcy doctrine would likely apply, with the result that “the provincial law must yield to the federal law,” rendering the provincial law “inoperative to the extent of the inconsistency.”<sup>120</sup> This would allow the relevant provisions of the Act to operate where rules enacted by regulatory bodies are inconsistent with them.

While there is no doctrine of “interjurisdictional immunity” for provincial entities as such, the courts may be inclined to take into account the degree of intrusion on provincial autonomy in the context of assessing whether federal legislation falls within the scope of a head of federal power. Even the interpretation of federal laws may be affected by concern over allowing provincial laws to operate in areas ordinarily under provincial authority; the *Jabour* doctrine that federal competition statutes will be construed so as not to apply to conduct regulated by provincial laws reflects such judicial solicitude. Furthermore, there may be significant political resistance from the provinces, and from those generally concerned with maintaining a balanced federation, to the enactment by Parliament of a measure that would clearly extend to the activities of self-regulating occupations.

There is a compelling public policy need to ensure fair access to the occupations. The economic and social future of Canada, according to many current estimates, is dependent on attracting immigrants and effectively deploying their talents and efforts. The failure to do so will leave Canada vulnerable to a situation in which there are not enough participants in the active work force to support social transfer systems, including pensions. One solution would be to reduce entitlement programs, but reductions would be politically difficult, discomfoting for many who rely on the program, and a source of injustice to those who have contributed to, and planned their lives around, the systems, only to find that the promised benefits are unavailable or substantially reduced.

Apart from demographic concerns, the failure to ensure that immigrants and long-time Canadians have fair access to practise in regulated occupations fundamentally impairs freedom and social justice in Canadian society. The denial of fair access to occupations frustrates the individual pursuit of meaning and prosperity. By increasing prices and reducing the number of service providers, unfair access affects the cost-effectiveness and accessibility of government programs such as health care. Furthermore, the public are denied

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<sup>118</sup> *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 77, [2007] 2 SCR 3.

<sup>119</sup> *Ibid.*

<sup>120</sup> Hogg, *supra* note 110 at 444.

the opportunity to access kinds of services they want or need, or must pay unnecessarily high prices for them.

The provinces have not demonstrated any willingness to address unwarranted barriers to entry to the occupations; rather they have often partnered with occupational lobbies to erect barriers to entry. They have been slow or passive at enacting reforms that would limit the abilities of occupational bodies to unfairly exclude potential entrants. In many respects, the federal government may be better able to resist the self-interested lobbying efforts of occupational groups. A provincial group that is provincially influential might have little clout in the federal arena. Occupational groups in particular tend to organize along provincial lines because they are provincially regulated entities.

While Parliament's participation is necessary and overdue to ensure fair access to the occupations, its efforts to reform the *Competition Act* must be sensitive to political resistance arising out of concerns of federal over-reach into a provincial head of power. The following actions might mitigate these concerns:

- *Addressing barriers to the professions in the form of general norms under the Competition Act, rather than attempting to enact occupation-specific legislation;*
- *Framing new laws as clarifications or elaborations of existing anti-competition provisions in the Competition Act in order to avoid creating the misimpression that the federal government is embarking on a new dimension of intrusion in economic regulation;*
- *Creating remedies for breaches of federal competition norms that are primarily civil, and forward-looking rather than punitive for past misconduct;*
- *As was done with the sweeping federal privacy statute, PIPEDA, allowing provinces to avoid application of the federal provisions by effectively regulating the area at the provincial level;*
- *Allowing a limited defence to the application of federal competition laws which would provide leeway for provincial public authorities to make their own public policy choices. A sweeping exemption, such as the “regulated conduct” exemption established in *Jabour*, would eviscerate the potential effectiveness of a federal law on barriers to entry in the occupations; however, it might be tolerable to enact a much narrower exemption. Judicially-created doctrine under the US federal anti-collusion Sherman Act shields the activities of self-regulated bodies that are directed—not merely permitted—by state law to proceed in a fashion that would ordinarily violate the Sherman Act's provisions.*

## D. Section 90.1 Agreements that Substantially Lessen Competition

Section 90.1 is a third potentially applicable provision in the *Act*. It is intended to fill the gap between ss. 45 and 92 (dealing with mergers), and came into force on 12 March 2010.<sup>121</sup> Like s. 79, applications may only be brought by the Bureau and there are three elements to establish: (i) an “agreement or arrangement” which can be “existing or proposed;” (ii) “between persons two or more of whom are competitors” that (iii) “prevents or lessens, or is likely to prevent or lessen, competition substantially in a market.”<sup>122</sup> If established, “the Tribunal may make an order” either “prohibiting” the action or “requiring” action to restore competition.<sup>123</sup> This remedy is quite flexible; instead of just prohibiting the offending behaviour or ordering the respondents to take action that “restore[s] competition,”<sup>124</sup> the new provision enables a broader solution. Section 90.1 grants the Tribunal discretion to order “any person ... to take any other action” provided that they and the Commissioner agree to it.<sup>125</sup>

The s. 90.1 remedy would be adequate, and it also has the advantage of lacking an administrative monetary penalty like s. 79 has. Although not required, the existence of a potential penalty of \$10 million for a first offence and \$15 million for subsequent offences in s. 79 seems to be a harsh penalty for a regulatory body which may have simply made an innocent error in judgment. According to Wakil, the monetary penalties under s. 79 “are highly controversial.”<sup>126</sup> Particularly in relation to unnecessarily restrictive or discriminatory entry barriers, the seemingly punitive fines made possible by ss. 79(3.1) are inappropriate, though the corrective remedies provided in ss. 79(1) and 79(2) would be appropriate. These remedies do allow for the correction of anti-competitive behaviour without a monetary penalty. While the s. 90.1 provision could possibly be applicable, s. 79 is probably the more desirable way to regulate entry requirements to regulated occupations via the *Act*. This is simply because the amendment of s. 78 to include an example relating to unnecessarily restrictive or discriminatory entry barriers seems more elegant than working such an amendment into s. 90.1.

## III. A DIFFERENT APPROACH TO CREDENTIAL ASSESSMENT

The current s. 78 examples indicate that the government is concerned about entities in dominant positions impeding the entry of potentially strong

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<sup>121</sup> Wakil, *supra* note 34 at 232.

<sup>122</sup> *Competition Act*, *supra* note 1, s 90.1(1).

<sup>123</sup> *Ibid*, s 90.1(1)(a), (b).

<sup>124</sup> *Ibid*, s 79(1), (2).

<sup>125</sup> *Ibid*, s 90.1(1)(b).

<sup>126</sup> Wakil, *supra* note 34 at 203.

competitors into the Canadian market.<sup>127</sup> Arguably the current approach to determining entry requirements to regulated occupations has exactly this effect. While “protecting the integrity of competition is important to ensure the efficiency of the Canadian economy and the prosperity of Canadians,”<sup>128</sup> greater competition may not always result in better quality service. On the contrary, service standards may decrease, causing consumers to lose confidence in the profession as a whole because they cannot adequately discern the quality of a service provider on their own as a result of asymmetric information. Therefore, at least some entry requirements that limit competition are “clearly in the public interest” because they “ensure the competence of those entering the profession” and “protect vulnerable clients and third parties.”<sup>129</sup>

On the other hand, while there is no proven correlation between higher entrance requirements and increased quality, there is an established relationship between high entrance requirements and higher incomes for those fortunate enough to enter the profession.<sup>130</sup> Competence to offer a professional service can be “acquired through a variety of combinations of training, education and experience.”<sup>131</sup> Therefore, requiring a specific piece of paper or score on an exam may discourage some foreign-trained professionals from becoming licensed without actually improving the quality of service offered to the public.

Therefore, in place of the existing entry requirements, or to supplement them, the self-regulating professions could offer assessments of an individual’s competence and their effectiveness at providing a particular service through an individual clinical-based assessment, rather than testing their study, exam skills or willingness to persevere through barriers. This would also provide better protection for the public than merely determining the value of the paper credential an individual holds, particularly considering the distinct mix of education and experience each applicant brings. If credentials are recognized on the basis of competence rather than degrees alone, then additional training would only be required if an individual is truly unprepared to competently contribute to the practice in Canada without further study.

Competence rather than paper-credential based assessment is consistent with the Bureau’s recent direction. In 2007, the Bureau studied several self-regulating professions and recommended how they could better comply with the *Act*. One of the suggestions was that regulators examine their entrance requirements using an *Oakes* style analysis.<sup>132</sup> It was recommended that regulations should clearly state the “specific objectives” the profession hopes to

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<sup>127</sup> See *Competition Act*, *supra* note 1 at s 78.

<sup>128</sup> Bureau, Abuse of Dominance Guidelines, *supra* note 54 at iv.

<sup>129</sup> Bureau, Letter to the Paralegal Standing Committee, *supra* note 13.

<sup>130</sup> Bureau, Regulated Professions, *supra* note 2 at 26-27.

<sup>131</sup> *Ibid* at 51-52.

<sup>132</sup> See *R v Oakes*, [1986] 1 SCR 103, 16 DLR (4th) 200.

achieve in order to increase transparency, lessening the chance it will be used for self-protectionism.<sup>133</sup> Second, any requirements should be rationally connected to the objectives by evidence, not just theory.<sup>134</sup> For example, if writing a test on basic knowledge of general family medicine will not “directly” contribute to or assess the competence of a surgeon, then it may not be close enough to be a “clear and verifiable outcome” nor will it be “the minimum necessary to achieve [the] stated objectives,” or “reasonably required” to protect the public interest.<sup>135</sup> This favours assessment of competence as the basis for entry into a profession rather than recognizing only paper credentials.

To implement more competence-based assessment, it would be more efficient to create a national body for each profession whose sole task is to assess credentials based on competency. Professional representatives from each province could sit on its governing board or be consulted as experts. There could also be lay people appointed to represent the interests of different groups affected, such as consumers and professional newcomers.<sup>136</sup> The representatives would be able to express concerns and could offer insight and possible solutions that those within the profession might not have considered. This would address the Bureau’s concern that the minimum requirements for entrance into some professions vary widely across the country, which suggests that barriers in certain jurisdictions are unnecessarily high because other provinces are using less restrictive alternatives to attain presumably consistent quality standards.<sup>137</sup>

However, this assumes that variety in entrance requirements from province to province is undesirable. This is not necessarily so. The more significant the differences between professionals’ service in different provinces the more necessary it is to have different minimum requirements. For example, the law is different in each province whereas pharmacists perform essentially the same tasks no matter which province they are in.<sup>138</sup> Therefore a national program is particularly suitable for professions like pharmacy, but may not suit the practice of law to the same degree.

Looking at the province with the lowest barriers to accreditation and determining whether they “are still achieving the desired level of competence” may help to ascertain the minimum requirements necessary to “protecting the

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<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid* at 37-38.

<sup>136</sup> See Trebilcock, *supra* note 62 at 230-231 (Trebilcock notes that in the past some Law Societies have appointed lay benchers to certain committees but instead he suggests letting various constituencies affected by the profession nominate individuals to present their point of view. The difficulty would be achieving the right balance of representation. Unless there is enough lay presence they will not have an effect, however, too much outside representation would dilute the benefit of self-regulation).

<sup>137</sup> See *ibid* at viii-ix.

<sup>138</sup> Bureau, Regulated Professions, *supra* note 2 at 103.

public interest.” This does not consider, however, the fact that even with minimal requirements the method of evaluation may not be the most directly connected to the objective of assessing competence.<sup>139</sup> Instead of assessing paper qualifications, the professions could set out the objectives behind the regulations, the minimum skills and knowledge necessary to practise a profession, and then allow professionals to demonstrate their competence, either through a period of supervised practice or by a recognized degree.

A further benefit of creating a national organization to assess competency-based credentials is that it would allow the provinces to pool their resources, making a clinical assessment program more cost effective. This would help counter the increased expense of a competency based assessment model. This is important because the cost of a more individualized program is one of the significant factors that could cause the Tribunal to find that the current practices are “reasonably necessary” because there is no feasible alternative, since there is a valid concern that regulation should not involve “excessive compliance costs,” either to the individual or the government.<sup>140</sup> Any added expense could be further offset by the benefit to Canadian residents, through increased tax dollars collected from newcomers working at higher paying jobs and increased accessibility to professional services, particularly if incoming professionals are required to work in an underserved rural area for a period of time.

Even if the provinces cannot agree on national standards or a national assessment agency, clearly setting out objectives would help to streamline the credential recognition and Bureau enforcement processes in several ways. First it would help with a s. 79 application because the self-regulator’s business justification for the barrier would be clear, allowing a newcomer to know the evidence they should show in their Application for Inquiry and making it easier for the Bureau to determine the chance of success an application before the Tribunal. Second, clearly defined objectives would increase transparency and guard against the threat of self-interest. Furthermore, it would enable more competence-based credential recognition. If a profession sets out the specific objectives they hope to achieve, individuals should be able to demonstrate that they meet those. This gives individuals more flexibility to demonstrate their skills and training. It also places the onus on them to show how they meet the standards, since they best understand their training and skills.

Finally, specifying objectives allows the profession and Bureau to determine ahead of litigation whether the objective could be achieved by market forces without the regulation, whether the anti-competitive effects outweigh the

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<sup>139</sup> *Ibid* at 155-156 (the report repeatedly says that entry requirements should be the “minimum necessary to properly and effectively practice law while protecting the public interest” at 156).

<sup>140</sup> Bureau, Letter to the Paralegal Standing Committee, *supra* note 13.

benefits, and if there is an “equally effective regulatory mechanism” with less negative effect on competition.<sup>141</sup>

#### IV. COMPETITION BUREAU FUTURE – INCREASED LITIGATION

Currently there is little case law involving the Bureau and self-regulated professions. *Jabour*, from the early 1980s is still one of the primary cases. This may be a result of the Bureau’s preference for addressing its concerns through settlement.<sup>142</sup> However, the current commissioner has clearly stated that the Bureau “will not be afraid to litigate” and “proceed vigorously” if “parties are unwilling to provide an adequate remedy”.<sup>143</sup> This signals a change in policy with the likely result that there will be more cases in the near future.

In 2007, the Bureau gave self-regulating professions two years to implement its recommendations. That time-frame has now passed. The intent behind the 2007 Report was that professions would make changes “voluntarily”; however, the recent Canadian Real Estate Association [CREA] case proved that “the Bureau will not hesitate to get involved to the extent authorized by the Competition Act.”<sup>144</sup>

The Bureau challenged Multiple Listing Service [MLS] restrictions under the Abuse of Dominant Position provision, alleging that the CREA had market power because there were no “adequate substitutes” for the MLS and that the restrictions were “prevent[ing] entry and imped[ing] expansion by competitive business models that provide unbundled residential real estate brokerage services”.<sup>145</sup> Although the CREA had made changes following the 2007 recommendations, these did not fully address the Bureau’s concerns. The Bureau felt that the rules still “explicitly protect[ed] CREA’s ability, at any time, to reinstate anti-competitive restrictions, and possibly more anti-competitive ones.”<sup>146</sup>

The parties reached a settlement, entering a consent agreement to end the case in October 2010.<sup>147</sup> However, the Bureau’s reason for pursuing this case

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<sup>141</sup> Bureau, Regulated Professions, *supra* note 2 at 41.

<sup>142</sup> Melanie L Aitken, “2010 Competition Law and Policy Conference – Keynote Dinner Address” (Speech delivered at the 2010 Competition Law and Policy Conference, Cambridge, Ont, 3 February 2010), online: Competition Bureau Canada <<http://www.competitionbureau.gc.ca>>.

<sup>143</sup> *Ibid.*

<sup>144</sup> Summary of Bureau Report, *supra* note 17 at 2.

<sup>145</sup> *The Commissioner of Competition v The Canadian Real Estate Association* [Notice of Application], at paras 2-4, 30, 39, (8 February 2010), CT-2010-002, online: Competition Tribunal <[http://www.ct-tc.gc.ca/CMFiles/CT-2010-002\\_Notice%20of%20Application\\_1\\_45\\_2-8-2010\\_2541.pdf](http://www.ct-tc.gc.ca/CMFiles/CT-2010-002_Notice%20of%20Application_1_45_2-8-2010_2541.pdf)> [CREA]; see also Aitken, 4 May 2010, *supra* note 9.

<sup>146</sup> *Ibid.*

<sup>147</sup> *CREA*, *supra* note 145; *The Commissioner of Competition v The Canadian Real Estate Association* [Consent Agreement], CT-2010-002, online: Competition Tribunal

could also apply to overly restrictive credential recognition schemes because they are “focused on striking down... anti-competitive rules” to enable more “innovative services” allowing consumers to “benefit from greater choice” which should exert “downward pressure on...fees in Canada.”<sup>148</sup>

## V. CONCLUSION

Self-regulating professional organizations do have “lawful power to impose restrictions on the entry ... of members” to the profession.<sup>149</sup> However, given the arduous process foreign professionals must go through in order to become licensed to practise in Canada, and the varying entrance requirements across provinces, change is necessary to achieve the primary goal of the *Competition Act*: to “maintain and encourage competition.”<sup>150</sup> Greater transparency and an independent committee charged with overseeing self-regulating bodies could make professions more competitive without losing the benefits of self-regulation. The Competition Bureau is a well-suited independent body to review self-regulatory decisions because it has experience assessing an action’s effect on competition and has legal power to enforce change through the Competition Tribunal if necessary. Such oversight could guard against economic protectionism.

While there are three sections of the *Competition Act* which could apply to entrance barriers to self-regulated occupations, s. 78 specifically could be changed to better fit a self-regulatory context. Therefore, we recommend the following amendments to make it clear that the *Competition Act* does apply to self-regulatory actions:

- *Amend the Abuse of Dominant Position section, s. 79, which provides civil remedies where an entity with substantial or complete control in a market acts in a way that has or is likely to prevent or lessen competition. Add as an anti-competitive act under s. 78 “unnecessary regulatory restrictions for the purpose of impeding or preventing a competitor’s entry into, or to eliminate him from, a market.” This would make it clear that s. 79 applies to self-regulatory actions and make it easier for the Competition Bureau to establish the required elements. An additional proviso should be included making it clear that this particular example will not be considered anti-competitive if there is adequate Fair Access legislation in place in a province.*

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<[http://www.ct-tc.gc.ca/CMFiles/CT-2010-002\\_Registered%20Consent%20Agreement\\_75\\_38\\_10-25-2010\\_2647.pdf](http://www.ct-tc.gc.ca/CMFiles/CT-2010-002_Registered%20Consent%20Agreement_75_38_10-25-2010_2647.pdf)>.

<sup>148</sup> Competition Bureau, Media Release, “Competition Bureau Seeks to Prohibit Anti-competitive Real Estate Rules” (8 February 2010) online: Competition Bureau <<http://www.competitionbureau.gc.ca>>.

<sup>149</sup> Bureau, Regulated Professions, *supra* note 2 at 133.

<sup>150</sup> *Competition Act*, *supra* note 1, s 1.1.

- *Adequate Fair Access legislation required to avoid application of s. 79 via the new amendment to s. 78 must include a supervisory component comprising of:*
  - *Oversight by a senior provincial body that is independent – above and beyond the professional self-regulators;*
  - *The overseeing body must have a mandate to determine whether registration processes are reasonable, transparent and fair, both procedurally and substantively; and*
  - *The overseeing body must be empowered to make legally binding remedial orders based on individual complaints as well as at its own instigation and investigation.*
- *Implement the amendment to s. 78 in stages like the PIPEDA. The amendment should be implemented so that the changes clearly apply immediately to federal self-regulatory action. However, suspend application of the section to provincial regulators for three years in order to allow provinces to create or amend Fair Access legislation that substantially complies with the federal provision.*

Finally, professionals educated outside Canada face time consuming and expensive requirements to become certified to practise in Canada. If these barriers on entry to the profession are not necessary to ensure that only qualified individuals provide professional services in Canada then it is important to find alternative ways to assess competence that are less onerous for newcomers and allow the Canadian public to benefit from their knowledge and expertise. Competition Bureau policy supports recognition of credentials through assessment of competence. Ideally the provincial organizations will work together to create national assessment bodies because ultimately each profession is in the best position to investigate and determine the most streamlined way to integrate newcomers, taking into account the characteristics of their work. The Competition Bureau's role, through enforcement of the *Competition Act*, should be to encourage organizations to research and make changes to minimize the anti-competitive effects of self-regulation on recognition of foreign credentials.

- *It is recommended that each self-regulatory body create a policy guideline clearly explaining the rationale behind each of their entry requirements and demonstrating that they have considered and employed less anti-competitive alternatives where appropriate.*

Hopefully knowledge that the Competition Bureau may act to enforce competition law will be sufficient encouragement for self-regulatory bodies to find creative ways to streamline the foreign credential recognition process to comply with federal law; failure to do so might spur the provinces to enact legally

enforceable fair access legislation to more actively supervise the exercise of provincial regulatory power.<sup>151</sup>

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<sup>151</sup> See *ibid* at s 124.1; Bureau, Abuse of Dominance Guidelines, *supra* note 54 at 2 (the *Act* provides a useful way for self-regulatory bodies to draft possible changes to their current entrance requirements and then get a “binding Written Opinion from the Commissioner” on how they would view the changes).