

Self-regulated professions

Balancing competition and regulation

Competition Bureau
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Foreword

The professions comprise up to one fifth of Canada's service economy and seven percent of the total hours worked in Canada's business sector. It is cause for concern, therefore, that labour productivity in this important sector of the Canadian economy is [approximately half](#) that of the professions in the United States and is in the bottom quintile for labour productivity among Canadian industries.

Research by the Organization for Economic Co-operation and Development (OECD) confirms the worrisome state of Canada's professional services sector. The OECD reported earlier this year that Canada's best opportunity for growth is in labour productivity and specifically recommended that Canada promote competition in professional services by [reducing regulation](#). Other research by the OECD has shown that countries that have streamlined and improved their regulatory regimes have seen significant payoffs in terms of productivity.

Much of the productivity problem that plagues Canada's professions may be due to regulators not considering competition issues, or considering them inadequately, when they were creating their regulatory schemes, in the context of a very different Canadian economy than exists today.

Normally, competition in a free market system protects both consumers and service providers better than any other alternative. The only time it is desirable to supplant competition by regulation is when markets are not functioning as well as they should be and when the benefits of regulation demonstrably outweigh the benefits of competition alone. But even then, regulation will be most effective when it imposes minimal restraints on competition.

This study, the first of its kind by the Competition Bureau, is a detailed look at the way regulation affects competition in self-regulated professions in Canada. As such it is a valuable tool for professionals, politicians, policy makers and consumer advocates. The Bureau is uniquely placed to do this study. As advocates for competition, we have considerable expertise in analyzing professional practices to identify uncompetitive elements. In addition, we hope that our advocacy and enforcement activities will work in tandem: by having regulators consider the competitive impacts of regulation, it will become unnecessary for the Bureau to consider them during investigations into alleged anti-competitive conduct.

I encourage readers to see this report's findings as applying to all professions. Our recommendations, which we plan to revisit in two years, are certainly not an indictment of any of the professions. Rather, our goal is to identify opportunities for improving necessary regulations and eliminating unnecessary ones so that Canadians can benefit from the best combination of regulation and competition.

Some will no doubt argue, correctly, that competition needs to be balanced against other policy objectives. My concern is that we have regulatory regimes that were established without adequately considering competition.

Our collective challenge, whether we are professionals or users of professional services, is to bring more competition to the professions. This study is a good place to start.

Sheridan Scott
Commissioner of Competition

Executive summary

Despite comprising a significant part of the service economy in Canada, perhaps as much as one fifth, the professions comprise one of the overall economy's least productive sectors. According to the [Conference Board of Canada](#), professional services rate in the bottom quintile for productivity per hours worked. In addition, labour productivity in the professions in Canada is approximately half that of the professions in the United States. At the same time, the professions are one of the most regulated sectors of the Canadian economy, and the regulation in place in the professions is more restrictive in Canada than in many member nations of the [Organization for Economic Co-operation and Development](#).

Given a considerable body of evidence that shows that reducing regulation improves competition and, as a result, productivity, it is reasonable to ask whether and how professional services could be less regulated in Canada. The Competition Bureau is ideally placed to answer this question, since one of its primary responsibilities is advocating for competition in Canada. On several occasions, the Bureau has advised Canadian regulatory bodies on how to improve their approach to regulation to realize the benefits of competition. The Bureau also has considerable experience investigating anti-competitive behaviour in the professional services sector.

The five groups of professionals—accountants, lawyers, optometrists, pharmacists and real estate agents—the Bureau chose for this study of the self-regulated professions in Canada are vital to the Canadian economy and are of great importance to Canadians in their daily lives. Access to advanced, innovative and competitive professional services is essential for individual Canadians as well as businesses. These professions affect the cost of many other services as well as most goods, including the most basic consumer goods.

These professions are also self-regulated, meaning that they have been given some powers that normally only governments hold. The organizations given self-regulating powers may therefore put in place restrictions that have the force of law. At the same time, these organizations have potentially conflicting concerns and interests—their own and those of the public. This is all the more reason to ensure that competition, from which both professionals and consumers benefit, is protected.

The Bureau selected these particular groups of professionals based on their volume of commerce as well as on the volume of complaints about anti-competitive behaviour in these professions it received, both from the public and from within the professions themselves, which gave it good reason to believe that existing regulation might be

restricting competition excessively. However, the Bureau's findings are transferable to other professions, since it is reasonable to expect the type of regulation found in these professions generally exists in others.

Competition and regulation

Competition is generally the best means of ensuring that consumers have access to the broadest range of services at the most competitive prices and that producers have the maximum incentive to reduce their costs as much as possible and meet consumer demand. However, professional services markets are characterized by particular qualities that can justify some form of regulation to protect consumers and ensure service quality. At the same time, there are compelling economic arguments that regulation can have the effect of severely limiting competition, thus preventing consumers from benefiting from the many advantages of a competitive environment.

The Competition Bureau does not argue blindly for competition at the expense of all other policy objectives, since there may be legitimate public interests other than the efficient allocation of resources at issue. The Bureau does, however, advocate that to be effective, regulatory decisions must be fully informed, keeping in mind the many direct and indirect impacts they may have on consumers through reduced competition. Regulation that is excessive or restricts competition more than an equally effective alternative comes at great cost and should be removed or modified.

This is an important message for all professions. Regulators—comprising provincial and territorial governments, and self-regulating organizations—must evaluate regulatory decisions through a balanced, evidence-based assessment, taking into account the numerous channels through which regulation can be beneficial or harmful to consumers of professional services. To this end, the governance structure of each profession must ensure broad representation. It is the Bureau's hope that this study will increase awareness of the competitive impact of regulation in professional services and motivate an expansive deliberation among regulators of the effects—favourable and not—of regulation.

Findings and recommendations

This study is the Bureau's first effort to identify potentially unnecessary and anti-competitive restrictions that exist in a representative group of self-regulated professions and that may well be present in other professions. (The specific examples below are just that, examples to illustrate the Bureau's findings. Chapters 3–7 contain all the recommendations.) The Bureau's recommendations are not based on findings of wrongdoing; rather, they reflect opportunities the Bureau believes regulators should seize.

Restrictions on entering the profession

Most professions maintain substantial entry qualifications, coupled with continuing education requirements. The Bureau found that these qualifications are, in some instances, noticeably uneven across the country.

In general, the Bureau supports the need for entry requirements to assure quality in the provision of professional services. However, any proposed increase to required entry qualifications should be justified as being the minimum that will reasonably ensure consumer protection. Furthermore, jurisdictions that maintain higher standards than others should look to the outcomes of less regulated jurisdictions when defining the minimum necessary level of qualification.

The Bureau was interested to find that the authority to accredit all Doctor of Optometry programs in Canada and the United States rests with the U.S.-based Accreditation Council on Optometric Education, which almost entirely comprises members of the American Optometric Association. The Bureau is of the view that there is a risk that the Council's accreditation policies are formed and evolve based on conditions of supply and demand in the U.S. and do not necessarily reflect conditions in Canada. As a result, provincial and territorial colleges of optometry should consider ways to ensure that the Council takes conditions of supply and demand in Canada into account when developing accreditation policies.

The Bureau also reviewed empirical studies on the effect of market entry restrictions on the price and quality of professional services. Generally, the studies found that the incomes of members of professions with restrictions on entry are higher than the incomes of comparable professionals who do not face restrictions. The effect on quality is unclear.

Restrictions on mobility

Generally, the professions are moving in the right direction with respect to interprovincial and international mobility. In each profession, the majority of provinces have signed a mutual recognition agreement to remove unnecessary barriers to mobility of qualified professionals and to establish the conditions under which professionals registered or licensed in one jurisdiction may have their qualifications recognized in another. Further work can be done to get all Canadian jurisdictions on board and to develop strong dispute-handling mechanisms and consistent implementation of these agreements.

Most professions use various mechanisms to assess the qualification of foreign professionals wishing to have their credentials recognized in Canada. Many of these mechanisms take the form of national organizations that assess basic educational or professional qualifications on behalf of the provinces and territories. However, the pharmacy profession in Canada does not use any of these mechanisms, relying instead on each province to set its own evaluation and entry criteria and assessment process. Given that the roles and responsibilities of pharmacists are essentially the same across the country, there is no apparent reason for the variation in the admission requirements for foreign-trained pharmacists. When the requirements are higher than necessary, the cost of entry can be needlessly high, resulting in fewer foreign-trained professionals applying to become pharmacists in certain provinces and territories.

Restrictions on overlapping services and scope of practice

The Bureau has identified a number of instances in which professionals who provide overlapping services are requesting that their scope of practice be expanded to include

one or more activities currently beyond their authorization. Regulators should conduct a thorough assessment of the overall effect of any proposed expansion. A full evaluation should take into account both the potential costs, in terms of public safety, and the potential benefits, in terms of lower prices, increased choice and enhanced consumer access to professional services.

For example, the Bureau learned that members of some accounting designations in some Canadian jurisdictions are not allowed to provide the full extent of public accounting services. Such restrictions limit the number of accountants who can offer this important service and therefore limit competition. The Bureau recommends that regulators reconsider these restrictions so that all accountants who are qualified to provide public accounting services may do so.

Restrictions on advertising

The Bureau has identified numerous restrictions that appear to go beyond what is necessary to protect consumers from false or misleading advertising and, as a result, limit consumers' access to legitimate information that greatly benefits competition. Among these are restrictions that limit the use of certain words and expressions and those that limit the size of advertisements. The Bureau is particularly concerned by restrictions on comparative advertising. Such restrictions obstruct competition between service providers and make it difficult for new entrants to advertise any distinct features of the services they offer, protecting incumbents from the full forces of competition.

The Bureau found many such restrictions on lawyers in many Canadian jurisdictions. Removing these restrictions would go a long way toward bettering this profession's competitiveness. Moreover, the Bureau recommends that the regulators in all professions review existing restrictions on advertising and remove those that go beyond prohibiting false or misleading advertising.

The Bureau also reviewed empirical studies on the effect of advertising restrictions on the price and quality of professional services. Generally, these studies found that restrictions on advertising increase the price of professional services, increase professionals' incomes and reduce the entry of certain types of firms. The effect on quality is small, except that the restrictions may result in fewer consumers using the service.

Restrictions on pricing and compensation

Some regulators publish suggested fee guides, which they claim to be non-binding. Fee guides that are purely voluntary in nature, while unquestionably preferable to any mandatory directive, remain a source of unease from a competition perspective, since they risk facilitating overt or tacit collusion. Given the negative effect of collusion on consumer welfare, the Bureau urges regulators to look to less intrusive means than fee guides to provide consumers with the information they need about prices. In addition, regulators should ensure that any maximum prices they set are not functioning as fixed prices in practice.

In the real estate industry, all provinces and territories but Quebec restrict agents' remuneration to either a fixed amount or a percentage of the selling price. Ontario goes even further and uses the phrase *but not both* in its restriction, meaning that real estate agents may not, for example, ask for a fixed amount for their initial work and then a percentage of a property's selling price. Such a restriction disallows two-part fees, a type of pricing arrangement one would expect to arise in a competitive real estate market in which some fixed level of work is generally required, but anything beyond it is uncertain. This approach prevents what would otherwise be a perfectly acceptable compensation arrangement that should spur competition among agents, since it maintains the incentive for them to work to get a higher selling price for their clients while ensuring that they will be fairly compensated for the preparatory work they do.

Restrictions on business structure

The Bureau is of the view that certain restrictions on business structure, namely restrictions on multidisciplinary practices between complementary service providers, have the potential to significantly reduce the benefits of competition.

Lawyers and public accountants, for example, appear to be natural complements to one another in terms of the services they provide. By working together, they would also be able to realize business efficiencies. However, the Bureau uncovered some restrictions in some provinces that prohibit or discourage members of these professions from working together or with other professionals in multidisciplinary practices.

Professions justify restrictions on multidisciplinary practices as preventing possible conflicts of interest, which is a laudable goal. However, the Bureau recommends that regulators consider less intrusive mechanisms than an outright prohibition on multidisciplinary practices to circumvent possible conflicts of interest, such as requiring all participants in collaborative relationships to adhere to similar rules of conduct.

Conclusion

An examination of competition in the self-regulated professions is a legitimate exercise at any time, since the right to self-regulate brings with it the responsibility for regulators to consider the greater good in all that they do, including competition.

The professions in general, and those included here, currently face a situation that is rich with opportunities to benefit from increased competition. These benefits will accrue not only to the professions themselves but also, and perhaps more importantly, to Canada and Canadians. This study is, as such, only a starting point. There is ongoing work for regulators to do. For the Competition Bureau's part, it plans to review in two years whether the professions have addressed the recommendations this study presents.

Introduction

The Competition Bureau embarked on this study of self-regulated professions—that is, professions governed in part by government and in part by organizations given self-regulatory powers—in its capacity as an advocate for competition. The intent of the study is to identify restrictions self-regulated professions place on the entry of prospective members into the profession and on how existing members do business that may unnecessarily hinder competition. The Bureau also hopes to contribute to the discussion on how best to regulate these professions, and others, in an effective way that achieves the benefits of both regulation and competition.

The Competition Bureau is an independent law enforcement agency. The Bureau contributes to the prosperity of Canadians by protecting and promoting competitive markets and enabling informed consumer choice. Under the direction of the Commissioner of Competition, the Bureau administers and enforces the *Competition Act*. As a law enforcement agency, the Bureau investigates allegations of anti-competitive conduct and pursues criminal and civil remedies to stop anti-competitive behaviour.

In addition to law enforcement, the Bureau also promotes competition through advocacy, of which this study is an example. As an advocate for competition, the Bureau frequently makes submissions to various legislative bodies and regulators, offering its unique perspective on how to implement reforms that encourage competition and ensure that competitive factors are taken into consideration in the formulation and review of policies.

The purpose of this study is not to urge professions to deregulate. Rather, it is to promote strong, effective regulation by applying competition analysis to this vitally important sector of the economy. In this way, the Bureau invites regulators—comprising provincial and territorial governments and self-regulating organizations—to consider the competition policy perspective when formulating, enacting and reviewing regulations, rules and policies.

As a first attempt to identify restrictions on competition in the self-regulated professions, this study focuses on five groups of professionals: accountants, lawyers, optometrists, pharmacists and real estate agents. This choice in no way indicates that these are necessarily the most regulated professions. Rather, the Bureau selected these groups based on their volume of commerce and the volume of complaints about anti-competitive behaviour, both from the public and from within the profession, since this gave the Bureau good reason to believe that existing regulation might be the cause of that anti-competitive behaviour. However, the Bureau's findings are transferable to other professions, since it is reasonable to expect the type of regulation found in these professions generally exists in others.

The Bureau approached this study, not as an impartial onlooker, but as a voice for the promotion of competition and the application of market forces wherever possible. The Bureau supports regulation only when necessary, and then, only to the minimum extent needed to achieve policy objectives. This study is premised on the Bureau's belief that competition is generally the best means to ensure consumers benefit from low prices, broad choice and the many other advantages of a dynamic, competitive landscape.

The importance of professions to Canadians

As the providers of services of great importance to the Canadian public, the five professions included in this study play a significant role in society and the economy. In this increasingly integrated and fast-paced world, the importance of access to advanced, innovative and competitive professional services is rising; individual consumers and business clients depend heavily on them every day. In fact, many professional services are at the heart of today's knowledge-based economy, meaning that the success of the professions is integral to the success of the Canadian economy as a whole.

Professions affect the cost of many other services as well as most goods, including basic consumer goods. The prices of the vegetables and breakfast cereal consumers buy at the grocery store, for example, have the grocery chain's legal, accounting and real estate costs built into them. When the chain offers its employees drug or eye care coverage, the prices of the products it sells will be influenced by its costs to provide that coverage.

It is difficult to quantify the contribution of professional services to the Canadian economy. However, there are some indications of their importance. For example, a University of Minnesota professor has estimated that in the United States 20 percent of workers in the year 2000 were in occupations with some form of state licensing, up from five percent in the 1950s. Taking into account local and federal government requirements, perhaps three of every 10 workers in the U.S. are required to have a licence to do their jobs. It is difficult to obtain parallel data for Canada, but it is reasonable to assume that the situation would be similar, although perhaps not as dramatic, since some of the occupations included in the professor's research are not considered to be self-regulating professions in Canada.¹ According to a recent Conference Board of Canada report, however, professional services account for approximately seven percent of the total business sector hours worked in Canada in 2004.²

Given the significance of the professions in Canada, it is worrisome that recent evidence shows that they comprise one of the overall economy's least productive sectors. According to the Conference Board, professional services rate in the bottom quintile for productivity per hours worked. In addition, labour productivity in the professions in Canada is approximately half that of the professions in the United States.³ At the same time, the professions are one of the most regulated sectors of the Canadian economy, and the regulation in place in the professions is more restrictive in Canada than in many other

¹ Kleiner, Morris, *Licensing Occupations: Ensuring Quality or Restricting Competition?* (Upjohn Institute, 2006).

² Conference Board of Canada, *Mission Possible: Stellar Canadian Performance in the Global Economy* (January 2007), p. 46, www.conferenceboard.ca/documents.asp?mext=1886.

³ Ibid.

member nations of the Organization for Economic Co-operation and Development (OECD).⁴

The role of regulation

In Canada, professional services are often governed by considerable regulation—both direct government regulation and the rules self-regulating organizations impose on their members. Trade associations can also play a governing role; however, since they do not have direct power to regulate, they are outside the scope of this study.

The primary basis for regulating the professions is to protect consumers of these services as well as the general public in response to the presence of factors that may cause the market to function less efficiently than it otherwise should. (See Chapter 1 for a thorough review of the economic theory behind regulation and the related effect on competition.)

While the nature and rigour of regulation varies across professions, the net result is that the professions have not traditionally been subject to the full forces of competition that prevail in other sectors of the economy, thus reducing the many ways in which consumers benefit from a competitive environment.

The regulatory restrictions that have the greatest potential to hamper competition are restrictions on market entry, including restrictions on entering the profession, mobility and on overlapping services and scope of practice, and restrictions on market conduct, including rules controlling advertising, pricing and compensation, and business structure.

While appropriate standards of quality can improve the efficiency and effectiveness of markets for professional services, professionals must be unburdened by ineffective, unnecessary and outdated regulations. This will allow professionals to make full use of their qualifications and deploy their vitally important skills in vibrant, efficient and competitive markets. Consequently, this will ensure that Canada is well positioned to take advantage of the many benefits of the knowledge-based economy. (See Chapter 2 for more on effective regulation.)

In addition, given the considerable body of evidence that shows that reducing regulation improves productivity, it is reasonable to ask whether and how professional services could be less regulated in Canada.⁵

Research process

The Competition Bureau conducted extensive research on the five groups of professionals, soliciting input from provincial and territorial regulators through a voluntary questionnaire (see Appendix 1) and by reviewing existing restrictions (as found

⁴ OECD, *Going for Growth, 2007: Structural Policy Indicators and Priorities in OECD Countries* (OECD, 2007), p. 45, www.oecd.org/document/8/0,3343,en_2649_201185_37882632_1_1_1_1.00.html.

⁵ For example, in the mid-1990s, the Australian government launched comprehensive pro-competition reforms at the national and state levels, and among other things identified 1,800 laws with a potential impact on competition in various sectors to review and then either amend or eliminate. In just a few years, Australia substantially improved its economic performance, becoming one of the OECD's top-performing economies, with an average growth rate of more than three percent since 2000 and the lowest unemployment rates since the 1970s. Australia, *National Competition Council, Report by the Independent Committee of Inquiry into a National Competition Policy for Australia* (August 1993), www.ncc.gov.au/publication.asp?publicationID=219&activityID=39.

in legislation, regulations, policies, codes of conduct and other instruments), holding follow-up consultations on the findings and conducting independent research. (See Appendix 2 for a complete list of regulators, self-regulating organizations and others that provided input at various stages of the research process.) Due to the sheer volume of information collected, the report only highlights selected restrictions in various provinces and territories to illustrate potential competition issues.

In using the questionnaire and the subsequent consultations, the Bureau made every effort to be accurate. While mindful that restrictions are not always implemented the same way as they are written in regulation, the Bureau worked with the available information. Although the Bureau relied heavily on the information it received from the questionnaires and consultations, the views and recommendations contained throughout this report are the Bureau's own.

To complement its own extensive expertise in the area of competition economics, the Bureau also sought the assistance and advice of expert economists to analyze the potential anti-competitive and efficiency effects of regulations regulators may impose.

Structure of the study

The study comprises seven chapters. In Chapter 1, economic analysis guides a theoretical discussion of the rationale for regulation of the professions, and exposes the types of restrictions that have the potential to negatively impact competition. The economic arguments for and against regulation are considered together to highlight the need for policymakers to balance the public benefits of restrictions against the potential anti-competitive effect.

Chapter 2 sets out overall recommendations for the formulation of optimal regulation. In particular, the Bureau posits six guiding principles to help regulators develop strong, efficient regulation that will maximize consumer welfare through competition but still meet policy objectives. The chapter concludes with a brief discussion of how to incorporate an assessment of the impact on competition into the formulation or modification of regulation.

Chapters 3–7 consider existing restrictions on five groups of self-regulated professionals: accountants, lawyers, optometrists, pharmacists and real estate agents, respectively. The Bureau identified six categories of restrictions that have the greatest potential to harm competition: restrictions on entering the profession, mobility, overlapping services and scope of practice, advertising, pricing and compensation, and business structure. Details on problematic restrictions, including any rationale for them the Bureau found or was made aware of, and how they are likely to reduce competition, are accompanied by recommendations to review, and when necessary, remove or replace them with less intrusive alternatives. Appendix 3 contains a complete list of the recommendations.

The questionnaire responses and consultation submissions referenced in chapter 3–7 are on file with the Competition Bureau. The URLs for websites referenced throughout this study are accurate as of mid-October 2007.

1. Economic analysis

In well-functioning markets, unfettered competition is the best means of ensuring that resources are allocated efficiently, that consumers have access to the broadest range of services at the most competitive prices and that producers have the maximum incentive to reduce their costs as much as possible and meet consumer demand. Markets for professional services are particularly vulnerable to factors that prevent them from functioning efficiently, including asymmetric information and externalities, as discussed in detail below. Economic conditions in these markets may therefore suggest that regulation of some sort has the potential to counter these sources of market failure and, as a result, enhance efficiency and improve consumer welfare.

Although regulators in self-regulated professions—comprising provincial and territorial governments and self-regulating organizations—often justify regulation on the basis of countering market failure, it is important to recognize that market failure, while a *necessary* condition for regulating, is not a *sufficient* condition for doing so. Ultimately, it is not enough for regulators to identify the existence of market failure as the reason to regulate; they must make a clear case that regulation is likely to improve upon free and open competition. Once they have done so, they must then turn to how best to regulate, including deciding which regulatory instrument (or mix of instruments) to use. The chosen regulatory response should directly target the identified market failure in a way that least restricts competition. (Chapter 2 contains more information on the analysis regulators should do when developing regulatory proposals or reviewing existing regulatory measures.)

This chapter sets out the economic theory behind both the potential anti-competitive effect and the public benefit of regulation in professional services markets, highlighting the need for regulators to balance the two. The chapter starts by reviewing the potential sources of market failure that might lead to the need for regulation. This section is followed by a discussion of the ways in which regulation may adversely affect competition among professional service providers and of the potential effect of regulation on price and service quality. These concepts are then applied to three types of market entry restrictions (restrictions on entering the profession, mobility, and overlapping services and scope of practice) and three types of market conduct restrictions (restrictions on advertising, pricing and compensation, and business structure). In addition, the empirical economics literature on the effect of entry restrictions and advertising on the price and quality of professional services is reviewed. A conclusion follows.

Market failure and the potential benefits of regulation

Markets for professional services are potentially vulnerable to two main sources of market failure: asymmetric information and externalities. In the presence of such market imperfections, free markets may not generate efficient outcomes, which may be a rationale for regulation, based on protecting the public interest.

Asymmetric information

Asymmetric information arises in professional services markets when consumers cannot accurately assess the quality of the services they need because they do not have the information to do so. This divide between buyers and sellers is perhaps the most important source of market failure in professional services markets and is the rationale regulators cite most for imposing restrictions in these markets.

It is useful to distinguish here between search goods, experience goods and credence goods (which in all cases comprise services as well as goods). The terms *search*, *experience* and *credence* refer to the accuracy with which consumers can observe and evaluate a good's characteristics. Search goods are defined as goods whose characteristics and quality consumers are able to evaluate with some degree of certainty before buying them. In contrast, consumers only learn the quality of experience goods upon consumption. The problem of asymmetric information becomes even more pronounced in the case of credence goods, the quality of which consumers are not fully able to assess, even after consumption. It is difficult for consumers to choose goods that suit their preferences from among experience goods, and especially credence goods, a fact that perhaps warrants some regulation to give consumers external quality signals. Eyeglasses frames are an example of search goods, since consumers are able to determine whether the fit and style suit their preferences prior to purchase. The lenses that are made for the frames are likely experience goods: consumers can only determine whether their vision has become clearer by looking through the lenses for some time. Complete eye health exams are credence goods, since consumers would not know with certainty after all the tests whether the resulting diagnosis for poor vision was correct.

Particular characteristics of professional services markets may give rise to problematic information asymmetries. First, the services professionals provide are often complex, such that consumers may be unable to judge their quality until after they have used them, if at all. Moreover, consumers may draw imperfect conclusions about service quality, due to the often tenuous relationship between professionals' abilities and the results they achieve. For example, even the highest quality lawyers lose cases.

The problem of asymmetric information may be amplified by the fact that many consumers do not use professional services often. In contrast, it may be less of a concern for businesses, since they are likely to be more sophisticated or frequent purchasers of professional services and thus over time may be able to discern service quality. Under certain circumstances, asymmetric information leads to two economic problems: adverse selection and moral hazard.

When quality is difficult for buyers to determine, sellers may have an incentive to offer lower quality services without lowering their prices. When consumers cannot distinguish between high- and low-quality service providers, they may assume that any service offering is of average quality and only be willing to pay as much as they think such service is worth. As a result, providers of the highest quality and highest price services might exit the market because they cannot get the prices they wish for their services. This process of overall quality deterioration driven by asymmetric information is known as adverse selection.¹ Under this theory, average quality would decrease further over time, until only low-quality, low-price services remain.

Asymmetric information also has the potential to create skewed incentives for service providers to act for their own benefit, contrary to consumers' best interests. This leads to the problem of moral hazard. In well-functioning, competitive markets with informed consumers, the incentives of buyers and sellers align. However, in markets characterized by asymmetric information, these incentives may diverge. When consumers cannot communicate their preferred combination of price and quality, service providers may, for example, oversupply quality in order to charge higher prices, even when lower quality services at more affordable prices would better serve consumers. Hypothetically, if pharmacists were free to receive compensation from drug manufacturers they might have an incentive to dispense more expensive brand name drugs when a lower priced generic might be the better option, unknown to consumers.

Given the risks of adverse selection and moral hazard, regulation in markets exhibiting asymmetric information may enhance consumers' ability to choose their preferred combination of price and quality, and dissuade professionals from exploiting consumers' lack of knowledge.

For example, entry restrictions may correct for adverse selection by preventing low-quality professionals from providing services. Although consumers tend to be harmed when their choices are limited, in circumstances of substantial asymmetric information, consumers may benefit. This is because the lack of choice reduces their uncertainty about quality, thereby ensuring that the prices consumers are willing to pay are high enough to induce high-quality professionals to offer their services.

Moral hazard is likely better addressed through restrictions on conduct than entry. For example, restrictions that set maximum prices may, in theory, reduce the potential for moral hazard by hindering service providers' ability to charge more by supplying higher quality services than consumers require.

Restrictions that ensure a minimum standard of quality to correct for asymmetric information and consequent problems of adverse selection will likely benefit consumers in markets in which consumer demand is low for low-quality services, highly sensitive to

¹ George A. Akerlof, "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism," *Quarterly Journal of Economics* 84(3), 1970, pp. 488–500. Akerlof coined the term *adverse selection* and won the Nobel Prize in Economics for his efforts in 2001. See www.nobelprize.org/nobel_prizes/economics/articles/akerlof/index.html.

quality and relatively insensitive to price.² However, when consumers prefer a combination of low quality and low price, restrictions on entry may exacerbate the negative impact of moral hazard.

Externalities

Although less prevalent and not cited as often as asymmetric information as a source of market failure, externalities—both negative and positive—potentially provide a justification for regulation in professional services markets.

Negative externalities most commonly appear in markets for professional services as negative effects on third parties that stem from consumers purchasing low-quality services. For example, consider a legal system in which clients hire low-quality lawyers who argue poor or incomplete cases before the courts, leading to substandard decisions. Such a scenario could undoubtedly have negative effects not just on the individuals who hired the low-quality lawyer but also on society as a whole. When buyers and sellers do not take the potential negative effects of their purchasing decisions into account, the market may not function efficiently. As a result, there may be a public benefit to regulating to ensure minimum service quality and reduce as much as possible the potential for negative externalities to arise.

In contrast, positive externalities associated with professional services arise when benefits accrue to third parties as a result of consumers purchasing high-quality services. In this case, such high-quality services may be undersupplied in unregulated markets if purchasers are only willing to pay for the private benefit they receive, not the additional benefit to others. Indeed, some services may even rise to the level of public goods. Economists define *public goods* as goods or services that are both non-rival and non-excludable. They are *non-rival* in the sense that one party using them does not preclude other parties from doing so. *Non-excludable* means that it is not possible to limit the use of the goods or services just to the parties who pay for them: when they are available to some, they are available to all (although different people may value them differently). An example of a positive externality is a pharmaceutical system that works quickly and effectively to distribute medication to those with illnesses. The individual consumer who obtains the appropriate medication swiftly with all side effects explained benefits, as does society because the risk of illness spreading is minimized.

Anticompetitive effects and the potential costs of regulation

In light of asymmetric information, potential externalities and the possibility of some services being akin to public goods, markets for professional services most likely require some form of regulation. However, regulation may inhibit competition beyond what is optimal, which would deprive consumers of the lower prices and high-quality services that result from open competition. Indeed, regulation that protects professionals from the forces of competition may in fact precipitate, rather than correct, market failure by

² For more detail on the types of markets that are likely to benefit from this type of regulation, see Hayne E. Leland, “Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards,” *The Journal of Political Economy* 87(6), December 1979, pp. 1328–1346.

creating, enhancing or preserving the market power of incumbents, which may lead to a lower supply or quality of services at higher prices than in a competitive market.

Specific restrictions that regulators impose may affect competition in several ways:

- by serving as barriers to entry and decreasing the supply of professionals and providers of substitute services;
- by increasing the likelihood of collusion; and
- by raising the costs of members of the profession.

Barriers to entry

Restrictions serve as barriers to entry in two ways. First, they may directly limit entry into the profession by, for example, capping the number of places available in required degree or training programs, or limiting the use of professional titles to qualified professionals. Second, restrictions may deter entry by raising the costs of joining the profession. Restrictions that increase the duration of initial training, for example, impose on those wishing to become members of the profession additional direct costs, such as paying for their training, and opportunity costs, because they forgo earnings during their training.

Barriers to entry may harm competition by reducing the supply of professionals, leading to higher prices and a correspondingly lower quality of service than would otherwise prevail. Since barriers to entry protect incumbents from outsiders, they may also limit competition on the basis of quality: the presence of fewer service providers likely decreases the incentive to develop innovative services.

Collusion

Restrictions may increase the likelihood that members of the profession can successfully collude to raise prices above the competitive level and lower output below it. Such collusion may be explicit, as is the case when the profession sets minimum or mandatory prices, or tacit, which could result from the profession issuing suggested price lists. Because collusive prices are higher than competitive ones (or quality is lower), collusion results in substantial harm to consumers.

The ability of members of the profession to maintain collusive prices depends on the extent to which the profession successfully restricts entry. In the absence of barriers to entry, new entrants would be attracted into the profession by the supra-competitive profits members earn, which would undercut members' ability to maintain the collusion, since they would have to arrange with new entrants to join it.

Raising members' costs

Finally, restrictions may raise the costs of members of the profession, which ultimately hurts competition. Increased costs may result in members reducing their output, since firms generally supply less of a service at a particular price when the cost of providing it increases. The reduction in output, in turn, will cause the price of the service to rise.

Increased costs may also deter some prospective members from joining the profession. This will result in price increases, since there will be fewer service providers.

It is important to distinguish between an equal increase in all members' costs, which is not associated with any enhancement of market power, and a disproportionate increase in costs for only some members, since the latter may be anti-competitive. An across-the-board cost increase simply acts as a barrier to entry. In contrast, an increase for only some members hampers their ability to compete effectively.

Examples of restrictions that raise the costs of all members of the profession include restrictions on advertising and restrictions on business structure. Restrictions on advertising force members to compete for consumers' business in more costly ways, resulting in a decreased willingness of members to provide the service at some prices. (Restrictions on advertising may also affect demand for the service by decreasing consumers' responsiveness to changes in price: because providers lack the ability to inform consumers of the lower price, there may be little incentive for them to, in fact, have lower prices.) Restrictions on business structure may decrease the returns associated with engaging in the profession by requiring members to organize their firms in inefficient ways and thereby discouraging prospective members from entering the market (and perhaps protecting high-cost incumbent firms from competition from lower cost rivals).

A new diploma requirement from which incumbents are grandfathered is an example of a restriction that only raises some members' costs. In this case, entrants have higher costs than do incumbents such that entrants are unable to compete as effectively. As a result, prices go up, benefiting the lower cost incumbents.

Restrictions

The remainder of the chapter reviews six types of market restrictions in two categories:

- market entry restrictions: restrictions on entering the profession, mobility, and overlapping services and scope of practice; and
- market conduct restrictions: restrictions on advertising, pricing and compensation, and business structure.

Market entry restrictions

Market entry restrictions include measures that have the effect of limiting the number of professionals able to enter a profession, that may limit professionals from offering their services elsewhere than where they are currently licensed, and that restrict members of related professions from offering similar services. For competition in professional service markets to be vibrant and effective, it is necessary that they be open to new entrants.

When it is difficult for consumers to determine service quality, reasonable requirements for professionals to demonstrate competence are likely to be consistent with promoting competition and efficient markets.

Entering the profession

The following are examples of restrictions facing individuals wishing to join a profession:

- educational requirements for certification or licensing;
- quotas on the number of new entrants or limits on the number of educational or training places available; and
- work experience, apprenticeship or practical training requirements for certification or licensing.

Restrictions on entering a profession limit the supply of professionals by affecting either the ability of potential entrants to join the profession or the returns associated with engaging in the profession. Restrictions that limit the number of training places available to entrants, for example, are typical of the former restriction. Lengthening the required training is an example of the latter; such restrictions would indirectly affect the number of entrants into the profession by increasing the cost, both in terms of foregone income (instead of working, potential entrants are in school) and direct educational expenditures.

The principal justification for restrictions on entry is that they protect consumers by increasing the quality of the services professionals provide. Restrictions on entry accomplish this goal by limiting the ability of less qualified individuals to engage in the profession. These restrictions may enhance demand for services when consumers are uncertain about quality—for example, when they are unable to distinguish between low- and high-quality service providers—by assuring them that the service providers meet minimum quality requirements.

While proponents of entry restrictions argue that demand may grow among certain consumers because they are more confident of the quality of the service, the resulting price increase will likely reduce demand among others, including those who prefer lower quality service at a lower price or those who are no longer able to afford the service at the higher, regulated price. This reduction may be viewed as a decrease in service quality for those consumers who no longer choose to purchase the service or who are no longer able to. This can offset the increase in quality consumers who continue to purchase the service enjoy.

Restrictions on entry may also have harmful non-price effects, such as limiting consumers' access to a profession, either because there is an insufficient supply of professionals to meet consumer demand or because geographic access to members (in non-metropolitan areas, for example) is reduced. Additionally, although regulators may argue that these restrictions are intended to enhance quality by setting educational, training or experience requirements, any restrictions that reduce the supply of professionals may also lessen competition among them. This, in turn, may offset the public benefits of these same restrictions by inhibiting quality competition among professionals or hindering their ability to develop innovative services.

Members of a profession may have an incentive to restrict supply more than is strictly necessary to ensure quality, because they would benefit from the higher prices and reduced competition that could result. If this were the case, the harmful effect of the restrictions on competition would outweigh the public benefit gained.

When weighing the consumer protection benefits of restrictions on entering a profession, it is important to consider whether the restrictions *necessarily* increase service quality. Although professionals with greater education or experience may provide higher quality service, the overall quality of the service may be largely due to unregulated characteristics of the professionals themselves. Similarly, some restrictions on entry, such as limits on the number of places available in training programs (which could serve as de facto quotas), may have little impact on quality and may, in fact, lessen the supply of professionals. A more effective approach then may be to have occupational controls that have the same quality-enhancing effect as entry restrictions but do not limit the supply of professionals. For example, a professional certification administered by the government or another regulatory body could signal quality to consumers while not preventing them from purchasing services from members of the profession who do not have the certification.

Mobility

Restrictions on entry may also include restrictions on the mobility of professionals. When different professional regulators control entry in different jurisdictions, the entry requirements imposed in one jurisdiction may not suffice for entry into another, limiting the ability of existing members to move between them.

Such restrictions on mobility may limit the ability of professionals to respond promptly and effectively to changes in demand, which may lead to a misallocation of service providers.

Overlapping services and scope of practice

Examples of restrictions that reduce the supply of professional services by limiting the ability of members of related professions to offer similar services include the following:

- restrictions on the use of titles by members of the profession;
- restrictions that give certain professionals exclusive rights to offer certain services; and
- restrictions that limit consumers' access to members of other professions offering complementary services.

The foundational concept here is demand substitutability—that is, what services do a sufficient number of consumers view as good substitutes for others, such that suppliers of one service are unlikely to be able to unilaterally raise their prices or otherwise harm competition?

In this context, restrictions on related professionals offering similar or overlapping services may limit the supply of substitute services, potentially allowing members of the profession to raise prices above the competitive level.

The benefits of these restrictions are closely related to the benefits of entry restrictions, discussed above— that is, in the presence of asymmetric information, these restrictions may enhance consumer demand by reducing uncertainty about the quality of the service.

Restrictions on professionals' use of titles may reserve a title for members of the profession who meet certain education, experience or training qualifications. Such titles may act as a quality signal to consumers, which may increase demand or reduce their search costs. Conversely, these restrictions may suggest to consumers that only professionals holding the title are qualified to provide certain services. This may harm competition when, as a result, consumers must purchase higher quality services than they need, at correspondingly higher prices. Restrictions on the number of professionals allowed to use a title may also inhibit price and quality competition among those holding it, resulting in a decline in consumer welfare.

Restrictions that give exclusive rights to members of a profession to offer certain services may protect consumers from low-quality service providers. For example, members of the profession may argue that related professional service providers lack the education or training required to provide the service, cannot provide the complete range of interrelated services, do not hold the malpractice insurance necessary to protect consumers, or are not required to adhere to conflict of interest guidelines that serve to protect consumers. Restrictions of this type may also reduce consumer uncertainty regarding service quality and enhance consumer welfare by limiting negative externalities associated with low-quality service.

At the same time, these restrictions may also pose anti-competitive risks similar to those associated with entry restrictions. In addition, members of the related profession may be able to offer services at lower prices than can members of the profession. This may be because they have a higher degree of specialization or because their costs, including their opportunity costs, are lower. In such cases, consumers benefit from lower prices.

The risk to competition of restrictions that limit the ability of related professions to offer similar services may be particularly acute. Although these restrictions may have some benefits, professions have an incentive to impose them, in the absence of any benefits to consumers, because they foreclose potential competitors and thus increase the returns associated with engaging in the profession. Alternatively, accreditation or registration programs may provide a quality signal to consumers without preventing other professionals from offering services.

Restrictions on overlapping services and scope of practice may also affect members of professions offering complementary services. For example, professions may only permit professionals who offer complementary services to provide those services in conjunction with members. In certain places in Canada, for instance, paralegals must work under the

supervision of lawyers. (Conversely, professions may prohibit members from collaborating with members of related professions; see “Restrictions on business structure,” below).

These restrictions may mitigate instances of asymmetric information. Since members of the profession may be better able than consumers to judge the quality of the complementary services, they can function as gatekeepers for their customers, ensuring high-quality service. Integration of complementary service providers may also enhance quality by allowing members of the profession to take advantage of any synergies or economies of scope that exist.³ Integration may also facilitate the development of innovative services. Finally, consumers may benefit from the convenience of being able to purchase complementary services from a single firm or reduce their search costs.

However, the restrictions regulators impose may, in fact, make this integration impossible. First, a profession may be able to dictate the supply of professionals providing complementary services by requiring them to practise in an integrated environment. For example, when entry into the profession is inefficiently low because of entry restrictions, entry into the complementary profession may also be inefficiently low. Second, members of the profession who have been conferred some degree of market power, due to market entry restrictions or market conduct restrictions, may also be able to exercise that market power in the provision of the complementary services. For example, members may require consumers to purchase higher quality complementary services than they otherwise would or may require consumers to pay for access to members of the complementary profession.

Evidence of the effect of market entry restrictions

The following table provides a brief summary of the findings of various empirical studies that sought to determine the effect of market entry restrictions on the price and quality of professional services, as measured primarily by professionals’ incomes. Generally, the studies found that the incomes of members of professions with restrictions on entry are higher than those of comparable professionals who do not face restrictions. Kleiner and Ham (2005) also provide an estimate of the effect of entry restrictions on the quality of the service provided, using data on complaints and the cost of malpractice insurance. With one exception, the studies focus on professions in the United States.

³ Economies of scope occur when the cost of producing two products together is less than the combined costs of producing the two products separately.

Table 1: Empirical studies looking at the effect of market entry restrictions on price and quality of professional services

Author	Profession	Effect on price	Effect on quality
Muzondo and Pazderka (1983)	4,571 professionals randomly chosen from 20 professions in Canada, including dentists, lawyers, optometrists, physicians and pharmacists.	Members of professions in which there are licensing restrictions on advertising, fee setting, and interjurisdictional mobility have their incomes enhanced by 26.9 percent.	n/a
Kleiner (2000)	Dentists, lawyers, barbers and cosmetologists in the United States.	Earnings were higher for those licensed professionals who require more education and training than for those that require less. For dentists, hourly earnings are 30 percent higher than for non-licensed professionals. For lawyers, the hourly earnings are 10 percent higher than for non-licensed professionals.	n/a
Kleiner and Ham (2005)	Doctors, dentists, lawyers, teachers and cosmetologists in the United States.	Licensing has a positive earnings effect for all (except for teachers), relative to their opportunity costs. With regards to universally regulated occupations, the impact of licensing is about 10–12 percent.	The effects on quality are unclear when measured by either complaints or malpractice insurance premiums.
Nicholson (2003)	Physicians in the United States.	Barriers to entry are reducing the number of non-primary care physicians. Results indicated that medical students would be willing to pay the hospital to obtain residency positions in dermatology, general surgery, orthopaedic surgery and radiology rather than receive the mean student salary of \$34,000 and continue with primary care medicine. The number of students in those medical categories would increase by an estimated 6 to 30 percent (in the given example) and teaching hospitals would save an additional \$0.6 to \$1 billion a year in labour costs.	n/a
Pagliero (2005)	Lawyers in the United States.	Professional licensing has a significant effect on entry salaries. On average, licensing increased annual entry salaries by more than \$10,000. This implies a total transfer from consumers to lawyers of 19 percent of lawyers' wages and a total welfare loss of more than \$3 billion.	n/a
Anderson, Halcoussis, Johnston and Lowenberg (2000)	Physicians in the United States.	Doctors in states with stricter regulations on alternative medicine (e.g. homeopathy) earn higher incomes than those in states with looser regulations.	n/a

Note: Full bibliographic citations for the studies listed in this table may be found at the end of this chapter (see page 35).

Market conduct restrictions

Professions may restrict how members may compete with another when offering professional services. Typical market conduct restrictions include the following:

- restrictions on advertising by members of the profession;
- suggested or mandatory fees for professional services; and
- restrictions on business structure, such as those on ownership, multidisciplinary practices, and firm location and size.

Advertising

Professions frequently restrict their members from engaging in various types of advertising, including comparative advertising, canvassing or soliciting, and offering inducements or discounts. In addition, professions often regulate the size, style and medium of advertising.

Advertising greatly facilitates competition by informing consumers of the characteristics, availability and prices of services. Advertising can also reduce consumers' search costs, ease entry for new professionals and enhance incentives for existing firms to innovate and expand.

Arguments in support of advertising restrictions focus on asymmetric information. When it is difficult for consumers to assess the accuracy of advertising, its information value may be minimal. For instance, advertising may lead consumers to think that one service offering and its alternatives are poor substitutes for one another when they are, in fact, identical or nearly so. Countering this misperception may require service providers to spend more on advertising than they otherwise might. For prospective suppliers, these costs may be a barrier to entry, while existing suppliers may pass them on to consumers. In both cases, consumers may end up paying higher prices without having benefited from the advertising.

Professions may also argue that restrictions on advertising may be necessary to protect consumers from false or misleading advertising, particularly in the face of asymmetric information. In such circumstances, consumers may be unable to assess the accuracy of advertising as it relates to quality, and so advertising may enhance demand for low-quality service providers who choose to advertise, to the detriment of high-quality service providers. Restrictions on advertising designed to protect consumers from false or misleading advertising must be assessed to determine whether they inhibit legitimate advertising to the least extent possible. The *Competition Act* and, in many instances, provincial and territorial consumer protection laws already prohibit false or misleading advertising, so no additional restrictions are necessary to protect consumers.⁴ However, given the complexity of many professional services, there are circumstances in which the profession is in a unique position to evaluate what constitutes false or misleading advertising.

Significant risk exists that over-regulation of advertising will deprive both consumers and practitioners of the many benefits of informative advertising. Informative advertising serves to make consumers' demand for services more responsive to changes in price because they have better information about the supply of those services. This enhances competition because professionals have greater incentive to compete by lowering their prices. As a general rule, professionals considering whether to lower their prices must take into account two offsetting effects: first, that the profit from each sale will decrease because the price has fallen and, second, that the number of sales will increase because the price has fallen. Restrictions on advertising may have the effect of muting the demand

⁴ For example, Part VII.1 of the *Competition Act* prohibits deceptive marketing practices, including "representation[s] to the public that [are] false or misleading in a material respect."

response to price decreases by making it difficult for professionals to inform enough consumers that their prices have, in fact, gone down. As a result, the increase in sales resulting from the price decrease may not be sufficient to offset the decrease in profitability from each sale, so that the contemplated price decrease is unprofitable.

In addition to enhancing competition by increasing consumers' price responsiveness, advertising may also enhance competition by facilitating the entry of new professionals and by increasing the returns associated with offering high-quality services. Potential entrants may find it difficult to establish a client base of sufficient scale to be financially viable, especially in professions in which consumers rely on experience or word-of-mouth when choosing service providers. Advertising enhances competition by allowing potential entrants to inform consumers of their presence and of the price and quality of their service. Advertising may also enhance competition by providing professionals offering high-quality or innovative services with a mechanism to distinguish themselves from competitors, much as it does for professionals offering lower prices.

Evidence of the effect of advertising restrictions

There is a substantial body of empirical evidence on the effect of advertising restrictions on the price and quality of professional services, as is summarized in the following table. Generally, these studies found that restrictions on advertising increase the price of professional services, increase professionals' incomes and reduce the entry of certain types of firms. Studies of the effect of advertising restrictions on quality show that it is small, except that the restrictions may result in fewer consumers using the service.

Table 2: Empirical studies looking at the effect of market conduct restrictions on price and quality of professional services

Author	Profession	Effect on price	Effect on quality
Muzondo and Pazderka (1980)	Members of 20 professions in 10 Canadian provinces, including dentists, lawyers, optometrists, physicians and pharmacists.	Members of professions that restrict advertising earn 32.8 percent higher incomes than members of similar professions that do not restrict advertising.	n/a
Muzondo and Pazderka (1983)	4,571 professionals randomly chosen from 20 professions in Canada, including dentists, lawyers, optometrists, physicians and pharmacists.	Members of professions where there are advertising restrictions increase their income by 10.8 percent.	n/a
Love and Stephen (1996)	Self-regulating professions (such as lawyers, physicians and optometrists) in North American and Western European markets.	Advertising restrictions were likely to increase professional fees. Results from the studies surveyed indicate that 16 out of 17 reports found that non-restrictive markets had lower average fees than did restrictive ones.	Very little evidence that restricting advertising is likely to raise quality.
Schroeter, Smith and Cox (1987)	Lawyers in the United States.	Fewer advertising restrictions increase competition among sellers in a market and create a more elastic demand curve for a particular firm. The price-cost ratio would fall by approximately 7 percent if market-wide advertising increased by 31 percent from its mean value.	n/a
Haas-Wilson (1989)	Optometrists in the United States.	Employment and price advertising restrictions reduce the total number of chain optical stores in a state. Data indicated that 1.5 to 1.7 fewer chain stores were opened per year by the largest optical firms in fully regulated states versus non-regulated states.	n/a
Benham (1972); Benham and Benham (1975)	Optometrists in the United States.	Results indicate that prices are 25–40 percent higher in the markets with greater professional control (advertising, limiting brand name identification and discouraging public evaluations of other professionals' work).	The higher prices are in turn associated with a reduction in the number of individuals obtaining optometry services. The price elasticity of demand was approximately –1.0.

Note: Full bibliographic citations for the studies listed in this table may be found at the end of this chapter (see page 35).

Pricing and compensation

Professions may regulate the fees their members charge or publish suggested fee schedules. Specific restrictions may set minimum or maximum fees, or prohibit certain types of payments (for example, payment on a contingency basis).

In unregulated markets, price is typically the primary factor on which firms compete, resulting in lower prices and higher output to the benefit of consumers. Price restrictions could inhibit this competition, resulting in prices that are above the competitive level and output that is below it.

Regulators most commonly justify price restrictions as reducing instances of asymmetric information, and thus preventing adverse selection and moral hazard.

In the case of adverse selection—consumers basing decisions on price rather than quality because they cannot assess the quality—fixed prices or a regulated price floor may preserve quality by preventing the exit of high-quality professionals from the market.

Setting maximum fees may assuage the problem of moral hazard (consumers not being able to assess their preferred combination of price and quality due to incomplete information). In such circumstances, a price ceiling may reduce the perverse incentive for professionals to offer higher quality and higher price services than consumers require.

Suggested fee schedules may provide information to consumers about reasonable fees, which may be of particular value when it is difficult or costly for consumers to compare prices. Suggested fee schedules may also benefit members of the profession by guiding new entrants when they set their fees or reducing the transaction costs associated with negotiating fees for complex services.

By contrast, price restrictions can have a significant negative effect on competition, innovation and consumer welfare. The potential anti-competitive effect of minimum price regulations is particularly noticeable. When the minimum price for a service is set above the unregulated market price, the market price rises to the regulated level, which results in reduced output, since consumers are willing to purchase fewer services at the minimum price. In general, price restrictions that fix fees or set a price floor significantly reduce competition between service providers and thus deny consumers the low prices of a freely competitive market.

Conversely, restrictions that set a maximum price may, on their face, seem beneficial to consumers. However, they too have the potential to deny consumers the full benefits of unrestricted price competition. Maximum price restrictions can result in competitive harm by reducing professionals' willingness to supply their services. When the maximum price is set below the unregulated market price, the market price decreases to the regulated level, which results in reduced output, since professionals are willing to supply fewer services at the maximum price. In particular, high-quality service providers who charge higher prices may exit the market, resulting in an overall decrease in service quality. Moreover, prices may end up converging on the maximum price, such that it ends up effectively functioning as a fixed price, thus limiting price competition.

Suggested fee schedules facilitate collusion by helping professionals decide on the prices they will charge. Under tacit collusion, those prices could range from competitive prices to those a monopolist would charge, but agreeing on exact prices could be difficult, particularly when professionals offer multiple services. A suggested price list could serve as a focal point for this determination, resulting in higher prices than would have prevailed in a competitive market.

Many of the consumer protection benefits of price restrictions may be realized through other methods than regulated or suggested fees. For example, publishing survey data on the average prices may reduce asymmetric information and search costs for consumers,

provide guidance for new entrants, and reduce transaction costs associated with pricing complex services, without necessarily raising competition concerns.⁵

Business structure

Restrictions on business structure include limits on the ownership of professional services firms, restrictions on multidisciplinary practices and restrictions on firm location. Regulators typically justify these restrictions as ensuring high-quality service; however, they may also have the anti-competitive effect of lowering the returns associated with engaging in the profession, inhibiting firms from developing innovative services and limiting the locations at which consumers can access services.

Ownership

Restrictions on ownership structure generally comprise requirements that only members of a profession may own businesses engaged in providing certain professional services or that set out whether members may form limited liability partnerships or corporations. Regulators typically justify such restrictions as helping professionals maintain independence and avoid the risk of commercial pressures compromising their conduct.

These restrictions may force owners to bear more of the risks associated with professional malpractice than they otherwise would. For example, in professional service partnerships, partners bear some personal liability for their own negligence and may also be liable for the negligent acts of other partners or employees. The assumption of personal liability may act as an increased deterrent against professional malpractice, although the presence of a market for professional malpractice insurance may limit this.

Pro-competitive benefits may also result from restricted ownership structures, by limiting the conflicts of interest between consumers, professionals and owners that arise when the interests of professionals do not align with consumers'. For example, professionals may recommend higher quality service than consumers actually require. Some firm ownership structures may reduce this misalignment. For example, partnership earnings accrue directly to professional members of the firm rather than to non-employed shareholders, which eliminates shareholder pressure on professionals to provide a level of service that is not in consumers' best interests. (At the same time, such an ownership structure may lead professionals to oversupply their services.)

On the other hand, the same ownership structure may affect the supply of entrants into the profession by changing the returns associated with engaging in the profession and increasing the liability risks, although the effect is likely to be small compared to that of entry restrictions. Restrictions on ownership may also constrain firms from achieving economies of scale and limit the availability of capital to expanding firms.⁶

⁵ For example, the *Statements of Antitrust Enforcement Policy in Health Care* (United States Department of Justice and the Federal Trade Commission, 1996, p. 61, www.usdoj.gov/atr/public/guidelines/0000.pdf) recognize that the exchange of price information may be pro-competitive under certain conditions (while also recognizing that such an exchange may facilitate collusion): "Participation by competing providers in surveys of prices for health care services, or surveys of salaries, wages or benefits of personnel, does not necessarily raise antitrust concerns. In fact, such surveys can have significant benefits for health care consumers. ... Purchasers can use price survey information to make more informed decisions when buying health care services." The Department of Justice and Federal Trade Commission provide a safe harbour for the exchange of price information when the information provided is collected by a third party, is at least three months old and does not allow individual survey participants to be identified.

⁶ Economies of scale occur when, over some interval of output, average total cost decreases.

Multidisciplinary practices

In multidisciplinary practices, members of different professions can work together and take advantage of economies of scope and scale by allocating overhead or fixed costs across a larger employee base, benefit from a pooled advertising and marketing budget, and share resources and knowledge across professional practice areas.

The economies of scope and scale resulting from inter-professional collaboration can benefit consumers by reducing firms' costs and prices. Moreover, they can enhance the ability of firms to offer high-quality and innovative services. Consumers may also benefit from the convenience of purchasing a range of professional services from a single firm. This convenience may also reduce consumers' search costs and transaction costs. Multidisciplinary practices may also offer lower prices to consumers who buy a number of professional services from a single practice.

Proponents of restricting inter-professional collaboration argue that multidisciplinary practices may produce conflicts of interest to the detriment of consumers. For example, accountants may be more likely to recommend obtaining unnecessary legal opinions on the interpretation of tax law when they work for a firm that also employs lawyers. Regulators also commonly justify restrictions on collaboration as enhancing service quality by requiring all professionals working for the same firm to meet the same professional standards or conduct requirements.

Restrictions that prohibit professionals from being involved in multidisciplinary practices might limit innovative and cost-efficient business structures, to the detriment of consumers, who are deprived of the resulting benefits of lower prices and increased convenience.

Firm location and size

Restrictions on the number of locations at which professionals may offer their services result in pro-competitive benefits when they counter the tendency for service quality at individual branches to standardize downwards across multiple branches, assuming that consumers find it difficult to evaluate service quality. These restrictions may also facilitate entry into the profession by limiting the geographic scope of incumbents' practices, thereby providing new entrants with a greater choice of geographic locations in which to establish their practices.

Restrictions on firm size may enhance competition and, by so doing, ensure that no firm is able to gain market advantage. This may be desirable; however, overly prohibitive restrictions limit the ability of large firms to take advantage of efficiencies associated with their size.

Contrasting with the potential pro-competitive benefits of restrictions on firm size and location are the potential anti-competitive consequences of consumers not having a service provider near them and professionals being unable, when the geographic area they serve is small, to operate near their competitors.

Restrictions on firm size and location likely also affect the returns and risk associated with engaging in the profession: restrictions on additional locations may prohibit profitable expansion that would allow professionals to diversify their risk. A decrease in the supply of professionals as a result of these restrictions would likely lead to an increase in prices, although the effect is likely to be secondary to that of education and training requirements, as was the case with restrictions on ownership structure.

Conclusion

This chapter has reviewed the potential consumer protection and anti-competitive effects of restrictions self-regulated professions impose. Regulators typically justify such restrictions as addressing market imperfections related to asymmetric information or externalities by increasing the quality of the services members of the profession provide.

Restrictions may have anti-competitive effects by serving as barriers to entry, facilitating collusion or raising members' costs, any or all of which could result in consumers paying higher prices for services, and firms reducing the supply of services they provide and being less likely to develop innovative services. Regulators should balance the consumer protection benefits of any restrictions against these potential anti-competitive effects, particularly since professions may have an incentive to impose restrictions that are stricter than is necessary to ensure service quality or protect consumers.

Restrictions may be broadly categorized as market entry restrictions and market conduct restrictions. The former includes restrictions on entering the profession, such as having to meet education and training requirements, restrictions on mobility, and restrictions on the ability of members of other professions to offer overlapping or complementary services. Market conduct restrictions include restrictions on advertising, pricing and compensation, and business structure.

When confronted with an instance of market failure, regulators may be inclined to look to regulation of some sort to address it. In this situation, it must be clear that regulation can improve upon the freely competitive market outcome. Determining this requires regulators to first identify and assess the type and degree of market failure and then look at existing non-regulatory measures that could solve the problem. When regulation is the best solution, then regulators should choose the regulatory tool that directly targets the market failure and has the least effect on competition. A more detailed discussion of a framework for this analysis follows in Chapter 2.

Full bibliographic citations for studies cited in the tables

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2. Effective regulation

The Competition Bureau recognizes that regulating professional services can be important for protecting consumers. It does not argue blindly for competition at the expense of all other policy objectives, since there may be legitimate public interests at issue other than the efficient functioning of markets. The Bureau does, however, advocate that to be effective, regulatory decisions must be fully informed, keeping in mind the many direct and indirect effects they may have on consumers through reduced competition. Regulation that is excessive or restricts competition more than an equally effective alternative can come at great cost and should be removed or modified.

In this chapter, the Bureau puts forward six guiding principles to help regulators—comprising provincial and territorial governments and self-regulating organizations—develop and maintain strong, efficient regulation that maximizes consumer welfare. The chapter also outlines a framework for regulators to detect and assess the impact on competition of restrictions under development or review.

Principles

Regulation should have clearly defined and specific objectives

If regulation is to be effective, it must be premised on clearly defined and specific objectives. A regulatory scheme should state the reasons for its existence and the outcomes it intends to achieve. Rather than simply presenting broad general principles, the scheme should address specific problems. Clearly defined and specific objectives will improve transparency and reduce the likelihood that regulation will be used to pursue private interests under the guise of public protection.

Restrictions should be directly linked to clear and verifiable outcomes

Specific restrictions chosen to achieve regulatory objectives should be directly linked to intended outcomes. To this end, a regulatory scheme should include performance standards that tie restrictions to outcomes through evidence rather than theory alone.

Regulation should be the minimum necessary to achieve stated objectives

Regulation should only comprise what is reasonably required to protect the public and should not restrict competition any more than is necessary to achieve the desired objectives. When considering regulatory options, regulators should look to regulatory schemes that exist across the country or elsewhere that have been shown to meet the

intended policy objectives, while not compromising the quality of professional services or competition.

It is often the case that multiple restrictions aim to achieve the same objective. Such overlap may indicate that there is more than the minimum necessary regulation in place. For example, regulators often justify restrictions on advertising as a form of quality assurance; however, this may be unnecessary when high minimum entry qualifications and licensing, also intended to ensure quality, already exist.

The regulatory process must be impartial and not self-serving

In order to achieve the public policy objectives of regulation in the most effective manner, professional organizations must ensure they have the best possible governance structure. To this end, professional organizations must broadly represent all aspects of the profession being regulated, with independent public members at the table alongside professionals. Such representation helps ensure that self-regulatory activities are in the public interest by providing a window on the profession's operations. With broad representation, no one market participant or group of participants can control the regulatory process and manipulate it to its advantage.

While the Bureau recognizes the need for professional organizations to be informed by the expertise of the profession, it is likely overrepresentation to have an overwhelming majority of the members be professionals themselves, which may lead to their pursuing the profession's private interests. Since regulation of the professions is most commonly justified in terms of consumer protection, it seems appropriate that the points of view of consumers be effectively represented in professional organizations.

A regulatory scheme should allow for periodic assessment of its effectiveness and be subject to regular reviews

Regulators should produce annual reports on their activities and regularly review the regulatory scheme to ensure it effectively meets *current* needs. In light of ever-changing technology and market conditions, regulators must continually question the effectiveness of current restrictions. For example, as discussed in Chapter 1, restrictions on the entry and conduct of professional service providers are often justified as addressing instances of asymmetric information, when consumers are unable to make informed decisions about professional services. The appropriate regulatory response to this has likely changed in recent years, with consumers increasingly using the Internet to find out about services before they buy them. Moreover, regulators must regularly review restrictions to identify those that have undue costs or those whose goals could be better achieved through less intrusive approaches. Without a dynamic review mechanism, regulatory schemes run the risk of losing their relevancy and becoming suboptimal responses to policy objectives.

A primary objective of the regulatory framework should be to promote open and effectively competitive markets

To help minimize unnecessary or overly restrictive regulation, all regulators should promote competition as a primary objective. Competition is generally the most effective

way to promote the efficient, low-cost and innovative supply of products meeting consumers' tastes and needs. A market is open and effectively competitive, and provides the maximum benefits of low prices and the efficient use of economic resources, when the following conditions are met:

- all potential competitors have the ability to compete, subject to any necessary technical, safety or other such requirements, based on their costs and ability to meet consumer demands at a lower price; and
- no participant in the market has sufficient market power to profitably sustain a significant and non-transitory price increase.

Competition assessment

To determine whether regulation has the potential to negatively impact competition, regulators should subject it to a competition assessment.

The Organization for Economic Co-operation and Development's (OECD) *Guiding Principles for Regulatory Quality and Performance* recognize the importance of an effective assessment of the effect on competition of regulatory measures.¹ Competition assessment has the following objectives:

- to attain public policy goals in ways least restrictive of competition;
- to develop a framework to identify, at the development stage, legislation and policies that unnecessarily restrict the functioning of the market; and
- to determine alternative approaches that would be less intrusive.

Regulators should analyze regulation with the net public benefit in mind, taking into account both the potential anti-competitive effects and consumer protection benefits. Such informed analysis is the only means by which regulation is assured to be in the overall public interest, striking the optimal balance between the potential benefits of both competition and regulation.

To help identify and measure the impact of regulation that may unduly restrict competition, the OECD developed a toolkit and guidance document for competition assessment.²

The OECD toolkit comprises three questions designed to detect whether regulation or other intervention in the market is likely to restrict competition and a framework for assessing any competition effects.

¹ OECD, June 2005, www.oecd.org/dataoecd/19/51/37318586.pdf

² See OECD, *Competition Assessment: Brief for Policy Officials*, February 9, 2007, [www.oelis.oecd.org/olis/2007/doc.nsf/7b20c1f93939d029c125685d005300b4/7b1c42380f21686dc1257261003e84d1/\\$FILE/JT03221509.PDF](http://www.oelis.oecd.org/olis/2007/doc.nsf/7b20c1f93939d029c125685d005300b4/7b1c42380f21686dc1257261003e84d1/$FILE/JT03221509.PDF), *Competition Assessment: Guidance*, February 8, 2007, [www.oelis.oecd.org/olis/2007/doc.nsf/3dce6d82b533cf6ec125685d005300b4/74c1d85e45d65e46c1257261003e8611/\\$FILE/JT03221469.PDF](http://www.oelis.oecd.org/olis/2007/doc.nsf/3dce6d82b533cf6ec125685d005300b4/74c1d85e45d65e46c1257261003e8611/$FILE/JT03221469.PDF), and *Integrating Competition Assessment into Regulatory Impact Analysis*, February 8, 2007, [www.oelis.oecd.org/olis/2007/doc.nsf/3dce6d82b533cf6ec125685d005300b4/14d0619d11f02e44c125726100390581/\\$FILE/JT03221472.PDF](http://www.oelis.oecd.org/olis/2007/doc.nsf/3dce6d82b533cf6ec125685d005300b4/14d0619d11f02e44c125726100390581/$FILE/JT03221472.PDF)

Detecting competition issues

The following three questions are designed to identify regulation and other market interventions with the potential to hinder competition.

- *Does the proposal limit the number or range of suppliers?* This is likely to happen, for example, when regulation grants certain professionals exclusive rights to provide certain services, establishes a licence as a requirement to practise, limits the scope of practice of certain professionals or significantly raises the cost of entry.
- *Does the proposal limit the ability of suppliers to compete?* Professionals are likely limited in their ability to compete when regulation, for example, controls or significantly influences the prices for services through fee schedules or limits the manner in which professionals may advertise their services.
- *Does the proposal reduce the incentive of suppliers to compete vigorously?* This incentive may decrease in the case of, for example, restrictions on the size and scale of businesses, recommended fee schedules, or a regulatory scheme that increases the costs to consumers of switching service providers.

Answering yes to one or more of the three questions signals a likely competition concern. (Answering no means that no further competition-related work is required immediately, although regulators should review all restrictions regularly to see whether they remain free of competition effects.) As discussed in Chapter 1, several types of restrictions potentially have negative effects on competition in the self-regulated professions and would trigger a yes answer to at least one of these threshold questions, thus warranting a full assessment.

Assessing competition issues

Carrying out a full competition assessment includes clearly identifying policy objectives, considering alternative regulatory responses to achieve those objectives, and evaluating and comparing the impact on competition of the various alternatives.

When a proposal merits assessment, regulators should evaluate the harm to competition. Key factors to look at, as set out in the OECD toolkit, include the following:

- entry of new firms;
- prices and production;
- quality and variety of goods and services;
- incumbent businesses;
- innovation;
- market growth; and
- related markets.

Through this analysis it may become apparent that the policy objectives can only be met by imposing a restriction that would have a negative impact on competition. In that case, the competition costs should be weighed against the other benefits of the regulation to ensure that the intervention provides net benefits to the public.

Following this framework should allow regulators to identify regulatory options that achieve policy objectives with the minimum impact on competition.

Conclusion

From the broadest perspective, an effective regulation is one that achieves its stated aim. From a competition perspective, at least three other issues arise. First, would competitive forces by themselves achieve the same end as regulation? Second, do the additional costs to the economy and consumers of the anti-competitive effect of regulation outweigh or cancel the benefits sought? Finally, is there an equally effective regulatory mechanism that is less harmful to the competition process?

The six principles of effective regulation outlined in this chapter are premised on the view that regulation, when necessary, must be developed and implemented in an open, effective and reviewable way. Regulators, comprising representatives of various interests—including consumers, regulators, professional organizations, professionals and competition experts, each bringing their various areas of expertise to the table—must ensure that restrictions are aimed at defined, measurable and limited goals. Furthermore, restrictions must be subject to regular and ongoing assessment. Meeting these essential conditions will help minimize unnecessary restrictions on competition by ensuring scrutiny and balance.

That alone is not sufficient, however. The drafting and reviewing of regulatory measures should have as one of its primary objectives to promote open and effective competition. The Bureau hopes that the principles for effective regulation outlined above, as well as the competition assessment framework, will help regulators develop strong, efficient regulatory schemes that achieve both the policy goals of the profession and the public policy goal of promoting a vibrant competitive environment for professional services.

Finally, it is also the Bureau's hope that applying these principles will increase awareness of the competitive impact of regulation in professional services and motivate expansive deliberation among regulators of the effects—favourable and not—of regulation.

3. Accountants

Overview

Role and function

Accountants measure, disclose and provide assurance about financial information to help managers, investors, tax authorities and others make decisions about resource allocation. Accountants participate in a wide range of business activities, such as tax preparation, auditing, financial planning, business valuation, forensic investigation, strategic planning, financial management, operations, sales and marketing, and information technology and human resources management. Some accountants are also involved in ensuring corporate accountability and help organizations maintain their long-term competitive advantages.

For the purposes of this chapter, one important distinction to make is between public accountants and other types of accountants. In general, public accountants do independent audits or reviews of organizations' financial statements to ensure they are correct, fair, complete and reasonable, so that a third party will be able to rely on them.¹ These services contrast with those other accountants, acting as internal auditors or management consultants, for example, provide.

How the profession is regulated

While there are generally no legal restrictions on who may practise accounting in Canada, some jurisdictions regulate public accounting. In addition, all accountants are subject to the rules and regulations of their respective designations. While there are numerous accounting designations worldwide, only three are generally recognized by provincial and territorial statute in Canada: Chartered Accountant (CA), Certified General Accountant (CGA) and Certified Management Accountant (CMA).

Provincial and territorial law gives a professional organization for each designation the power to govern the profession in that jurisdiction.² For example, the Institute of Chartered Accountants of British Columbia may make bylaws on the following:

- standards of professional conduct, competency or proficiency for students or a class of members;

¹ The precise definition of *public accounting* varies across Canada. The description here is taken from Ontario's *Public Accounting Act*, 2004, S.O. 2004, c. 8, s. 2(1).

² The professional organizations for the three designations generally have similar powers and serve similar functions, although there may be some variation in the standards they establish. In this chapter, these organizations are referred to generally as provincial and territorial accounting organizations. *Regulators* refers to provincial and territorial regulatory bodies.

- qualifications and procedures for admission as a member, election as a fellow or enrolment as a student;
- investigations and practice reviews;
- insurance against professional liability claims; and
- authorization of members to provide public accounting services through limited liability partnerships.³

In addition, three national organizations—the Canadian Institute of Chartered Accountants (CICA), the Certified General Accountants Association of Canada (CGA-Canada) and the Society of Management Accountants of Canada (CMA Canada)—represent their members at the national level, conduct research and advocate for the profession. These groups also develop educational programs and examinations. For example, the CICA and the provincial and territorial accounting organizations jointly developed the CA qualifying evaluation, known as the Uniform Evaluation.⁴ Similarly, CGA-Canada developed the CGA Program of Professional Studies, which comprises an educational program and the Professional Applications and Competence Evaluations.⁵ CMA Canada developed the CMA entrance examination, Strategic Leadership Program and other accreditation programs.⁶

Overlapping services

There is considerable overlap in the services accountants within the three designations provide. In addition, since most accounting services in Canada are not regulated, other service providers, such as bookkeepers, certified financial planners and tax attorneys, may provide services that overlap to some extent with those of accountants. These service providers face varying levels of regulation. For example, lawyers are more regulated than bookkeepers, who do not appear to have to be members of the Canadian Bookkeepers Association in order to practise.⁷

Entering the profession

Individuals seeking to become accountants in Canada must have a university degree, pass the required professional education courses and accumulate a certain amount of work experience. Prospective accountants must also be accredited by the provincial or territorial accounting organization for their designation before they may use their professional designation. Registration typically involves submitting an application, with proof of qualifications, and paying a fee.

Individuals wishing to be licensed to provide public accounting services must fulfill the education and work experience requirements set by the regulator.

³ *Accountants (Chartered) Act*, [R.S.B.C. 1996] c. 3, s. 8(2).

⁴ CICA, consultation submission, July 4, 2007.

⁵ CGA-Canada questionnaire response, question 4.10, October 2006.

⁶ CMA Canada, consultation submission, June 27, 2007.

⁷ Canadian Information Centre for International Credentials, “Information for foreign-trained bookkeepers,” www.cicic.ca/en/professions.aspx?sortcode=2.19.21&prof=1231.

Market Demand

The geographic market for accounting services depends on the client and the services being requested. For example, the market for the audit services large public accounting firms provide is national or possibly international, whereas it is likely more limited for the accounting services small businesses and individuals need.

Several factors affect the demand for accountants, particularly public accountants, including fluctuations in the business cycle, changes in legislation affecting tax and audit policy, new regulation (whether implemented by the profession itself or mandated by law), and changes in per capita wealth. Demand for public accounting services, such as preparing audited financial statements, increases in the first quarter of the calendar year, since the fiscal years of the majority of incorporated entities and trusts end on December 31.⁸ Demand for other accounting services in Canada is seasonal and peaks in March or April each year in anticipation of the April 30 deadline for filing personal income tax returns.⁹

Across Canada, the demand for accounting services appears to have fluctuated slightly in recent years, with accountants' operating revenues ranging in real terms between 2000 and 2004 from a low of \$8.42 billion to a high of \$9.06 billion.¹⁰

Supply

CICA, together with the provincial and territorial CA organizations, represent approximately 72,000 CAs and 10,000 students in Canada and Bermuda, approximately 40 percent of whom work as public accountants.¹¹ National, and provincial and territorial CGA organizations represent approximately 68,000 CGAs and students in Canada, Bermuda, the Caribbean, Hong Kong and China.¹² CMA Canada represents 38,000 CMAs and 10,000 students in Canada and around the world.¹³ Even though CGAs and CMAs have not historically been allowed to offer the full extent of public accounting services in every province, there are more than 3,500 CGAs and 1,000 CMAs practising public accounting in Canada.¹⁴

There are other accounting designations in Canada that, if recognized by provincial and territorial statute, could increase the supply of public accountants. For example, the

⁸ CICA, consultation submission, July 4, 2007.

⁹ From 1991 to 2006. Statistics Canada, CANSIM Table 281-0023, "Employment (SEPH), unadjusted for seasonal variation, by type of employee for selected industries classified using the North American Industry Classification System (NAICS), monthly (persons)."

¹⁰ Statistics Canada, CANSIM Table 360-0007, "Summary statistics for accounting services (all establishments), by North American Industry Classification System (NAICS), annual," http://cansim2.statcan.ca/cgi-win/cnsmcgi.exe?Lang=E&RootDir=CII/&ResultTemplate=CII/CII_pick&Array_Pick=1&ArrayId=360-0007.

¹¹ Generally, these organizations are called institutes; in Quebec, the CA professional organization is known as the Ordre des comptables agréés du Québec. Figures on CAs and students from CICA, "CICA," at www.cica.ca/index.cfm/ci_id/12/la_id/1.htm. Figure on public practice from CICA, "What Do CAs Do?" www.cica.ca/index.cfm/ci_id/57/la_id/1.htm.

¹² CGA-Canada, consultation submission, July 9, 2007. Generally, the provincial and territorial CGA organizations are called associations; in Quebec, the CGA professional organization is known as the Ordre des CGA du Québec.

¹³ CMA Canada, consultation submission, June 27, 2007. CMA Canada is a partnership of the Society of Management Accountants of Canada and the provincial and territorial CMA organizations, generally called societies; in Quebec, the CMA professional organization is known as the Ordre des comptables en management accrédités du Québec (CMA Canada, "Provinces," www.cma-canada.org/1/8/8/6/index1.shtml).

¹⁴ Figure for CGAs from CGA-Canada, consultation submission, July 9, 2007. Figure for CMAs from Competition Bureau communication with Steve F. Vieweg, President and CEO of CMA Canada, July 11, 2007.

Association of Chartered Certified Accountants (ACCA), which was founded in the U.K. in 1904 and established in Canada in the early 1970s, has 110,000 members and 260,000 students in 170 countries, of which 30,000 are in public practice. ACCA membership in Canada has increased approximately 25 percent over the last four years, bringing the number of members and students to 1,700.¹⁵

In 2006, there were approximately 191,200 financial auditors and accountants in Canada's 10 provinces and 19,390 accounting offices across all the provinces and territories.¹⁶ More than three quarters (77 percent) of all accountants are located in Ontario, Quebec and British Columbia.¹⁷ According to Statistics Canada, 19 percent of all accountants are self-employed and 77 percent work full time. Table 1 shows the number of accountants by province in 2006.

Table 1: Number of accountants by province, 2006

Province	Employment type		
	Total employed	Self-employed	Firm-employed
Alberta	25,000	5,100	19,900
British Columbia	25,100	5,900	19,200
Manitoba	5,500	800	4,700
New Brunswick	3,300	500	2,800
Newfoundland and Labrador	1,900	n/a	1,600
Nova Scotia	3,300	n/a	2,900
Ontario	76,200	13,900	62,300
Prince Edward Island	700	n/a	600
Quebec	46,000	9,500	36,500
Saskatchewan	4,200	500	3,700
Canada (excluding the territories)	191,200	36,200	154,200

Source: Statistics Canada, "Employee Statistics for NOCS B011, Financial Auditors and Accountants," custom request, 2006.

From 2001 to 2006, the number of accountants increased 14 percent, from 167,080 to 191,200.¹⁸

¹⁵ ACCA questionnaire response, cover letter, July 12, 2006.

¹⁶ Statistics Canada, "Employment Size Ranges for NAICS 541212, Offices of Accountants," custom request, 2006. There were 19,351 accounting offices across the 10 provinces and 39 offices in the territories.

¹⁷ Information in this section is for "Financial Auditors and Accountants" as defined by Statistics Canada in the National Occupational Classification for Statistics 2001 (NOC-S 2001) B011. This is the most disaggregated level of data available for Canada. This category comprises the following: financial auditors who "examine and analyze the accounting and financial records of individuals and establishments to ensure accuracy and compliance with established accounting standards and procedures," accountants who "plan, organize and administer accounting systems for individuals and establishments," and articling students in accounting firms.

¹⁸ Statistics Canada, "Earnings Data for NOCS B011, Financial Auditors and Accountants," custom request, 2006, and 2001 census.

Restrictions and recommendations

Market entry restrictions

Entering the profession

To become designated as a CA, CGA or CMA, individuals must have a university degree.¹⁹ In addition, all of the provincial and territorial accounting organizations require some amount of professional education. Professional education programs range in length from less than one year to more than two years, depending on the designation and the province or territory. For example, the professional programs for CAs in western Canada are generally more than two years long, while the corresponding programs in the Atlantic provinces are about a year shorter.²⁰ Although some accountants complete their professional education in less time than others, all accountants within the various professional designations are considered competent. For this reason, it would be worthwhile for each jurisdiction to benchmark their professional education program against those of jurisdictions whose requirements take the least time to complete. Proof that these jurisdictions still ensure quality in the delivery of accounting services should provide incentive to those with lengthier requirements to shorten them.

Individuals wishing to be designated as accountants in Canada must also pass an examination either to gain entry into the professional training course or to successfully complete it. The length and content of the examination are different for each accounting designation. However, within each designation, they do not vary across the provinces and territories.

The final requirement for becoming a designated accountant in Canada is work experience, with candidates generally having to accumulate two to three years experience in accounting or a related field. The length and nature of the work experience required varies by designation, and province and territory. For example, CA candidates generally must accumulate three years of work experience but in Quebec only require two.²¹ CMA and CGA candidates also need a minimum of two years of work experience.²² Again, jurisdictions where accountants are able to reach the desired level of competence in less time should be viewed as good models to emulate for the jurisdictions whose requirements take longer to meet.

All the accounting designations also require their members to pursue continuing professional development. The requirements are comparable across the three designations.

The standards outlined above for education, training and experience that the provincial and territorial accounting organizations impose on individuals wishing to become designated accountants exist to ensure a level of competency and quality of service to the

¹⁹ CICA, "How to become a CA," www.cica.ca/index.cfm/ci_id/133/la_id/1.htm; CGA-Canada, "Education," www.cga-canada.org/en-ca/Programs/Education/Pages/ca_education_default.aspx; CMA Canada, "Become a CMA," www.cma-canada.org/index.cfm?ci_id=4111&la_id=1.

²⁰ CICA, questionnaire response, question 4.7, November 15, 2006.

²¹ Ibid.

²² CGA-Canada, consultation submission, July 9, 2007; CMA Canada, "FAQs," question 8, www.cma-canada.org/index.cfm/ci_id/4128/la_id/1.htm.

public. However, entry requirements increase prospective accountants' direct and opportunity costs. For this reason, the requirements that go beyond ensuring an acceptable level of quality may act as an unnecessary barrier to entry, thus potentially limiting the supply of accountants.

The requirement for candidates to demonstrate a certain level of competence before being admitted into a professional designation is legitimate. However, some jurisdictions succeed in achieving the desired competence level in substantially less time than others. Since all accountants from the same designations are presumed competent, there is no reason why the amount of time needed to complete each element of the qualification process should vary by jurisdiction.

Recommendation

The provincial and territorial accounting organizations should, when establishing or reviewing regulatory requirements, set the lowest acceptable time requirements for completing elements of the qualification process. In doing so, the organizations should benchmark their requirements against those in jurisdictions with the lowest time requirements that are still achieving the desired level of competence.

Mobility

Interprovincial mobility

The Bureau did not find in any of the provinces or territories any residency requirements for accountants, other than for those who work as public accountants. This means that many accountants may practise in provinces and territories where they do not live. Furthermore, CAs, CGAs and CMAs each have a mutual recognition agreement, which facilitates members moving between provinces and territories. Section 5 of the CGA mutual recognition agreement, for example, states that there are no residency requirements for practising as a CGA in Canada.²³

These mutual recognition agreements, along with national standards for accounting designations, have increased mobility between provinces and territories; however, restrictions in some jurisdictions on who may practise public accounting can impair movement of accountants, which potentially renders the mutual recognition agreements meaningless for public accountants in some parts of Canada (see “Overlapping services and scope of practice,” below).

International mobility

Foreign accountants who wish to register as CAs, CMAs or CGAs in Canada face requirements ranging from passing an examination to completing a professional program and additional work experience, depending on whether they are members of recognized foreign accounting bodies.

CICA's International Qualifications Appraisal Board (IQAB) assesses the admission standards of foreign accounting bodies and recommends to the provincial and territorial CA organizations in Canada whether and under what conditions members may be

²³ CGA-Canada, questionnaire response, Appendix 13, October 2006.

designated as Canadian CAs.²⁴ Regardless of which foreign accounting body they belong to, all foreign accountants wishing to be designated as Canadian CAs must pass the CA Reciprocity Examination and may be required to complete additional practical training.

Members of foreign accounting bodies that have standards and requirements similar to those of CGA-Canada who wish to register in Canada must be members in good standing of those bodies and have achieved their designation by passing the required examinations (rather than through mutual recognition or otherwise). CGA-Canada has classified foreign accounting bodies into two groups, and the requirements for admission depend on the classification. Nonetheless, all applicants must complete studies equivalent to the CGA educational requirements, pass two or three examinations, meet a minimum requirement for professional experience and meet degree requirements, unless certified in their home country prior to 1998.²⁵

In December 2006, CGA-Canada and the Association of Chartered Certified Accountants signed a global mutual recognition agreement. It provides a route for qualified members of either body to become members of the other, as long as they meet initial admission requirements. As a result, members of both designations benefit from increased international recognition and mobility.

Members of the some 160 professional accounting bodies that belong to the International Federation of Accountants may be eligible for accelerated entry into the CMA designation in Canada through the Professional Advance Standing Program.²⁶ Depending on the requirements of the provincial and territorial accounting organization applicants wish to join, they may be eligible for various exemptions, based on their academic history and other professional studies.²⁷

Ensuring quality is a legitimate reason for having minimal restrictions to international mobility. Accounting standards are not globally uniform, and the quality of the work of the members of other accounting designations is not necessarily equivalent to that of members of Canadian accounting designations. These restrictions on entry help protect the public interest by ensuring that individuals who present themselves to the public as designated accountants in Canada are qualified to do so. That is why ongoing assessment of foreign accounting designations is of such importance. Each additional foreign accounting designation that is classified as a qualified designation can increase mobility of qualified foreign accountants, while ensuring the quality of the services they provide. The result is ultimately healthy for effective competition. However, once another designation is recognized as equivalent, all further requirements, including examinations, should be kept to a minimum.

²⁴ Based on this assessment, the IQAB places foreign accounting bodies into one of three categories (designated bodies, non-designated bodies or non-assessed bodies). Candidates' specific entry requirements vary depending on which type of body they belong to (CICA, "International Qualifications Appraisal Board," www.cica.ca/index.cfm/ci_id/618/la_id/1/).

²⁵ Competition Bureau communication with CGA-Canada, December 6, 2006.

²⁶ For a list of the member bodies of the International Federation of Accountants, see International Federation of Accountants, "Member Bodies," www.ifac.org/About/MemberBodies.tmpl.

²⁷ For an example of the requirements foreign accountants wishing to become CMAs in Ontario must meet, see Certified Management Accountants of Ontario, "University Degree Holders—Internationally Trained Professionals," <http://www3.cma-ontario.org/content.asp?id=3700>.

Recommendation

The provincial and territorial accounting organizations should continue to review foreign accounting designations in order to expand the list of qualified foreign accounting designations, while minimizing all barriers to the accreditation process.

Despite the various mutual recognition agreements, other restrictions can limit international mobility. For example, although foreign accountants wishing to be designated as accountants in Canada are generally not required to reside in the province or territory in which they intend to work, some provinces require that public accountants be permanent residents in Canada.²⁸ Such restrictions can unnecessarily impede qualified foreign public accountants from doing business in Canada and therefore limit competition.

Recommendation

Regulators should consider removing residency requirements for foreign-trained accountants who wish to be public accountants in Canada.

Overlapping services and scope of practice

In some of the jurisdictions where public accounting is regulated, not all accounting designations are permitted to offer the full extent of this service. This is the case in Quebec, where provincial legislation only allows CGAs and CMAs to practise public accounting in limited circumstances.²⁹

The CGAs of New Brunswick challenged Quebec's restrictions on public accounting, alleging that Quebec law and regulation restricted interprovincial mobility of workers, thus contravening Chapter 7 of the Agreement on Internal Trade.³⁰ The complaint also alleged that Quebec's regulations on the licensing, certification and registration of accountants from other jurisdictions do not principally concern those individuals' competence to practise public accounting, as required by the agreement.³¹

An internal trade panel noted that "...as a party to the *Agreement* [on Internal Trade], the Respondent [Quebec] is required to recognize equivalent competencies in the occupation of public accounting acquired by accountants in other provinces."³² The panel went on as follows:

²⁸ Newfoundland and Labrador, for example. *Public Accountancy Act*, R.S.N.L. 1990, c. P-35, s. 10.

²⁹ *Chartered Accountants Act*, R.S.Q., c. C-48, s. 24, 28, 29.

³⁰ *Report of the Article 1716 Panel Concerning a Dispute by the Certified General Accountants Association of New Brunswick with Quebec regarding Quebec's Measures Restricting Access to the Practice of Public Accounting*, August 19, 2005, www.ait-aci.ca/en/dispute/1_eng.pdf, p. 3. Chapter 7 of the Agreement on Internal Trade includes a series of obligations intended to ensure that workers qualified to work in one province or territory have access to employment opportunities in any other part of the country. Labour mobility barriers typically affect the approximately 15 to 20 percent of the workforce employed in regulated professions and trades. These barriers are rooted in provincial and territorial differences in the definitions of various occupations and the qualifications for entering the professions. Under the Agreement, regulators must comply with Chapter 7 obligations by April 1, 2009. Regulators must compare their occupational standards and, where a high level of commonality is found to exist, agree to recognize workers already qualified in another province without any additional assessments, testing or training. When any significant differences are found, regulators must reconcile or accommodate them, to minimize their impact on workers.

³¹ *Ibid.*

³² *Ibid.*, p. 17.

...to require that a non-CA accountant qualified to practice public accounting in his or her province simply apply to be a CA in Québec in order to practice public accounting in that province does not recognize the occupational qualifications of a worker from any other jurisdiction where those qualifications have already been recognized, nor does it give adequate recognition to the fact that the competencies required to practice public accounting can be acquired through a variety of combinations of training, education and experience. There does not appear to be any mechanism in Québec for recognizing the occupational qualifications of a non-CA accountant from another jurisdiction where those qualifications have already been recognized, nor for assessing the qualifications of non-CAs from other jurisdictions that would recognize that competencies can be acquired by different means. Without such mechanisms in place, it is difficult to conclude that Québec's public accounting measures relate principally to competence.

Accordingly, the Panel finds that the Respondent's application of the CA occupational standard for public accounting to non-CA accountants from other jurisdictions where those qualifications have already been recognized does not relate principally to competence and is inconsistent with Articles 707(1)(a) and 708 of the Agreement.³³

The panel went on to conclude that "public accounting measures that restrict access to the practice of public accounting by non-CA accountants recognized in other jurisdictions as qualified to practice public accounting have impaired internal trade and have caused injury."³⁴ In October 2005, the Quebec government made a public commitment to work with all three accounting designations to resolve this conflict.³⁵ On December 14, 2006, it tabled a Bill in the National Assembly that would allow CGAs and CMAs to practise the full extent of public accounting in Quebec, but it died on the order paper on February 21, 2007, when the legislature was dissolved for the March 2007 election.³⁶ On November 13, 2007, the Quebec government tabled Bill 46, which, if passed, could resolve this issue.³⁷

Limiting who can perform public accounting effectively limits competition among accountants for this important service. Given the observed opening of the market to other designations in some jurisdictions, it appears that it is possible to do the same in Quebec without jeopardizing the public interest.

³³ Ibid, p. 18.

³⁴ Ibid, p. 23.

³⁵ Quebec, "Différend entre l'Association des comptables généraux accrédités du Nouveau-Brunswick et le Québec," <http://communiqués.gouv.qc.ca/gouvqc/communiqués/GPOF/Octobre2005/18/c2653.html>.

³⁶ *An Act to amend the Professional Code and the Chartered Accountants Act in respect of public accountancy*, see www.assnat.qc.ca/eng/37legislature2/Projets-loi/Publics/06-a064.htm.

³⁷ *An Act to amend the Professional Code and the Chartered Accountants Act in respect of public accountancy*, see www.assnat.qc.ca/fra/38legislature1/Projets-loi/Publics/07-f046.htm.

Recommendation

Provincial regulators should give all members of accounting designations who have the appropriate level of competence the right to practise the full extent of public accounting.

In Ontario, CGAs and CMAs were not permitted to practise public accounting until November 2005, when the *Public Accounting Act, 2004*, came into effect.³⁸ This legislation is the result of the work of a 2001 panel established under the provisions of the Agreement on Internal Trade to consider a complaint by the CGAs of Manitoba. The panel found that Ontario's public accountant licensing system operated as a barrier to mobility because it effectively prevented qualified CGAs who practised public accounting in other jurisdictions from being licensed in Ontario.³⁹

Once the Public Accountants Council has set standards and the CA, CGA and CMA organizations have shown they can meet them, they will be authorized to license and govern their members as public accountants in Ontario.⁴⁰ Members of the Association of Chartered Certified Accountants will also be given a chance to demonstrate they meet the standards, but the association will first need to apply to the Attorney General of Ontario to become a designated body.⁴¹ It remains to be seen whether adopting these standards will fulfill the intent of the *Public Accounting Act* and abolish unnecessary barriers to entry for competing accounting designations.

Although limiting who may perform public accounting is intended to maintain professional standards, some Canadian and international jurisdictions have been able to protect the public and still open the market to allow members of other designations to offer public accounting services.⁴²

The maintenance of high accounting standards does not require imposing one accounting body's detailed mandatory curriculum on others in a manner that raises the costs of entry to members of those bodies and effectively excludes members of other designations from competing. Doing so would effectively limit competition from other designations.

Recommendation

The Ontario Public Accountants Council should be flexible when applying the new standards under the *Public Accounting Act* in order to give members of all designations who have the equivalent training and education the right to practise public accounting.

³⁸ Ministry of the Attorney General, "Ontario Government Modernizes Accounting Profession," news release, November 1, 2005, www.attorneygeneral.jus.gov.on.ca/english/news/2005/20051101-pubacct.asp.

³⁹ The panel found that because chartered accountants dominated the membership of Ontario's Public Accountants Council, it could not objectively assess the competence of members of competing bodies to practise public accounting. *Report of the Article 1716 Panel Concerning the Dispute Between the Certified General Accountants Association of Manitoba and Ontario Regarding the Public Accountancy Act (R.S.O., 1990, Chapter P-37) and Regulations*, October 5, 2007, p. 17, www.ait-aci.ca/en/dispute/6_eng.pdf.

⁴⁰ The revamped council comprises 17 members: four CAs, two CGAs, two CMAs and nine public members appointed by the government. Ministry of the Attorney General, news release, note 38, above.

⁴¹ Association of Certified Chartered Accountants, consultation submission, July 5, 2007.

⁴² For example, in the U.K. members of four separate bodies may provide public accounting services.

Market conduct restrictions

Advertising

Each accounting designation has its own set of advertising restrictions, although many similarities exist among them, including, in most cases, provisions forbidding the following:

- false or misleading advertising;⁴³
- declarations that cannot be substantiated;⁴⁴ and
- soliciting for engagements in a persistent, coercive or harassing manner.⁴⁵

These restrictions are similar to ones in the *Competition Act* and could be seen as duplication. However, the Bureau recognizes that the designations' accounting-specific expertise is of added value in protecting the public from false and misleading advertising. Moreover, restrictions of this type are considered to be consumer protection measures and, as a result, do not pose any competition problems.

However, other types of advertising restrictions, such as those that set parameters on firm names and limit the information accountants may put on their business cards, stationery and business signs, do not appear to be necessary to protect consumers.⁴⁶ The same can be said of restrictions on extravagant or self-laudatory advertising and restrictions that limit the media in which advertisements may appear.⁴⁷

Although some restrictions on advertising are designed to maintain the good reputation of the profession and to protect the public from false or misleading claims, the provincial and territorial accounting organizations should remember that, in general, there are great benefits to be gained from professionals freely advertising their services. Advertising can result in better-informed clients and, therefore, reduce instances of asymmetric information, as well as give accountants incentive to innovate and offer better quality services to the public.

Recommendation

Provincial and territorial restrictions on advertising by accountants should start from the premise that all advertisements are permitted except those that mislead or misinform the public. Provincial and territorial accounting organizations should consider removing any restriction that does not explicitly serve this purpose.

In the course of this study, the Bureau found other restrictions on the way accountants may solicit clients. For instance, many provinces and territories have restrictions that

⁴³ For example, Rule 217.1(a) of the *CA Rules of Professional Conduct and Related Guidelines*, Rule 509(a) of the *CGA Code of Ethical Principles and Rules of Conduct*, and Rule 217.1(a) of the B.C. *CMA Rules of Professional Conduct*.

⁴⁴ For example, Rule 217.1(d) of the *CA Rules*, Rule 509(d) of the *CGA Code*, and Rule 217.1(d) of the B.C. *CMA Rules*.

⁴⁵ For example, Rule 217.2 of the *CA Rules* and Rule 509(b) of the *CGA Code*.

⁴⁶ An example of a restriction on firm names is Rule 510 of the *CGA Code of Ethical Principles and Rules of Conduct*. An example of limitations on information on business cards, stationery and signs is section 2.01 of the *Regulation respecting advertising by certified general accountants* R.Q. c. C-26, r.37.

⁴⁷ Interpretation of Rule 217 of the *CA Rules*.

prevent members from soliciting clients from other member or non-member accountants or that limit the services they provide to clients of other accountants.⁴⁸

There are benefits to be gained when professionals aggressively pursue clients, including, ultimately, lower prices. The elimination of solicitation restrictions could result in increased price competition between professionals, which would not necessarily result in a loss of professional integrity, particularly since all accounting designations have a strict code of conduct to which their members must adhere.

Recommendation

The provincial and territorial accounting organizations should consider eliminating all solicitation restrictions that go beyond protecting the public from persistent, coercive or harassing solicitation.

Pricing and compensation

Rules limiting specific pricing practices generally vary by accounting designation rather than by province and territory. Some rules were put in place to discourage accountants from lowering the quality of their services for the sake of competing on price. This is the case with Rule 204.4(34) of the *CA Rules of Professional Conduct and Related Guidelines*, which states that CAs may only perform engagements for a significantly lower fee than what their predecessors charged when qualified members do the work in accordance with professional standards. While this type of restriction may be justified on the grounds that it helps protect the public, it can discourage competition based on price and therefore restrict competition by cost-efficient firms. Eventually, such a restriction can lead to members of the profession charging the highest price recorded in the market, which ultimately results in less price competition. Given these effects on competition, it is important for regulators to consider whether there are other policy responses that would protect the public but do less harm to competition.

Recommendation

All Chartered Accountant organizations should consider eliminating Rule 204.4(34) of the *CA Rules of Professional Conduct and Related Guidelines*, which gives conditions as to when CAs may perform engagements for a significantly lower fee than that charged by predecessors.

While each accounting designation has its own set of rules, many of these rules are similar. For example, all three recognized accounting designations prohibit members engaged in the practice of public accounting from offering or receiving compensation for referrals.⁴⁹

Although this type of restriction may serve to protect the public by ensuring the independence of public accountants, some jurisdictions have found it possible to protect

⁴⁸ For example, in Northwest Territories, CAs may not solicit work from clients already working with other CAs (Rule 301 of the Northwest Territories CA Rules). When taking special assignments CGAs may not do anything that impairs their client's existing relationship with any other accountants (Rule 502 of the CGA Code). In Alberta, CMAs taking special assignments as the result of referrals must not offer services beyond those the clients hire them to provide (Article 3, IIIG-4, Alberta CMA Code).

⁴⁹ See Rule 216 of the CA Rules, Rule 507 of the CGA Code, and Rule 216 of the B.C. CMA Rules.

the public without such a restriction. For example, in countries where members of the Association of Chartered Certified Accountants are authorized to practise public accounting, members are allowed to offer or receive compensation for referrals when they have established safeguards to eliminate threats to compliance with principles of professional conduct or reduce them to an acceptable level.⁵⁰

Recommendation

The provincial and territorial accounting organizations should consider whether restrictions on compensation for referrals are needed to maintain and preserve public accountants' independence. If so, the organizations should consider whether this restriction could be replaced with self-imposed safeguards.

Business structure

The following three tables, which were provided by the three national accounting organizations, set out various restrictions on business structure in a number of provinces and territories.

⁵⁰ The ACCA *Code of Ethics and Conduct*, section 3.2, rules 4 to 31, lists threats to compliance with the fundamental principles of integrity, objectivity, professional competence and due care, confidentiality and professional behaviour.

Table 2.1: Restrictions on business structure and multidisciplinary partnerships for CAs

	Alberta ²	British Columbia	Manitoba ⁴	Newfoundland and Labrador	Nova Scotia ⁵	Ontario ⁶	Quebec ^{7,8}	Saskatchewan
Restrictions to forms of business structure or ownership								
Sole practitioners								
Limited liability partnerships are generally forbidden				X				
Public limited companies are generally forbidden	X	X	X	X	X	X		X
Private companies are generally forbidden	X		X	X		X		X
Limitation to multidisciplinary partnerships with other professionals¹								
Any form is generally forbidden		X		X	X	X		X
Incorporation is generally forbidden	X	X		X		X		X
Some comparable licensed professions are allowed to co-operate in various commercial forms (including incorporation)	X ³	X		X		X	X	
Incorporation is allowed only with comparable licensed professions but incorporation is forbidden with non-comparable licensed professions		X		X		X		

Source: CICA, questionnaire response, and consultation submission, July 20, 2007.

Notes

1. Provided that they are not operating as public accountants, CAs are not restricted from conducting other business in conjunction with other professionals and conducting such other business using various commercial forms, including incorporated entities.
2. Professional corporations and general partnerships are also restricted.
3. Multidisciplinary co-operation is acceptable, but incorporation is not.
4. In Manitoba, member CAs may not be in partnership with non-members, although this is not an explicit rule. When work is being done by a related business such as a consulting firm, the members are responsible for the actions of the non-members in the related business.
5. There are restrictions on private companies that are not professional corporations.
6. There are restrictions on professional corporations and general partnerships.
7. The *Regulation respecting the practice of the chartered accountancy profession within a partnership or a joint stock company when members practice within those structures and offer assurance services* stipulates that at all times more than 50 percent of the voting rights must be held by members of the Ordre des comptables agréés du Québec or members of CICA.
8. There is no limitation on multidisciplinary partnerships, except with respect to the voting rights concerning assurance services (described in note 6).

Table 2.2: Restrictions on business structure and multidisciplinary partnerships for CGAs

	Alberta	British Columbia	Manitoba	Newfoundland and Labrador	Nova Scotia	Ontario	Quebec	Saskatchewan
Restrictions to forms of business structure or ownership								
Sole practitioners			X				X	
Limited liability partnerships are generally forbidden		¹	X	X			X	
Public limited companies are generally forbidden	X		X	X		X	X	X
Private companies are generally forbidden	X	²		X		X	X	
Limitation to multidisciplinary partnerships with other professionals								
Any form is generally forbidden		³		X				
Incorporation is generally forbidden	X	²	X	X		X		X
Some comparable licensed professions are allowed to cooperate in various commercial forms (including incorporation)				X			X	X
Incorporation is allowed only with comparable licensed professions but incorporation is forbidden with non-comparable licensed professions	X		X	X				

Source: CGA-Canada

Notes

1. LLPs are allowed with other CGAs.
2. CGAs are permitted to incorporate. They must waive their limited liability for acts and debts. Only CGAs may hold voting shares. Immediate family members or family trusts are permitted to hold non-voting shares.
3. CGAs are permitted to partner with other designated accountants (CA, CMA) but may not call their firm a firm of Certified General Accountants. They are not permitted to partner with other professionals (i.e. lawyers, doctors).

Table 2.3: Restrictions on business structure and multidisciplinary partnerships for CMAs

	Alberta ¹	Manitoba ⁴	Newfoundland and Labrador	Nova Scotia	Ontario ⁷	Quebec ⁸	Saskatchewan
Restrictions to forms of business structure or ownership							
Sole practitioners							
Limited liability partnerships are generally forbidden			X	X	X	X	
Public limited companies are generally forbidden	X	X	X	X ⁴		X	X
Private companies are generally forbidden	X	³	X			X	X
Limitation to multidisciplinary partnerships with other professionals¹							
Any form is generally forbidden			X	⁵			X
Incorporation is generally forbidden	X	X	X	⁶			X
Some comparable licensed professions are allowed to co-operate in various commercial forms (including incorporation)	X ²	X ²	X		X		

Source: CMA Canada.

Notes

1. Professional corporations and general partnerships are also restricted.
2. Multidisciplinary co-operation is acceptable, but incorporation is not.
3. There are restrictions on private companies that are not professional corporations.
4. The *Public Accountants Act*, R.S.N.S. 1989, c. 369, permits incorporation as long as licensed public accountants hold the majority of voting shares.
5. The *Public Accountants Act*, R.S.N.S. 1989, c. 369, permits practising “along (sic) or in partnership with others”; however, “others” is not specified. In the absence of a specific prohibition in the *Public Accountants Act*, there would be no restriction against a multidisciplinary partnership unless the other professions involved restrict it.
6. Incorporation with other licensed public accountants is possible; however, incorporation with other disciplines is not, as each set of governing rules requires its own profession to control the company. The *Public Accountants Act*, R.S.N.S. 1989, c. 369, requires that a licensed public accountant hold the majority of voting shares; the *Legal Profession Act*, S.N.S. 2004, c. 28, requires that a lawyer hold all voting shares. Both are not possible at the same time.
7. CMAs in Ontario may incorporate commercially but professional corporations are not permitted at this time.
8. In accordance with Rule 187.11 of the *Professional Code*, R.S.Q. c. C-26, the *By-Law permitting the practice of professional activities within a limited liability partnership or a joint-stock company* is currently under study at the Office des professions du Québec.

A close look at the tables above reveals a wide range of restrictions on business structure by the three accounting designations and across the provinces. It is reasonable to ask whether the variation brings any benefit, not only to consumers but also to individual accountants and the industry as a whole. It is also reasonable to suggest that there may be instances when the jurisdiction with the least restrictions in a particular area has just as solid a track record of protecting the public interest as the jurisdiction with the most.

Recommendation

Given the variance in business structure restrictions between provinces, each regulator should consider whether its current rules on business structure and ownership are necessary. Those that go beyond the minimum necessary to achieve a clearly defined public interest objective should be removed.

A notable set of restrictions are those on the business structure of professional services firms, including rules about who may form public limited companies, limited liability partnerships, private companies and multidisciplinary partnerships. For example, limited liability partnerships are forbidden for CAs only in Newfoundland and Labrador, while public limited companies are generally forbidden for CAs in all provinces, except Quebec. In addition, many provinces impose restrictions on who may own accounting practices. For example, when members of an accounting designation wish to set up a professional corporation they must ensure that one or more members own all the voting shares.⁵¹

The CICA states that restrictions on business structure maintain the proper balance between reasonably protecting public accountants against liability (except when they commit negligent or wrongful acts or omissions) and protecting the public interest. Specifically, restricting multidisciplinary partnerships enables CA organizations to discipline member firms for misconduct, whereas they would not necessarily be allowed to discipline the members of another profession in a multidisciplinary firm.⁵²

From a competition standpoint, restrictions on firms' business structure do not allow accounting firms to profit from the possible efficiencies that stem from multidisciplinary firms. These restrictions can also discourage the entry of new accountants into the market and may act to protect higher cost firms from competition from newer, more cost-efficient firms.

Recommendation

Regulators should look at ways to allow public accountants to work with non-accountants without jeopardizing the public interest.

⁵¹ See, for example, Society of Management Accountants of Saskatchewan, *Bylaws*, Bylaw 10.02(b); Institute of Chartered Accountants of Ontario, *Bylaws*, Bylaw 308(1); Manitoba, *Certified General Accountants Act*, C.C.S.M. c. C46, s. 11.3(1)(d).

⁵² CICA, consultation submission, July 4, 2007.

Conclusion

In Canada, although the market entry and conduct restrictions that provincial and territorial accounting organizations have put in place are similar in many regards, significant differences exist among them.

One of these discrepancies is the limit that certain provinces put on who may perform public accounting, which hinders the mobility of accountants and limits competition in this market. To facilitate competition in public accounting services, the regulators in each province and territory should consider establishing the minimum necessary competencies that public accountants should have and allowing the members of all domestic and foreign accounting designations that meet this standard to offer public accounting services.

Advertising regulation also varies depending on the province and territory, and some specific restrictions appear unnecessary to protect the public. If professionals were free to advertise their services and aggressively pursue clients, consumers would benefit from increased competition for accounting services.

In addition, the Bureau questions why certain provinces have business structure restrictions but others do not. If the restrictions are not necessary, and the public interest is protected, they should be eliminated.

Even though these discrepancies exist, accounting designations have made many strides in standardizing their rules and bylaws. However, the provincial and territorial accounting organizations should review them regularly and take into consideration the track record of jurisdictions with fewer restrictions in maintaining service quality and protecting the public. This will help lower the cost of entry for future accountants and ensure more competition in this market.

4. Lawyers

Overview

Role and function

Among other things, lawyers advise clients on legal matters, represent clients before bodies such as administrative boards and tribunals, draft legal documents such as contracts and wills, plead cases and conduct prosecutions in court.

In Quebec, notaries may perform all the same functions as lawyers except for litigation and advocacy. Notaries' traditional activities are in areas in which the law requires notarial deeds and instruments (such as mortgages and marriage contracts) prepared in prescribed ways. As with lawyers, Quebec notaries may give legal advice.¹

Many lawyers work in law firms (or notarial offices for Quebec notaries), while other lawyers and notaries are employed in the offices of private companies, associations, non-governmental organizations, and federal, provincial and municipal governments; many others are self-employed.²

How the profession is regulated

Provincial and territorial law societies regulate the legal profession in Canada. For example, the Law Society of Manitoba, empowered by the *Legal Profession Act*, establishes standards for education, professional responsibility and competence, disciplines members and regulates the practice of law in that province.³ There are 14 law societies in Canada: one for each province (two in Quebec) and territory.⁴

Although not a regulatory body, the Federation of Law Societies of Canada (FLSC) is a national body representing lawyers in Canada. The FLSC has representatives from each of the 14 law societies and has historically functioned as a “clearing house facilitating the exchange of views and information of member law societies.”⁵ The FLSC’s mission is to research matters of importance to the legal profession in Canada, further co-operation and uniformity among the provincial governing bodies, improve the public’s understanding of

¹ Chambre des notaires du Québec, “Areas of notarial practices,” www.cdnq.org/en/notariesInQuebec/areas.html.

² Human Resources and Skills Development Canada, “About the NOC 2006 Update,” www23.hrdc-dhrc.gc.ca/2001/e/groups/4112.shtml; Service Canada, “Judges, Lawyers and Quebec Notaries,” www.jobfutures.ca/noc/411p1.shtml.

³ *Legal Profession Act*, C.C.S.M. c. L107.

⁴ For a complete list of the provincial and territorial law societies, go to Federation of Law Societies of Canada (FLSC), “The Practice of Law in Canada,” www.flsc.ca/en/lawSocieties/lawSocieties.asp#list. In Quebec, there is one law society for lawyers, the *Barreau du Québec*, and one for notaries, the *Chambre des notaires du Québec*.

⁵ FLSC, “History of the Federation,” www.flsc.ca/en/about/history.asp.

the legal profession in Canada, and express the views of the provincial governing bodies on national and international issues.⁶

The Canadian Bar Association (CBA) is a voluntary professional organization, formed in 1896 and incorporated by a Special Act of Parliament on April 15, 1921. The CBA represents lawyers, judges, Quebec notaries, law professors and law students from all Canadian provinces and territories. Approximately half of all practising lawyers in Canada are members of the CBA. The objectives of the CBA include improving the law and the administration of justice, promoting fair justice systems and effective law reform, and protecting and promoting the rule of law and the independence of the legal profession.⁷

Overlapping services

There are a number of other service providers whose services may complement or be substitutes for the services lawyers offer. For instance, paralegals may perform various legal duties under the guidance of lawyers, such as preparing legal documents (including wills, real estate papers and affidavits), maintaining records and files, conducting legal research and interviewing clients. Paralegals may not, however, give legal advice. Generally, paralegals obtain their qualifications through education, experience or both.

Notaries public provide services such as certifying real estate papers, legalizing documents and swearing declarations.⁸

Mediators substitute for lawyers when the parties to a legal proceeding or transaction choose dispute resolution through mediation instead of litigation. The mediator is neutral and helps the parties reach a conclusion without a trial. Apart from lawyers, mediators may be social workers, psychologists or other professionals trained in dispute resolution.⁹

Arbitrators may also offer services that substitute for the services of lawyers. Arbitrators help the parties to a legal proceeding or transaction avoid litigation and reach a settlement. Unlike mediators, arbitrators hear the facts of the case and legal issues and make a decision the parties must follow.¹⁰

Entering the profession

Individuals seeking to be lawyers must have a common law degree or, in Quebec, a civil law degree. Following university, prospective lawyers must complete a provincial bar admission course and pass the accompanying examination(s). All law societies require prospective lawyers to complete an articling period, as well as register with a society in

⁶ FLSC, "Mission of the Federation," www.flsc.ca/en/about/mission.asp.

⁷ Canadian Bar Association, consultation submission, July 11, 2007. See also Canadian Bar Association, "About the CBA," www.cba.org/CBA/about/main.

⁸ Notaries in Quebec are not to be confused with notaries public. Quebec notaries must complete a full legal education and must article before being admitted to the profession, while notaries public are strictly commissioned clerks. Also, contrary to notaries in Quebec, notaries public may not provide legal advice. Although notaries public have the power to certify documents, their certification has only a limited probative effect. *Chambre des notaires du Québec*, "The Latin notary and the notary public," www.cdnq.org/en/notariesInQuebec/latin.html; Canlaw, "What is a Notary Public," www.canlaw.com/notaries/notary.htm.

⁹ Department of Justice Canada, "Resolving Disputes: Think About Your Options," www.justice.gc.ca/en/dept/pub/rd/index.html#dispute_resolution.

¹⁰ *Ibid.*

order to practise law. The requirements for registering with a law society typically include the educational requirements listed above and paying an annual membership fee.

Market

Demand

The demand for legal advice and representation comes from the general public, businesses and governments.

Members of the public use lawyers for a variety of legal matters, including estate planning, divorce, real estate transactions, and civil and criminal court cases.

Some businesses exclusively employ lawyers to provide legal services, such as drawing up contracts or acting in mergers, court cases and other legal matters.

The federal government employs approximately 1,800 lawyers at the Department of Justice in various fields, such as criminal litigation, civil litigation, tax litigation, public law, civil law, criminal and social policy, and legislative services.¹¹

The geographic market for legal services likely depends on the client and the service requested. The market is likely fairly local for individuals and small firms, whereas it is provincial, national or international for large firms.

Generally, rising caseloads and continued regulation drive the need for lawyers, although demand is difficult to predict.¹² The demand for lawyers is also influenced by the state of the economy and the business cycle, since a change in the volume of business activity affects the demand for lawyers, particularly those involved with real estate transactions, mergers and acquisitions, bankruptcies, contract preparation and other legal proceedings particular to commercial activity.

A decrease in the use of lawyers' services may result from an increased use of dispute-resolution services in which a lawyer's services are not mandatory.¹³

Supply

In 2006, there were approximately 72,000 lawyers in Canada's 10 provinces, 90 percent of whom practised in Ontario, Quebec, Alberta and British Columbia. Further, there were 23,559 law offices across the provinces and territories.¹⁴ In 2006, approximately 50 percent of lawyers in Canada were self-employed. Table 1 shows the number of lawyers by province that year.

¹¹ Department of Justice Canada, "A Legal Career with Justice," <http://canada.justice.gc.ca/en/dept/ri/rec/lcj/index.html>.

¹² Law School Admission Council, Inc., "Law as a Career," www.lsac.org/canadianCFC/template2.asp?url=LawCareer.htm.

¹³ Department of Justice Canada, note 11, above.

¹⁴ Statistics Canada, "Employment Size Ranges for NAICS 541110—Offices of Lawyers," custom request, 2006. There were 23,484 law offices across the 10 provinces and 75 offices in the territories. Note that the FLSC reports total membership in all Canadian law societies of approximately 98,000. This includes notaries in Quebec and may also include double counting of lawyers who are members of more than one law society. FLSC, "2005 Law Societies Statistics," www.flsc.ca/en/pdf/statistics2005.pdf.

Table 1: Number of lawyers by province, 2006

Province	Employment type			
	Total employed	Self-employed	Firm-employed	Firm-employed, full time
Alberta	8,200	4,200	4,000	3,700
British Columbia	9,300	4,600	4,600	4,200
Manitoba	1,300	600	800	700
New Brunswick	1,100	500	600	600
Newfoundland and Labrador	900	500	n/a	n/a
Nova Scotia	2,000	1,100	900	800
Ontario	29,800	15,300	14,500	14,000
Prince Edward Island	200	n/a	n/a	n/a
Quebec	17,400	8,900	8,500	8,300
Saskatchewan	1,700	800	1,000	1,000
Canada (excluding the territories)	72,000	36,600	35,400	33,900

Source: Statistics Canada, "Employee Statistics for NOCS E012—Attorneys," custom request, 2006.

From 2001 to 2006, the number of lawyers increased 13 percent, from 63,600 to 72,000.

In 2005, 2,778 lawyers in Canada practised in provinces in which they did not reside. Ontario had the largest number of non-resident practising lawyers, with 769; Newfoundland and Labrador, with 13, had the fewest.¹⁵ That year, there were also 297 lawyers with occasional appearance certificates across all provinces, as well as 321 transfers between jurisdictions (see "Mobility," below).¹⁶

In 2005, there were more than 3,100 articling students, more than 3,300 students admitted to the bar admission course, and slightly more than 3,000 students called to the bar across all provinces.¹⁷

Restrictions and recommendations

Market entry restrictions

Entering the profession

To become a lawyer in Canada, individuals must possess an LL.B from a recognized Canadian university.¹⁸ Applicants to law school most likely hold an undergraduate degree, although some law schools accept applicants who have only completed two years of an undergraduate degree.¹⁹ In Quebec, lawyers and notaries must have a three-year civil law degree instead of a common law degree. Students wishing to become notaries must take an additional year of schooling to obtain a diploma in notarial law. Civil law schools require applicants to have completed a two-year CEGEP (college) diploma.

¹⁵ FLSC, *ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ FLSC, "Admission to a Law Society," www.flsc.ca/en/lawSocieties/lawSocieties.asp#admission.

¹⁹ See, for example, University of Manitoba, "Admissions Information," www.umanitoba.ca/law/newsite/faq.php, and University of New Brunswick, "Admission Handbook 2007," http://law.unb.ca/pdf/AdmissionsHandbook2007_001.pdf.

All provincial and territorial law societies require prospective lawyers to complete a professional legal training course, known as the bar admission course, which includes the bar examinations.²⁰ Across the country, the course varies significantly in length, as the following examples show:

- British Columbia: 10-week Professional Legal Training Course and examinations;
- Alberta: six-month Canadian Centre for Professional Legal Education Program and assessments and examinations;
- Saskatchewan: eight-week Bar Admission Course and examinations delivered by the Saskatchewan Legal Education Society Inc.; and
- Nova Scotia: five-week Skills Training Course and an examination.²¹

All law societies also require prospective lawyers to complete an articling period, either before or after the bar admission course. The minimum length of articling varies by jurisdiction, ranging from six months for lawyers in Quebec and nine months in British Columbia, to a year in Alberta, Yukon and several other provinces and territories.²²

The noted variations in the length of the professional legal training course and articling suggest that the entry requirements may have been set, in some instances, at a higher than necessary level, thereby increasing the requirements prospective lawyers have to meet to enter into the profession. In its consultation submission, the FLSC did not provide the Bureau with a rationale for the dissimilarities across the country.²³ Furthermore, given the National Mobility Agreement (see below), which allows lawyers to move freely among jurisdictions regardless of the legal training course or articling period required by their home jurisdictions, the reason for the discrepancies is not apparent.²⁴

Recommendation

Law societies should justify the duration of the professional legal training course and articling as the minimum necessary to properly and effectively practise law while protecting the public interest. When reviewing the duration of education and training lawyers require, law societies should look at other law societies that have maintained the quality of legal services while requiring shorter periods for training and articling.

²⁰ FLSC, “The Practice of Law in Canada,” www.flsc.ca/en/lawSocieties/lawSocieties.asp.

²¹ Law Society of British Columbia, “About PLTC,” www.lawsociety.bc.ca/licensing_membership/pltc/about.html; Law Society of Alberta, “2007–2008 CPLED Program,” www.lawsocietyalberta.com/files/trends/CPLED_Information_Circular_2.pdf; Law Society of Saskatchewan, “Programs and Services: Saskatchewan Legal Education Society Inc.,” www.lawsociety.sk.ca/newlook/Programs/sklesi.htm; Nova Scotia Barristers’ Society: “Bar Admission Course,” www.nbsns.ca/barcourse.html.

²² École du Barreau du Québec, “Stages,” www.ecoledubarreau.qc.ca/stages/admissibilite.php; Law Society of British Columbia, “New Admissions,” www.lawsociety.bc.ca/licensing_membership/becoming_bc_lawyer/new_admissions.html; Law Society of Alberta, *Rules of the Law Society of Alberta*, r. 56(1)(a); Law Society of Yukon, *Rules of the Law Society of Yukon*, r. 84.1(a).

²³ The FLSC responded to the Bureau’s questionnaire and provided a consultation submission on behalf of the law societies of Newfoundland and Labrador, New Brunswick, Nova Scotia, Prince Edward Island, Ontario, Manitoba, Saskatchewan, Alberta, British Columbia, Yukon and Northwest Territories. Although Nunavut is not expressly mentioned as being covered by the FLSC’s questionnaire response and consultation submission, it is implicitly, since Nunavut has adopted the Northwest Territories’ *Legal Profession Act and Rules*.

²⁴ Lawyers must meet certain specified conditions in order to provide legal services outside their home jurisdictions under the scope of the National Mobility Agreement. See “Mobility,” below.

Mobility

Interprovincial mobility

For lawyers wishing to move between jurisdictions, nine provinces (British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Prince Edward Island, Nova Scotia, and Newfoundland and Labrador) have fully implemented the National Mobility Agreement (NMA). The NMA sets out principles that govern temporary and permanent mobility among signatory provinces. Under this agreement, practising lawyers in provinces that have implemented the NMA, who have liability insurance and defalcation coverage, and who “have no outstanding criminal or disciplinary proceedings, no discipline record, and no restrictions or limitations on the right to practise may provide legal services [on a temporary basis] in or with respect to the law of a reciprocating jurisdiction for up to 100 days in a calendar year without a permit.”²⁵ Lawyers do not have to inform other law societies that they are doing so.²⁶

Lawyers practising for more than 100 days, or who otherwise develop an “economic nexus” (by opening an office from which to serve the public, opening and operating a trust account or becoming a resident in the jurisdiction) are ineligible for temporary mobility but may apply to transfer to the desired jurisdiction (permanent mobility).²⁷ Lawyers transferring permanently, who are entitled to practice in a signatory jurisdiction that has implemented the NMA and who are of good character, are excused from writing transfer examinations or any other examinations; however, they “must still meet any qualifications that ordinarily apply for lawyers to be entitled to practise law in the jurisdiction in question. They must also certify that they have reviewed and understood reading materials required by the jurisdiction.”²⁸

The NMA eases the mobility of lawyers between jurisdictions, which effectively serves to reduce barriers to entry and increase the supply of lawyers by allowing them to practise their profession outside their home jurisdiction. Although not full members of the NMA, Quebec and the three territories have allowed for some mobility.

Although Quebec has signed the NMA, it has not yet implemented it. Nonetheless, the *Bâtonnier* of Quebec—the head of the Quebec Bar (the *Barreau du Québec*)—may, under section 33 of the province’s *Professional Code* and upon fulfilling certain conditions, issue special authorizations allowing Canadian or foreign lawyers to practise law in Quebec for specific cases. Special authorizations are valid for up to 12 months and may be renewed. The *Barreau du Québec* may require that counsel who are members of the *Barreau* help lawyers seeking special authorizations because of the differences in legal regimes between Quebec and other jurisdictions, in Canada and abroad. Special authorizations do not fall within the scope of the rules of temporary mobility under the NMA.²⁹

²⁵ FLSC, “Mobility of Lawyers in Canada,” www.flsc.ca/en/committees/mobility.asp. According to *Black’s Law Dictionary* (8th ed., 2004, p. 448), *defalcation* can mean embezzlement, the failure to meet an obligation, and/or a non-fraudulent default.

²⁶ FLSC, consultation submission, June 11, 2007.

²⁷ *Ibid.* An economic nexus is a connection that is established when a lawyer, while practising law on an occasional basis within a jurisdiction, does something that is inconsistent with this.

²⁸ FLSC, “Mobility of Lawyers in Canada,” note 25, above.

²⁹ FLSC, consultation submission, June 11, 2007. See also *Barreau du Québec*, “Special Authorization to Practise Law in Québec,” www.barreau.qc.ca/avocats/autorisation-speciale/index.html.

On November 3, 2006 Northwest Territories, Nunavut and Yukon signed the Territorial Mobility Agreement with the 10 provinces. This means the territories now “participate in national mobility as reciprocating governing bodies with respect to the permanent (transfer) mobility provisions of the NMA.”³⁰ The territories do not seem to have established guidelines for temporary mobility, although in Northwest Territories and Nunavut lawyers may apply for restricted appearance certificates for a single matter or for a number of matters over a limited period of time.³¹

From a competition standpoint, complete mobility of lawyers across Canada is optimal and could be increased if all jurisdictions signed and implemented the NMA with respect to both temporary and permanent mobility.

Recommendation

Law societies should facilitate the movement of lawyers between jurisdictions to ensure complete temporary and permanent mobility throughout Canada. To do so, the Quebec Bar should implement, and the territories should sign and implement, the National Mobility Agreement.

International mobility

Instead of each law society establishing its own committee to assess and recognize foreign legal education and experience, the Council of Canadian Law Deans and the FLSC created the National Committee on Accreditation (NCA) to evaluate the credentials of foreign lawyers applying for admission to a Canadian common law society from either outside of Canada or from Quebec. The NCA does not evaluate foreign lawyers for acceptance into the Quebec law societies.³² Those wishing to become a member of the Quebec Bar must apply to the equivalencies committee to have any training or diploma they received outside Quebec recognized as equivalent.³³ Following the evaluations, the NCA sets out the educational and practice requirements that applicants must meet to qualify for admission and issues successful candidates with certificates of qualification to practise in Canada. Foreign lawyers may still need to take the bar admission course and write the provincial or territorial bar examination, do other coursework or gain work experience before being accepted into a law society.³⁴

Members of the Law Society of Alberta, the Law Society of Saskatchewan, the Law Society of Upper Canada (Ontario) and the Law Society of Prince Edward Island must be either Canadian citizens or permanent residents. The Law Society of Newfoundland and Labrador requires that members be residents of Canada.³⁵

The necessity of residency restrictions is questionable, since other law societies have not deemed residency or citizenship requirements to be essential. The law societies that have such restrictions provided the Bureau with no rationale for them. From a competition

³⁰ Ibid.

³¹ Law Society of the Northwest Territories, *Rules of the Law Society of Northwest Territories*, r. 49.

³² FLSC, “The Practice of Law in Canada,” www.flsc.ca/en/lawSocieties/lawSocieties.asp#foreign.

³³ *Regulation respecting the Standards for equivalence of diplomas and training of the Barreau du Québec*, R.Q. c. C-26, r.19.2.1.

³⁴ See, for example, Nova Scotia Barristers’ Society, “Practising in N.S.: Foreign Applicants,” www.nsbs.ns.ca/foreign.html.

³⁵ FLSC, “The Practice of Law in Canada,” www.flsc.ca/en/lawSocieties/lawSocieties.asp#admission.

standpoint, such restrictions limit the supply of lawyers by imposing an additional requirement that lawyers must meet before becoming members of a law society that has such a restriction.

Recommendation

The law societies that require their members to be residents or Canadian citizens should consider following the example of law societies that have not considered it necessary to include such requirements and eliminate these restrictions.

In most jurisdictions, foreign lawyers have the option of practising as foreign legal consultants, providing advice on the law of their home jurisdictions and on international law; however, Quebec, Northwest Territories, Yukon and Nunavut do not currently allow this.³⁶ Allowing foreign lawyers to act as legal consultants would provide for greater competition in this important area of the law.

Recommendation

The law societies of Quebec, Northwest Territories, Yukon and Nunavut should adopt rules enabling foreign lawyers to act as foreign legal consultants.

Foreign lawyers applying for permission to practise as foreign legal consultants must, in some instances, be residents of the jurisdiction in which they wish to practice, as is the case in Ontario, for example.³⁷ Such a requirement effectively limits the extent to which foreign lawyers who are not residents may practise as foreign legal consultants, which in turn limits competition for these services.

Recommendation

Law societies should remove the residency requirements for foreign legal consultants. Local presence should not be necessary.

Overlapping services and scope of practice

Members of provincial and territorial law societies have the exclusive right to practise law.³⁸ The statutes of the various law societies each include a similar definition of the term *practice of law*. Generally, it encompasses a variety of tasks, such as giving legal advice, making representations and drafting legal documents.

Included in the statutes are exceptions to the general rule of exclusivity, whereby certain people—namely students-at-law, individuals acting on their own behalf, public officers, insurers, court agents and legal assistants (also called paralegals)—are allowed to do certain legal tasks. In the case of paralegals, the statutes often contain a section listing the specific tasks that lawyers may delegate to them.³⁹ These tasks are generally limited to

³⁶ FLSC, consultation submission, June 11, 2007. See also World Trade Organizations, *Trade Policy Review: Report by the Secretariat*, February 14, 2007, www.wto.org/English/tratop_e/tpr_e/s179-04_e.doc.

³⁷ Law Society of Upper Canada, *By-law 14*, s. 4(2).

³⁸ See, for example, British Columbia, *Legal Profession Act*, S.B.C. 1998, c. 9, s. 15, and Prince Edward Island, *Legal Profession Act*, R.S.P.E.I. 1988, c. L-6.1, s. 20(1).

³⁹ See for example, Law Society of British Columbia, *Professional Conduct Handbook*, c. 12, r. 8, and Law Society of Newfoundland and Labrador, *Rules of the Law Society of Newfoundland and Labrador*, r. 12.07.

matters of routine administration and often require constant supervision of lawyers, as is the case in, for example, British Columbia, and Newfoundland and Labrador, where no independent paralegal practice is allowed.⁴⁰

In certain jurisdictions, members of the public may hire independent paralegals to appear and represent them in small claims court and before most tribunals, boards and agencies. Paralegals may also deal with simple wills, uncontested divorces, incorporations and pardons. In addition, paralegals may undertake work in other fields: for example, paralegals may practise as immigration consultants when properly registered with the Canadian Society of Immigration Consultants.

In Ontario, however, the independence of paralegals may be compromised under Bill 14, which was passed by the Ontario Legislature on October 19, 2006, and came into effect on May 1, 2007.⁴¹ Bill 14 amended the *Law Society Act* and, as a result, the Law Society of Upper Canada became responsible for regulating paralegals. Independent paralegals are now subject to licensing requirements set by the Law Society and are only allowed to engage in permitted activities that do not fall under the definition of *legal services*. Under the legislation, “a person provides legal services if the person engages in conduct that involves the application of legal principles and legal judgment with regard to the circumstances or objectives of a person.” Paralegals are allowed to continue to work independently on matters before small claims court, provincial boards and agencies, and on *Provincial Offences Act* matters before the Ontario Court of Justice, such as highway traffic cases. However, Bill 14 outlaws non-advocacy work by paralegals, such as simple incorporations, wills, uncontested divorces and powers of attorney.

The Law Society of Upper Canada will not have the authority to regulate paralegals until it issues the first paralegal licence, which is expected to be in early 2008. In the meantime, the Law Society will continue to receive, investigate and act on complaints that paralegals are providing legal services that only lawyers may provide.⁴²

The legislative changes in Ontario restrict the set of suppliers to whom consumers may turn for certain legal services, thereby curtailing the option of working with paralegals and increasing the costs of legal services to consumers. Furthermore, a conflict of interest arises from having the Law Society of Upper Canada regulate paralegals, given that they have an incentive to restrain the range of legal activities paralegals may offer.

Recommendation

To the extent that paralegals need to be regulated, the proper avenue for this is not through the law societies, given the obvious conflict of interest that arises from having one competitor regulate another. Alternative means of regulatory oversight should be explored.

⁴⁰ Law Society of British Columbia, *Professional Conduct Handbook*, c. 12(4); Law Society of Newfoundland and Labrador, *Rules of the Law Society of Newfoundland and Labrador*, r. 12.03. In its consultation submission of June 28, 2007, the British Columbia Paralegal Association defined a paralegal as “a person with training and knowledge of the substantive and procedural aspects of the law, who is capable of independent legal work performed subject to the general supervision of a lawyer.”

⁴¹ *An Act to Promote Access to Justice by Amending or Repealing Various Acts and by Enacting the Legislation Act, 2006*, S.O. 2006, c. 21.

⁴² Law Society of Upper Canada, “Paralegal Regulation,” www.lsuc.on.ca/paralegals/.

Another example of an area that has been affected by the wide scope of practice of lawyers is that of title insurance. Title insurance is an insurance policy covering the condition of title or ownership of real property at the time the policy is issued. This type of insurance protects property owners against losses or damages suffered as a result of title and off-title defects. It can be purchased as a substitute for a solicitor's report or the coverage a land title assurance fund provides. It is designed to streamline the conveyancing process and to enable real estate professionals to close transactions in a timely fashion.

Certain laws and regulations currently prevent title insurance companies from fully conducting their business. In some jurisdictions, laws and regulations give exclusive authority on certain aspects of real estate conveyancing to lawyers and notaries, which impedes title insurers' ability to offer their services. For instance, members of the Law Society of Upper Canada have the exclusive mandate to certify title on behalf of title insurers. Recent amendments to Ontario's *Land Titles Act* have had the effect of allowing only lawyers to transfer titles.⁴³ Proposed professional rules would require two lawyers to work on title transfers, a requirement that consumers would have no right to waive. In British Columbia, the law society allows only a lawyer or notary, and a limited number of other people, to witness the borrower's signature on mortgage documents. In addition, the Director of Land Registration in British Columbia has designated lawyers and notaries public as the only people under the *Land Title Act* who are allowed to affix digital signatures to documents to be filed at the Land Title Office.⁴⁴ The Law Society of New Brunswick has a practice standard that prevents an Application of First Registration for property to be registered unless the property owner has met with a lawyer. Through the *Act to Amend the Land Titles Act* (Bill 17), New Brunswick has given lawyers a monopoly on the electronic submission of documents.

The range of activities that is reserved for lawyers must be justified by a clear social benefit. An overly broad scope of practice for lawyers only raises costs for consumers by prohibiting alternative low-cost providers (such as paralegals and title insurers) from offering certain legal services. The FLSC stated in its consultation submission that "the underlying rationale for [providing lawyers with an exclusive right to practise law] is to protect the public."⁴⁵ The Bureau acknowledges that this is valid but is of the view that it can be achieved without affording lawyers complete exclusivity on all legal tasks.

Recommendation

Law societies should neither prohibit related service providers (such as paralegals and title insurers) from performing legal tasks, nor limit their ability to do so, unless there is compelling evidence of demonstrable harm to the public.

⁴³ *Land Titles Act*, R.S.O. 1990, c. L.5.

⁴⁴ In this capacity, lawyers and notaries are known as subscribers. The *Land Title Act*, R.S.B.C. 1996, c. 250, s. 168.1, defines a subscriber as "an individual who is authorized by a certificate to sign electronic applications and instruments under this Part, and electronic returns under the *Property Transfer Tax Act*."

⁴⁵ FLSC, consultation submission, June 11, 2007.

Market conduct restrictions

Advertising

Typically, lawyers are permitted to advertise their services and fees, provided that the advertising claims are not false or misleading and are in good taste, so as not to bring the profession or the administration of justice into disrepute. The Bureau recognizes the need for such restrictions; however, some of those currently in place go beyond simply preventing false or misleading advertising and, as a result, raise competition concerns in light of the numerous benefits advertising brings to consumers.

Size, style and content of advertising

In Newfoundland and Labrador, and Ontario, lawyers may only advertise fees charged for their services when the advertisements do not use words or expressions such as *from...*, *minimum*, *...and up* or the like, when referring to the fees to be charged.⁴⁶ Similarly, in Nova Scotia, an advertisement may not contain the words *simple* or *complicated*, or words of like import, in addition to the words previously mentioned.⁴⁷ The Law Society of Newfoundland and Labrador, besides forbidding the use of certain words, also prohibits members from indicating in advertisements that prices are discounted, reduced or special rates.⁴⁸

In advertisements in Yukon, lawyers may only convey information about their places and hours of business, the identity of lawyers in their firms, the identity of representative clients, the fields of law to which they restrict their practices and the types of services they provide.⁴⁹ Contrary to other law societies, Yukon's does not permit lawyers to use photographs, logos or symbols in their advertisements.⁵⁰

The Law Society of Alberta recently amended its *Code of Professional Conduct* to remove the restriction on advertising by former judges and to allow them to refer to their former status.⁵¹ In contrast, the law societies of Nova Scotia, Prince Edward Island, Saskatchewan and Yukon have maintained their restrictions on such advertising.⁵²

The law societies of Yukon and Nova Scotia are the only ones to restrict the size of advertisements. Both require advertisements to be of a size commensurate with the amount of information being given.⁵³ In Yukon, lawyers may only place one listing in each of the white pages and yellow pages, no bigger than a double quarter column.⁵⁴

⁴⁶ Law Society of Newfoundland and Labrador, *Rules of the Law Society of Newfoundland and Labrador*, r. 8.11(c); Law Society of Upper Canada, *Rules of Professional Conduct*, r. 3.04(2)(c)

⁴⁷ *Regulations made pursuant to the Legal Profession Act*, r. 7.6.6 (c).

⁴⁸ Law Society of Newfoundland and Labrador, *Rules of the Law Society of Newfoundland and Labrador*, r. 8.11 (c)

⁴⁹ *Legal Profession Act*, R.S.Y. 2004, c. 134, s. 105.

⁵⁰ Law Society of Yukon, *Rules of the Law Society of Yukon*, r. 193.

⁵¹ Law Society of Alberta, "Changes to Advertising Rules Effective February 2007," www.lawsocietyalberta.com/advisory/advisory_nov_04.cfm.

⁵² Nova Scotia, *Regulations made pursuant to the Legal Profession Act*, r. 7.6.3 (d); Law Society of Prince Edward Island, *Regulations of the Law Society of Prince Edward Island*, r. 41(2); Law Society of Saskatchewan, *Rules of the Law Society of Saskatchewan*, r. 1605; Law Society of Yukon, *Rules of the Law Society of Yukon*, r. 199.

⁵³ Nova Scotia, *Regulations made pursuant to the Legal Profession Act*, r. 7.6.2 (d); Law Society of Yukon, *Rules of the Law Society of Yukon*, r. 193.

⁵⁴ With the approval of the Chairman of the Discipline Committee, an advertisement may be allowed to exceed the prescribed size (Law Society of Yukon, *Rules of the Law Society of Yukon*, r. 197).

Certain law societies, such as those in Newfoundland and Labrador, and Quebec, prohibit their members from using statements of gratitude in their advertisements.⁵⁵

Referral fees

Lawyers are also prohibited from compensating non-lawyers for recommending their services or referring clients to them. In Newfoundland and Labrador, the law society rules state that lawyers may not provide to or receive from real estate brokers or title insurers any reward for directing or receiving clients.⁵⁶

The FLSC stated in its consultation submission that advertising is regulated to “protect public interest and confidence in the legal system.”⁵⁷ From the Bureau’s perspective, the restrictions currently in place on advertising go outside of what is necessary to guarantee this, since the public needs only to be protected against advertising that is false or misleading. The elimination of the superfluous restrictions would allow for more innovative and informative advertising and, as a result, increase competition and lower consumers’ search and information-gathering costs.

Recommendation

Generally, law societies should lift any unnecessary restrictions on advertising—that is, any restriction above and beyond the prohibitions on false, misleading and deceptive advertising—unless they can justify their existence. In particular, law societies should remove restrictions on the size, style and content of advertisements and allow non-lawyers to be compensated for referring services or clients.

Of particular concern to the Bureau are restrictions on claiming to be a specialist or expert in a field of law as well as on comparative advertising, as set out below.

Specialist and expert certification

Although most law societies allow members to list preferred areas of practice, they prohibit members from claiming to be specialists or experts in given fields. For example, lawyers in British Columbia may state a preference for practising in certain fields when they have devoted at least 20 percent of their time to it in the past three years.⁵⁸ At the same time, they are strictly prohibited from using the title of specialist.⁵⁹ Manitoba lawyers “may advertise a preferred area or areas of practice provided the advertisement does not contain a claim, either directly or indirectly, that the advertising lawyer is a specialist or expert.”⁶⁰ In Newfoundland and Labrador, lawyers may advertise preferred areas of practice so long as they do not claim to be specialists, experts, leaders or established or experienced practitioners in any field.⁶¹ In Prince Edward Island, lawyers may only advertise preferred areas of practice that are approved under regulation.⁶²

⁵⁵ Law Society of Newfoundland and Labrador, *Rules of the Law Society of Newfoundland and Labrador*, r. 8.05 (c); Quebec: *Code of ethics of advocates*, R.Q. c. B-1, r.1, s. 5.06, for lawyers; *Code of ethics of notaries*, R.Q. N-3, r.0.2, s 70, for notaries.

⁵⁶ Law Society of Newfoundland and Labrador, *Rules of the Law Society of Newfoundland and Labrador*, r. 8.12(1), 8.12(2).

⁵⁷ FLSC, consultation submission, June 11, 2007.

⁵⁸ Law Society of British Columbia, *Professional Conduct Handbook*, c. 14, r. 16.

⁵⁹ *Ibid.*, r. 18.

⁶⁰ Law Society of Manitoba, *Code of Professional Conduct*, c. 14, C8.

⁶¹ Law Society of Newfoundland and Labrador, *Rules of the Law Society of Newfoundland and Labrador*, r. 8.10.

⁶² Law Society of Prince Edward Island, *Regulations of the Law Society of Prince Edward Island*, s. 40(1), 40(2).

Interestingly, although Saskatchewan does not permit lawyers to use the titles specialist, expert and leader, or any similar designation, members of the law society may be identified as leading practitioners in any publication that relies on input from independent parties approved by the ethics committee.⁶³

The Law Society of Upper Canada is the only law society to have implemented a program for lawyers to obtain specialist certification in a given practice area when they can show they meet the following qualifications:

- that they practised for a minimum of seven years prior to the date of the application;
- that they had substantial involvement in the specialty area during five of the seven years;
- that they complied with the professional development requirements; and
- that they complied with the professional standards requirements.⁶⁴

Although the laws and regulations of certain law societies allow lawyers to state that they are specialists or experts when certified, no means for obtaining certification have been put in place. This is the case in Alberta and Quebec.⁶⁵ In New Brunswick, although the *Law Society Act* specifies that the law society rules may designate specialized areas of practice and set out how and under what conditions members may present themselves as preferring or limiting their practice to one area, no such rules have been adopted.⁶⁶

The FLSC stated in its consultation submission that the constraints on members of the legal profession from presenting themselves as specialists are “intended to ensure that potential clients are accurately informed about the skills and knowledge of a particular practitioner.”⁶⁷ However, such restrictions also reduce the quantity and quality of information available to the public and prevent consumers from being able to identify the most competent lawyers in a given field. The Bureau is of the view that allowing the designation of specialists through a recognized certification program, similar to that offered by the Law Society of Upper Canada, will ensure information about lawyers’ skills and knowledge is accurate. Such a designation may help members of the public choose lawyers that best suit their needs and assure that the public has access to a certain calibre of lawyers who meet specific requirements. Such a designation contrasts favourably with lawyers simply stating preferred areas of practice, which provides no indication of the quality of their services.

⁶³ Law Society of Saskatchewan, *Rules of the Law Society of Saskatchewan*, r. 1615(1), 1615(3).

⁶⁴ Law Society of Upper Canada, “About the Program,” <http://mrc.lsuc.on.ca/jsp/csp/index.jsp>.

⁶⁵ Law Society of Alberta, *Code of Professional Conduct*, c. 5, r. 5; Quebec *Professional Code*, R.S.Q., c. C26, s. 58.

⁶⁶ *Law Society Act*, 1996, S.N.B. 1996, c. 89, s. 17(2)(u), 17(2)(v).

⁶⁷ FLSC, consultation submission, June 11, 2007.

Recommendation

Law societies should evaluate the possibility of adopting a specialist certification program similar to that in Ontario. Alternatively, law societies could consider allowing members to be identified as leading practitioners in publications that rely on data from independent parties approved by the law societies' ethics committee, as is the case in Saskatchewan.

Comparative advertising

Lawyers in Alberta, British Columbia, New Brunswick, Ontario and Saskatchewan may not, in their advertisements, compare their fees to those of other lawyers.⁶⁸ In addition, lawyers in Alberta, British Columbia, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island and Saskatchewan are not permitted, in advertisements, to compare the quality of their services to those of other lawyers.⁶⁹

In most instances, lawyers may not state or imply any qualitative superiority over other lawyers, although the regulations do not explicitly state that lawyers are proscribed from using comparative advertising (in Manitoba and Nova Scotia, for example).⁷⁰ In its chapter on advertising, the Law Society of Alberta's *Code of Professional Conduct* states that lawyers' advertisements must, among other things, be verifiable: "an advertisement that states or implies qualitative superiority to another firm or lawyer is generally unacceptable, because it cannot be verified according to any objective, widely-held standard."⁷¹

In Yukon, the regulation takes a more general form, prohibiting lawyers from referring to the quality of the services they provide, regardless of whether the advertisements are comparative or claiming superiority.⁷²

Comparative advertising fosters price competition by allowing prospective clients to compare fees. When consumers cannot compare the prices for legal services, there is little or no incentive for lawyers to compete on price, thereby raising the costs to consumers. Additionally, such restrictions hinder competition between lawyers and make it particularly difficult for new lawyers to advertise their entry and distinguish their services from those of their competitors.

⁶⁸ Law Society of Alberta, *Code of Professional Conduct*, c. 5, r. 6(d); Law Society of British Columbia, *Professional Conduct Handbook*, c. 14, r. 12c; Law Society of New Brunswick, *Code of Professional Conduct*, c. 16, commentary 4f); Law Society of Upper Canada, *Rules of Professional Conduct*, r. 3.04(1)c); Law Society of Saskatchewan, *Rules of the Law Society of Saskatchewan*, r. 1611(1)(c).

⁶⁹ Law Society of Alberta, *Code of Professional Conduct*, c. 5, R.1, C.1a); Law Society of British Columbia, *Professional Conduct Handbook*, c. 14, r. 5d; Law Society of New Brunswick, *Code of Professional Conduct*, c. 16, commentary 4e); Law Society of Newfoundland and Labrador, *Rules of the Law Society of Newfoundland and Labrador*, r. 8.05(1)(a); Nova Scotia: *Regulations made pursuant to the Legal Profession Act*, r. 7.6.3; Law Society of Upper Canada, *Rules of Professional Conduct*, r. 3.04(1)c); Law Society of Prince Edward Island, *Regulations of the Law Society of Prince Edward Island*, s. 38(3)(b); Law Society of Saskatchewan, *Rules of the Law Society of Saskatchewan*, r. 1602 (d).

⁷⁰ Law Society of Manitoba, *Rules of the Law Society*, r. 5-114(1), and *Code of Professional Conduct*, c. 14, r. 7; Nova Scotia: *Regulations made pursuant to the Legal Profession Act*, r. 7.6.3.

⁷¹ Law Society of Alberta, *Code of Professional Conduct*, c. 5, R1, C1(a).

⁷² Nova Scotia: *Regulations made pursuant to the Legal Profession Act*, r. 7.6.3; Law Society of Yukon, *Rules of the Law Society of Yukon*, r. 193.

Recommendation

Law societies should abolish prohibitions on comparative advertising of verifiable factors, such as price.

Pricing and compensation

Every provincial and territorial law society has a section in its code of professional conduct that describes the rules concerning fees. Some have adopted the Canadian Bar Association's code in its entirety; others have adopted it with slight variations.

Lawyers may not charge or accept any fee that is not fully disclosed, fair and reasonable. The CBA code lists several factors to consider when determining a fair and reasonable fee, namely the time, effort and skill required, customary charges for similar work, the exposure and risk to the client in criminal cases, and any prior relevant agreements made between the client and lawyer. Disciplinary action may be taken against lawyers who cannot justify their fees as being fair and reasonable.⁷³ New Brunswick's code further clarifies that fees should not entirely depend on the outcome of the case or the hours spent on the case.⁷⁴ Clients who do not believe their lawyers' fees to be reasonable can request an independent review of them by the courts.

The restrictions appear reasonable and do not raise any competition concerns. However, there are some that seem overly restrictive, as follows.

According to the FLSC, none of the law societies has adopted suggested fee schedules.⁷⁵ However, under Quebec's *Professional Code*, the General Council of the Barreau du Québec, which governs the Quebec Bar, "may, in particular, by resolution [...] suggest a tariff of professional fees that the members of the order may apply in respect of the professional services they render."⁷⁶

The presence of suggested fees may create an opportunity for price fixing, which is contrary to the principles of competition. As a result of the suggested fees, lawyers may set prices higher than they otherwise would. The quality of legal services may decrease, since professionals who have fixed prices likely have little or no incentive to improve the quality of their services.

Recommendation

The Quebec legislature should consider repealing the provision of the *Professional Code* that gives professions the right to suggest a tariff of professional fees that the members may apply.

⁷³ Canadian Bar Association, *Code of Professional Conduct*, c. XI, Commentary 1.

⁷⁴ Law Society of New Brunswick, *Code of Professional Conduct*, c. 9, Commentary 2)(c)i).

⁷⁵ FLSC, questionnaire response, question 5.1, January 18, 2007.

⁷⁶ *Professional Code*, R.S.Q., c. C-26, s. 86.01(12). The *Professional Code* is the parent legislation governing the Quebec professional system. In consequence, the Bureau's recommendation that follows applies to all professionals, not only lawyers and notaries, including pharmacists, accountants and optometrists, which other chapters of this study cover.

Contingency fee agreements are generally acceptable as long as they remain fair and reasonable, and respect any other condition the law societies have established.⁷⁷ Some jurisdictions have restricted the areas of practice in which contingency fees may be used. For example, Yukon prohibits lawyers from entering into contingency fee agreements when the services provided relate to matrimonial causes, the property of people under legal disability or the distribution of estates.⁷⁸ In Ontario, lawyers may not enter into contingency fee agreements for criminal or quasi-criminal proceedings or for family law matters.⁷⁹ Other law societies void agreements in certain areas of the law unless the courts approve the agreements: this is the case, for instance, in British Columbia, New Brunswick and Saskatchewan.⁸⁰

Since contingency fee agreements attach a lawyer's remuneration to the outcome of a case, they may provide lawyers with incentive to act in their clients' best interests. Furthermore, contingency fee agreements render the justice system more accessible for those who are unable to access it due to financial limitations.

Recommendation

Law societies should identify the goals of the restrictions on contingency fees in certain practice areas, and then determine whether the restrictions are the best means of achieving the desired goals, considering that other law societies have not deemed such restrictions necessary.

Two law societies have set maximums for the remuneration lawyers are entitled to receive under contingency fee agreements. In British Columbia, this maximum is 33.3 percent of the amount the plaintiff recovers for a claim for personal injury or wrongful death arising out of the operation of a motor vehicle. The maximum remuneration for any other type of claim for personal injury or wrongful death is 40 percent.⁸¹ In New Brunswick, a reviewing officer must approve agreements that set the contingency fees at more than 25 percent of the amount recovered.⁸²

The Bureau recognizes that restrictions on the maximum percentage that lawyers may demand under contingency fee agreements have been put into place to protect consumers. However, a maximum percentage has the potential to be anti-competitive when it is set at a supra-competitive level and serves as a focal point towards which lawyers will move, creating an inviting opportunity for tacit collusion.

Recommendation

The law societies of British Columbia and New Brunswick should consider eliminating the maximum percentage to which lawyers are entitled under contingency fee agreements. The appropriate fee structure should be left to market forces to determine.

⁷⁷ A contingency fee agreement is an agreement between a lawyer and a client whereby a lawyer is only paid when there the legal matter concludes successfully for the lawyer's client. The fee is based on a percentage of the award.

⁷⁸ *Legal Profession Act*, R.S.Y. 2004, c. 134, s. 68(3).

⁷⁹ *Solicitors Act*, R.S.O. 1990, c. S.15, s. 28.1(3).

⁸⁰ British Columbia, *Legal Profession Act*, S.B.C. 1998, c. 9, s. 67(5); New Brunswick, *Law Society Act*, 1996, S.N.B. 1996, c. 89, s. 83(5); Law Society of Saskatchewan, *Rules of the Law Society of Saskatchewan*, r. 1502(b).

⁸¹ Law Society of British Columbia, *Rules of the Law Society of British Columbia*, r. 8-2.

⁸² Law Society of New Brunswick, *Contingent Fee Rules*, r. 2(1).

Business structure

All law societies, apart from the Law Society of Upper Canada and the Barreau du Québec, have made multidisciplinary practices unfeasible by prohibiting lawyers from splitting, sharing or dividing clients' fee with anyone other than other lawyers.⁸³ Furthermore, lawyers are not allowed to enter into any arrangement whereby non-lawyers share in the fees or revenues generated by the practice of law.⁸⁴

In Ontario, upon receiving approval from the Law Society of Upper Canada, lawyers may form multidisciplinary practices with individuals who are not members of the Law Society. The individuals must be of good character and practise professions, trades or occupations that support or supplement the practice of law. Lawyers must maintain effective control over the individuals' practice by ensuring, in particular, that they comply with the law society's regulations and practise with the appropriate level of skill, judgment and competence.⁸⁵ A member of the Law Society must maintain professional liability insurance coverage for the individual.⁸⁶ In Quebec, lawyers may only share fees with members of the bar, other professional orders or professions listed in Schedule A of the *Regulation respecting the practice of the profession of advocate within a limited liability partnership or joint-stock company and in multidisciplinary* or persons that are a partnership or joint-stock company within which they are authorized to engage in their professional activities.⁸⁷

Many law societies specify that law corporations must not carry on any activities other than providing legal services or services directly associated with providing legal services (see, for example, British Columbia, Manitoba, New Brunswick).⁸⁸

In Saskatchewan, lawyers "may share premises, facilities and staff with a person who is not a member of the Society, provided that the non-member's reputation or activities do not jeopardize the integrity of the profession, that the business of the member and non-member are kept entirely separate, and that clients of the member are not confused as to the person with whom they are dealing."⁸⁹

Multidisciplinary practices translate into cost efficiencies and increased consumer choice and convenience. Restricting this form of business structure may cause harm to consumers, since they cannot take advantage of the numerous benefits of a one-stop-shop. The Law Society of Upper Canada and the Barreau du Québec, by allowing

⁸³ See, for example, Law Society of British Columbia, *Professional Code Handbook*, c. 9, r. 6, and Law Society of Manitoba, *Code of Professional Conduct*, c. 11, C10.

⁸⁴ See, for example, Nova Scotia Barristers' Society, *Legal Ethics and Professional Conduct Handbook*, r. 12.10, and Law Society of Saskatchewan, *Code of Professional Conduct*, c. 11, C9.

⁸⁵ Conditions that must be satisfied in order for a member of the Law Society to be able to enter into a multidisciplinary partnership with an individual who is not a member are set out in Law Society of Upper Canada, *By-law 7*, s. 18(2).

⁸⁶ Law Society of Upper Canada, *ibid.*, s. 30(2).

⁸⁷ *Code of ethics of advocates*, s. 3.05.14. In section 1 of the *Professional Code*, a *professional order* is defined as any professional order listed in Schedule I of the Code or constituted in accordance with the Code. Schedule A of the Regulation lists other persons authorized to engage in professional activities within a limited liability partnership or joint stock company: contributors of the Chambre de l'assurance de dommages; contributors of the Chambre de la sécurité financière; members in good standing of a law society constituted outside Quebec; patent agents registered with the Commissioner of Patents under the *Patent Act*; and members in good standing of the Canadian Institute of Actuaries.

⁸⁸ British Columbia, *Legal Profession Act*, S.B.C. 1998, c. 9, s. 81(4); Manitoba, *Legal Profession Act*, C.C.S.M. c. L107, s. 33(3); New Brunswick, *Law Society Act*, 1996, S.N.B. 1996, c. 89, s. 37(8).

⁸⁹ Law Society of Saskatchewan, *Rules of the Law Society of Saskatchewan*, r. 1616.

multidisciplinary practices, have demonstrated the feasibility of such structures. That they do allow multidisciplinary practices is evidence in itself that other law societies should reconsider the cost-benefit analysis of their restrictions on multidisciplinary practices.

Recommendation

Law societies should consider less intrusive mechanisms than prohibiting multidisciplinary practices to circumvent possible conflicts of interests. Examples to follow are those of the Law Society of Upper Canada and the Barreau du Québec, both of which allow lawyers to form partnerships with non-lawyers, under certain conditions and appropriate regulation.

Recommendation

In order to allow for multidisciplinary practices, law societies will have to remove restrictions that currently prohibit or discourage lawyers from working in multidisciplinary arrangements with other professionals. Instead, they should allow the following:

- lawyers to split, share or divide clients' fees with non-lawyers;
- lawyers to enter into arrangements with non-lawyers regarding sharing fees or revenues generated by the practice of law; and
- law corporations to carry on activities other than providing legal services or services directly associated with providing legal services.

Recommendation

Law societies wishing to take a more conservative approach should consider allowing lawyers, under specific conditions, to share premises, facilities and staff with non-lawyers, as is the case in Saskatchewan.

Conclusion

Law societies must assess, from a competition standpoint, the costs and benefits of the various types of restrictions they impose. Many of the restrictions currently in place have the effect of raising costs to consumers.

The most evident of these restrictions are those on overlapping services and scope of practice, which prohibit low-cost providers from offering certain legal services. However, costs to consumers may also be increased indirectly through restrictions on conduct. For example, many existing advertising restrictions go above and beyond simple prohibitions of false, misleading and deceptive advertising. This effectively limits the innovative means by which lawyers may advertise and reduces the information advertisements contain.

Maximum pricing restrictions on contingency fee agreements may also raise costs for consumers, since they potentially create an inviting opportunity for tacit collusion. When restrictions set maximum prices higher than the competitive level, they serve as a focal point for lawyers when pricing their services.

As for multidisciplinary practices, their prohibition deprives consumers of the cost efficiencies and convenience of purchasing a number of services from one firm.

With increasing legal fees, access to justice in Canada is a genuine concern. Escalating legal costs will mean that only the very wealthy will be able to afford legal assistance. As the Right Honourable Beverley McLachlin, Chief Justice of the Supreme Court, said in a speech she gave to the Empire Club of Canada on March 8, 2007,

Many Canadian men and women find themselves unable, mainly for financial reasons, to access the Canadian justice system. Some of them decide to become their own lawyer. Our courtrooms today are filled with litigants who are not represented by counsel, trying to navigate the sometime complex demands of law and procedure. Others simply give up.

Although legal aid may offer a solution to some, qualifying for it is very difficult, which leaves a large group of people without the financial means to seek legal assistance. Because of the inaccessibility of the legal system, it is of vital importance that consumers not incur avoidable costs resulting from overly restrictive regulation.

5. Optometrists

Overview

Role and function

Optometrists are primary health care providers for the eyes. In this role, optometrists examine, diagnose, treat, manage and prevent disorders, diseases and injuries of the visual system, eyes and associated structures, and identify related systemic conditions affecting the eyes.¹ The main functions of optometrists include the following:

- examining human eyes by any method (other than surgery), to diagnose and treat any abnormal conditions, or refer patients for treatment, in co-operation with doctors and other health professionals;
- using instruments, procedures or agents to measure, examine or diagnose visual defects or abnormal conditions of the eyes;
- prescribing and fitting glasses, contact lenses or other devices to correct, relieve or treat the eyes;
- prescribing, supervising and managing therapy to improve and monitor visual health; and
- referring patients to other health practitioners, as required.²

How the profession is regulated

As a health profession, optometry is regulated in every province and territory by a regulatory body usually called a college.³ For example, the Alberta College of Optometrists, under the *Health Professions Act*, sets the criteria for licensing optometrists and regulates the practice of optometry in that province. As regulators, the colleges protect public safety by ensuring that competent and accountable health care practitioners provide eye care in an ethical manner.⁴

The colleges are directed by a board comprising elected members of the profession in the jurisdiction. The boards in some provinces and territories also include members of the public appointed by the government.

¹ Canadian Association of Optometrists, “The Optometrist and Health Care Delivery in Canada,” www.opto.ca/en/public/pdfs/advocacy_init/Role_document_final.pdf; Association of Schools and Colleges of Optometry, “What is a Doctor of Optometry,” www.opted.org/info_faq.cfm#1.

² Canadian Association of Optometrists, “What is an Optometrist?” www.opto.ca/en/public/03_optometry/03_00_what_is.asp.

³ Canadian Examiners in Optometry, “Frequently Asked Questions,” www.ceo-eco.org/faq.asp, questions 1 and 16, and “Understanding the Profession,” www.ceo-eco.org/home_description.asp.

⁴ College of Opticians of Ontario, consultation response, July 6, 2007.

Overlapping services

Ophthalmologists (and other physicians), optometric assistants and opticians provide services that complement or are substitutes for the services optometrists provide.

Ophthalmologists are the designated leaders of the eye care team, which comprises ophthalmologists, optometrists and opticians, according to the Canadian Ophthalmological Society.⁵ Ophthalmologists are medical doctors trained to provide the full spectrum of eye care. As such, their authorized scope of practice is much broader than that of optometrists.

Since the ratio of ophthalmologists to Canadians is quite low compared to that in the U.S., most ophthalmologists in Canada only provide secondary and tertiary care, leaving primary eye care to optometrists.⁶ Ophthalmologists provide some services in competition with optometrists but tend to focus on complementary services. As with optometrists, ophthalmologists prescribe glasses and contact lenses; however, they also perform complex eye surgery and treat certain diseases of the eye, which optometrists may not do.⁷ Optometrists usually refer patients with eye diseases or other conditions that require treatment to ophthalmologists.

Optometric assistants are not regulated service providers; rather, they are specially trained to help optometrists care for patients, and do, among other things, in-office data collection and other non-evaluative tasks.⁸ Assistants receive in-depth training on the various pieces of equipment, procedures and techniques necessary to running an efficient optometric practice.⁹

Opticians design, fit and dispense eyeglasses, contact lenses, low-vision aids and prosthetic ocular devices based on prescriptions from optometrists and from physicians, such as ophthalmologists. Some opticians also manufacture finished lenses, and design and manufacture glasses frames and other optical devices.¹⁰ Opticians compete with optometrists in the filling of prescriptions for and the sale of eyeglasses.¹¹

Opticians in some provinces also administer sight tests (called refraction) for specific groups of people but may not write prescriptions for visual corrections based on the results of the sight tests, or diagnose or treat eye diseases. In Alberta and British Columbia, for example, some opticians do sight tests, but a physician or optometrist must review and approve the results before they can be used to dispense eyeglasses.¹² (For more on this, see “Overlapping services and scope of practice,” below.)

⁵ Canadian Ophthalmological Society, “The Eye Care Team,” <http://eyesite.ca/english/public-information/eye-care-team.htm>.

⁶ There are 3.3 ophthalmologists for every 100,000 people in Canada, compared with 5.7 per 100,000 in the United States. Canadian Association of Optometrists, consultation response, July 3, 2007.

⁷ American Academy of Ophthalmology, “The Eye Care Team,” <http://aao.org/about/team.cfm>.

⁸ Manitoba Association of Optometrists, consultation response, June 25, 2007.

⁹ Canadian Association of Optometrists, “Optometric Assistants,” www.opto.ca/en/public/03_optometry/03_05_assistants.asp.

¹⁰ Opticians Association of Canada, consultation response, July 10, 2007.

¹¹ Canadian Association of Optometrists, “What is an Optometrist?” note 2, above, and Opticians Association of Canada, “What is an Optician?” www.opticians.ca/consumers/quest_optician.asp.

¹² Bureau communication with Mary Field, Chief Administrative Officer of the Opticians Association of Canada, April 13, 2007, and July 17, 2007.

Entering the profession

To practise optometry in Canada, individuals must earn the Doctor of Optometry (OD) degree and meet the requirements of a provincial or territorial licensing authority.¹³

Prospective optometrists must also complete the Canadian Standard Assessment in Optometry (CSAO) administered by the Canadian Examiners in Optometry.¹⁴ The CSAO is a national exam that assesses the practice competencies (“activities required for safe and effective optometric practice”) of optometrists who wish to practise in Canada.¹⁵ All the provincial and territorial colleges of optometry (except Quebec’s) use the CSAO as a criterion for admission.¹⁶

Finally, optometrists must hold a licence to practise. Each province and territory sets the criteria for issuing this licence. Once licensed, optometrists must meet ongoing requirements set by the licensing authority to keep their licence and be allowed to practice in that jurisdiction.

Market

Demand

Consumers who have eye injuries, diseases of the eye or poor vision generate the demand for eye care services, as do people seeking preventive care through general examinations. Demand for services from the eye care team—ophthalmologists, optometrists and opticians—depends on the same conditions that affect demand for general health care, such as health, income, health insurance coverage and government subsidies for health care.

When optometrists cannot provide the needed level of care, they refer patients to ophthalmologists (or other medical specialists) for surgery, prescription medication or other treatment. Most ophthalmologists only accept new patients on referral from optometrists or physicians.¹⁷ Optometrists generally see patients first, before ophthalmologists do, and provide the majority of primary eye care.¹⁸ An average optometric practice, which employs an average of 2.3 optometrists, handles about 2,800 patient consultations each year.¹⁹

The geographic market for optometrist services is likely to be highly localized, since people do not usually travel great distances to consult an optometrist.

¹³ Canadian Association of Optometrists, “The Optometrist and Health Care Delivery in Canada,” note 1, above.

¹⁴ Ibid.

¹⁵ Canadian Examiners in Optometry, “Canadian Standard Assessment in Optometry,” www.ceo-eco.org/assessment.asp. The specific competencies are explained in greater detail in Canadian Examiners in Optometry, *Competency-Based Performance Standards for the Canadian Standard Assessment in Optometry, 2005: A Report of the Working Group of the Competence Committee of Canadian Examiners in Optometry*, www.ceo-eco.org/CBPS_Document.pdf.

¹⁶ Canadian Examiners in Optometry, “Frequently Asked Questions” (question 2 and others), www.ceo-eco.org/faq.asp.

¹⁷ See, for example, Manitoba Association of Optometrists, “TPAs,” <http://optometrists.mb.ca/tpas.htm>.

¹⁸ The Manitoba Association of Optometrists claims on its website (ibid) that optometrists provide approximately 77 percent of primary eye care, although whether this is a provincial or national estimate is unclear. In its consultation response of July 3, 2007, the Canadian Association of Optometrists stated that “there is no reliable national source to confirm the extent of primary eye care provided by optometrists throughout Canada. It can safely be stated that the majority of primary eye examinations are performed by optometrists.”

¹⁹ Canadian Association of Optometrists, “Career Information,” www.opto.ca/en/public/03_optometry/03_03_career_info.asp.

The amount of eye care coverage varies widely by jurisdiction. The *Canada Health Act* only allows physicians (ophthalmologists in the case of eye care) to be reimbursed and leaves each province and territory to decide which services to cover.²⁰ While most provinces cover annual eye exams for residents younger than age 18 and older than age 65, Prince Edward Island, Northwest Territories, and Newfoundland and Labrador do not cover any optometry services.²¹ Several provinces, including British Columbia, Alberta, Manitoba and Ontario, cover medically necessary eye exams for all ages.²² Similarly, Saskatchewan and Quebec are among the majority of jurisdictions that provide extended coverage to those with limited incomes.²³

As illustrated in Table 1, average household spending on prescription eyewear varies by province and territory. For example, in 2005, it ranged from a low of \$95 in Prince Edward Island to a high of \$175 in Alberta, while the average across Canada was \$135.²⁴

Table 1: Average household expenditure on prescription eyewear

Province or territory	2000	2001	2002	2003	2004	2005
Alberta	\$158	\$153	\$152	\$148	\$176	\$175
British Columbia	119	116	111	113	147	139
Manitoba	117	117	120	122	128	140
New Brunswick	101	92	102	97	108	104
Newfoundland and Labrador	92	96	91	94	99	97
Northwest Territories	n/a	97	n/a	105	n/a	148
Nova Scotia	102	90	92	93	103	103
Nunavut	n/a	68	n/a	117	n/a	102
Ontario	120	105	117	106	126	117
Prince Edward Island	90	85	88	88	103	95
Quebec	122	136	130	144	156	153
Saskatchewan	120	127	136	124	126	136
Yukon	n/a	187	n/a	127	n/a	127
Canada	\$122	\$119	\$122	\$121	\$140	\$135

Source: Statistics Canada, Annual, Table 203-0008, "Survey of household spending, household spending on health care, by province and territory, annual."

Note: In 1999 and every second year thereafter starting in 2001, statistics for Canada include the territories. For the other years, national statistics only include the 10 provinces. Data from the 2001, 2002, and 2003 Survey of Household Spending have been re-weighted using 2001 Census weights.

²⁰ Alberta College of Optometrists, consultation response, June 27, 2007.

²¹ Prince Edward Island, "In-Province Medical Services that are Not Insured,"

www.gov.pe.ca/infopei/onelisting.php3?number=76273; Northwest Territories, "Physician Services," www.hlthss.gov.nt.ca/Features/Programs_and_Services/health_care/physician_services.asp; Newfoundland and Labrador, "Medical Care Plan," www.health.gov.nl.ca/mcp/html/mcp.htm.

²² British Columbia, "Supplementary Health Care Benefits," www.healthservices.gov.bc.ca/msp/infoben/benefits.html#eyeexam;

Alberta, "Health Care Insurance Plan," www.health.gov.ab.ca/ahcip/ahcip_othercare.html; Manitoba, "Are You Covered?"

www.gov.mb.ca/health/mhsip/; Ontario, "Health Services," www.health.gov.on.ca/english/public/pub/ohip/services.html.

²³ Saskatchewan, "Fully Covered Services," www.health.gov.sk.ca/ps_coverage_full.html; Health Canada, "Chapter 3: Quebec, *Canada Health Act Annual Report, 2004–2005*, p. 89, www.hc-sc.gc.ca/hcs-sss/alt_formats/hpb-dgps/pdf/cha-lcsra-0405-qc_e.pdf. In its consultation response of July 3, 2007, the Canadian Association of Optometrists wrote, "Coverage for patients on social assistance is provided in the majority of Provinces."

²⁴ Statistics Canada, Annual, Table 203-0008, "Survey of household spending, household spending on health care, by province and territory, annual."

Supply

In 2001, there were approximately 3,720 optometrists in Canada, 89 percent of whom were self-employed and 89 percent of whom worked full time.²⁵ In 2006, there were approximately 2,182 optometrists' offices in Canada.²⁶ Table 2 shows the distribution of optometrists by province in 2001.

The schools of optometry in Canada have capacity for 533 optometry students (overall in the four or five years of the Doctor of Optometry program). Students from 17 U.S. schools of optometry may also qualify to work in Canada.²⁷

Table 2: Number of optometrists, 2001

Province	Employment type		
	Total employed	Self-employed	Firm-employed
Alberta	295	210	85
British Columbia	410	325	85
Manitoba	115	85	30
New Brunswick	120	100	20
Newfoundland and Labrador	35	30	5
Nova Scotia	95	80	15
Ontario	1,315	1,085	230
Prince Edward Island	10	10	0
Quebec	1,205	985	220
Saskatchewan	115	105	10
Canada	3,715	3,015	700

Source: Statistics Canada, "Employee Statistics for NOCS D012 Optometrists," 2001, and 2001 Census.

Restrictions and recommendations

Market entry restrictions

Entering the profession

Prospective optometrists must complete at least three years of prerequisite college or university courses, including those in mathematics, and the physical and biological sciences, as well as a four- or five-year university Doctor of Optometry (OD) program.²⁸

Graduates of the OD program must then satisfy the licensing requirements of a provincial or territorial college of optometry in order to practise. Included in these requirements are successful completion of a national examination (except in Quebec) and, typically, a province- or territory-specific jurisprudence examination.

Most provinces require practising optometrists to keep their skills and qualifications up to date by completing continuing education for licence renewal. For example, optometrists

²⁵ Information presented in this section is for optometrists, as defined by Statistics Canada in the National Occupational Classification for Statistics 2001 (NOC-S 2001) D021. This is the most disaggregated level of data available for Canada.

²⁶ Statistics Canada, "Employment Size Ranges for NAICS 621320—Offices of Optometrists," 2006, custom request. There were 2,178 optometrists' offices across the 10 provinces and four offices in the territories.

²⁷ Canadian Association of Optometrists, "Career Information," see note 19, above.

²⁸ On its website, the Canadian Association of Optometrists states that the OD is a four-year program with the prerequisite of one to three years of college or university mathematics and science courses (Canadian Association of Optometrists, *ibid*). However, in its consultation response of July 3, 2007, the Association clarified that this level has increased to that mentioned above.

in Manitoba must complete 30 hours of continuing education every two years.²⁹ In Nova Scotia, optometrists must complete 45 hours of continuing education every three years.³⁰

Successful completion of a province- or territory-specific jurisprudence exam and a national exam are reasonable licensing requirements and pose no concern from a competition standpoint. The current continuing education requirements are not particularly onerous and appear to be fairly similar across the country. As long as these requirements are directly linked to the need to update skills and are applied similarly to all optometrists, incumbents and new entrants alike, they do not raise competition concerns. However, education requirements and accreditation of optometry programs are another matter, in a number of regards.

The authority to accredit all OD programs in Canada and the United States rests with the U.S.-based Accreditation Council on Optometric Education, which comprises nine members of the American Optometric Association and two public members.³¹ While standardization may bring some benefits, from a competition perspective, the fact that an American organization accredits Canadian schools may pose a risk that the accreditation policies are formed and evolve based on conditions of supply and demand in the U.S. and do not necessarily reflect conditions in Canada. Therefore, it is critical that this accreditation process include a mechanism by which to feed in the relevant Canadian information. One such mechanism might be Canadian representation on the Council.

Recommendation

Provincial and territorial colleges of optometry should consider ways to ensure that conditions of supply and demand in Canada are taken into account in the formulation and development of the Accreditation Council on Optometric Education's accreditation policies.

In Canada, prospective optometrists face significant entry restrictions because of the limited number of accredited schools of optometry. There are 19 accredited schools in North America, only two of which are in Canada: the University of Waterloo (English program) and the Université de Montréal (French program).³² Although Canada recognizes the 17 accredited schools in the United States, the cost of studying optometry in the U.S. is nearly three times that in Canada, ranging from \$175,000 to \$200,000 there, compared to \$60,000 to \$70,000 here.³³ In light of this substantial cost gap, the likely choice for many prospective Canadian optometrists is one of the two accredited Canadian schools.³⁴

²⁹ The consultation response from the Manitoba Association of Optometrists, June 25, 2007, indicates that Manitoba's requirement for continuing education has just been increased to comply with the national objective of 15 hours per year; therefore, effective January 1, 2007, Manitoba optometrists must have 30 hours per two-year reporting period (up from 20 hours).

³⁰ Nova Scotia College of Optometrists, questionnaire response, question 4.11.

³¹ American Optometric Association, "ACOE Membership," www.aoa.org/x5154.xml.

³² American Optometric Association, "Why Choose Optometry," www.aoa.org/x5130.xml.

³³ Canadian Association of Optometrists, "Career Information," note 19, above.

³⁴ The July 3, 2007, consultation response from the Canadian Association of Optometrists says, "According to the most recent annual report from the Association of Schools and Colleges of Optometry, there were 348 Canadians enrolled in 15 US Optometry School programs in 2006." The fact that Canadians are enrolled in U.S. schools does not contradict the likelihood that the cost gap has meant that for many students wishing to study optometry, attending a Canadian school is the only financially viable option.

With only two schools in Canada, competition for first-year spaces is substantial, and few students are admitted annually. For example, there were approximately 250 applicants in 2006 for the 85 first-year places in the University of Waterloo's program.³⁵ The competition for a place in the program at the Université de Montréal is even more intense, since that school accepts only 43 out of the approximately 600 applicants each year.³⁶ The Canadian Association of Optometrists has long advocated for a third school of optometry in western Canada and has written to provincial ministries of education in support of such a school.³⁷

Recommendation

The provincial ministries of education should review the current number of university places for optometry students to determine whether it is adequate to meet current and future demand for optometry services in Canada.

While the OD degree has been a four- or five-year program for some time, the prerequisite level of education has been increasing. To meet new ACOE standards, applicants to the School of Optometry at the University of Waterloo will require at least three years of pre-optometry university education (up from two years), as of 2008.³⁸

These rigorous minimum entry qualifications and the limited number of university places are barriers to entry to the optometry profession, since they increase both the direct and opportunity costs of pursuing a career in optometry. As such, any further increase in minimum entry qualifications combined with the restriction on university places protects incumbents from vigorous competition. Nonetheless, a certain level of qualification is most certainly required to ensure service quality and to protect consumers. Therefore, decisions surrounding entry requirements must involve a trade-off between consumer protection and sufficient supply of the service (which also protects consumers by ensuring access to the service). As entry requirements become more demanding, the incremental benefits to consumers in the form of quality control diminish. At the same time, the costs to consumers resulting from restricted competition and reduced access escalate.

Recommendation

The provincial and territorial colleges of optometry must justify any proposed increase in the required entry qualifications for prospective optometrists as being the minimum necessary for consumer protection.

Mobility

Interprovincial mobility

The majority of the provincial colleges of optometry have signed a mutual recognition agreement (MRA) to remove unnecessary barriers to mobility of qualified optometrists

³⁵ University of Waterloo, "Undergraduate Calendar for 2007–2008," www.ucalendar.uwaterloo.ca/SCI/optometry.html.

³⁶ Université de Montréal, "Programme Doctorat en optométrie," www.opto.umontreal.ca/doctorat_optometrie/etudiants_etrangers.html.

³⁷ Canadian Association of Optometrists, consultation response, July 3, 2007.

³⁸ University of Waterloo, "Changes to Academic Prerequisites," www.optometry.uwaterloo.ca/prospective/od/changes.html.

and to establish the conditions under which optometrists licensed in one jurisdiction may have their qualifications recognized in another.³⁹

The signatories to the MRA have agreed to the following: that the basic scope of practice for optometrists is similar in each jurisdiction, that the requirements for licensing are having the OD degree from an accredited school and passing the Canadian Standard Assessment in Optometry, and that there are no residency requirements.

Those provinces and territories that have not signed the MRA impose restrictions on mobility that prevent optometrists from effectively responding to changes in demand across jurisdictions. Such restrictions may lead to a significant misallocation of optometrists in Canada.

Recommendation

Every province and territory should sign the Mutual Recognition Agreement (MRA) to facilitate the movement of optometrists throughout Canada. Non-signatories should clearly articulate the features of the MRA that are currently preventing them from signing on to the agreement so that *all* provincial and territorial colleges of optometry can cooperate in order to extend the MRA to the rest of the provinces and territories.

International mobility

To practise in Canada, optometrists with a degree from an accredited school in the United States must write the Canadian Standard Assessment in Optometry exam and comply with provincial or territorial licensing requirements. International practitioners who do not have a degree from an accredited school must have their qualifications assessed through the University of Waterloo's International Optometric Bridging Program (IOBP).⁴⁰ The IOBP assesses candidates' academic qualifications and prior learning, and subsequently refers them to one of the following:

- a one-month orientation program (Bridging One);
- a year-long structured academic program (Bridging Two); or
- a four-year Doctor of Optometry program (when their academic qualifications are assessed as being inadequate).⁴¹

The ultimate goal of the bridging program is to prepare foreign-trained optometrists for the CSAO exam, which is required for licensing in Canada.

All provinces and territories in Canada currently recognize the IOBP.⁴² That they have done so is encouraging, since it clarifies the qualification process for international

³⁹ According to the copy of the MRA found on the Alberta College of Optometrists website (www.collegeofoptometrists.ab.ca/pdf/MRA.pdf), the signatories are Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia and Prince Edward Island. As of 2001, British Columbia, Newfoundland and Labrador and the three territories had not signed the MRA.

⁴⁰ University of Waterloo, "International Optometric Bridging Program," www.optometry.uwaterloo.ca/iobp.

⁴¹ The costs for IOBP assessments and the two bridging programs are as follows: \$750 for the academic qualification assessment; \$950 for the prior learning assessment; \$3,000 for Bridging One; and \$30,000 for Bridging Two. Costs listed in the application package available from the University, www.optometry.uwaterloo.ca/iobp/applicationrequest.html.

⁴² Ibid.

practitioners. In general, when assessing foreign qualifications, there should be no discrimination between qualified domestic and foreign applicants other than on the grounds of competence; based on the information available to the Bureau, the international bridging program at Waterloo seems consistent with this objective.⁴³

Overlapping services and scope of practice

Every service optometrists offer is also available from either opticians or ophthalmologists.⁴⁴ For example, optometrists and opticians may both fill prescriptions and sell eyeglasses and other eyewear. In addition, optometrists and ophthalmologists may both diagnose and treat certain eye pathologies and give eye tests.⁴⁵ Given these areas of overlap, optometrists do not have an outright monopoly on any particular service. However, optometrists are the main providers of primary eye care and reportedly possess a majority market share in this area.⁴⁶

There is an ongoing debate in Canada about whether opticians should be allowed to conduct sight testing independently and use the test results to dispense eyeglasses. These services are currently the domain of optometrists and ophthalmologists.⁴⁷ This debate has been fuelled by the development of accurate and reliable technology that allows for automated refraction, a computerized assessment of visual acuity and determination of the need for, and strength of, corrective lenses.⁴⁸

Optometrists do not have exclusive rights to conduct refraction (also known as sight testing); therefore, it is not outside of opticians' scope of practice.⁴⁹ Rather, it is the prescribing of eyewear based on the results of a sight test that only optometrists and physicians, including ophthalmologists, may do. In British Columbia and Alberta, some opticians perform sight tests; however, opticians may only dispense eyeglasses based on the results of these tests when a medical practitioner reviews the results and authorizes them for use in the dispensing of eyewear.⁵⁰

⁴³ The consultation response from the Ordre des Optométristes du Québec, July 4, 2007, stated that a similar French program is currently being developed for foreign-trained optometrists that will allow them to have their credentials assessed and recognized so they may practise optometry in Quebec.

⁴⁴ New Brunswick Association of Optometrists, questionnaire response, question 4.3.

⁴⁵ American Academy of Ophthalmology, note 7, above.

⁴⁶ See note 18, above.

⁴⁷ The consultation response from the British Columbia Association of Optometrists, July 6, 2007, stated that proposals on this issue have been considered and rejected in other jurisdictions, including Alberta in 2003 and, most recently, Ontario in 2006.

⁴⁸ For example, EyeLogic™ is "an automated system that connects and combines data from ophthalmic equipment to produce detailed and accurate refraction results" ("The EyeLogic System," www.eyelogic.com/system.htm). A study conducted by the creators of EyeLogic™ and published in the *Journal of Telemedicine and Telecare* suggests "an absence of operator influence on the results of the refractions and a degree of consistency and accuracy compatible with the prescription of lenses" (Ingenta, "A Fully Automated Remote Refraction System," abstract, www.ingentaconnect.com/content/rsm/jtt/2000/00000006/A00204s2/art00007). See also College of Opticians of British Columbia, "Information for the Public," www.cobc.ca/Automated_Refraction.aspx.

⁴⁹ "Refractometry [conducting a sight test] describes the act of measuring the refractive error of the eye for the purposes of a sight test. It includes the determination of values to describe the power of the lenses required to focus light on a patient's retina. Refractions are used in combination with ocular health and binocular assessments to diagnose the cause of vision impairments and, if necessary, the most appropriate eyewear prescription" (Health Professions Regulatory Advisory Council, *Regulation of Health Professions in Ontario: New Directions*, p. 280, www.hprac.org/en/reports/resources/New_Directions_April_2006_EN.pdf). On permissions, see Opticians Association of Canada, "Vision Testing by Opticians in BC: Frequently Asked Questions," www.opticians.ca/consumers/faq.asp and American Academy of Ophthalmology, note 7, above.

⁵⁰ Bureau communication with Mary Field, Chief Administrative Officer of the Opticians Association of Canada, April 13, 2007. In Alberta, opticians are only permitted to do this as employees of physicians. The physician may be in a remote location, and the opticians are not restricted in the equipment they may use. Opticians need not be employees of physicians in B.C.; however, they must only use automated sight testing equipment.

A clear distinction between a sight test and an eye health exam is very important to this discussion. A sight test measures visual acuity, whereas a complete eye health exam, in addition to measuring vision, considers possible underlying health problems to provide a detailed evaluation of the patient's overall eye health.⁵¹

Opponents of allowing opticians to perform sight tests do not claim there is any danger in the test itself and agree that measuring refraction is simply a data-gathering procedure that involves no medical expertise. Instead, their concern lies in missed pathology, since opticians conducting the sight test could assume that simple refractive error is the cause of blurred vision without doing more detailed investigation.⁵²

There is currently a proposal in British Columbia to allow opticians to perform independent automated sight testing that attempts to address the concern about missed pathology.⁵³ This proposal includes a detailed screening process that carefully distinguishes between individuals with high and low risks for significant eye problems and establishes strict guidelines for eligibility. Through this screening process, opticians would be allowed to offer sight tests to healthy adults who have no risk factors for underlying health problems. Furthermore, if enacted the proposal would allow opticians, for the first time, to make small modifications to an eligible candidate's lens power. The proposal also includes rules that would require opticians to properly inform the public of the distinction between a sight test and a complete eye health exam.

The strength of this proposal lies in the screening process, which appears to be quite comprehensive and deserves a closer look. Under the existing guidelines of the College of Opticians of British Columbia, potential clients with the following conditions are screened out and not eligible for automated refractions:

- those older than 65, since the leading causes of visual impairment are age-related;
- those with specific illnesses and health conditions, such as diabetes, macular degeneration, cataracts and cardiovascular disease, unless already under a doctor's care;
- those at high risk for retinal detachment due to conditions such as hypertension, recent trauma to the head or recent pain in the eye, or people with lens prescriptions of greater than a specified strength;⁵⁴
- those with specific visual symptoms, such as the recent onset of floaters, halos, distortion, double vision or flashing lights; and
- those who have had any eye surgery.⁵⁵

⁵¹ For a more detailed discussion of the distinction between a sight test and a complete eye health exam, see College of Opticians of British Columbia, *Sight Testing Client Brochure*, www.cobc.ca/my_folders/Legislation/SightTestCard.pdf.

⁵² In its consultation response of July 3, 2007, the Canadian Association of Optometrists describes this concern. See also Health Practices Regulatory Advisory Council, note 49, above, p. 287.

⁵³ In March 2004, the government of British Columbia announced its intention to amend regulation for opticians in the manner described in this section. (For details on the proposed amendment, see College of Opticians of British Columbia, note 48, above). However, the British Columbia Association of Optometrists said in its consultation response of July 6, 2007, that this proposal is not under active consideration.

⁵⁴ Defined as +8.00 diopters or -10.00 diopters.

⁵⁵ Council of Optometrists of British Columbia, "Frequently Asked Questions: Who is not eligible for an automated refraction?" www.cobc.ca/Automated_Refraction.aspx.

Potential clients are also screened based on the results of their sight tests and referred to ophthalmologists or optometrists for eye health exams when they cannot achieve vision of at least 20/30 or when their vision shows a change of more than a predetermined acceptable amount.⁵⁶

Importantly, the Canadian Ophthalmological Society has issued recommendations for the frequency of eye examinations by age group and type of patient.⁵⁷ For low-risk patients exhibiting no symptoms of underlying health problems, the following frequencies are recommended for the age groups eligible for sight testing under the B.C. proposal:

- age 19–40 years: at least every 10 years;
- age 41–55 years: at least every five years; and
- age 56–65 years: at least every three years.

Proponents of expanding opticians' scope of practice to include sight testing argue that it will increase the efficiency and accessibility of the eye care team and provide low-risk consumers with a convenient, low-cost option for getting their eyes checked. The majority of Canadians seeking optometric services do so because they want to update their eyewear and wish to know whether their prescription has changed before spending money on new corrective lenses.⁵⁸ For clients with these demands, and who do not have underlying health problems or eye-health risk factors, it seems onerous and would be overly expensive to require them to revisit an optometrist or ophthalmologist for a complete eye health exam every time they want their vision tested. It is plausible that a process that is more expensive and involved than necessary would result in some individuals failing to update their eyewear or have their vision tested.

Recommendation

Regulators should determine the overall costs and benefits of extending opticians' scope of practice to include measuring refractive error for low-risk consumers and dispensing eyewear based on the results, including the potential costs in terms of public safety and the potential benefits in terms of lower prices, increased choice and consumer access to eye care services.

A second scope of practice issue concerns the initiative by optometrists to be permitted to prescribe therapeutic pharmaceutical agents (TPAs) throughout Canada. Optometrists are now permitted to prescribe TPAs in seven jurisdictions in Canada, while all 50 states in

⁵⁶ Defined as more than plus or minus one diopter in a six-month period or a total change of more than two diopters from the original prescription.

⁵⁷ For the complete list of recommendations for all age groups and patient types, go to Canadian Ophthalmological Society, *Canadian Ophthalmological Society evidence-based clinical practice guidelines for the periodic eye examination in adults in Canada*, p. 43, http://eyesite.ca/english/program-and-services/policy-statements-guidelines/CPG-periodic-eye-exam_e.pdf.

⁵⁸ This fact is revealed in *Health Canada Statistical Report on the Health of Canadians 1996–1997*. The findings of this report are outlined in *Submission to the Health Professions Regulatory Advisory Council by The Ontario Opticians Association and The Opticians Association of Canada*, April 29, 2005, [www.opticians.ca/images/prof/content/OOA_OAC_Submission_to_HPRAC_April_29_2005_1\[1\].pdf](http://www.opticians.ca/images/prof/content/OOA_OAC_Submission_to_HPRAC_April_29_2005_1[1].pdf).

the United States allow it. TPAs are prescription medications used to treat glaucoma, eye infections, eye inflammation, eye allergies and superficial eye injuries.⁵⁹

Until recently residents of Ontario were among the four percent of the combined populations of Canada and United States that did not have access to prescriptions for TPAs through optometrists.⁶⁰ In light of this, the Ontario Association of Optometrists recommended an amendment to the province's *Optometry Act* to authorize optometrists to prescribe TPAs and an amendment to the regulations governing optometrists' scope of practice to allow treatment with TPAs. This amendment recently became law.⁶¹

Those remaining jurisdictions where optometrists are not authorized to prescribe TPAs should look to the experience of those jurisdictions that allow it. For example, optometrists in Alberta have been diagnosing, treating and managing glaucoma and other diseases, disorders and conditions of the eye since that province's TPA legislation passed in 1996, with not a single complaint or lawsuit filed.⁶²

Recommendation

Regulators in those provinces and territories that continue to prohibit optometrists from prescribing therapeutic pharmaceutical agents should assess the necessity of such restrictions in light of their relaxation in most of Canada and the United States. As with the recommendation to review the proposed extension of opticians' scope of practice, the costs and benefits of any such extension for optometrists should be carefully considered.

From a competition standpoint, expanding the scope of practice of a profession is favourable when it can be done safely and effectively. Such expansion directly benefits consumers whose range and choice of services and providers increases. Furthermore, as areas of professional overlap broaden, competition between service providers intensifies, placing downward pressure on prices and enhancing the environment for the promotion and maintenance of quality service and innovation.

Market conduct restrictions

Advertising

Advertising by optometrists is regulated in Canada, although the specific advertising restrictions vary by province and territory.⁶³

The colleges of optometry each have a section in their respective legislation allowing them to regulate advertising and to establish what they consider to be reasonable

⁵⁹ According to Manitoba Association of Optometrists, "TPAs," www.optometrists.mb.ca/tpas.htm, optometrists are permitted to prescribe TPAs in Alberta, Saskatchewan, New Brunswick, Nova Scotia, Quebec, Yukon and, most recently, Ontario. The fact that Ontario was recently added to this list is from Alberta College of Optometrists, consultation submission, June 27, 2007.

⁶⁰ Proposal to expand the scope of practice of optometry in Ontario, Ontario Association of Optometrists, submitted to the Health Professions Regulatory Advisory Council, April 2005.

⁶¹ Bill 171, the *Health Systems Improvement Act*, received Royal Assent on June 4, 2007. The Act adds the controlled act of "prescribing drugs as prescribed in regulation" to the list of therapeutic drug prescribing privileges in the *Optometry Act, 1991*. With this, Ontario becomes the seventh province to allow optometrists to prescribe therapeutic drugs; the provincial government will now have to develop regulations to support this. Canadian Association of Optometrists, consultation submission, July 3, 2007.

⁶² Alberta College of Optometrists, consultation submission, June 27, 2007.

⁶³ Several consultation submissions indicated that many restrictive advertising guidelines and regulations are currently being updated. According to the July 3, 2007, consultation submission from the Canadian Association of Optometrists, "several provinces have proposed more modern changes that still await government approval."

guidelines.⁶⁴ Restrictions fall into two categories: content of advertising and type of advertising, with the former being the more restrictive of the two.

While it can be argued that the purpose of advertising restrictions is to protect consumers from false or misleading information, such restrictions also have the potential to limit the availability of legitimate information that benefits consumers and competition.

Several provincial and territorial optometry restrictions state that advertising must be truthful, dignified, in good taste and not misleading; however, many go beyond this.⁶⁵ For example, Nova Scotia, Ontario and Quebec also explicitly prohibit testimonials and endorsements.⁶⁶ Price advertising is not allowed in British Columbia, New Brunswick, Nova Scotia or Saskatchewan.⁶⁷ When advertising a price reduction or discount in Quebec, optometrists must place more emphasis on the good or service than on the discount.⁶⁸ In New Brunswick, consumers must not be able to see any notices about discounts on optometrist fees from outside optometrists' offices.⁶⁹ Ontario prohibits optometrists from being mentioned in non-members' advertising or listings.⁷⁰ Conversely, Nova Scotia prohibits the use of outside logos or business names on optometrists' advertising.⁷¹

While there are few regulations about the type or method of advertising, those that do exist appear overly restrictive and seem to go beyond what is necessary to protect the public from harm. Both British Columbia and Ontario prohibit displaying either merchandise or optical materials outside buildings where optometrists practise.⁷² British Columbia further prohibits optometrists from displaying their licence or diplomas where consumers can read them from outside optometry offices.⁷³ In Ontario, optometrists may not attempt to solicit patients through personal contact or communication with potential patients.⁷⁴ Optometrists' advertising in Nova Scotia may only use means of communication that are equally available to all members.⁷⁵ Nova Scotia also forbids direct mail campaigns.⁷⁶

Of particular concern from a competition standpoint are restrictions on comparative advertising, which most jurisdictions ban, especially advertisements that claim that one

⁶⁴ For example, the British Columbia *Optometrists Act* [RSBC 1996], c. 342, s. 10(1)(j), gives the Board of Examiners in Optometry the power to make rules regulating advertising by optometrists.

⁶⁵ See, for example, Prince Edward Island, *Optometry Act*, R.S.P.E.I. 1988, c. O-6, s. 23, and Alberta, *Optometry Profession Standards of Practice Regulation*, Alta. Reg. 389/1985, s. 16.

⁶⁶ Nova Scotia Association of Optometrists, *By-laws*, s. 46(c); Ontario, *Optometry Act*, 1991, O. Reg. 859/93, s. 1, item 25(v); Quebec, *Code of ethics of optometrists*, R.Q. c. O-7, r.2.2, s. 51.03.

⁶⁷ See, for example, Nova Scotia Association of Optometrists *By-laws*, s. 45(d).

⁶⁸ Quebec, note 66, above, s. 51.10(4).

⁶⁹ New Brunswick Association of Optometrists, *Optometric Guidelines for Promotional Activities as proposed by the advertising policies review committee for the New Brunswick Association of Optometrists*, p. 5 (provided with questionnaire response).

⁷⁰ *Optometry Act*, 1991, O. Reg. 859/93, s. 1, item 24(ix).

⁷¹ Nova Scotia Association of Optometrists, *By-laws*, s. 46(g).

⁷² Ontario, *Optometry Act*, 1991, O. Reg. 859/93, s. 1, item 43; Board of Examiners in Optometry, *Province of British Columbia Rules*, s. 34.

⁷³ Board of Examiners in Optometry, *ibid.*

⁷⁴ *Optometry Act*, 1991, O. Reg. 859/93, s. 1, item 44.

⁷⁵ Nova Scotia Association of Optometrists, note 71, above, s. 44.

⁷⁶ Nova Scotia College of Optometrists, questionnaire response, question 5.4.

licensed optometrist is superior to another.⁷⁷ Such restrictions impede competition between optometrists and make it particularly difficult for new optometry practices to advertise their unique features, thus protecting existing optometrists from competition.

Restrictions on comparative price advertising likely reduce consumer welfare by leading to price increases, since optometrists have little or no incentive to compete on price when they are prohibited from informing consumers that they have lower prices than their competitors. Additional possible costs of restrictions on comparative advertising include higher consumer search and information-gathering costs, and consumers' making purchasing decisions that they might not otherwise have made had they been more fully informed. In fact, the last of these could include consumers deciding not to purchase optometry services at all.

Recommendation

Provincial and territorial colleges of optometry should review existing restrictions on advertising and remove those that go beyond prohibiting false or misleading advertising. The restrictions that colleges maintain should be clearly linked to a reduction in consumer harm.

Pricing and compensation

Several colleges and associations of optometry publish suggested fee schedules for optometry services, all of which are claimed to be non-binding. The nature of these fee schedules, as well as their effect on prices, varies by province. For example, the Alberta Association of Optometrists publishes a non-binding suggested fee schedule each year, although members do not always respect it in practice.⁷⁸ In New Brunswick, the pricing guide is also non-binding, but members always respect it in practice.⁷⁹ The Manitoba Association of Optometrists bases its suggested fees on surveys and reviews them annually.⁸⁰ The Ontario Association of Optometry publishes a fee schedule as a guide but gives optometrists discretion to adjust fees on an individual basis.⁸¹ Nonetheless, it is professional misconduct to charge fees that are excessive or unreasonable or to neglect to notify patients prior to procedures when fees are higher than the suggested ones.⁸² Although Saskatchewan and Prince Edward Island have fee guides, actual fees are on average lower than the suggested ones, which are set by competition.⁸³ As in Manitoba, there are no restrictions on contingency fees or other related pricing arrangements in Saskatchewan.⁸⁴

⁷⁷ See, for example, Manitoba Association of Optometrists, *By-Law No. 1/06*, s. 16, provided by the Manitoba Association of Optometrists in its questionnaire response, questions 5.3 and 5.4.

⁷⁸ Alberta College of Optometrists, questionnaire response, questions 5.1 and 5.2, September 13, 2006.

⁷⁹ New Brunswick Association of Optometrists, questionnaire response, questions 5.1 and 5.2.

⁸⁰ Manitoba Association of Optometrists, questionnaire response, questions 5.1 and 5.2.

⁸¹ Ontario Association of Optometrists sent a guide in response to the questionnaire, September 20, 2006. Its 2006 *Suggested Schedule of Professional Fees* makes this statement in the introduction.

⁸² *Optometry Act*, 1991, O. Reg. 859/93, s. 1, items 33, 34.

⁸³ Questionnaire responses from the Prince Edward Island College of Optometry and Saskatchewan Association of Optometrists, questions 5.1 and 5.2, August 19, 2006.

⁸⁴ Questionnaire responses from the Saskatchewan Association of Optometrists, August 19, 2006, and the Manitoba Association of Optometrists, questions 5.1 and 5.2.

From the Bureau's perspective, suggested fee schedules do not contravene the *Competition Act* when they meet two conditions: the schedules are in no way directives with nothing more than voluntary adherence expected; and departure from the fee schedule does not result in professionals being disciplined or disadvantaged in any way.

Nonetheless, the suggested fee schedules that groups of optometrists establish remain a source of unease from a competition standpoint. Furthermore, the Bureau has not been made aware of any rationale for the publication of suggested fee schedules for optometry services that directly targets a public interest objective. Conversely, the Bureau has no concern about individual optometry offices establishing and advertising their own fees, a practice that would likely encourage competition.

The formulation and implementation of suggested fee schedules by colleges and associations of optometry potentially risk facilitating collusion (either overt or tacit) on prices or promoting adherence to specified fees. This risk is augmented in the optometry profession by restrictions on comparative price advertising. Furthermore, the ability of optometrists to successfully restrict entry into the profession further increases the likelihood that the collusion will continue.

Collusion reduces consumer welfare through higher prices and, possibly, lower quality services than what would likely result from unrestricted competition. Given the negative consequences of collusion for consumers, it is vital for regulators to assess the potential benefits of suggested prices against this backdrop.

Recommendation

Colleges and associations of optometry should discontinue publishing suggested price lists, given their potential harm to competition, in favour of allowing individual optometrists to set their own prices.

Business structure

Optometrists in Canada face an array of restrictions on the business structure of their optometry practices. For example, in Quebec, no optometrist may keep more than one office unless each is under the control or management of an optometrist.⁸⁵ In British Columbia, optometric corporations may not carry on any activity other than optometry and all voting shareholders must be optometrists.⁸⁶ In Ontario, only members of the optometry profession may establish an optometric corporation.⁸⁷ In Alberta and Quebec, optometrists are not allowed to divide, share, split or allocate fees for optometry services or materials with non-optometrists.⁸⁸

Restrictions discouraging or prohibiting optometrists from co-operating with non-optometrists are prevalent throughout Canada. Most troublingly, some provinces restrict

⁸⁵ *Optometry Act*, R.S.Q. c. O-7, s.1.

⁸⁶ Board of Examiners in Optometry, note 72, above, s. 64.3 and 64.4.

⁸⁷ *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18, s. 85.8.

⁸⁸ Alberta, *Health Professions Act*, R.S.A. 2000, c. H-7, s. 98(1)(f); Quebec, *Code of ethics of optometrists*, R.Q. c. O-7, r.2.2 s. 33(1). The consultation submission from the Ordre des Optométristes du Québec stated that a new rule has been proposed that would allow Quebec optometrists to share revenue in this way; however, this amendment still has to be reviewed by the Office of the Professions of Quebec and approved by the provincial government.

the ability of optometrists to have any interest in, or agreement with, ophthalmic outlets, firms, dispensaries or laboratories. The colleges of optometry often justify these rules as protecting against conflict of interest; however, optometrists are permitted to sell eyewear within their practice, a fact that substantially weakens the conflict of interest argument against collaboration with ophthalmic dispensers.

The restrictions in Ontario in this regard are particularly illustrative.⁸⁹ In Ontario, it is a conflict of interest for the public entrances and exits of optometrists' premises to be within or interconnecting with the premises of retailers, optical companies or ophthalmic dispensers. Furthermore, optometrists may not practise in association, partnership or otherwise with ophthalmic dispensers or any other persons or corporations except optometrists or legally qualified medical practitioners. Conversely, optometrists in Saskatchewan may operate as independent doctors of optometry within big-box dispensaries, such as those in Wal-Mart or Costco stores, "provided they maintain their professional identity and ensure ownership and confidentiality of the patient's clinical record."⁹⁰

Interestingly, rules preventing optometrists from entering into business arrangements with non-optometrists that sell optical services or products were challenged in court in 1998. Costco and two optometrists who had been found to be operating in association with optical product retailers appealed their case to British Columbia Supreme Court.⁹¹ In finding that the rules violated the freedom of association guaranteed by the Canadian Charter of Rights and Freedoms and were invalid, the court noted the following:

The Board appears to presume that optometrists who sell what they prescribe will adhere to the standards of conduct set for the profession and be free of any adverse public perception regarding the independence of the advice they give. There is no evidentiary justification for assuming that other optometrists who may associate with non-optometrists will conduct or appear to conduct themselves any less professionally.⁹²

Given the complementarities between the activities of optometrists and opticians, it would be natural for members of both professions to work under the same roof. Such multidisciplinary arrangements would likely result in efficiencies not available to professionals working separately. Thus, by not allowing these relationships, the optometry profession is blocking the potential development of more efficient business models and future innovation. Moreover, these restrictions may discourage prospective optometrists from entering the market and also protect inefficient incumbent optometrists from competition from more efficient rivals. Accordingly, costs are likely being kept inefficiently high, resulting in higher prices to the consumer. A further anti-competitive result of these rules is that they force most optometrists into the same business model, thus ensuring that they all face a similar cost structure. This makes it less likely that meaningful competition or cost innovation will develop.

⁸⁹ *Drug and Pharmacies Regulation Act*, R.R.O. 1990, Reg. 550, s. 26(4)(c), 26(4)(e).

⁹⁰ Saskatchewan Association of Optometrists, consultation submission, June 18, 2007.

⁹¹ *Costco Wholesale Canada Ltd. v. British Columbia Association of Optometrists* (1998) B.C.J. No. 646.

⁹² *Ibid.*, para. 86.

Recommendation

Colleges of optometry should remove restrictions that prohibit or discourage optometrists from working in multidisciplinary arrangements with opticians.

Conclusion

Canada's aging population will substantially increase future demand for eye care services. Enhancing access to these services requires action on two fronts: increasing the number of eye care professionals and making more efficient use of existing professionals.

With respect to increasing the number of professionals, it may be that two schools of optometry in Canada are not enough. Indeed, the profession has been supportive of increasing the number of places in optometry programs at Canadian universities.⁹³ In addition to increasing the number of nationally trained optometrists, the profession should continue its efforts to facilitate qualified foreign-trained optometrists who wish to practise in Canada.

In order for existing professionals to be more effective, the colleges of optometry should remove restrictions that prohibit or discourage the development of more efficient business models—for example, naturally complementary arrangements between optometrists and opticians. This would allow the market for optometry services to benefit from vibrant competition between increasingly efficient rivals and drive improvements in quality and innovation.

To further enhance the effectiveness of existing professionals, it is paramount that all members of the eye care team—ophthalmologists, optometrists and opticians—be allowed to work to their full potential. As long as consumers are informed of the differences between the roles, functions and qualifications of various eye care professionals and the services each offers, it follows that each profession that can safely offer a service be authorized to do so. Although the Bureau does not have the expertise to identify the appropriate areas into which service providers could safely expand their scope of practice, it urges the colleges of optometry (which do possess such expertise) to undertake a detailed assessment of any proposed scope of practice expansion for all members of the eye care team.

Canada's aging population and heightened future demand for eye care, coupled with the various factors restricting supply in the optometry profession and overlapping service providers, speak loudly to the need for regulators to review restrictions in this area and ensure that competition is not being hampered unnecessarily.

⁹³ Canadian Association of Optometrists, consultation submission, July 3, 2007.

6. Pharmacists

Overview

Role and function

The public's perception of pharmacists is that their main function is to fill prescriptions written by medical doctors. But in recent years, pharmacists have become involved in a broader spectrum of health care concerns, such as giving advice to patients, supporting local health groups (e.g. lung and diabetes associations), offering counselling clinics on specific topics (e.g. smoking cessation, weight loss and diabetes), identifying, resolving and preventing medication-related problems, identifying instances in which medications are insufficient to deal with patients' needs, and ensuring that Canadians receive the best possible drug therapy. This has led pharmacists to see themselves as professionals responsible for patients' optimal use of drugs.¹

Pharmacists work in a variety of settings: community settings, such as health clinics, hospitals and other institutions (e.g. nursing homes), industry (i.e. pharmaceutical manufacturing companies), government, and education and research.² Most commonly, pharmacists work in independent, banner (non-franchises with a common corporate identity), franchise, chain, supermarket, and mass merchandiser and department store pharmacies. Pharmacists may be salaried employees or owner-operators.³

How the profession is regulated

All of the provinces allow pharmacists to self-regulate through governing bodies, most often called colleges or boards.⁴ For example, the Ontario College of Pharmacists, established and empowered by the *Pharmacy Act*, the *Regulated Health Professions Act*, the *Drug and Pharmacies Regulation Act*, and the *Drug Interchangeability and Dispensing Fee Act*, sets requirements for registration, licenses pharmacists, defines professional misconduct, sets standards of operation and regulates the practice of pharmacy in Ontario.⁵ In the three territories, government directly regulates pharmacists.

¹ Canadian Pharmacists Association, "How to Become a Pharmacist," www.pharmacists.ca/content/about_cpha/about_pharmacy_in_can/how_to_become/index.cfm.

² Ibid.

³ Rogers Publishing, Pharmacy Group, *Trends and Insights*, pp. 17, 20, www.mckesson.ca/documents/Trends_2005.pdf.

⁴ They are the College of Pharmacists of British Columbia, the Alberta College of Pharmacists, the Saskatchewan College of Pharmacists, the Ordre des pharmaciens du Québec, the New Brunswick Pharmaceutical Society, the Nova Scotia College of Pharmacists, the Prince Edward Island Pharmacy Board and the Newfoundland and Labrador Pharmacy Board. See Canadian Pharmacists Association, "Directory of Pharmacy Associations," www.pharmacists.ca/content/about_cpha/about_pharmacy_in_can/directory/associations.cfm?main_heading=Provincial%20Regulatory%20Authorities.

⁵ Ontario College of Pharmacists, "Who We Are," www.ocpinfo.com/client/ocp/OCPHome.nsf/web/About+OCP.

Provincial or territorial law and each provincial college or board defines the products and geographic areas in which pharmacists may trade. The geographic area corresponds to the province or territory in which pharmacists are located and licensed to practise.

Pharmacists' services are usually defined by the enabling legislation in each jurisdiction, although the precise definition varies. Some jurisdictions do not define the practice of pharmacy at all (Yukon, Northwest Territories, Nunavut, New Brunswick and Saskatchewan), while others (Quebec, for example) define it indirectly by specifying the activities in which pharmacists alone may engage.

The National Association of Pharmacy Regulatory Authorities represents the interests of the provincial and territorial regulators and promotes harmonization of regulations.

Overlapping services

There are no professionals who provide exactly the same services as pharmacists do because no other profession has the principal function of dispensing drugs by prescription. Although other professionals, such as nurse practitioners and dentists, may incidentally perform limited acts of dispensing, selling or supplying prescribed drugs in restricted circumstances, none performs the complete range of essential activities that pharmacists do.

Entering the profession

Individuals seeking to become licensed pharmacists in Canada usually must do the following:

- obtain a bachelor's degree in pharmacy from a Canadian university (there are currently nine Canadian universities with pharmacy schools);
- complete a national examination administered by the Pharmacy Examining Board of Canada (except in Quebec);⁶ and
- obtain practical experience through a training program (apprenticeship or internship).

Particular requirements vary from province to province, with fluency in either English or French generally being required.⁷

Market

Demand

Pharmacist services are provided to patients receiving drugs in hospital or as outpatients; therefore, the demand for these services depends on the demand for prescription drugs. As noted, the profession itself is becoming involved in a broader spectrum of health care concerns than ever before.⁸

⁶ Ordre des pharmaciens du Québec, consultation submission, July 6, 2007.

⁷ National Association of Pharmacy Regulatory Authorities, "Specific Provincial and Territorial Requirements and Application Information for Licensure," www.napra.org/docs/0/94/109.asp. In Prince Edward Island, a jurisprudence examination covering federal and provincial regulations, and practice standards is required (Prince Edward Island Pharmacy Board, consultation submission, June 1, 2007).

⁸ To this end, the National Association of Pharmacy Regulatory Authorities and the National Advisory Committee on Pharmacy Practice undertook a two-year review to make recommendations on the feasibility of a national specialty recognition program because there is currently no certified specialist program in the profession, although patients may request and pharmacists do provide

The demand is influenced by various factors, including demographic changes, disease patterns, new drug products and prescribing practices. Overall, spending on both prescribed and over-the-counter drugs has steadily risen. According to the Canadian Institute for Health Information, drug expenditures grew by 9.7 percent annually from 1997 to 2004, when they reached \$21.8 billion, and were expected to reach \$25.5 billion by 2006.⁹

The geographic market for pharmacist services is likely to be limited, since retail consumers usually fill prescriptions near their homes or receive prescription drugs while in hospital. The only exceptions to this are consumers who purchase drugs from Internet pharmacies.

Supply

Across Canada, as of January 1, 2007, there were 29,699 pharmacists licensed to practise in a patient care setting across Canada (see Table 1) and 7,889 licensed community pharmacies.¹⁰

Table 1: Number of pharmacists in Canada, as of January 1, 2007

Province or territory	Number of pharmacists (percentage of national total)
Alberta	3,532 (11.9 percent)
British Columbia	4,071 (13.7 percent)
Manitoba	1,136 (3.8 percent)
New Brunswick	648 (2.2 percent)
Newfoundland and Labrador	556 (1.9 percent)
Northwest Territories	23 (0.1 percent)
Nova Scotia	1,087 (3.7 percent)
Nunavut	17 (0.1 percent)
Ontario	10,183 (34.3 percent)
Prince Edward Island	157 (0.5 percent)
Quebec	7,057 (23.7 percent)
Saskatchewan	1,195 (4.0 percent)
Yukon	37 (0.1 percent)
Total	29,699

Source: National Association of Pharmacy Regulatory Authorities.¹¹

specialized services. National Association of Pharmacy Regulatory Authorities, "A Regulatory Framework for Recognizing and Certifying Pharmacist Specialists in Canada—May 2003," www.napra.org/docs/0/95/715.asp.

⁹ Canadian Institute for Health Information, National Health Expenditure Database, "Drug Expenditure in Canada 1985 to 2006," pp. 6 and 5, http://secure.cihi.ca/cihiweb/products/Drug_Expenditure_in_Canada_2007_e.pdf.

¹⁰ National Association of Pharmacy Regulatory Authorities, "National Statistics," www.napra.ca/docs/0/86/363.asp. *Patient care setting* refers to setting where pharmacists come into direct contact with patients, for example, retail, hospital and nursing home pharmacies. Licensed community pharmacies are retail pharmacies open to the public, unlike hospital pharmacies, which only serve the needs of hospital patients.

¹¹ The figures cited above from the National Association of Pharmacy Regulatory Authorities may vary from figures provided by various provincial organizations. For example, according to the consultation submission from the Ordre des pharmaciens du Québec (July 6, 2007), there were 6,908 pharmacists in Quebec as of March 31, 2006. Likewise, the Ontario College of Pharmacists consultation submission (June 26, 2007) indicated that on December 31, 2006, there were 10,713 pharmacists licensed in that province. The Prince Edward Island Pharmacy Board consultation submission (June 1, 2007) reported that the province has 158 licensed pharmacists. The consultation submission of the Alberta College of Pharmacists (August 17, 2007) reported that the province had 3,500 registered pharmacists. In communications with the Bureau on November 3, 2006, the Canadian Society of Consultant Pharmacists stated that there were 1,200 licensed pharmacists in Manitoba in 2006.

According to the National Association of Pharmacy Regulatory Authorities, “the majority of pharmacists work in licensed community pharmacies that are not part of the public health care system.”¹²

On average, there is slightly fewer than one pharmacist for every 1,000 Canadians. There is some variation in this ratio across provinces and territories, with Nunavut having the lowest and Saskatchewan the highest.¹³ The two most populous provinces, Ontario and Quebec, have the most pharmacists.

Restrictions and recommendations

Market entry restrictions

Entering the profession

Individuals wishing to practise as pharmacists in Canada must complete one year of predominantly pre-pharmacy science courses and then earn a bachelor’s degree in pharmacy from a Canadian university.¹⁴ There are currently nine pharmacy schools in Canada, with a tenth set to open in Waterloo in January 2008.¹⁵ This will be the first new pharmacy school in Canada in 20 years; it will also feature the only co-op pharmacy program in Canada.¹⁶

The pharmacy profession in Canada does not formally place quotas on the number of pharmacies or pharmacists. However, there are limits on the number of students admitted to the university pharmacy programs. For example, in the 2008 admission cycle at the University of Toronto, only 240 students will be accepted from an anticipated pool of more than 1,000 applicants.¹⁷

Recommendation

In light of the anticipated changing demand for pharmacy services in Canada, universities should regularly review the number of places available in their pharmacy programs to ensure an adequate supply of pharmacists.

To be licensed, every graduate from a Canadian pharmacy school must pass the Qualifying Examination administered by the Pharmacy Examining Board of Canada (PEBC) (except in Quebec, which administers its own examination).¹⁸ Through the

¹² National Association of Pharmacy Regulatory Authorities, note 8, above.

¹³ The per capita figures were determined using data from Statistics Canada for the most recent full census.

¹⁴ Admission into a university pharmacy program in Canada requires successful completion of at least one year of a pre-pharmacy science program, with certain courses being mandatory: Bureau communication with the Canadian Pharmacists Association, October 2, 2006, and Canadian Council for Accreditation of Pharmacy Programs, September 19, 2006. See also, for example, University of Toronto, “Section 1—Admissions Overview,” www.pharmacy.utoronto.ca/undergrad/admis/index.jsp.

¹⁵ University of Waterloo, “Welcome to the School of Pharmacy,” www.pharmacy.uwaterloo.ca. Currently, each province has one pharmacy school, with the exception of Quebec (which has two) and New Brunswick and Prince Edward Island (which have none).

Canadian Pharmacists Association, “Canadian Faculties and Schools of Pharmacy,” [www.pharmacists.ca/content/about_cpha/about_pharmacy_in_can/directory/associations.cfm?main_heading=Canadian\\$Faculties\\$and\\$Schools\\$of\\$Pharmacy](http://www.pharmacists.ca/content/about_cpha/about_pharmacy_in_can/directory/associations.cfm?main_heading=Canadian$Faculties$and$Schools$of$Pharmacy).

¹⁶ University of Waterloo, “Pharmacy,” www.findoutmore.uwaterloo.ca/programs/full_description.php?program=Pharmacy, and “Welcome to the School of Pharmacy,” *ibid*.

¹⁷ University of Toronto, note 14, above.

¹⁸ Pharmacy Examining Board of Canada, “About Us,” www.pebc.ca/EnglishPages/General/AboutUs.html.

examination and certification process, the PEBC is responsible for ensuring that pharmacists have a “minimal level of competence to practise at an entry level.”¹⁹

The final requirements for a pharmacist’s licence are practical experience and fluency in either English or French. In most provinces, candidates may meet the language requirement by showing that they are fluent or proficient in either English or French; however, Quebec requires all pharmacists to be fluent in French.²⁰ Provinces require varying durations of practical experience, from four weeks in British Columbia to 36 weeks in Prince Edward Island and Nova Scotia.²¹

Given that the roles and responsibilities of pharmacists are essentially the same throughout Canada, there is no apparent reason for the combined duration of education and practical experience requirements to vary across provinces. When the duration of the required experience is longer than necessary, the cost of entry for individuals wishing to be licensed as pharmacists can be needlessly high.

Recommendation

To avoid unnecessarily high practical experience requirements, provinces whose requirements take longer to complete than those of other provinces should look to the experience of those provinces to determine whether an acceptable level of quality could be achieved in less time.

Mobility

Interprovincial mobility

There are no residency requirements to be licensed as a pharmacist in any province or territory. In addition, all provinces except Quebec (and the three territories) signed a mutual recognition agreement (MRA) on April 9, 2000, through the auspices of the National Association of Pharmacy Regulatory Authorities.²² The intention of the agreement is to remove unnecessary barriers to mobility of qualified pharmacists and establish the conditions under which pharmacists in good standing in one province may have their qualifications recognized in another.

Section 4 of the MRA guarantees mobility to all pharmacists who are licensed in good standing in any signatory province as of July 1, 2001, and to those who meet specific licensing requirements after that date.

The MRA facilitates movement of pharmacists between provinces by greatly reducing, if not removing, registration and licensing barriers. Under the agreement, the signatories must undertake periodic reviews no less than every two years after July 1, 2001, to

¹⁹ Ibid.

²⁰ *Regulation respecting the terms and conditions for the issue of permits by the Ordre des pharmaciens du Québec*, R.Q. c. P-10, r.8.1, s. 1(6).

²¹ British Columbia: College of Pharmacists of British Columbia, *Bylaws of the Council of the College of Pharmacists of British Columbia*, s. 6(1)(d)(i); Nova Scotia: Nova Scotia College of Pharmacists, consultation submission, July 6, 2007; Prince Edward Island: Prince Edward Island Pharmacy Board, consultation submission, June 1, 2007.

²² *Mutual Recognition Agreement for the Profession of Pharmacy in Canada*, www.napra.org/pdfs/professional/mra.pdf. In 2003, Ontario and Quebec signed an agreement to facilitate recognition of training of each other’s members. See Ordre des pharmaciens du Québec, consultation submission, July 6, 2007, and *Protocole d’entente entre: L’ordre des pharmaciens du Québec et L’Ontario College of Pharmacists*, www.opq.org/fr/media/docs/m.o.u._version_finale_fran_aise.pdf.

explore ways to facilitate the non-signatories joining the agreement. Quebec attended the meeting in October 2003 but the territories did not.²³ The fact that the territories have not signed the MRA does not, however, pose any obstacles to pharmacists outside the territories from relocating there, since to be licensed in each territory, they must already be licensed in a province and pay the prescribed licensing fee.²⁴ No additional qualifying examinations are required.

Having all provinces sign the MRA would allow pharmacists to provide professional services seamlessly throughout Canada and, thus, respond to changes in demand quickly and effectively.

Recommendation

The National Association of Pharmacy Regulatory Authorities should continue its efforts to have Quebec sign the Mutual Recognition Agreement.

International mobility

A survey conducted in 2005 revealed that 90 percent of the pharmacists practising in Canada had received their pharmacy degree from a Canadian university. Of the remaining 10 percent, three percent were trained in the United States and seven percent were trained outside North America.²⁵

Pharmacists who were licensed outside Canada must meet varying admission requirements, depending on the province. Most provincial colleges and boards of pharmacy require either graduation from a pharmacy program that is recognized as equivalent to the one in their province or completion of Pharmacy Examining Board of Canada examinations. For example, the Prince Edward Island Pharmacy Board may accept a comparable pharmacy licence from another jurisdiction without additional requirements, whereas in Newfoundland and Labrador, foreign-trained pharmacists must complete a minimum of 32 weeks of practical experience in Canada.²⁶ In Nova Scotia, foreign-trained pharmacists may be required to complete up to 12 months of practical experience before being licensed.²⁷

In addition to the standard registration requirements, all foreign-licensed pharmacists wishing to practise in Canada must be fluent or proficient in English or French, or demonstrate that they are proficient to specified standards in each province.²⁸

²³ See October 17, 2003, notes for workshop at which the parties to the MRA reaffirmed their goal of having the non-member jurisdictions join them, www.napra.org/pdfs/licensing/031022MRAworkshopreport-final.doc. See also National Association of Pharmacy Regulatory Authorities, "Overview," www.napra.org/docs/0/94/106.asp.

²⁴ See, for example, *Pharmacy Act*, R.S.N.W.T. 1988, c. P-6, s. 3(2), 4(1)(a); *Pharmacists Act*, R.S.Y. 2002, c. 170, s. 2, 3, 4.

²⁵ Rogers Publishing, note 3, above, p. 20; Human Resources and Social Development Canada, *Report on Implementation of the Labour Mobility Chapter of the Agreement on Internal Trade—July 2001*, www.rhdsc.gc.ca/en/cs/sp/hrsc/lmp/mobility/2001-000049/page00.shtml. Of the 10,274 pharmacists sent surveys, 1,613 responded.

²⁶ Prince Edward Island: *Pharmacy Act*, R.S.P.E.I., 1988, c. P-6, s. 9(3); Newfoundland and Labrador: National Association of Pharmacy Regulatory Authorities, "Requirements for Initial Licensure in Newfoundland and Labrador, Jan. 1, 2004," www.napra.org/docs/0/94/109.asp#new. See also Marie Berry, *Canadian Pharmacy Law*, (Canada Law Book: Aurora, Ont., 1995) vol. 1 at 8.110, p. 8-13.

²⁷ Berry, *ibid*.

²⁸ Standard registration requirements are passing a provincial jurisprudence exam and the Pharmacy Examining Board of Canada qualifying exam, and completing a practical training requirement.

Pharmacists whose pharmacy degree is from a country other than Canada or the United States must take the Evaluation Examination before taking the Qualifying Examination.²⁹ All provinces except Quebec (which administers its own examination) require applicants trained outside of Canada to pass the same qualifying examination, administered by the Pharmacy Examining Board of Canada.³⁰

Given that the roles and responsibilities of pharmacists are essentially the same across the country, there is no apparent reason for the variation in the admission requirements for foreign-trained pharmacists. When the requirements are higher than necessary, the cost of entry can be needlessly high, resulting in fewer pharmacists entering the profession and, as a result, domestic pharmacists being protected from legitimate competition from qualified foreign pharmacists.

Recommendation

Each provincial college or board of pharmacy should review whether it has minimized its admission requirements for certifying foreign-trained pharmacists who otherwise meet the qualification requirements. Such a review should look to provinces with less onerous admission requirements that continue to meet quality standards.

In other professions, regulators use various mechanisms to assess whether the applications of foreign-educated or -trained professionals may be expedited, including an international qualification approval board, an international bridging program and a national committee on accreditation, all administered by national organizations that assess educational and professional qualifications on behalf of provincial colleges and boards. The pharmacy profession in Canada does not use any of these mechanisms, relying instead on each province to set its own evaluation and entry criteria, and assessment process, as noted above. Professional competence should be the only grounds for assessing foreign credentials; whether the qualified entry candidate is local or foreign should be immaterial.

However, two of the pharmacy schools at the University of Toronto and the University of British Columbia offer bridging programs to help foreign-trained pharmacists qualify for entry into the profession in Canada. Since 2001, more than 525 students have graduated from the University of Toronto program, which boasts a 92 percent success rate for graduates passing licensing examinations.³¹ This achievement is salutary from a competition perspective because it helps clarify and expedite the process for adequately qualified foreign-trained pharmacists to enter the profession in Canada. Increased competition among qualified pharmacists is thereby fostered, to the benefit of consumers.

²⁹ Pharmacy Examining Board of Canada, "The Evaluating Examination: Introduction," www.pebc.ca/EnglishPages/EEX/EEXIntroduction.html.

³⁰ Pharmacy Examining Board of Canada, note 18, above, and "The Qualifying Examination: Introduction," www.pebc.ca/EnglishPages/QEX/QEXIntroduction.html, as well as Berry, note 26, above, 8.120, p. 8-14.

³¹ University of Toronto, "International Pharmacy Graduate Program," www.ipgcanada.ca; University of British Columbia, "Canadian Pharmacy Practice Programme," www.pharmacy.ubc.ca/cppd/programs/CP3_Program.html.

Recommendation

Each provincial college or board of pharmacy should make efforts to identify foreign jurisdictions whose trained pharmacists meet admission requirements. In addition, all provinces should work towards a nationally recognized, formal bridging program, similar to the ones offered by the University of Toronto and the University of British Columbia.

Overlapping services and scope of practice

There are no other professions that are primarily involved in the same functions as pharmacists, principally because it is usually an offence for someone who is not registered and licensed as a pharmacist to practise pharmacy. It is also the case because pharmacists usually dispense all prescriptions, regardless of who writes them.³² However, some provinces and territories do have legislative exceptions that allow optometrists, physicians, nurse practitioners and dentists to dispense or administer particular drugs under certain conditions.³³ In Manitoba, physicians in remote communities may compound and dispense drugs.³⁴ In Nunavut, medical practitioners and dentists may supply drugs; nurses may also supply specified drugs when directed or supervised by a medical practitioner or dentist.³⁵ From a safety perspective, restricting who may possess, handle and dispense drugs (some of which are poisons) meets a legitimate public safety objective. It also ensures that licensed pharmacists supervise the work of pharmacy technicians, who have fewer professional qualifications.

Pharmacy technicians may provide services that complement those of pharmacists. Pharmacy technicians help pharmacists fill prescriptions and operate pharmacies.³⁶ Whether they have formal training (e.g. at a community college) or receive on-the-job training, pharmacy technicians are restricted by law as to what they may do and must perform their activities under the supervision and guidance of a pharmacist, who is responsible for their conduct.³⁷

In Alberta, pharmacy technicians working under the “indirect supervision” of pharmacists may help check repackaged drugs and may also compound drugs.³⁸ In Quebec, pharmacy clerks (the functional counterpart of a pharmacy technician in that province) may sell medications under the supervision of pharmacists and may prepare medications when they have five or more years of experience.³⁹

³² For example, see Alberta Association of Registered Nurses, “Nurse Practitioner Fact Sheet” for listed exceptions, www.nurses.ab.ca/pdf/NP_pdfs/Fact_Sheet_-_Prescribing_&_Distributing_Guidelines_for_NPs.pdf.

³³ See, for example, Alberta, *Pharmacy and Drug Act*, R.S.A. 2000, c. P-13 as am'd, and Ontario, *Drug and Pharmacies Regulation Act*, [formerly *Health Disciplines Act*] R.S.O., 1990, c. H.4, s. 149, 165.

³⁴ Manitoba, *Pharmaceutical Regulation*, Regulation 56/92 s. 27(1).

³⁵ *Pharmacy Act*, R.S.N.W.T., 1988, c. P-6, as am'd by *An Act to Amend Certain Acts Concerning Health Professions*, S.Nu. 2001, c. 10, s. 2(c).

³⁶ Pharmacy Choice, “Pharmacy Technician Careers,” www.pharmacychoice.com/careers/pharmacy_technician_career.cfm.

³⁷ Ordre des pharmaciens du Québec, consultation submission, July 6, 2007; Alberta, *Pharmacy and Drug Act*, R.S.A. 2000, c. P-13, as am'd, and *Pharmacists Profession Regulation*, Alta. Reg. 129/2006; *Pharmacy and Drug Regulation*, A.R. 240/2006; Council of the Alberta College of Pharmacists, *Minutes*, March 22, 2007, Edmonton, Alberta, subsection 2.5.1, “Resolutions Committee—Pharmacy Technician Ratio,” <https://pharmacists.ab.ca/downloads/documentloader.ashx?id=4387>; Manitoba, note 34, above, s. 17 (2), (3) passed pursuant to the *Pharmaceutical Act*, C.C.S.M., c. P60.

³⁸ Alberta College of Pharmacists, consultation submission, August 17, 2007.

³⁹ *Pharmacy Act*, R.S.Q., s. 2.01 and 2.02.

In Ontario, pharmacy technicians are not permitted to perform any of the controlled acts that occur during the professional aspects of operating a pharmacy.⁴⁰ However, recent amendments to Ontario's *Pharmacy Act, 1991* (once they come into force) will create a new class of certificate of registration within the profession that allows the Ontario College of Pharmacists to license and regulate pharmacy technicians.⁴¹ The amendments will also protect the title of pharmacy technician in the same way that the title of pharmacist is now protected.

The role of technicians varies slightly depending on the specific location of employment. For example, in a traditional pharmacy setting “technicians help licensed pharmacists provide medication and other healthcare products to patients. Technicians usually perform routine tasks to help prepare prescribed medication for patients, such as counting tablets and labelling bottles. Technicians refer any questions regarding prescriptions, drug information or health matters to a pharmacist.”⁴² However, in hospitals, nursing homes and assisted-living facilities, technicians have additional responsibilities, such as reading patient charts and delivering medicine to patients, after the pharmacist has checked the prescription. Specifics about hospital pharmacy operations vary slightly by province and territory.

In Canada, the permitted ratio of pharmacists to pharmacy technicians varies widely, from 1:1 (Saskatchewan, Newfoundland and Labrador) to 1:4 (Quebec).⁴³ The reason for limiting the number of technicians working under a pharmacist is to ensure a pharmacist is not supervising too many technicians at once.⁴⁴ However, pharmacy technicians are very adept at the mechanical tasks of filling prescriptions (such as counting pills and mixing lotions), since they do this regularly and often, and higher ratios allow pharmacists to devote more time to patient-oriented services, such as counselling.⁴⁵ Further, at least one provincial regulator has adopted the position that “establishing an arbitrary pharmacist-technician ratio does not achieve” the goal of ensuring “safe, effective and quality pharmacy services,” which is the intent of the restriction.⁴⁶

Changing patient demographics (i.e. an aging population that is increasing in size) and medical advances are placing greater demands on pharmacists' time and professional knowledge. This has caused pharmacists to become increasingly dependent on pharmacy technicians (who are increasingly performing more duties of pharmacists) to help them meet growing prescription drug demands and administrative needs. However, pharmacy technicians are largely unregulated in Canada, and the provincial colleges and boards of pharmacy that seek an expanded mandate to regulate pharmacy technicians are aware of

⁴⁰ Bureau communication with the Ontario College of Pharmacists, August 18, 2006.

⁴¹ *Health System Improvements Act, 2007*, S.O. 2007, c.10, s. 18. The statute was introduced in the Ontario Legislature as Bill 171 and received Royal Assent on June 4, 2007. However, the part of the statute affecting the health professions, including pharmacists, will only come into force upon proclamation by the Lieutenant Governor.

⁴² Pharmacy Choice, “Pharmacy Technician Careers,” note 36, above.

⁴³ Berry, note 26, above, at 8.530 (p. 8-43). Berry notes that Alberta, British Columbia and Ontario have no set ratio of pharmacists to pharmacy technicians.

⁴⁴ College of Pharmacists of British Columbia, *White Paper on Pharmacy Technicians: A Discussion for Council*, March 2006, paras. 3.1, 3.7, www.bcpharmacists.org/Portals/0/PDF/Resources/CPBC/WhitePaperFinalMay2006.pdf.

⁴⁵ In communications with the Bureau on August 18, 2006, the Ontario College of Pharmacists commented on the tasks pharmacy technicians are suited to doing. Regarding ratios, see College of Pharmacists of British Columbia, *ibid*, para. 3.6.

⁴⁶ Council of the Alberta College of Pharmacists, *Minutes*, note 37, above.

the potential for conflict with pharmacists.⁴⁷ Although the general movement appears to be towards direct regulation of pharmacy technicians by pharmacists, the further issue of the need to standardize the number of pharmacy technicians working under the supervision of a pharmacist is still being debated within the pharmacy profession.⁴⁸ No matter whether or how pharmacy technicians are regulated or what the acceptable pharmacy technician to pharmacist ratio is, pharmacists are and will continue to be ultimately responsible, under the rules that govern them, for the work done by employees they supervise.

Within those parameters, though, employing a greater number of pharmacy technicians should allow pharmacists to spend more time on qualitative patient needs (such as counselling on drug use and interaction), thereby increasing the likelihood that the quality of pharmacists' services will correspondingly improve. It should also permit the pharmacy to fill more prescriptions, thereby increasing efficiency.

Recommendation

In order to increase efficiency while still maintaining adequately safe pharmacy operations, provincial colleges and boards of pharmacy should allow individual pharmacists to decide the number of pharmacy technicians they will employ in their pharmacies. The colleges and boards that stringently limit the use of pharmacy technicians in pharmacies should consider the provinces that allow for the greatest use of pharmacy technicians as having taken the least restrictive approach, which they should adopt.

Market conduct restrictions

Advertising

The provincial colleges and boards of pharmacy tend to restrict advertising for pharmacists' services. None of the three territories has enacted rules governing advertising by pharmacists or pharmacies, so this activity is subject only to the restrictions under the federal *Food and Drugs Act* and *Controlled Drugs and Substances Act* relating to contraceptives, narcotics and other controlled substances.⁴⁹

Restrictions on price advertising are very broad across the provinces. In both Ontario, and Newfoundland and Labrador, price advertising of a single drug is prohibited. Advertisements in Newfoundland and Labrador must include prices for at least 15 drugs; a similar restriction in Ontario requires prices for 10.⁵⁰ According to the Ontario College of Pharmacists, this restriction is intended to prohibit pharmacists from advertising a single drug as a loss leader.⁵¹ However, the net result has been that the restriction has diminished the effectiveness of the message drug advertisements convey and constrained consumers' ability to easily make price comparisons between competing pharmacies.

⁴⁷ College of Pharmacists of British Columbia, *White Paper*, note 44, above, pp. 1, 12.

⁴⁸ Council of the Alberta College of Pharmacists, *Minutes*, note 37, above.

⁴⁹ *Food and Drugs Act*, s. 3, *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, s. 3-4.

⁵⁰ Newfoundland and Labrador, *Pharmacy Board Standards of Pharmacy Practice: Guidelines on Advertising for Community Pharmacies* (September 20, 1999, updated October 2005), s. 7(2); Ontario, Ontario Reg. 202/94 as am'd, s. 38(3).

⁵¹ Bureau communication with the Ontario College of Pharmacists, August 18, 2006.

In Newfoundland and Labrador, Ontario and British Columbia, advertisements that list prices must also include the drug cost, markup, professional fee and total charge for the prescription.⁵² In Manitoba, and Newfoundland and Labrador, professional fees may not be listed on their own in advertisements.⁵³ In Prince Edward Island, any markup must be stated in advertisements.⁵⁴ Only the full retail price for prescriptions is allowed to appear in advertisements in New Brunswick.⁵⁵ No price information is allowed in Saskatchewan, except on a sign provided or approved by the Council of the Saskatchewan College of Pharmacists.⁵⁶

Although coupons are mostly unregulated, Quebec prohibits all discounts, gifts, rebates, coupons or other bonuses when selling medicine.⁵⁷ According to the Ordre des pharmaciens du Québec, the prohibition is designed to prevent pharmaceutical companies and pharmacists from using commercial incentives to promote the use of drugs, since pharmacists are required to be guided by patient needs rather than commercial interests.⁵⁸ In Ontario, attaching bonus points, coupons or other incentives to the sale of prescription medication is prohibited.⁵⁹ Manitoba allows coupons under certain conditions.⁶⁰

Recent court cases have clarified restrictions on coupons in the pharmaceutical industry in Ontario and New Brunswick. According to the outcomes of two cases, pharmacists may not distribute food coupons redeemable at grocery stores to their customers (Ontario), but they may provide rebate coupons redeemable at the pharmacy on the cost of prescriptions (New Brunswick).⁶¹

Product price is the primary tool firms use to compete in open markets. Price restrictions inhibit this competition, thereby frustrating one of the purposes of the *Competition Act*, namely to provide consumers with competitive prices and product choices. No rationale justifying the prohibition on low price ads (and ads for a single product, in particular) was provided, and the Bureau is unaware of direct evidence of harm to consumers when pharmacists have been allowed to advertise low prices.

Recommendation

Colleges and boards of pharmacy should remove restrictions on price advertising unless they can show a clear link to a meaningful reduction in consumer harm by such restrictions.

All the provinces prohibit advertisements that are not in good taste, compare services or abilities, promise more effective service or better results, or lower the honour or dignity

⁵² Newfoundland and Labrador: Newfoundland and Labrador Pharmacy Board, *Guidelines on Advertising for Community Pharmacies*, September 20, 1999, s. 7(1); British Columbia: *Bylaws of the Council of the College of Pharmacists of B.C.*, s. 34(7); Ontario, O. Reg. 202/94 as am'd, s. 38(4).

⁵³ Manitoba: *Manitoba Pharmaceutical Association Code of Ethics*, s. 14(6); Newfoundland and Labrador: *ibid*, s. 9.

⁵⁴ Prince Edward Island Pharmacy Board, *Advertising Regulations*, s. 6.

⁵⁵ *Regulations of the New Brunswick Pharmaceutical Society*, s. 13.04.

⁵⁶ Saskatchewan College of Pharmacists, *Bylaws*, made under the *Pharmacy Act*, April 2006, s. 14.12.2, 14.12.4.

⁵⁷ *Code of ethics of pharmacists*, R.Q. c. P-10, r.5, s. 3.05.07.

⁵⁸ Ordre des pharmaciens du Québec, consultation submission, July 6, 2007.

⁵⁹ Ontario Pharmacists' Association, consultation submission, July 5, 2007.

⁶⁰ Manitoba, note 53, above, s. 14(7).

⁶¹ *Stenzler v. Ontario College of Pharmacists*, [1998] O.J. No. 681; *Nicholson v. New Brunswick Pharmaceutical Society*, [1994] N.B.J. No. 270.

of the profession.⁶² Also, six provinces ban advertisements that contain unverifiable assertions or testimonials, and two provinces prohibit endorsements.⁶³

Every province greatly restricts comparative advertising by pharmacists that relates to their abilities or the services they offer. Newfoundland and Labrador, Nova Scotia and Prince Edward Island have banned the use of specific words in advertising, including qualifying words such as *professional*, *trusted*, *licensed*, *accurate*, *fast* and *cheap*.⁶⁴

Other restrictions focus on specific aspects of pharmacists' business:

- British Columbia does not allow the title of specialist or information about the effectiveness or indications for the use of prescription drugs to be in an advertisement.⁶⁵
- Manitoba bans advertisements that describe the method of drug preparation.⁶⁶
- Ontario forbids the advertisement of brand name equipment used to provide prescription services.⁶⁷
- Saskatchewan prohibits signs that are flamboyant, grandiose or sensational, or that demean the profession.⁶⁸

Existing advertising prohibitions leave very little to no room for pharmacists to promote themselves other than by name, contact information and business hours. Instead, pharmacists are left to rely on the advertising, image and promotion of the retail enterprise in which they are situated. Promotion is viewed as somehow undignified and unprofessional, with sanctions in place for those who tarnish the image of the professional through the crassness of commercial promotion.

False and misleading advertising prohibitions do serve the valid purpose of protecting the public from fraud; however, consumers are already protected from false and misleading advertising under the federal Competition Act as well as various provincial consumer protection laws that require advertisements to be truthful and verifiable. Advertising restrictions that go beyond this do not serve the consumer interest well, since they result in consumers being denied the information they need to make fully informed decisions and choices about the services they require.⁶⁹ The restrictions may also protect relatively inefficient incumbents from competition from new entrants.

⁶² See, for example, Alberta, *Pharmacy and Drug Regulation*, A.R. 240/2006, s. 24.

⁶³ See, for example, *Bylaws of the Council of the College of Pharmacists of B.C.*, s. 34(3), and *Regulations of the New Brunswick Pharmaceutical Society*, s. 13.04

⁶⁴ See, for example, Prince Edward Island Pharmacy Board, *Advertising Regulations*, paras. 2(a), 2(b).

⁶⁵ *Bylaws of the Council of the College of Pharmacists of B.C.*, s. 34(4), (6), (7), (8). This prohibition also exists in Nova Scotia, but an exception in that province is made for pharmacists who have acquired a specialist certification approved by the Nova Scotia College of Pharmacists Council. Nova Scotia College of Pharmacists, consultation submission, July 6, 2007.

⁶⁶ Manitoba, note 53, above, s. 14(1).

⁶⁷ Ontario, O.Reg. 202/94 as am'd, made pursuant to the *Pharmacy Act*, 1991, s. 38(2)(g).

⁶⁸ Saskatchewan College of Pharmacists, note 56, above, s. 14.12.3.

⁶⁹ European countries span the range of advertising restrictions, from effective prohibition (e.g. France, Greece, Luxembourg, Portugal and Spain) to allowing some advertising (e.g. Germany, Netherlands, Poland, Sweden and the U.K.). France, Hungary and Luxembourg were undertaking reforms in this area in 2004. See EC Commission, *Progress by Member States in reviewing and eliminating restrictions to Competition in the area of Professional Services*, Staff Working Document SEC 1064, Brussels 5.9.2005, www.eco.public.lu/attributions/cconc/staffworkingdoc.pdf, Annex 4, pp. 35, 36.

Prohibitions on comparative advertising function to restrict the incentive of more efficient service providers to develop their services. They also have the potential to reduce the returns associated with innovation and relative quality improvement and thus diminish the incentive to engage in these improvements in the first place.

Recommendation

Provincial colleges and boards of pharmacy should eliminate all restrictions on advertising that go beyond protecting consumers from false or misleading advertising, including prohibitions on all forms of comparative advertising.

Pricing and compensation

Retail pharmacists derive their income in part from charging a handling or dispensing fee per prescription. Additionally, many health plans and drug formularies limit the fees pharmacists may charge health plan participants or are reimbursed by the health plan.⁷⁰ While dispensing fees may vary by the location of the pharmacy, the overall average dispensing fee is \$9.16. Table 2 shows the distribution of average dispensing fee by type of pharmacy in 2005.

Table 2: Average dispensing fee by pharmacy type, 2005

Pharmacy type	Dispensing fee
Supermarket lock and leave	\$6.25
Supermarket	\$6.25
Mass merchant or department store	\$6.49
Banner	\$9.32
Chain	\$9.40
Independent	\$9.48
Franchise	\$9.57
Overall	\$9.16

Source: Rogers Publishing, *Trends and Insights*, p. 28, www.mckesson.ca/documents/Trends_2005.pdf.

Usually health plans reimburse pharmacists on a fee per prescription-dispensed basis, but in Saskatchewan, Prince Edward Island, Yukon and Northwest Territories, pharmacists are reimbursed as a percentage of the price of the prescription dispensed.⁷¹ Quebec pharmacists are reimbursed for the cost of the drug plus a professional fee.⁷²

In addition to dispensing prescription drugs, pharmacists are also qualified to provide a limited number of specialized services, such as weight loss or smoking cessation counselling, the fees for which vary widely, since, unlike dispensing fees, fees for other services are not capped by provincial drug plans or formularies. For example, the average fee for diabetes management is \$18.59, \$27.17 for medication management and \$42.76

⁷⁰ Saskatchewan charges health plan participants under the *Prescription Drugs Act*, s. 4(1), 5(b), (c), (d), 9(1), and *Prescription Drugs Regulations* 1993, s. 3, 3.2, 4-12. The consultation submission from the Ontario Pharmacists' Association, July 5, 2007, noted the point about health plan participants being reimbursed.

⁷¹ According to the British Columbia Pharmacy Association consultation submission of June 11, 2007, pharmacists in all jurisdictions charge a professional fee as part of the prescription cost. Specific examples taken from Elias Mossialos and Monique Mrazek, "The Regulation of Pharmacies Abroad," Annexe C of *The control of entry regulations and retail pharmacy services in the UK: A report of an OFT market investigation*, a report prepared for the Office of Fair Trading, January 2003, p. 61, www.offt.gov.uk/shared_offt/reports/comp_policy/oft609annexc.pdf.

⁷² Ordre des pharmaciens du Québec, consultation submission, July 6, 2007.

for smoking cessation; however, the vast majority of pharmacists do not charge fees for these services.⁷³

Several provincial pharmacy associations (including the Ontario Pharmacists Association) have created and promoted suggested fee schedules for professional services, although these fee schedules are not publicly available and their contents are unknown.⁷⁴ Fee schedules that are entirely voluntary and do not carry adverse consequences for members who choose not to comply with them (e.g. discipline or financial disadvantage) do not contravene the *Competition Act*. However, their very existence causes concern about their influence on competition. Fee schedules can potentially facilitate collusion in price setting, either overtly or tacitly, by signalling acceptable prices and, thereby encouraging pharmacists to set their prices accordingly.

The costs imposed on consumers by these restrictions are higher than they would be in a free market, as is the potential for lower quality service. The Bureau is not aware of any rationale for the use of fee schedules that is linked to the public interest, which means that fee schedules impose costs without any apparent benefit to consumers.

Recommendation

In provinces where suggested fee schedules for pharmacists exist, they should be removed.

Business structure

Restrictions on the business structure of Canadian pharmacies vary by province, but in general, govern who may own and manage pharmacies. Table 3, below, shows some of the restrictions on the business structure of Canadian pharmacies by province.

⁷³ Rogers Publishing, note 3, above, p. 23.

⁷⁴ British Columbia Pharmacy Association, consultation submission, June 11, 2007; Bureau communication with the Ontario College of Pharmacists, September 6, 2007, and Canadian Pharmacists Association, consultation submission, September 29, 2006. See also British Columbia Pharmacy Association, *Professional Fees*, position statement, February 6, 2004, p. 2; Human Resources Development Canada, *A Situational Analysis of Human Resource Issues in the Pharmacy Profession in Canada*, July 2001, 4.2.4, p. 32 and 4.4.2, pp. 40–42; Ontario Pharmacists Association, “Reimbursement Rate for Pharmacists’ Professional Services,” www.opatoday.com/documents/Reimbursementrate.pdf; and Pharmacy Gateway, “Pharmacy on the map: State of the Industry Report,” in particular, “Ontario: Top Advocacy Issues” www.pharmacygateway.ca/pastissue/content/phpost/2000/07-00/pharm_map.jsp.

Table 3: Restrictions on business structure for pharmacies by province

	Alberta	British Columbia	Manitoba	New Brunswick	Newfoundland and Labrador	Nova Scotia	Ontario	Prince Edward Island	Quebec	Saskatchewan
Pharmacy must be managed by a pharmacist	X	X		X	X	X	X	X	X	X
Pharmacy must be owned by a pharmacist or pharmacist partnership							X		X	
Drug prescriber may not own or operate a pharmacy		X					X			
Pharmacy may not be located in an establishment that sells tobacco products						X	X	X	X	
Pharmacy must surrender licence when ownership or manager changes			X		X	X		X		
Pharmacist may only manage one pharmacy						X				
Pharmacy required to be open a minimum number of hours			X	X	X					
Majority of shareholders or directors in a corporation must be pharmacists		X					X		X	X

Sources

Alberta: *Pharmacy and Drug Act*, R.S.A., 2000, c. P-13, as am'd; *Pharmacists Profession Regulation*, A.R. 129/2006; *Pharmacy and Drug Regulation*, A.R. 240/2006.

British Columbia: *Pharmacists, Pharmacy Operations and Drug Scheduling Act*, R.S.B.C. 1996, c. 363; College of Pharmacists of British Columbia, consultation submission, July 5, 2007; British Columbia Pharmacy Association, consultation submission, June 11, 2007.

Manitoba: *Pharmaceutical Act*, C.C.S.M., c. P60; *Pharmaceutical Regulation*, Regulation 56/92.

New Brunswick: *Pharmacy Act*, S.N.B., 1983, c. 100; C.S.N.B. 2005, c. 100; New Brunswick Pharmaceutical Society, *Regulations and General By-Laws*.

Newfoundland and Labrador: *Pharmacy Act*, S.N.L., 1994, c. P-12.1; *Pharmacy Regulations*, N.L.R. 80/98; *Interchangeable Drug Products Formulary Regulations*, 1998, N.L.R. 75/98.

Nova Scotia: *Pharmacy Act*, S.N.S., 2001, c. 36; *Practice of Pharmacy Regulations*, N.S. Reg. 193/2003; Nova Scotia College of Pharmacists, consultation submission, July 6, 2007.

Ontario: *Drug and Pharmacies Regulation Act* [formerly *Health Disciplines Act*], R.S.O., 1990, c. H.4; *Regulated Health Professions Act*, S.O., 1991, c.18, including the *Professional Code*; *Health Professions Procedural Code*, S.O. 1991, c. 18; Bureau communication with the Ontario College of Pharmacists, September 6, 2007.

Prince Edward Island: *Pharmacy Act*, R.S.P.E.I., 1988, c. P-6; *Authorization Regulations*, P.E.I. Reg. EC575/92; Prince Edward Island Pharmacy Board, consultation submission, June 1, 2007.

Quebec: *Pharmacy Act*, R.S.Q., c. P-10; *Regulations*, R.Q. c. P-10, r.1, r.3.2, r.4, r.5, r.6.1, r.8.1, r.8.2, r.12.1, r.19, r.20.1; *Professional Code*, R.S.Q., c. C-26; Ordre des pharmaciens du Québec, consultation submission, July 6, 2007.

Saskatchewan: *Pharmacy Act*, 1996, S.S., 1996, c. P-9.1; Saskatchewan College of Pharmacists, *Bylaws*, made under the *Pharmacy Act*, April 2006, s. 14(2)(l).

Of particular note are restrictions on who can participate in the ownership of a pharmacy: specifically, Nova Scotia restricts pharmacists to managing only one pharmacy, while Quebec requires the pharmacy to be owned by a pharmacist or pharmacist partnership, and British Columbia prohibits drug prescribers from having an ownership interest in a pharmacy.

Ontario has taken a step to foster competition by allowing pharmacies to be located in buildings that also house walk-in medical clinics, sometimes even sharing the same commercial space. Pharmacies in Ontario may also be located in supermarkets or department stores.

Restrictions on business structure are intended to maintain the independence of pharmacists from other professionals in order that commercial pressures associated with

multidisciplinary ownership and management do not compromise pharmacists' professional practice or judgment. Aside from trying to avoid conflicts of interest when drug prescribers, such as doctors, dispense drugs, it is difficult to understand why some of these restrictions exist.

The concern about such rules from a competition perspective is that they force many pharmacists into the same business model. This has the effect of ensuring that pharmacists face a similar cost structure, making meaningful competition less likely to occur and possibly preventing entry of new market participants.

Recommendation

The provincial colleges and boards of pharmacy should review their restrictions on the ownership and business structure of pharmacies with a view to eliminating unnecessary obstacles to efficient business models.

Conclusion

Many of the restrictions the provincial colleges and boards of pharmacy have put in place result in increased costs to consumers. Therefore, the colleges and boards should review these restrictions from a competition perspective to determine whether their objectives can be met at lower cost to consumers. When they can, the colleges and boards should revise them accordingly.

In the pharmacy profession, restrictions on conduct have emerged that raise concerns from a competition perspective because they are likely to increase costs to consumers. Problematic conduct restrictions relate to advertising, specifically comparative and price advertising. Advertising is an important aspect of competition and provides consumers with valuable information on which to base their choice of service and service provider. Restrictions that perpetuate asymmetric information only serve to further withhold information from consumers that will help them make informed choices.

Additional restrictions on conduct that deserve attention include restrictions on pricing and business structure. Fee schedules are problematic because they could foster tacit collusion, reducing consumer welfare. Restrictions on business structure are a concern because they limit pharmacists to operating in business models that stifle meaningful competition.

7. Real estate agents

Overview

Role and function

Real estate agents help people buy and sell real estate.¹ Agents may represent buyers, sellers or both in transactions and may also help clients evaluate property markets and advise on appropriate asking prices and purchase offers.² In some provinces, real estate agents may also act as property managers. Some agents also purchase and sell properties as a sideline.

When representing buyers, real estate agents search for potential properties that will suit buyers' needs; when representing sellers, they search for potential buyers.³ In addition, when acting for buyers, real estate agents typically provide information about neighbourhoods and communities, write offers and agreements to purchase, guide clients when they make offers and agreements to purchase, and arrange for home inspections.⁴ When acting on behalf of sellers, real estate agents provide information on housing market conditions, suggest repairs to improve saleability, market homes to potential buyers, deal with potential buyers and follow through with the closing process.⁵

In some cases, real estate agents may represent clients who are looking for property to rent rather than purchase. Some provincial legislation allows agents to be active in other areas, such as brokerage transactions related to loans secured by mortgages.⁶

Real estate agents traditionally specialize in either commercial or residential real estate but are broadly qualified to help buy and sell any type of property.⁷

¹ In this report, the term *real estate agents* comprises salespeople, agents and brokers, unless otherwise specified. For general information on real estate in Canada, see Canadian Real Estate Association (CREA) www.realtor.ca and www.crea.ca.

² CREA, "Information for Buyers," www.realtor.ca/info_buyers.htm; "Information for Sellers," www.realtor.ca/info_sellers.htm. In Quebec, the Court of Appeal described the relationship between an agent and a seller or buyer as being a service provider relationship in a service contract. "However it must be noted that the real estate broker commonly does not have a mandate to sell or purchase but merely a mandate to seek out and find prospective purchasers or sellers. It is further well established that his mandate is fulfilled and a broker is entitled to his commission if he has brought the seller and purchaser in relation with each other and a broker is entitled to his commission if he has brought the seller and purchaser in relation with each other and therefore is the effective cause of the sale" (*Montreal Agencies Limited v. Kimpton* 1927 S.C.R. p. 598 at p. 601; *Gagnon v. Richardson* 1963 R.L. p. 156 at p. 158, cited in *Compagnie de fiducie MRS c. ACAIQ*, C.A. 500-09-010474-005, May 21, 2003; Association des courtiers et agents immobiliers du Québec, consultation submission, July 9, 2007.)

³ CREA, "Glossary," entries for Buyer's Agent and Seller's Agent, www.realtor.ca/glossary.htm.

⁴ Canada Mortgage and Housing Corporation, "What Professionals Should You Call On?" www.cmhc-schl.gc.ca/en/co/buho/hostst/hostst_005.cfm.

⁵ CREA, "Information for Sellers," note 2, above.

⁶ As noted in Quebec, *Real Estate Brokerage Act*, R.S.Q. c. C-73.1, s. 1. The term in Quebec for mortgages in this case is *immovable hypothec*.

In most cases, real estate agents receive a percentage of the sale prices of properties they sell. They may also receive flat fees for the services they provide. In either case, they then typically share their commissions with buyers' agents, based on the terms of listing agreements. With remuneration based on commission, an individual agent's salary is not proportionate to the time he or she spends trying to sell a property or searching for one; a property may sell very quickly or not at all, in which case, the agent does not receive remuneration for his or her work.

How the profession is regulated

Provincial real estate councils regulate the real estate industry in six of the ten provinces (Manitoba, Newfoundland and Labrador, Prince Edward Island and New Brunswick are the exceptions). Provincial law and regulation establish these councils to license real estate professionals and to create and administer the rules agents must follow. In the territories and the four provinces without real estate councils, the governments directly license agents and regulate the profession.⁸

The primary role of the provincial real estate councils is to protect the public interest. For example, the Real Estate Council of Alberta, under that province's *Real Estate Act*, is responsible for regulating real estate professionals, protecting consumers and "setting and enforcing standards of conduct" for real estate agents.⁹ The councils, which are composed of industry and public members, and sometimes government representatives, are required to meet established legislative objectives.

In every province, a registrar, or someone in a comparable position, determines the fitness of individuals to be licensed as real estate agents, according to the criteria set out in law and regulation. Licensees have to pay annual fees. The registrar performs these functions independently of the board of the provincial real estate council, which is responsible for the general oversight of council operations.¹⁰

In contrast to provincial real estate councils or government regulators, which have as their prime focus the interests of the public, provincial real estate associations represent the interests of their members. Membership to the provincial association is not required in order to trade in real estate. In some cases, provincial associations are also regulators in some regards; for example, the Prince Edward Island Real Estate Association establishes and enforces a code of ethics.¹¹ The associations also usually provide the pre-licensing courses aspiring real estate agents must take.¹²

Real estate agents are also represented by local, industry-led real estate boards or associations and, at the national level, by the Canadian Real Estate Association (CREA).

⁷ CREA, "Career Possibilities," www.crea.ca/public/careers/possibilities.htm.

⁸ In this chapter, *regulators* refers to both these councils and government regulatory bodies. Unlike in other professions, there are a number of restrictions on real estate agents that do not fall under the regulators' scope and therefore have not been addressed in this study. Local, provincial and federal trade associations play a big role in the real estate industry. These associations create restrictions that can have an impact on the competitive dynamic of the market.

⁹ Real Estate Council of Alberta, "RECA Overview," www.reca.ca/about_reca/reca_overview.htm.

¹⁰ Real Estate Council of Ontario, consultation submission, July 5, 2007.

¹¹ Prince Edward Island Real Estate Association, "Code of Ethics," www.peirea.com/code_of_ethics.html.

¹² For example, the Alberta Real Estate Association, www.abrea.ab.ca/education/index.htm.

Membership in a local board or local association, which is not required in order to trade in real estate, gives agents access to the Multiple Listing Service® (MLS®), the various components of which local boards administer. The boards also implement regulations that support CREA's national policies.¹³

Overlapping services

There are a number of other professionals who may participate in real estate transactions without real estate licences, including lawyers and auctioneers. For example, practising lawyers may represent buyers or sellers in real estate transactions when it is in the course of their practice.¹⁴ Auctioneers may also represent parties to real estate transactions when these transactions are carried out as part of their auctioneering duties.¹⁵ Any bank, credit union, or loan, trust or insurance company may trade real estate that defaults to it, without requiring the services of a real estate agent.¹⁶ Representatives acting on behalf of the Queen, agencies of the Crown, municipalities or local governments, and corporations having the power of expropriation may buy and sell real estate without the services of real estate agents.¹⁷ Finally, buyers or sellers may represent themselves in real estate transactions.

Entering the profession

Individuals seeking to be licensed as real estate agents do not typically need a university degree but generally must complete one or more professional courses. Individuals must also pass a provincial qualifying examination or examinations. In some provinces, individuals must also meet age, reputation and residency requirements to become licensed (see Table 1).

There are additional educational requirements, including coursework, examinations or both, that agents must complete to become brokers or managing brokers.¹⁸

Market

Demand

The demand for real estate agents depends on the demand for real estate transactions, which varies with economic factors such as the business cycle, unemployment, population growth and interest rates. The services of real estate agents are necessary only when buyers or sellers want to be represented in their real estate transactions, since they always have the option to represent themselves.

¹³ CREA, "Organized Real Estate in Canada," www.crea.ca/public/crea/organised_real_estate.htm.

¹⁴ See, for example, Alberta, *Real Estate Act*, R.S.A. 2000, c. R-5, s. 2(3)(d), and Quebec *Real Estate Brokerage Act*, R.S.Q. c. C-73.1, s. 3.

¹⁵ See, for example, British Columbia, *Real Estate Services Regulation*, B.C. Reg. 506/2004, s. 2.9.

¹⁶ See, for example, Manitoba, *Real Estate Brokers Act*, C.C.S.M. c. R20, s. 41(1)(d).

¹⁷ *Ibid.*, s. 41(1)(e).

¹⁸ See CREA, "Glossary," note 3, above, for the distinction between broker and sales representative. It is important to note that salespeople have to work under a broker's supervision. The definition of *managing broker* varies across the country but a representative definition is Quebec's (*Real Estate Brokerage Act*, R.S.Q. c. C-73.1, s. 13): "Every establishment must be managed by a natural person having the qualifications required of a person to hold a broker's certificate. That person must, in the cases prescribed in the by-laws of the Association, devote himself exclusively to his managerial duties."

While neither buyers nor sellers are required to use agents, agents are the only people (besides lawyers, auctioneers and others noted above) that clients may hire to represent them throughout real estate transactions.¹⁹

The geographic market for real estate agent services is typically limited, since buyers generally search for properties to purchase or rent in specific areas.

According to Statistics Canada, real estate agents and brokers across Canada had operating revenues in 2005 of more than \$8.5 billion, up from \$5.1 billion in 2001.²⁰

Supply

In 2005, there were 98,813 people licensed to buy and sell real estate in Canada. Almost half of these, 47,431, were located in Ontario.²¹

Depending on the province or territory, real estate agents may specialize in residential, commercial or farm properties, or property management.

Real estate agents are licensed for a whole province or territory; however, within a province or territory they tend to specialize in relatively narrow geographic areas so that they can develop a reputation and brand image, and better understand local property markets, to more effectively serve their clients. In urban areas, for example, agents may just work in particular neighbourhoods.

In North America, the Internet is playing an expanding role in advertising real estate properties for both real estate agents and private sellers.²² According to the National Association of Realtors, a U.S.-based trade organization, 61 percent of agents used the Internet in 2006 to attract buyers to their listings, second only to yard signs (75 percent).²³ It is reasonable to assume that the same trends are occurring in Canada. Furthermore, in 2003, a Canadian survey showed that 85 percent of those who had purchased a new home in the previous two years had used the Internet to look for information about houses for sale.²⁴

In Canada, the tool agents use most often to list information about properties is MLS®. Only licensed agents that are members of CREA through membership in their local real estate boards may list properties on MLS® and access the complete listings; however, some boards have contracts with third parties—appraisers, for example—that allow those third parties to view listings. The listings that only members may view contain, among others, instructions to co-operating brokers and personal information. The public may visit www.mls.ca to look for properties, but the information on this website is not as

¹⁹ See “Overlapping services,” above.

²⁰ Statistics Canada, CANSIM Table 352-0005, “Summary statistics for real estate agents, brokers, appraisers and other real estate activities (all establishments), by North American Industry Classification System (NAICS), annual, 1998 to 2005,” and Catalogue no. 63-018-X, “Offices of Real Estate Agents and Brokers, by Province.”

²¹ Real Estate Institute of Canada, “ARELLO News,” January–February 2006, www.reic.ca/arellonews.html.

²² See, for example, Internet Property Listings, “Real Estate for Sale Throughout Canada and Internationally,” www.canadian-real-estate-for-sale.com.

²³ Coldwell Banker, “Where do buyers come from?” www.coldwellbanker.ca/Learn/Articles/wherebuyers.asp.

²⁴ Ipsos Canada, “The Internet is a Key Tool in Looking for a New House,” survey, October 7, 2003, www.ipsos-na.com/news/pressrelease.cfm?id=1931.

complete as the listings to which CREA members have access. The website is an advertising vehicle, just like newspapers and agents' websites.

According to a 2006 CREA survey, 64 percent of buyers and 68 percent of sellers said the property involved in their transaction was listed on MLS®.²⁵

Restrictions and recommendations

Market entry restrictions

Entering the profession

Table 1, below, lists some of the provincial and territorial licensing requirements. Exemptions from the requirement to obtain a real estate licence are set by provincial or territorial regulation.²⁶

²⁵ CREA, consultation submission, July 6, 2007.

²⁶ See, for example, Alberta, *Exemption Regulation (Real Estate Act)*, Alta. Reg. 111/1996; British Columbia, *Real Estate Services Regulation*, B.C. Reg. 506/2004, s. 2.1 to 2.19; Newfoundland and Labrador, *Real Estate Trading Act*, R.S.N.L. 1990, c. R-2, s. 4.

Table 1: Licensing requirements for real estate agents

	Alberta	British Columbia	Manitoba	New Brunswick	Newfoundland	Northwest Territories and Nunavut	Nova Scotia	Ontario	Prince Edward Island	Quebec	Saskatchewan	Yukon
Minimum age (either 18 or 19)	X	X	X	X		X	X	X	X			X
Criminal record check	X	X	X				X		X	X	X	
Fingerprints	X											
Good reputation	X	X	X				X	X	X			X
Employed by a brokerage	X	X	X	X	X	X	X	X	X	X	X	X
Language proficiency	X	X										X
Permanent or business office in the province or territory				X	X	X			X	X	X	X
Resident of the province or territory for at least three months												X
Citizen or resident of Canada								X	X	X		
Eligible to work in Canada	X		X	X			X	X	X			
Business address in the province or territory			X				X	X	X			

Sources

Alberta: Real Estate Council of Alberta, *Rules; Interpretations Manual*, s. 5(1), 5(2), 13(1); "First-time Associates," www.reca.ca/licences_forms/real_estate/first_time_agents.htm; "Certified Criminal Record Checks," www.reca.ca/licences_forms/criminal_check.htm; consultation submission, July 6, 2007; questionnaire response (question 4.13).

British Columbia: *Real Estate Services Act*, s. 10; Real Estate Council of British Columbia, "How do I become licensed to sell real estate in British Columbia?" www.recbc.ca/becoming_licensed/TradingServices.htm; Sauder School of Business, "How to Satisfy the Language Proficiency Requirement," www.sauder.ubc.ca/re_licensing/programs/licensing/lpi.cfm.

Manitoba: *Real Estate Brokers Act*, s. 3; Manitoba Real Estate Association, *Real Estate Career Guide 2007*, www.realestatemanitoba.com/education/mrea_real_estate_career.pdf.

New Brunswick: New Brunswick Real Estate Association, "Salespeople," www.nbrea.ca/en/content.php?id=4.

Newfoundland and Labrador: *Real Estate Trading Act*, s. 8, 9.

Northwest Territories and Nunavut: *Real Estate Agents' Licensing Act*, s. 5, 9.

Nova Scotia: Nova Scotia Real Estate Commission, *Commission Bylaws*, s. 315; "Program Information," www.nsrec.ns.ca/programinfo/licensinginfo.htm; consultation submission, July 5, 2007.

Ontario: *General*, O.Reg. 567/05, s. 4, 5, 24; Real Estate Council of Ontario, consultation submission, July 5, 2007.

Prince Edward Island: *Real Estate Trading Act*, s. 7, 8; Info PEI, "Real Estate License: Real Estate Agent (or Broker)," www.gov.pe.ca/infopei/index.php3?number=14978; Prince Edward Island Real Estate Association, consultation submission, July 6, 2007.

Quebec: *By-law of the Association des courtiers et agents immobiliers du Québec*, s. 5, 8, 9, 11, 12, 13, 18, 19, 20, 21.

Saskatchewan: *Real Estate Act*, s. 19, 23, 23.1, 24; Saskatchewan Real Estate Commission, consultation submission, July 5, 2007; *Bylaws*, s. 307.

Yukon: *Real Estate Agents' Licensing Regulations*, s. 4, 5.

The necessity for a real estate agent to have a business address or a business office in the province where he or she is licensed is there to ensure that agents keep their business records in the province and that those records are easily accessible, as is required by provincial law.

For international applicants, the requirement to be Canadian citizens or residents will create a barrier to entry. The requirement to be eligible to work in Canada will have the same effect. However, those requirements will not have a significant impact on

competition because there is currently a large supply of real estate agents. The condition imposed by Yukon requiring that applicants reside in the territory three months before applying for a real estate licence raises concerns, though, which are discussed under “Mobility,” below.

The criminal record check, fingerprints and good reputation requirements do not affect entry into the profession a great deal. Those requirements are there to protect the public, but regulators must be careful not to create artificial barriers to entry by unnecessary security requirements.

Regardless of the province or territory, all agents must complete pre-licensing professional courses and pass a qualifying exam. The courses last from about 90 hours (15 days) in Prince Edward Island and Nova Scotia to more than 200 hours in British Columbia, 240 in Quebec and 288 in Alberta (the Real Estate Council of Alberta is currently consulting members on a proposal to reduce the course length).²⁷ Aspiring agents in some jurisdictions may take some of the existing courses by correspondence or via the Internet.²⁸ The length of the mandatory pre-licensing courses varies significantly between jurisdictions, which the Bureau questions, since the jurisdictions with the least requirements do not seem to have a significantly poorer quality of real estate service.

It is noteworthy that Quebec will be implementing a new program in July 2008 based on the competencies the provincial real estate council has determined individuals need to become agents. Furthermore, Quebec’s council is considering introducing non-mandatory pre-licensing courses; anybody could then write the examinations without having to take the courses.²⁹ This would effectively eliminate education as a barrier to entry.

In most provinces, individuals wishing to become brokers or managing brokers must first complete the licensing requirements at the agent level (agents are also known as salespeople, associates and trading services representatives) and then complete a few years of work experience, additional coursework or both to achieve the advanced designation. For example, Nova Scotia requires agents to take the Brokers/Managers course and examination and have three years of work experience as salespeople before becoming brokers.³⁰ Associates in Alberta must have been registered in Alberta for at least two of the previous five years before being allowed to become a broker.³¹ Once again, the Bureau found differences in the amount of work experience agents must accumulate before being allowed to apply for a broker’s licence.

Real estate agents at all levels may also have to complete continuing education requirements. The type of continuing education courses and the frequency at which they

²⁷ Prince Edward Island: Prince Edward Island Real Estate Association, “Real Estate Career,” www.peirea.com/real_estate_career.html; Nova Scotia: Nova Scotia Real Estate Commission, “Program Information,” www.nsrec.ns.ca/programinfo/licensinginfo.htm; British Columbia: Real Estate Council of British Columbia, “How do I become licensed to sell real estate in British Columbia,” www.recbc.ca/becoming_licensed/TradingServices.htm; Quebec: Association des courtiers et agents immobiliers du Québec, consultation submission, July 9, 2007; Alberta: Real Estate Council of Alberta, consultation submission, July 6, 2007.

²⁸ See, for example, Ontario Real Estate Association College, “Learning Options,” www.oreacollege.com/index.cfm/ci_id/228.htm.

²⁹ Association des courtiers et agents immobiliers du Québec, consultation submission, July 9, 2007.

³⁰ Nova Scotia Real Estate Commission, “Program Information,” note 27, above.

³¹ Real Estate Council of Alberta, “Licence Upgrading,” www.reca.ca/licences_forms/real_estate/licence_upgrade.htm.

must be taken varies across the country. For example, in Ontario, agents are required to complete additional educational courses within their first two years of practice to maintain their licence and must complete ongoing educational requirements thereafter.³² In Saskatchewan, agents must complete any continuing professional courses approved by the Saskatchewan Real Estate Commission.³³

Given the relatively short process individuals have to follow to become real estate agents, educational requirements are not a significant barrier to entry. However, the inconsistencies across provinces and territories in educational requirements do raise questions as to whether regulators have set the requirements at the minimum level necessary for real estate agents to be sufficiently qualified.

The proposal by Quebec's real estate council to introduce non-mandatory pre-licensing courses would have the effect of virtually eliminating barriers to entry in that province and, therefore, increasing efficiency and competition.

Recommendation

Regulators should look towards their counterparts in other provinces, territories and jurisdictions when deciding the level of education necessary to obtain a real estate agent licence, or maintain it, and the length of the work experience required to apply for a broker's licence. In particular, regulators should consider implementing non-mandatory pre-licensing courses similar to those the Quebec real estate council is currently considering.

Mobility

Interprovincial mobility

Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario and Saskatchewan have signed a mutual recognition agreement under which agents moving from one province to another or working in more than one province are evaluated only on knowledge specific to the province in which they wish to work, provided that their educational qualifications satisfy those of that province.³⁴

Restrictions on the mobility of real estate agents create an unnecessary barrier to entry for those wishing to work in another province or territory. Since each province and territory has its own licensing process and people may easily move between jurisdictions, it is essential that agreements and legislation facilitate the movement of real estate agents.

³² Ontario Real Estate College, "Welcome to a Rewarding Career in Real Estate," www.oreacollege.com/index.cfm/ci_id/224.htm; Real Estate Council of Ontario, consultation submission, July 5, 2007.

³³ Saskatchewan Real Estate Commission, *Bylaws*, s. 329.

³⁴ Human Resources and Social Development Canada, *Report on Implementation of the Labour Mobility Chapter of the Agreement on Internal Trade—July 2001*, www.hrsdc.gc.ca/en/cs/sp/hrscd/imp/mobility/2001-000049/page06.shtml; Nova Scotia Real Estate Commission, consultation submission, July 5, 2007.

Recommendation

Every province and territory should sign the current Mutual Recognition Agreement or any modified version of it to facilitate the movement of real estate agents between jurisdictions. Provinces and territories that do not wish to sign such an agreement should at least establish requirements to facilitate the movement of real estate agents between jurisdictions.

Each province and territory has also established in its laws mobility requirements for those seeking to practise within the jurisdiction, some presenting more difficulties for applicants from other jurisdictions than others. For example, in Newfoundland and Labrador, individuals who have been actively trading in real estate in another province for a total of two years during the three years immediately before applying to be licensed do not have to write the examination.³⁵ In New Brunswick, individuals licensed in another province or territory as salespeople or managers/brokers are eligible to write the pre-licensing examination without having to take the prerequisite courses.³⁶ In Prince Edward Island, individuals who hold real estate licences in other provinces are required to pass a pre-licensing course exam, which has a fee.³⁷

Since July 1, 2007, Saskatchewan has allowed licensed agents from any jurisdiction (not just in Canada) to be licensed in the province. To be eligible, agents must take a course and examination on the provincial real estate laws and forms. The requirement was implemented because real estate law and the documents required for real estate transactions are not common to all jurisdictions.³⁸

The Bureau applauds the initiatives taken by the industry regarding mobility. These allow real estate agents the flexibility to move in response to changing conditions in demand; however, some provinces and territories still have requirements that limit agents' mobility. For example, as seen in Table 1, Yukon requires applicants to be residents for at least three months prior to application, which reduces agents' mobility.³⁹ This requirement obliges individuals wishing to apply for a real estate licence to move to Yukon three months before doing so. This precludes agents from any other province or territories from also being licensed in Yukon and creates an unnecessary waiting period for someone moving to Yukon.

Recommendation

Yukon should consider removing the requirement contained in section 5(1)(c) of the *Real Estate Agents' Licensing Regulations* that individuals be residents for at least three months prior to applying for a real estate licence.

³⁵ *Real Estate Licensing Regulations*, C.N.L.R. 994/96, s. 5.

³⁶ New Brunswick Real Estate Association, "Challenging the Exam," www.nbrea.ca/en/content/6.

³⁷ This is due, in part, to certain provisions of the *Real Estate Trading Act* and particular restrictions of the Island Regulatory and Appeals Commission. Prince Edward Island Real Estate Association, consultation submission, July 6, 2007.

³⁸ Saskatchewan Real Estate Commission, consultation submission, July 5, 2007, and *Bylaws*, s. 313.

³⁹ *Real Estate Agents' Licensing Regulations*, Y.C.O 1977/158, s. 5(1)(c).

International mobility

Only a few provinces and territories have explicitly addressed international mobility. This is not a concern from a competition standpoint, because the requirements for becoming a real estate agent are not significant barriers to entry into the profession.

In Alberta, the real estate council may exempt agents from pre-licensing courses, the provincial qualifying examination, or both, when they are currently licensed or are eligible for licensing in Colorado, Georgia, Idaho, Montana, Oklahoma, Oregon, South Dakota, Utah or Wyoming.⁴⁰ In Yukon, agents are exempt when they have experience and training equivalent to what they would have acquired by selling or managing real estate in a Commonwealth country or the United States for not less than two of the previous five years.⁴¹ In British Columbia, brokers who have held active real estate licences in the United States for not less than one year during the three years prior to applying for a licence are exempt from the Real Estate Trading Services Licensing Course but not from the examination.⁴²

Ontario's regulation does not list the countries or states from which applicants are exempt from some licensing requirements. It does mention that the registrar reserves the right to grant exemptions from the pre-licensing courses to applicants with an equivalent status to that of real estate or business broker, or salesperson in Ontario.⁴³ As mentioned previously, Saskatchewan's policies on mobility include all jurisdictions. If the Quebec real estate council implements its proposed non-mandatory pre-licensing courses, agents from other jurisdictions would only need to pass the examinations to become licensed in that province. Furthermore, in Quebec agents may be exempted from the pre-licensing courses when their general or vocational college training is considered to be equivalent to what is required to be licensed in Quebec.

Even though the requirements for becoming a real estate agent are not significant barriers to entry, provinces and territories should strive to ensure there are no unnecessary barriers to entry and while still allowing the competencies of prospective agents to be evaluated.

Overlapping services and scope of practice

Six provinces (Alberta, British Columbia, Manitoba, New Brunswick, Ontario and Saskatchewan) and two territories (Northwest Territories and Nunavut) explicitly prohibit anyone but licensed real estate agents from collecting commission for real estate trading. Other provinces use terms such as *salesperson* and *broker* when referring to those who collect or pay a commission.⁴⁴

⁴⁰ Real Estate Council of Alberta, "Licence Reciprocity," www.reca.ca/licences_forms/real_estate/reciprocity_licences.htm.

⁴¹ *Real Estate Agents' Licensing Regulations*, Y.C.O 1977/158, s. 4(3).

⁴² Real Estate Council of British Columbia, "How do I become licensed in BC if I am already licensed in another jurisdiction in North America?" www.recbc.ca/becoming_licensed/jurisdiction.htm.

⁴³ *Educational Requirements, Insurance, Records and Other Matters*, O. Reg. 579/05, s. 7.

⁴⁴ Alberta, *Real Estate Act*, R.S.A. 2000, c. R-5, s. 17, 18, 21; British Columbia, *Real Estate Services Act* [SBC 2004] c. 42, s. 4; Manitoba, *Real Estate Brokers Act*, C.C.S.M. c. R20, s. 24; New Brunswick, *Real Estate Agents Act*, R.S.N.B. 1973, c. R-1, s. 21.1; Northwest Territories and Nunavut, *Real Estate Agents' Licensing Act*, R.S.N.W.T. 1988, c. 48 (Supp.), s. 57; Ontario, *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c. 30, Sch. C, s. 30(c); Saskatchewan *Real Estate Act*, S.S. 1995, c. R-1.3, s. 67.

In addition, most provinces and territories stipulate that individuals may not trade real estate or otherwise hold themselves out as real estate agents, salespersons, brokers, associate brokers or associates unless they are licensed and properly registered with a brokerage.⁴⁵ Only members of CREA are permitted to use the term REALTOR® in their designation.⁴⁶ The use of this private, trademarked term is not a substitute for fulfilling the regulatory requirements professionals must meet.⁴⁷ Agents may use it in addition to a provincial or territorial designation (such as licensed associate or broker).

Each piece of provincial and territorial legislation governing real estate agents includes a list of people who are exempt from holding real estate licences. These may include, depending on the jurisdiction, lawyers, notaries, auctioneers and property managers. However, the legislation usually requires that the real estate services such people offer be provided in the course of their regular practice or business. Lawyers and Quebec notaries also provide complementary services to those offered by real estate agents. Typically, lawyers and notaries are involved in closing real estate transactions. For example, in Quebec, notaries make mortgage documents official by depositing and preserving them in their notarial records (called a notarial act *en minute*).⁴⁸

For sellers who choose not to use the services of real estate agents (since they are not mandatory), there are companies that offer tools to advertise their property. As discussed previously, only agents that are members of CREA and have mandates from sellers to act for them may list properties on MLS®. Property owners who choose not to be represented by real estate agents are not permitted to do so.

The word *trade* (as in agents being allowed to trade in real estate) is defined by each province and territory in the definitions or interpretation section of its real estate legislation. Those definitions usually describe trading as, among other things, disposing of, acquiring or transacting in real estate by sale, purchase, agreement for sale, exchange, option, lease, rental or otherwise. The legislation in some provinces and territories also includes the activity of listing or advertising real estate in the definition.⁴⁹ However, these jurisdictions usually also have policies that state that they do not apply the definition of *trade* to businesses that advertise or list real estate but are not engaged in transactions. This means that “for sale by owner” companies, which only advertise properties, are exempt from licensing.

Since only real estate agents are allowed to trade in real estate, the scope and interpretation of the definition of *trade* are very important because they determine the limits of what real estate agents may do and, thus, affect all players in the industry. For example, firms that offer real estate advertising and marketing services would not be able

⁴⁵ See, for example, Alberta, *Real Estate Act*, R.S.A. 2000, c. R-5, s. 17.

⁴⁶ CREA, “REALTOR® Services,” www.crea.ca/public/use_a_realtor/use_a_realtor.htm.

⁴⁷ Real Estate Council of Ontario, consultation submission, July 5, 2007.

⁴⁸ *Civil Code of Québec*, C.c.Q. s. 2693.

⁴⁹ See, for example, Alberta, *Real Estate Act*, R.S.A. 2000, c. R-5, s. 1(x)(ii); New Brunswick, *Real Estate Agents Act*, R.S.N.B. 1973, c. R-1, s. 1; Newfoundland and Labrador, *Real Estate Trading Act*, R.S.N.L. 1990, c. R-2, s. 2(k)(ii); Northwest Territories and Nunavut, *Real Estate Agents’ Licensing Act*, R.S.N.W.T. 1988, c. 48 (Supp.), s. 1; Nova Scotia, *Real Estate Trading Act*, S.N.S. 1996, c. 28, s. 2(y); Ontario, *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c. 30, Sch. C, s. 1; Prince Edward Island, *Real Estate Trading Act*, R.S.P.E.I. 1988, c. R-2, s. 1(s)(iii); Yukon, *Real Estate Agents Act*, R.S.Y. 2002, c. 188, s. 1.

to offer their services to customers to help them sell their properties if advertising were the exclusive right of real estate agents. This is an unnecessary limit on competition.

Recommendation

Legislators should consider legislative amendments to give force of law to the current policy of exempting from licensing requirements any “for sale by owner” companies and advertisers that are not involved in real estate transactions.

Market conduct restrictions

Advertising

Two advertising restrictions are common across all provinces and territories. First, advertising must not be false or misleading. Second, the name of the agent or broker and the associated brokerage must be displayed clearly, regardless of the type of advertisement.⁵⁰ In addition, every jurisdiction, either specifically or implicitly, requires that agents have the consent of property owners to advertise.⁵¹ These restrictions are there to protect the public and do not cause any competition concerns.

There are other restrictions that are not as widespread that also seem to be acceptable from a competition perspective. For example, in Saskatchewan agents must submit all advertising to brokers or branch managers for approval prior to publication.⁵² Nova Scotia and Saskatchewan have additional rules requiring that advertising not be in bad taste, offensive or harmful to the public or the profession.⁵³ In New Brunswick and Prince Edward Island, only listing brokers may place signs on properties for sale, rent or lease.⁵⁴

Although the Bureau did not find significant cause for concern about advertising restrictions, it is mindful that consumers are generally best served by open and free competition, which restrictions can undermine. As a result, restrictions on advertising should be kept to a minimum to ensure that real estate agents have access to the full range of ways to advertise their services to the public, and hence maximize the incentives they have to offer the highest quality service and to innovate.

Recommendation

Restrictions regarding any form of advertising should not go beyond protecting consumers from false or misleading advertising.

Pricing and compensation

In all provinces and territories, agents may only trade real estate on behalf of the brokerage that employs them and may receive compensation only from that brokerage.

⁵⁰ See, for example, British Columbia, *Real Estate Services Act Rules* (Ministerial Order: M417), s. 4-6, 4-7, 4-8.

⁵¹ For example, British Columbia, *Real Estate Services Act Rules*, *ibid*, s. 4-8, New Brunswick Real Estate Association, *Standards of Business Practice*, art. 16, and Quebec, *By-law of the Association des courtiers et agents immobiliers du Québec*, R.Q. c. C-73.1, r. 2, s. 102, set this out explicitly. Real Estate Council of Alberta, consultation submission, July 6, 2007, and Nova Scotia Real Estate Commission, consultation submission, July 5, 2007, remark on the implicit requirement.

⁵² *Real Estate Act*, S.S. 1995, c. R-1.3, s. 55; Saskatchewan Real Estate Commission, *Bylaws*, s. 729.

⁵³ Nova Scotia: *Real Estate Trading Act*, S.N.S. 1996, c. 28, s. 28, and Nova Scotia Real Estate Commission, *Commission By-Law*, s. 708; Saskatchewan: Saskatchewan Real Estate Commission, *ibid*, s. 726.

⁵⁴ New Brunswick: New Brunswick Real Estate Association, note 51, above, art. 25; Prince Edward Island: Prince Edward Island Real Estate Association, consultation submission, July 6, 2007.

Brokerages may pay a commission only to employees who are licensed to trade real estate. Although the type of remuneration is negotiable, within the limits permitted by law, there has been a strong tendency towards fees that are a fixed percentage of the selling price of the property.⁵⁵

There have been no fixed or suggested prices in the real estate industry since the Competition Tribunal issued a prohibition order in 1988 prohibiting, among other things, collusion among agents to fix commission rates, fees or splits, or to boycott certain agents or advertising media. Even though the order ceased to apply in 1999, real estate regulators across the country continue to respect it and have incorporated many of its principles into their codes of conduct.⁵⁶ It is important that the industry continues to let the market set the commission rates so that consumers have the opportunity to pay competitive prices for the services of real estate agents.

In 2003, the Competition Bureau reached a settlement with Re/Max Ontario-Atlantic Canada Inc., Re/Max of Western Canada (1988) and Re/Max International Inc. regarding commission rates. The consent order states that Re/Max may not prohibit its franchisees or sale associates in Canada from setting independent commission rates or advertising such rates. The settlement aimed at enhancing competition for real estate brokerage services and benefiting Canadian consumers by allowing Re/Max franchisees to advertise commission rates or fees to the public.⁵⁷

All the provinces and Yukon prohibit commission based on the difference between the listed or asking price and the actual selling price.⁵⁸ In Alberta, this prohibition was originally introduced to prevent real estate agents from suggesting inaccurate list prices in order to mislead clients and increase their commissions.⁵⁹ Quebec's real estate council sees the prohibition as protecting the seller, who could otherwise be deprived of a significant portion of the sale price.⁶⁰ Since the intention of this restriction is, in fact, to protect the public, the Bureau does not have a concern about it from a competition perspective.

The legislation in New Brunswick, and Newfoundland and Labrador states that if no prior agreement has been made about the amount of commission, the prevailing rate in the community of the sold or purchased real estate is to be used.⁶¹ Yukon has a similar

⁵⁵ White, Lawrence J., *The Residential Real Estate Brokerage Industry: What Would More Vigorous Competition Look Like?* p. 8, www.stern.nyu.edu/eco/wkpapers/Residential.pdf.

⁵⁶ Competition Bureau, "Closing the Deal: Ten Years After the Real Estate Prohibition Order," speaking notes, www.competitionbureau.gc.ca/internet/index.cfm?itemID=914&lg=e.

⁵⁷ Competition Bureau, "Competition Bureau Settles Real Estate Case Involving Canadian Re/Max Franchisees," news release, February 17, 2003, www.competitionbureau.gc.ca/internet/index.cfm?itemID=297&lg=e.

⁵⁸ Alberta: *Real Estate Act*, R.S.A. 2000, c. R-5, s. 24; British Columbia: *Real Estate Services Act Rules* (Ministerial Order: M417), s. 5-14; Manitoba: *Real Estate Brokers Act*, C.C.S.M. c. R20, s. 32(2); New Brunswick: *Real Estate Agents Act*, R.S.N.B. 1973, c. R-1, s. 22(3); Newfoundland and Labrador: *Real Estate Trading Act*, R.S.N.L. 1990, c. R-2, s. 44(1); Nova Scotia: Nova Scotia Real Estate Commission, consultation submission, July 5, 2007; Ontario: *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c. 30, Sch. C, s. 36(3); Prince Edward Island: *Real Estate Trading Act*, R.S.P.E.I. 1988, c. R-2, s. 42(2); Quebec: *Rules of professional ethics of the Association des courtiers et agents immobiliers du Québec*, R.Q. c. C-73.1, r. 5, s. 36; Saskatchewan: *Real Estate Act*, S.S. 1995, c. R-1.3, s. 66(1)(a); Yukon: *Real Estate Agents Act*, R.S.Y. 2002, c. 188, s. 33(1).

⁵⁹ Real Estate Council of Alberta, consultation submission, July 6, 2007.

⁶⁰ Association des courtiers et agents immobiliers du Québec, consultation submission, July 9, 2007.

⁶¹ New Brunswick: *Real Estate Agents Act*, R.S.N.B. 1973, c. R-1, s. 22(2); Newfoundland and Labrador: *Real Estate Trading Act*, R.S.N.L. 1990, c. R-2, s. 44(2).

provision that limits the remuneration to five percent of the sale price when no prior agreement has been made.⁶² This type of rule protects the customer and does not raise any competition issue.

Since commission rates are usually based on the selling price of the property, it is clear that agents have a financial interest in those prices. The commission that an agent receives is not in proportion to the time spent working to sell the house. In addition, since the impact of a price increase on the agent's earnings is low relative to the impact on the seller, the agent's incentives may not be aligned with those of the seller. For example, at a six percent commission rate, the agent receives \$12,000 in commission when the property is sold for \$200,000. For a \$205,000 selling price, the agent receives \$12,300. As a result, the agent does not have the financial incentive to wait for a better price for his or her clients. Data from a 2005 study seems to support this: it showed that homes owned by real estate agents sold for about 3.7 percent more than other houses and stayed on the market about 9.5 days longer.⁶³

All provinces and territories, with the exception of Quebec, place restrictions on methods of remuneration and restrict remuneration to either a fixed amount or a percentage of the selling price.⁶⁴ According to the Real Estate Council of Alberta, the restrictions on the method of remuneration ensure that consumers are aware of the exact or expected costs of hiring real estate agents.⁶⁵

Ontario goes even further and uses the phrase *but not both* in its restriction, meaning that real estate agents may not, for example, ask for a fixed amount for their initial work and then a percentage of the selling price at closing.⁶⁶ Such a restriction disallows two-part fees, a type of pricing arrangement one would expect to arise in a competitive real estate market in which some fixed level of work is generally required, but anything beyond that is uncertain. Lawrence J. White elaborates on this point:

Further to the extent that there are fixed costs that are associated with the agent's efforts (say, the initial consultation with the sellers) and also costs that vary with the expected selling price (say, more advertising for a more expensive house), a two-part fee, e.g., \$2,000 plus 3% of the selling price would be expected in a competitive environment. The total amount of this two-part fee, when expressed in a percentage of the selling price, would exhibit the expected taper.

(...)

⁶² *Real Estate Agents Act*, R.S.Y. 2002, c. 188, s. 33(3).

⁶³ Steven D. Levitt and Chad Syverson, *Market Distortions When Agents are Better Informed: The Value of Information in Real Estate*, Working Paper 11053, www.nber.org/papers/w11053.

⁶⁴ In *Proprio Direct Inc c. Pigeon* [2006] J.Q. no 7477, the Association des courtiers et agents immobiliers du Québec contested a fee charged by Proprio Direct. The contract between the seller and Proprio Direct required that the seller pay a non-refundable lump sum for services, regardless of whether the property sold. Because there is no specific section of the contract on how brokerages are to be remunerated, and since both parties agreed to this contract, the Court of Appeal accepted this form of payment. However, on March 8, 2007, the Supreme Court of Canada granted leave for appeal and will now hear the case.

⁶⁵ Real Estate Council of Alberta, consultation submission, July 6, 2007.

⁶⁶ *Real Estate and Business Brokers Act*, 2002, S.O. 2002, c. 30, Sch. C, s. 36.

Further, ..., a fixed percentage fee announced by most or all brokers in a metropolitan area prevents the inherent quality differences that surely exist among brokers from being rewarded.⁶⁷

The Bureau finds it difficult to believe that, in the case of Alberta's rationale for its restrictions, consumers needing to be aware of exact or expected costs is inconsistent with permitting agents to charge a fixed amount and a percent of the sales price when pricing their services. With information on the markets being more accessible, consumers now have a better idea of the value of their properties and are able to make wiser and more informed decisions. This, along with more information about the options consumers have regarding the services the various players in real estate transactions offer, will also likely have an effect on consumer behaviour.

With regard to Ontario's approach, it prevents what would otherwise be a perfectly acceptable compensation arrangement that should spur competition among agents, since it maintains the incentive for them to work to get a higher selling price for their clients while ensuring that they will be fairly compensated for the preparatory work they do. At the same time, it is unlikely that consumers would suffer for not knowing the exact amount of commission they would pay, because, as is the case in the current system, the seller would know in advance the percentage of commission he or she would have to pay when the property sold. The only difference would be the fixed amount to be paid at the signing of the contract, an amount that would be known to the seller from the start.

Recommendation

The Ontario legislature should allow real estate agents to charge a combination of a percentage and a fixed amount when pricing their services under the *Real Estate and Business Brokers Act, 2002*, in order to better serve all customers. Other provincial legislators should also clearly allow such pricing by removing the *or* in the appropriate section of their laws.

Business structure

The restrictions on business structure for real estate agents are fairly general. For example, agents and brokers may only trade real estate for the brokerages that employ them (except in Alberta, where brokerages and agents may enter into contractual, non-employment relationships, and in Prince Edward Island, where independent contractors as well as employees are paid commissions).⁶⁸ In addition, brokerages must be licensed.

However, some provinces have additional restrictions, such as requiring prospective brokers in British Columbia to have a minimum of cash hand as a condition of being licensed as a brokerage (applicants must have three months' operating expenses plus \$5,000 cash in the bank), requiring receiving authorization from the Superintendent of Real Estate Agents and Salespersons before opening a branch office in Newfoundland and Labrador, and restricting the number of agents and brokers that a single manager may

⁶⁷ White, note 55, above.

⁶⁸ See, for example, Saskatchewan, *Real Estate Act*, S.S., 1995, c. R-1.3, s. 53(2). Alberta: Real Estate Council of Alberta, consultation submission, July 6, 2007; Prince Edward Island Real Estate Association, consultation submission, July 6, 2007.

supervise in Quebec.⁶⁹ When considering or reviewing restrictions of this type, regulators should always keep the protection of the public as the primary goal.

As noted, agents may trade real estate only on behalf of the brokerages that employ them and may receive compensation only from those brokerages. Consequently, only brokerage owners can really be self-employed and independent. However, in Alberta, brokerages and agents may enter into contractual and non-employment relationships that permit agents to be self-employed; however, agents must still operate in accordance with brokerage policies.⁷⁰ A greater number of types of contracts would offer more possibilities for both agents and brokerages to have employment arrangements that meet their own needs and those of the businesses.

To become brokers, agents must have between two and three years of experience, depending on the province where they are licensed. In many provinces, they must also take at least one course and pass at least one examination. These requirements are barriers to new agents who would like to start their own businesses. They are also not typical of other professions. For example, lawyers may start their own businesses the day they are accepted to the bar after finishing a mandatory articling period, which varies from six months to one year; no additional courses are necessary. With some adjustments to the educational requirements for licensing, real estate agents could become brokers sooner. In addition, measures to protect real estate agents' customers from error, omissions and professional neglect, such as holding professional insurance, could easily be made mandatory. Such insurance is already mandatory in some provinces and in numerous other professions.⁷¹ At the moment, brokerages are liable for their employees and, therefore, hold the appropriate type of insurance.

One change in how the real estate industry is organized could help address concerns about independence. In Quebec, when the *Real Estate Brokerage Act* is eventually reviewed, the real estate council plans to recommend that no distinction be made between agents and brokers. Only one type of licence would exist. Each person holding a licence would be professionally independent, but brokers could still work in real estate brokerages if they wished.⁷² The council's recommendations would ensure that a greater number of agents are independent in the way they conduct their business. There is at least one precedent for this: there is no differentiation between brokers and agents in Ireland. Only the owner of the real estate practice must obtain a licence and a Client Bank Account for the practice to receive and hold all client monies. The practice may employ whomever it wishes and the employees do not require licences.⁷³

⁶⁹ British Columbia: Real Estate Council of British Columbia, questionnaire response, October 2006, question 4.17; Newfoundland and Labrador: *Real Estate Trading Act*, R.S.N.L. 1990, c. R-2, s. 10; Quebec: *Real Estate Brokerage Act*, R.S.Q. c. C-73.1, s. 13, 14, and *By-law of the Association des courtiers et agents immobiliers du Québec*, R.Q. c. C-73.1, r. 2, s. 80.

⁷⁰ Real Estate Council of Alberta, consultation submission, July 6, 2007.

⁷¹ See, for example, Ontario, *Educational Requirements, Insurance, Records and Other Matters*, O. Reg. 579/05, s. 11, and *General*, O. Reg. 567/05, s. 4; British Columbia, *Real Estate Services Act*, [SBC 2004] c. 42, s. 104(2); Real Estate Council of British Columbia, questionnaire response, October 2006, questions 3.5 and 4.18; and Saskatchewan, *Real Estate Regulations*, R.R.S. c. R-1.3, Reg. 1, s. 18.1.

⁷² Association des courtiers et agents immobiliers du Québec, consultation submission, July 9, 2007.

⁷³ Ireland Residential Real Estate Business Practices, "Relationship of Buyer/Seller to Practitioner," www.worldproperties.com/CountryBusPractice.aspx?countryID=11&BusinessPracticeID=-1&TypeID=1.

Although the Bureau does not know the current cost of the lack of independence of agents in Canada, it is reasonable to believe that such a cost exists. Many real estate agents work for the major franchises in the country and must follow franchise policies on various aspects of their work. More independence for real estate agents, and with a shorter waiting period, would mean that they could offer a greater variety of products and offer it sooner than is currently possible, without having to follow the directives of an already established broker. Consumers would then have access to more dynamic real estate services offerings.

Recommendation

To promote more competition among real estate agents, regulators should reconsider the necessity of making a distinction between brokers, and agents and salespeople. Alternatively, regulators could explore options that would allow agents to become more independent.

Conclusion

Buying or selling real estate is often the most significant transaction of people's lives. While the main objective of real estate regulators is to protect the interests of the public, they must also allow consumers to have access to a variety of products and services at the best possible price.

Despite the fact that the Bureau did not find major restrictions in the real estate industry, a few points of interest arose in the course of this study.

The barriers to entering the real estate profession are quite low. Therefore, the supply of real estate agents is large, compared with the supply of other professionals. This opens the door to a particularly competitive market for consumers; however, the restrictions that do exist are not uniform between provinces in some regards.

The unnecessary barrier to entry created by some existing restrictions on mobility is an issue that provinces and territories should address in the near future. Real estate agents in Canada should be able to easily become licensed in another province or territory. The Bureau understands that there might be legislative differences among the provinces and territories, but the competencies necessary to become an agent are uniform throughout the country.

The two initiatives that the Quebec's real estate council is proposing are very encouraging. More specifically, the abolition of the distinction between agents and brokers would enhance competitiveness in the industry, which the Bureau believes would have a positive effect on the prices consumers pay for real estate services.

Conclusion

Self-regulated professions have the lawful power to impose restrictions on the entry and conduct of their members. The need for regulation of this sort may be justified in the presence of market failure—that is, when markets are unable to function efficiently on their own. The main causes of such market failures can and do exist in the professions the Competition Bureau examined for this study. The most important of these causes is asymmetric information, which is essentially a knowledge gap between consumers and professionals that results in consumers being, or likely being, unable to assess the quality of professional services. Faced with asymmetric information, consumers of professional services may not be able to determine what is in their best interests and may depend on regulation to provide some signal of quality.

However, self-regulating professions must acknowledge that the private interest of its members will inevitably be at odds with the common good at some times. Therefore, it follows that regulators—comprising provincial and territorial governments and self-regulating organizations—must follow certain principles to ensure regulation is in the overall public interest, based on well-defined and specific objectives, subject to regular and ongoing review, and not unnecessarily restrictive of freely competitive markets.

It also follows that regulators must develop the expertise necessary to properly assess competition issues as they relate to the profession in question. A number of valuable aids to this have been developed, including some key principles and tools put forward by the Organization for Economic Co-operation and Development.

Building on its extensive review of restrictions in six areas (as summarized below) the Bureau puts forward recommendations that it believes are opportunities for regulators to seize to ensure that they are balancing the potential public safety benefits of regulation with the various advantages of a dynamic, competitive market.

Entering the profession

Most professions maintain substantial entry qualifications, coupled with continuing education requirements. The Bureau found that these qualifications are, in some instances, noticeably uneven across the country.

In general, the Bureau supports the need for entry requirements to assure quality in the provision of professional services. However, any proposed increase to required entry qualifications should be justified as being the minimum that will reasonably ensure

consumer protection. Furthermore, jurisdictions that maintain higher standards than others should look to the outcomes of the jurisdictions with fewer restrictions when defining the minimum necessary level of qualification.

Mobility

With respect to interprovincial mobility, the Bureau has the sense that the professions are moving in the right direction, possibly spurred by the requirements of Chapter 7 of the Agreement on Internal Trade, which include a series of obligations intended to ensure that workers qualified to work in one province or territory have access to employment opportunities in any other part of the country. (Under the Agreement, regulators must comply with these obligations by April 1, 2009.) The majority of provinces in each profession studied have signed a mutual recognition agreement to remove unnecessary barriers to mobility of qualified professionals and establish the conditions under which professionals licensed in one jurisdiction may have their qualifications recognized in another.

The Bureau is encouraged by the existence of such agreements; however, drafting and signing them is only the first step. These agreements must be implemented effectively and be consistently respected in practice.

In terms of international mobility, the Bureau applauds those professions that have developed a process for recognizing the credentials of international practitioners solely structured around an assessment of qualifications. Such programs are important to ensuring that domestic professionals are not using foreign accreditation programs as a means to erect unnecessary barriers to entry to protect themselves from competition.

The Bureau is particularly supportive of professions in which all provincial regulators have agreed on one international bridging program. Such programs are encouraging, since they clarify the qualification process for international practitioners. When assessing foreign qualifications, there should be no discrimination between domestic and foreign-qualified applicants for registration other than on the grounds of competence and language requirements.

Overlapping services and scope of practice

The Bureau has identified a number of instances in which professionals who provide overlapping services are requesting that their scope of practice be expanded to include one or more activities currently beyond their authorization.

While the Bureau does not have the expertise to identify the appropriate areas into which service providers could safely expand their scope of practice, it recommends that regulators (who do possess such expertise) conduct a thorough assessment of the overall effect of any proposed expansion. A full evaluation should take into account both the potential costs, in terms of public safety, and the potential benefits, in terms of lower prices, increased choice and enhanced access to professional services.

From a competition perspective, expanding the scope of practice of a profession is favourable when it can be accomplished safely and effectively. Scopes of practice that can be expanded safely benefit consumers by increasing the choice of service providers and intensifying competition between professionals that provide similar services. As Canada's aging population puts increased pressure on the supply of certain professional services (namely, health care services), it becomes ever more important to ensure that all types of professionals within fields facing increased future demand are being used to their full potential. As long as consumers are informed of the distinction between the roles, functions and qualifications of overlapping professionals and the services that each offers, all professionals who can safely offer a service should be authorized to do so.

Advertising

In all the professions studied, the Bureau identified numerous restrictions that appear to go beyond what is necessary to protect consumers from false or misleading advertising and, as a result, limit consumers' access to legitimate information that greatly benefits competition.

Legislation to protect consumers from misleading advertising already exists in the form of the *Competition Act*; however, the Bureau recognizes that regulators may be in a unique position to evaluate what exactly constitutes false or misleading advertising within their fields.

The Bureau is particularly concerned by restrictions on comparative advertising. Such restrictions obstruct competition between service providers and make it difficult for new entrants to advertise any distinctive features of the services they offer, protecting incumbents from the full forces of competition. The Bureau recommends that regulators in every profession review existing restrictions on advertising and remove those that go beyond prohibiting false or misleading advertising.

Pricing and compensation

Some regulators publish suggested fee guides, which they claim to be non-binding. Fee guides that are purely voluntary in nature, while unquestionably preferable to any mandatory directive, remain a source of unease from a competition perspective, since they risk facilitating overt or tacit collusion.

The Bureau did not discover any minimum price regulation in its research; however, some maximum price regulation was identified. While the anti-competitive potential of minimum price regulation is far greater, maximum prices also have the potential to restrict competition when they reduce the willingness of members of the profession to supply their services or improve quality, or act as a point on which prices converge.

Given the negative effect of tacit or overt collusion on consumer welfare, the Bureau urges regulators to look to less intrusive means to achieve the informational benefits of suggested fee guides. In addition, regulators should ensure that any maximum prices do not function in practice as fixed prices.

Business structure

Most of the restrictions on business structure the Bureau identified are justified by regulators as ensuring that outside parties do not influence professionals to act in any way but in the best interests of consumers.

The Bureau is of the view that certain restrictions in this vein, namely restrictions on multidisciplinary practices between complementary service providers, have the potential to seriously reduce the benefits of competition, including efficiencies that would likely remain unrealized by service providers working separately.

Therefore, the Bureau recommends that regulators consider less intrusive mechanisms than the prohibition of multidisciplinary practices to circumvent possible conflicts of interest, such as the requirement for all parties to collaborative arrangements to adhere to similar rules of conduct.

In summary, a number of common themes arose during the course of this study: regulate only when necessary; keep the net public benefit in mind, weighing all the potential costs and benefits of regulation; and use regulatory tools that restrict competition to the minimum extent possible. As regulators review existing restrictions and develop new ones, they would do well to keep these themes in mind, along with the guiding principles for effective regulation set out in Chapter 2.

The professions in general, and those reviewed for this study, currently face a situation that is rich with opportunities to benefit from increased competition. These benefits will accrue not only to the professions themselves but also, and perhaps more importantly, to Canada and Canadians. This study is, as such, only a starting point. There is ongoing work for regulators to do. For the Competition Bureau's part, it plans to review in two years whether the professions have addressed the recommendations this study presents.

Appendix 1: Questionnaire

Competition Bureau Professions Study Information on Professions Regulations - Part i

Part 1: General Information

1.1 This questionnaire was completed by:

Name:

Position:

Organization:

Postal Address:

Telephone Number:

E-mail Address:

1.2 Please provide the web sites where the Competition Bureau can find all applicable current rules and regulations governing your profession, including all provincial statutes and legislation, bylaws, constitutions, codes or rules of conduct, regulations, protocols, procedures, guidelines and related documents.

If any of the above documents are not publicly available on-line, please provide a hard copy of these documents with your response to this information request.

Part 2: Organizational Characteristics of Your Profession

2.1 Is membership in a professional association required in order to become a full member of your organization or profession? Yes _____ No _____

If the answer is “Yes”, are there more than one such professional organizations for your profession in your province? Yes _____ No _____

If the answer is “Yes” again, please identify all such professional organizations in your province.

2.2 Please choose which category is true for the main organizational structure of your profession. (Please choose one and add comments if applicable) **See Note 1.**

Licensing and compulsory membership in a professional association	
Licensing without compulsory membership in a professional association	
No compulsory licensing and voluntary membership in a professional association (= certification)	
No compulsory licensing nor voluntary membership in a professional association (= certification)	

2.3 Regulations are created...(please choose one)

exclusively by public authorities	
exclusively by the responsible professional association	
by public authorities and by the professional association	
other (explain)	

2.4 The implementation of the regulations is organized and controlled

exclusively by public authorities	
exclusively by the responsible professional association	
by public authorities and by the professional association	
other (explain)	

2.5 Please identify all provincial bodies that govern the regulations and codes of conduct for your professional organization (e.g. government departments or agencies, provincial colleges)

4.2 If the answer is “Yes” to question 4.1, please identify the sections in applicable legislation, regulations, bylaws, codes or rules of conduct or other applicable document(s).

4.3 Please list up to ten services that your professional organization has an **exclusive** right to offer in your province and the estimated % of total member revenue obtained from each service for the years 1995, 2000 and 2005.

Exclusive services offered by your profession		% of Total Revenue
1.		1995 2000 2005
2.		1995 2000 2005
3.		1995 2000 2005
4.		1995 2000 2005
5.		1995 2000 2005
6.		1995 2000 2005
7.		1995 2000 2005
8.		1995 2000 2005
9.		1995 2000 2005
10.		1995 2000 2005

4.4 Are there specific regulations or restrictions on access by others to the market in your province for the services offered exclusively by your professional organization?

Yes ___ No ___

If the answer is “Yes”, please identify these restrictions.

4.5 Please list up to five services that both your professional organization and other professional organizations have the right to offer in your province and identify those other professional organizations

Type of service	Other Professional Organization
1.	
2.	
3.	
4.	
5.	

4.6 Please list up to five services that your professional organization does not have the right to offer in your province but which you believe you are qualified to offer. Please identify the professional organization(s) offering the service now and provide the justification for why you are excluded and why you believe you can offer the service identified. (Note: If there more than five services, please provide the identical information for each.)

Type of service	Other Entity	Justification
1.		
2.		
3.		
4.		
5.		

4.7 Is a university or college degree a necessary precondition to become a member of your professional organization? Yes university ___ Yes college ___ No ___

If answer is “Yes”, which degree and what is the minimum duration of study? Please give exact information

Name of qualification:

Years of study:

4.8 Are higher education qualifications necessary for entrance to your professional organization? Yes _____ No _____

If the answer is “Yes” to question 4.8, of what duration? Please give exact information

Name of each qualification:

Years of study for each qualification:

4.9 Are there requirements in regard to a period of relevant practice or experience (e.g. articling) in order to become a full member of your professional organization? Yes _____ No _____

If the answer is “Yes” to question 4.9, of what duration? Please give exact information

Additional relevant practice requirements:

Duration:

4.10 Is there a requirement to pass one or more special professional exams in order to become a full member of your professional organization and offer services that are restricted to your professional organization? Yes _____ No _____

If the answer is “Yes” to question 4.10, how many exams and provide the name of each. Also, what entity administers these exams?

4.11 Are further exams or continuing education required for the members of your professional organization? Yes _____ No _____

If the answer is “Yes” to question 4.11, please list these requirements and describe how continuing education is organized and controlled.

4.12 How does your professional organization deal with the admittance of individuals who are qualified to practice your profession in (a) other provinces and (b) other countries?

4.13 If a member leaves your professional organization for a year or more, is she or he required to re-qualify in order to practice your profession? If so, please identify all requirements.

Are there any restrictions on who may use the designation associated with your profession (e.g. medical doctor, chartered accountant, lawyer, etc.)

4.15 Are there limitations on the number of individuals who may enter your professional organization each year? (Assuming the individual has the prerequisite educational qualifications.) If so, please describe these limitations including identifying the mechanisms used to limit entry.

4.16 Is the establishment of a business in your profession restricted to specific forms of business structure or ownership (such as limited liability partnerships or public companies).?

Yes _____ No _____

If the answer is “Yes” to question 4.15, please identify the kinds of business structures which are not permitted: (check all that are applicable)

sole practitioners	
limited liability partnerships	
public limited companies	
private company	
other (please specify)	

4.17 Is the establishment of a business in the profession restricted by quotas or economic needs tests? **See Note 2.** Yes ____ No _____

4.18 Are there regulations on compulsory professional indemnity insurance?
Yes ____ No ____

If the answer is “Yes”, what is the minimum amount in Canadian dollars which professionals must be insured? Per case _____
Per Business _____

Part 5 Regulations on Professional Conduct

5.1 Are there regulations or suggestions for the fees/prices for services your profession offers? Yes _____ No _____

If the answer is “Yes” to question 5.1, please identify the sections in the applicable legislation, regulations, bylaws, codes or rules of conduct or other applicable document(s).

If the answer is “No”, go to question 5.3

5.2(a) For each type of service your profession offers, please identify which of the following pricing applies:

binding minimum fees/prices for all services
binding maximum fees/prices for all services
binding minimum fees/prices for some services
binding maximum fees/prices for some services
non-binding suggested fees/prices
binding suggested fees/prices
other (please describe)

5.2(b) Are these binding or suggested fees/prices always respected in practice?
Yes ___ No ___

If the answer is “No” to question 5.2(b), do enforcement mechanisms exist to ensure binding fees/prices are respected? If so, please identify these enforcement mechanisms.

5.2(c) If the answer is “No” to question 5.2(b), are actual fees/prices or lower on average than binding or suggested fees?

Higher ___ Lower ___

5.2(d) How are price lists determined in your profession?

5.2(e) How often are fee/price lists changed? Once a year ___
More than once a year ___ Other ___ (please explain)

5.2(f) Are there any restrictions on particular pricing arrangements (e.g. contingency fees)? If yes, please specify these restrictions.

5.2(g) Please provide all fee/price lists (either binding or non-binding) for your profession for the years 1995, 2000, 2005 and 2006 for the province in which your profession provides service.

5.3 Are there regulations on advertising and marketing in your profession?
Yes ___ No ___

If the answer is “Yes” to question 5.3, please identify the sections in the appropriate legislation, regulations, bylaws, codes or rules of conduct or other applicable document(s).

If the answer is “No” to question 5.3, go to question 5.5.

5.4 Of what kind are these advertising and marketing restrictions?

all forms of advertising are strictly forbidden	
most forms of advertising are forbidden	
some forms of advertising are forbidden, these being:	
direct mailing	
price advertising	
comparative advertising	
other (specify)	
1.	
2.	
3.	

5.5 Are there regulations restricting geographical areas of service? Yes ____ No ____

If the answer is “Yes” to question 5.5, please identify these regulations and the applicable legislation, regulations, bylaws, codes or rules of conduct or other applicable document(s).

If the answer is “No”, go to question 5.7

5.6 Of what kind are these regulations on location and diversification?

geographical restrictions on offering services e.g. territorial restrictions	
restrictions on establishing branch offices	
other (please specify)	

5.7 Are there restrictions on multidisciplinary partnerships with other professionals? (e.g. accountants and lawyers)

If the answer is “No” to question 5.7, go to question 5.9.

5.8 If the answer is “Yes”, what are these restrictions on multidisciplinary partnerships?

any form is generally forbidden	
incorporation is generally forbidden	
some comparable licensed professions are allowed to cooperate in various commercial forms (including incorporation)	
incorporation is allowed only with the comparable licensed professions but incorporation is forbidden	
If other circumstances apply, please describe	

5.9 Are there any regulations on specialization in your profession? **See Note 3.**

Yes _____ No _____

If the answer is “Yes”, how is specialization organized? Is there a right to the title for this specialization? May this specialization be advertised? Please describe?

Part 6 Other Instruments for Quality Control

6.1 Are there any special (voluntary) certification systems, which coexist alongside the traditional licensing or certification model? **See Note 4.**

Yes _____ No _____

If the answer is “Yes”, please describe these systems, their purpose, and provide your experience with these systems.

6.2 Does there exist any other special instruments of quality control not mentioned in the data sheet so far? Yes _____ No _____

If the answer is “Yes”, please describe each of them, their purpose, and provide your experience with each of them.

Part 7 Other Restrictions

7.1 Please identify any arrangements your professional association has negotiated with professional associations in other parts of Canada or internationally which gives your association the exclusive right to provide specific services. Please identify these services, the names and locations of these other professional associations and the date the arrangement was negotiated.

7.2 Please identify any other areas (other than those referred in Part 4 above where your professional association or others practicing your profession restrict entry into the profession or otherwise regulate the market conduct of members.

**Competition Bureau
Professions Study
Information on Professions Regulations - Part ii**

Part 8 Changes to the Regulatory Framework

8.1 Please give a brief overview of areas in which regulation of your profession has changed in the past ten years. If you wish to include a longer exposition, report, or study results, please provide a copy.

Area of Regulation	Changes to Regulation	Purpose for Changes	Date of Implementation
1.			
2.			
3.			
4.			
5.			
6.			
7.			
8.			

8.2 Please give a brief overview of areas in which regulations of your profession are currently being discussed. If you wish to include a longer exposition, reports, or study results, please indicate this.

Area of Regulation	Changes to Regulation	Purpose for Changes	Date of Implementation
1.			
2.			
3.			
4.			
5.			
6.			
7.			
8.			

**Competition Bureau
Professions Study
Information on Professions Regulations - Part iii
Data on Your Profession**

In the following sections data is requested for the years **1995, 2000 and 2005**.

Part 9 Membership of the Professional Body (See Note 5)

Please state, if known (this question refers to the professionals and firms in the province of your own professional body)

Total Membership of your Professional Body (by membership category - name as appropriate)	1995	2000	2005

Part 10 Stages of Access to the Profession

Please fill in the categories which are applicable to your profession.

	1995	2000	2005
newly admitted profession members in each year			
trainees passing Final Qualifying Exams in each year			
trainees writing Final Qualifying Exams in each year			
professional trainees (in all stages of pre-qualifications)			
new trainee entrants in each year			
graduates from relevant disciplines, if known (e.g. law faculties etc.)			

Part 11 Questions about the Profession as a whole

11.1 Professionals

	1995	2000	2005
Total # of professionals practising in your province			
percentage of above self-employed (%)			
percentage of above non self-employed (%)			

11.2 Firms Practising the Profession in your province (see Note 6)

	1995	2000	2005
Total # of firms in your province			
percentage of firms non-incorporated (%)			
percentage of firms incorporated (%)			

11.3 Size of Firms (in terms of Professionals)

Total # of firms in your province	1995	2000	2005
% of firms with 1 qualified professional			
% of firms with 2 qualified professionals			
% of firms with 3-5 qualified professionals			
% of firms with 5-30 qualified professionals			
% of firms with more than 30 qualified professionals			

11.4 Size of Firms (in terms of Non-Professional Employees)

Total # of firms in your province	1995	2000	2005
% of firms with 0 employees			
% of firms with 2 employees			
% of firms with 3-10 employees			
% of firms with 10-50 employees			
% of firms with more than 50 employees			

11.5 Size of Multi-branch Firms (note that this refers to points of access by clients/consumers of professional skills. A branch office is counted as a separate location)

Total # of firms in your province	1995	2000	2005
% of firms with 1 office in province			
% of firms with 2-5 offices in province			
% of firms with 5-20 offices in province			
% of firms with 20-50 offices in province			
% of firms with more than 50 offices in province			

11.6 Cost Structure of Firms (Please enter best estimates for “median firm” in your province)

% of total costs	1995	2000	2005
Remuneration of Professionals			
other wages and salaries			
cost of professional insurance and risk			
investment in office premises			
investment in technology (e.g. computers)			
on-going professional education (courses)			
other costs (specify if possible)			
Total Costs	100%	100%	100%

11.7 Average Revenues by Size of Firms (Please enter best estimates for “median firm” in your province average revenue in dollars)

	1995	2000	2005
Firms with 1 qualified professional			
Firms with 2 qualified professionals			
Firms with 3-5 qualified professionals			
Firms with 5-30 qualified professionals			
Firms with more than 30 qualified professionals			

11.8 Average Revenues by Size of Multi-branch Firms (Please enter best estimates for “median firm” in your province average revenue in dollars)

Average revenues for

	1995	2000	2005
Firms with 1 office in province			
Firms with 2-5 offices in province			
Firms with 5-20 offices in province			
Firms with 20-50 offices in province			
Firms with more than 50 offices in province			

Notes to the Survey Questionnaire

Note 1

Licensing indicates cases where there is a requirement for official/legal permission to offer specific services in the market. Such licensing is typically carried out by public authorities and/or the responsible professional association. Only licensed service providers are allowed to use a specific professional title.

Certification indicates cases where there is no requirement for licensing in order to offer specific services in the market, but usually where service providers are organized in one or more professional bodies and to obtain this certification they have to fulfil certain qualification (e.g. educational) requirements. Usually only the service providers certified in this way are allowed to use a specific professional title.

Note 2

In general terms this question deals with quantitative restrictions on the number of people who may enter the profession and offer the respective services. Such limits may be related to an economic needs test or other types of proviso, e.g., a limit to the number of professionals a community can support.

Note 3

Specialization may take different forms. A lawyer may, for example, acquire specific skills and some kind of additional certification in the field of family law. In this context “specialization” means that the respective member of the profession not only has the advantage of acquiring specific skills but that this specialisation is recognised by some kind of institutionalized certification. This may take place within the traditional licensing or certification model adopted by the profession, or as a separately organized grouping.

Note 4

For the term “certification” see Note 1. This question deals with special voluntary certification that, for example, may exist in the context of further specialisation (see Note 3) or international recognition.

Note 5

Membership of a Professional Body may not necessarily extend to all professionals in your field. Nevertheless, in this section information regarding your knowledge about the profession as a whole is sought. Please answer with concrete data, or where this is not available, with an estimate based on your knowledge of the profession. If it is an estimate, please identify it as such.

Note 6

This includes all firms whose primary business involves practicing the profession, e.g., accountancy firms and firms offering accountancy and legal services, but not an industrial firm employing some professional accountants.

Appendix 2: Organizations that provided input to the study

Accountants

- Association of Chartered Certified Accountants
- Canadian Institute of Chartered Accountants (on behalf of all provinces and territories)
- Certified General Accountants Association of Canada (on behalf of all provinces and territories)
- Certified General Accountants Association of Newfoundland and Labrador
- Ordre des comptables en management accrédités du Québec
- Society of Management Accountants of Canada (on behalf of all provinces and territories)

Lawyers

- British Columbia Paralegal Association
- Canadian Bar Association
- Federation of Law Societies of Canada (on behalf of all law societies, except those in Quebec and Nunavut, although Nunavut adopted Northwest Territories' legislation and regulation as a whole)
- First Canadian Title

Optometrists

- Society of Eye Care Professionals Inc.
- Vision Council of Canada

- Alberta College of Optometrists
- British Columbia Association of Optometrists
- Canadian Association of Optometrists
- Canadian Examiners in Optometry
- Manitoba Association of Optometrists
- New Brunswick Association of Optometrists
- Nova Scotia College of Optometrists
- Ontario Association of Optometrists
- Ordre des optométristes du Québec
- Prince Edward Island College of Optometry
- Saskatchewan Association of Optometrists

- Alberta Opticians Association
- College of Opticians of British Columbia
- College of Opticians of Ontario
- Ontario Opticians Association
- Opticians Association of Canada
- Ordre des opticiens d'ordonnances du Québec
- Saskatchewan Ophthalmic Dispensers Association

Pharmacists

- Alberta College of Pharmacists
- British Columbia Pharmacy Association
- Canadian Council for Accreditation of Pharmacy Programs
- Canadian Pharmacists Association
- Canadian Society of Consultant Pharmacists
- College of Pharmacists of British Columbia
- Government of Alberta, Alberta Health and Wellness, Pharmaceutical Policy and Program Branch
- Government of Northwest Territories, Department of Health and Social Services
- Government of Yukon, Office of the Yukon Regulator of Pharmacists, Consumer Services
- Manitoba Pharmaceutical Association
- National Association of Pharmacy Regulatory Authorities
- Nova Scotia College of Pharmacists
- Ontario College of Pharmacists
- Ontario Pharmacists' Association
- Ordre des pharmaciens du Québec
- Prince Edward Island Pharmacy Board

Real estate agents

- Association des courtiers et agents immobiliers du Québec
- Canadian Real Estate Association
- Government of New Brunswick, Department of Justice and Consumer Affairs
- Government of Northwest Territories, Municipal and Community Affairs, Community Operations
- Manitoba Real Estate Association
- Manitoba Securities Commission, Real Estate Section
- New Brunswick Real Estate Association
- Nova Scotia Real Estate Commission
- Prince Edward Island Real Estate Association
- Real Estate Council of Alberta
- Real Estate Council of British Columbia
- Real Estate Council of Ontario
- Saskatchewan Real Estate Commission

Appendix 3: Recommendations

Below are all the recommendations found in chapter 3–7. Readers are encouraged to consult the individual chapters for the context for each recommendation.

Accountants

Entering the profession

- The provincial and territorial accounting organizations should, when establishing or reviewing regulatory requirements, set the lowest acceptable time requirements for completing elements of the qualification process. In doing so, the organizations should benchmark their requirements against those in jurisdictions with the lowest time requirements that are still achieving the desired level of competence.

Mobility

International mobility

- The provincial and territorial accounting organizations should continue to review foreign accounting designations in order to expand the list of qualified foreign accounting designations, while minimizing all barriers to the accreditation process.
- Regulators should consider removing residency requirements for foreign-trained accountants who wish to be public accountants in Canada.

Overlapping services and scope of practice

- Provincial regulators should give all members of accounting designations who have the appropriate level of competence the right to practise the full extent of public accounting.
- The Ontario Public Accountants Council should be flexible when applying the new standards under the *Public Accounting Act* in order to give members of all designations who have the equivalent training and education the right to practise public accounting.

Advertising

- Provincial and territorial restrictions on advertising by accountants should start from the premise that all advertisements are permitted except those that mislead or misinform the public. Provincial and territorial accounting organizations should consider removing any restriction that does not explicitly serve this purpose.

- The provincial and territorial accounting organizations should consider eliminating all solicitation restrictions that go beyond protecting the public from persistent, coercive or harassing solicitation.

Pricing and compensation

- All Chartered Accountant organizations should consider eliminating Rule 204.4(34) of the *CA Rules of Professional Conduct and Related Guidelines*, which gives conditions as to when CAs may perform engagements for a significantly lower fee than that charged by predecessors.
- The provincial and territorial accounting organizations should consider whether restrictions on compensation for referrals are needed to maintain and preserve public accountants' independence. If so, the organizations should consider whether this restriction could be replaced with self-imposed safeguards.

Business structure

- Given the variance in business structure restrictions between provinces, each regulator should consider whether its current rules on business structure and ownership are necessary. Those that go beyond the minimum necessary to achieve a clearly defined public interest objective should be removed.
- Regulators should look at ways to allow public accountants to work with non-accountants without jeopardizing the public interest.

Lawyers

Entering the profession

- Law societies should justify the duration of the professional legal training course and articling as the minimum necessary to properly and effectively practise law while protecting the public interest. When reviewing the duration of education and training lawyers require, law societies should look at other law societies that have maintained the quality of legal services while requiring shorter periods for training and articling.

Mobility

Interprovincial mobility

- Law societies should facilitate the movement of lawyers between jurisdictions to ensure complete temporary and permanent mobility throughout Canada. To do so, the Quebec Bar should implement, and the territories should sign and implement, the National Mobility Agreement.

International mobility

- The law societies that require their members to be residents or Canadian citizens should consider following the example of law societies that have not considered it necessary to include such requirements and eliminate these restrictions.

- The law societies of Quebec, Northwest Territories, Yukon and Nunavut should adopt rules enabling foreign lawyers to act as foreign legal consultants.
- Law societies should remove the residency requirements for foreign legal consultants. Local presence should not be necessary.

Overlapping services and scope of practice

- To the extent that paralegals need to be regulated, the proper avenue for this is not through the law societies, given the obvious conflict of interest that arises from having one competitor regulate another. Alternative means of regulatory oversight should be explored.
- Law societies should neither prohibit related service providers (such as paralegals and title insurers) from performing legal tasks, nor limit their ability to do so, unless there is compelling evidence of demonstrable harm to the public.

Advertising

- Generally, law societies should lift any unnecessary restrictions on advertising—that is, any restriction above and beyond the prohibitions on false, misleading and deceptive advertising—unless they can justify their existence. In particular, law societies should remove restrictions on the size, style and content of advertisements and allow non-lawyers to be compensated for referring services or clients.
- Law societies should evaluate the possibility of adopting a specialist certification program similar to that in Ontario. Alternatively, law societies could consider allowing members to be identified as leading practitioners in publications that rely on data from independent parties approved by the law societies' ethics committee, as is the case in Saskatchewan.
- Law societies should abolish prohibitions on comparative advertising of verifiable factors, such as price.

Pricing and compensation

- The Quebec legislature should consider repealing the provision of the *Professional Code* that gives professions the right to suggest a tariff of professional fees that the members may apply.
- Law societies should identify the goals of the restrictions on contingency fees in certain practice areas, and then determine whether the restrictions are the best means of achieving the desired goals, considering that other law societies have not deemed such restrictions necessary.
- The law societies of British Columbia and New Brunswick should consider eliminating the maximum percentage to which lawyers are entitled under contingency fee agreements. The appropriate fee structure should be left to market forces to determine.

Business structure

- Law societies should consider less intrusive mechanisms than prohibiting multidisciplinary practices to circumvent possible conflicts of interests. Examples to follow are those of the Law Society of Upper Canada and the Barreau du Québec, both of which allow lawyers to form partnerships with non-lawyers, under certain conditions and appropriate regulation.
- In order to allow for multidisciplinary practices, law societies will have to remove restrictions that currently prohibit or discourage lawyers from working in multidisciplinary arrangements with other professionals. Instead, they should allow the following:
 - lawyers to split, share or divide clients' fees with non-lawyers;
 - lawyers to enter into arrangements with non-lawyers regarding sharing fees or revenues generated by the practice of law; and
 - law corporations to carry on activities other than providing legal services or services directly associated with providing legal services.
- Law societies wishing to take a more conservative approach should consider allowing lawyers, under specific conditions, to share premises, facilities and staff with non-lawyers, as is the case in Saskatchewan.

Optometrists

Entering the profession

- Provincial and territorial colleges of optometry should consider ways to ensure that conditions of supply and demand in Canada are taken into account in the formulation and development of the Accreditation Council on Optometric Education's accreditation policies.
- The provincial ministries of education should review the current number of university places for optometry students to determine whether it is adequate to meet current and future demand for optometry services in Canada.
- The provincial and territorial colleges of optometry must justify any proposed increase in the required entry qualifications for prospective optometrists as being the minimum necessary for consumer protection.

Mobility

Interprovincial mobility

- Every province and territory should sign the Mutual Recognition Agreement (MRA) to facilitate the movement of optometrists throughout Canada. Non-signatories should clearly articulate the features of the MRA that are currently preventing them from signing on to the agreement so that *all* provincial and territorial colleges of optometry can co-operate in order to extend the MRA to the rest of the provinces and territories.

Overlapping services and scope of practice

- Regulators should determine the overall costs and benefits of extending opticians' scope of practice to include measuring refractive error for low-risk consumers and dispensing eyewear based on the results, including the potential costs in terms of public safety and the potential benefits in terms of lower prices, increased choice and consumer access to eye care services.
- Regulators in those provinces and territories that continue to prohibit optometrists from prescribing therapeutic pharmaceutical agents should assess the necessity of such restrictions in light of their relaxation in most of Canada and the United States. As with the recommendation to review the proposed extension of opticians' scope of practice, the costs and benefits of any such extension for optometrists should be carefully considered.

Advertising

- Provincial and territorial colleges of optometry should review existing restrictions on advertising and remove those that go beyond prohibiting false or misleading advertising. The restrictions that colleges maintain should be clearly linked to a reduction in consumer harm.

Pricing and compensation

- Colleges and associations of optometry should discontinue publishing suggested price lists, given their potential harm to competition, in favour of allowing individual optometrists to set their own prices.

Business structure

- Colleges of optometry should remove restrictions that prohibit or discourage optometrists from working in multidisciplinary arrangements with opticians.

Pharmacists

Entering the profession

- In light of the anticipated changing demand for pharmacy services in Canada, universities should regularly review the number of places available in their pharmacy programs to ensure an adequate supply of pharmacists.
- To avoid unnecessarily high practical experience requirements, provinces whose requirements take longer to complete than those of other provinces should look to the experience of those provinces to determine whether an acceptable level of quality could be achieved in less time.

Mobility

Interprovincial mobility

- The National Association of Pharmacy Regulatory Authorities should continue its efforts to have Quebec sign the Mutual Recognition Agreement.

International mobility

- Each provincial college or board of pharmacy should review whether it has minimized its admission requirements for certifying foreign-trained pharmacists who otherwise meet the qualification requirements. Such a review should look to provinces with less onerous admission requirements that continue to meet quality standards.
- Each provincial college or board of pharmacy should make efforts to identify foreign jurisdictions whose trained pharmacists meet admission requirements. In addition, all provinces should work towards a nationally recognized, formal bridging program, similar to the ones offered by the University of Toronto and the University of British Columbia.

Overlapping services and scope of practice

- In order to increase efficiency while still maintaining adequately safe pharmacy operations, provincial colleges and boards of pharmacy should allow individual pharmacists to decide the number of pharmacy technicians they will employ in their pharmacies. The colleges and boards that stringently limit the use of pharmacy technicians in pharmacies should consider the provinces that allow for the greatest use of pharmacy technicians as having taken the least restrictive approach, which they should adopt.

Advertising

- Colleges and boards of pharmacy should remove restrictions on price advertising unless they can show a clear link to a meaningful reduction in consumer harm by such restrictions.
- Provincial colleges and boards of pharmacy should eliminate all restrictions on advertising that go beyond protecting consumers from false or misleading advertising, including prohibitions on all forms of comparative advertising.

Pricing and compensation

- In provinces where suggested fee schedules for pharmacists exist, they should be removed.

Business structure

- The provincial colleges and boards of pharmacy should review their restrictions on the ownership and business structure of pharmacies with a view to eliminating unnecessary obstacles to efficient business models.

Real estate agents

Entering the profession

- Regulators should look towards their counterparts in other provinces, territories and jurisdictions when deciding the level of education necessary to obtain a real estate agent licence, or maintain it, and the length of the work experience required to apply

for a broker's licence. In particular, regulators should consider implementing non-mandatory pre-licensing courses similar to those the Quebec real estate council is currently considering.

Mobility

Interprovincial mobility

- Every province and territory should sign the current Mutual Recognition Agreement or any modified version of it to facilitate the movement of real estate agents between jurisdictions. Provinces and territories that do not wish to sign such an agreement should at least establish requirements to facilitate the movement of real estate agents between jurisdictions.

International mobility

- Yukon should consider removing the requirement contained in section 5(1)(c) of the *Real Estate Agents' Licensing Regulations* that individuals be residents for at least three months prior to applying for a real estate licence.

Overlapping services and scope of practice

- Legislators should consider legislative amendments to give force of law to the current policy of exempting from licensing requirements any “for sale by owner” companies and advertisers that are not involved in real estate transactions.

Advertising

- Restrictions regarding any form of advertising should not go beyond protecting consumers from false or misleading advertising.

Pricing and compensation

- The Ontario legislature should allow real estate agents to charge a combination of a percentage and a fixed amount when pricing their services under the *Real Estate and Business Brokers Act, 2002*, in order to better serve all customers. Other provincial legislators should also clearly allow such pricing by removing the *or* in the appropriate section of their laws.

Business structure

- To promote more competition among real estate agents, regulators should reconsider the necessity of making a distinction between brokers, and agents and salespeople. Alternatively, regulators could explore options that would allow agents to become more independent.