



# Admitted but Excluded

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**Removing Occupational Barriers  
to Entry for Immigrants to Canada**

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**By Bryan Schwartz**

About the author



**Dr. Bryan Schwartz** is the Asper Professor of International Business and Trade Law at the University of Manitoba. He holds an LL.B. from Queen’s and a Master’s and Doctorate in law from Yale Law School. He is the author of seven books and over seventy academic articles in a wide variety of areas, including constitutional and international law, law and economics, Aboriginal law, human rights law, and law and literature. He is the inaugural editor of two journals: the *Asper Review of International Business and Trade Law* and *Underneath the Golden Boy*, an annual review of legislative developments in Manitoba. Over the years, he has received numerous awards and honours for teaching, research and community service. Bryan is also a practicing lawyer. He has been counsel to the Pitblado law firm since 1994, and appeared many times before the Supreme Court of Canada. He frequently advises governments, organizations and individuals on legal issues involving policy development or legislative reform.



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Date of First Issue: August 2012.

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ISSN 1491-78

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# Foreword

The Frontier Centre for Public Policy is pleased to publish this edition of *Admitted but Excluded: Removing Occupational Barriers to Entry for immigrants to Canada*.



Canada's future prosperity will depend partly on our ability to attract highly educated and skilled immigrants. Our aging population has already begun to put pressure on government finances and this pressure will grow over time. If we fail to draw in productive new citizens from abroad, it will become increasingly difficult for governments to raise sufficient revenue to provide necessary public services. The results will be a reduction in the quality of public services, and/or much higher taxes on those Canadians who are of working age.

Canada's continued economic success will therefore require policy strategies that make Canada an attractive place for skilled immigrants to live and work. Of particular importance, policymakers must work to remove barriers to entry that currently prevent many eminently qualified professionals from working in the professions for which they are trained. *Admitted but Excluded* is a series of articles that examines several possible strategies for policy reform that can help promote the appropriate recognition of professional credentials earned in other countries.

The paper's lead author, Bryan Schwartz, is uniquely well qualified to address these issues. Professor Schwartz is a professor of business and trade law at the University of Manitoba. He is an expert on constitutional law, human rights law, and the relationship between the law and the economy. All of these areas of Professor Schwartz' expertise are closely related to the legal and policy questions surrounding obstacles to occupational freedom for new Canadians.

Dr. Schwartz is also a practicing lawyer in this area. He has seen first-hand the impact that unfair barriers to professional practice have on the lives of immigrants. *Admitted but Excluded* reflects Dr. Schwartz' deep knowledge of the relevant legal and policy questions, as well as his sensitivity to the emotional and financial strain experienced by immigrants and their families when unfair barriers to entry prevent them from working in the professions for which they are trained. This study outlines a series of strategies for policy reform that can help remove these barriers.

This research was recently published in academic journal format as a special edition of the *Asper Review of International Business and Trade Law*. The authors have formulated and expressed their views as independent scholars, and not on behalf of the Frontier Centre. The Frontier Centre is here republishing this study in e-book format. We are excited to publish this special publication, helping to ensure that its findings and policy recommendations reach a wide audience of policymakers and concerned Canadians.

**Peter Holle**, President, Frontier Centre for Public Policy

# Preface

I am an academic and a practising lawyer. A series of foreign-trained clients, frustrated and demeaned by the treatment they received at the hands of occupational regulators, inspired me to organize this collection of essays. I was able to help some individuals achieve their merited licensing status through vehicles such as investigations by human rights tribunals. Others took their talents, training and work ethic to other jurisdictions when faced with the emotional and financial cost of a protracted struggle. Other contests are still in progress. Their struggles helped alert and educate me to a profound problem with national dimensions, and I hope that this academic project will contribute to much needed reform.



Recognizing from the outset that the issue of *Admitted but Excluded* has many legal and policy dimensions, I enlisted the assistance of a number of dedicated and talented students to help me explore them. While I bear responsibility for any errors or shortcomings, I would like to recognize and thank the contributions of the following:

- **Fanni Weitsman** (LL.M. 2009), a gifted, multijural and multilingual visitor from Russia and Israel completed her master's thesis under my supervision three years ago and then spent her final summer here writing an extensive initial research report on the issues we have addressed in this project.
- **Janet Valel** (J.D. 2011) co-wrote and researched the chapter on human rights legislation as a vehicle for reform.
- **Natasha Dhillon-Penner** (LL.B. 2010) researched and co-wrote the chapter on fair access legislation.
- **Mary-Ellen Wayne** (J.D. 2012) edited the original version of the chapter on fair access legislation and drafted supplementary material to update it.
- **Rachel Hinton** (J.D. 2011) researched and co-wrote the chapter discussing uses of the federal Competition Act as a mechanism to end monopolizing regulation by occupational regulators.
- **Anne Amos-Stewart** (LL.B. 2010) and Katrina Broughton (J.D. 2012) co-wrote with me the chapter on how progress can be made through international agreements involving Canada.
- **Mark Melchers** (J.D. 2012) co-authored the last three chapters. They respectively propose potential reforms in Canadian immigration law and practice, identify lessons to be learned from Canada's agreements on internal trade, and review the various frontline agencies that aim to facilitate recognition of foreign-acquired competencies.

- **Graham Honsa** (J.D. 2012), Katrina and Mark all made major contributions to the copy-editing and citation checking and otherwise polishing the collection.
- **Darla Rettie**, my colleague at the Pitblado law firm, has worked with me on a number of cases, and provided some valuable insight on several of the early chapters of this book.

The various chapters are meant to stand on their own, as well as in combination, and that contributed inevitably to some overlap among them. It is hoped, however, that read as whole, they present a reasonably unified perspective.

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# Executive Summary

Canada's prosperity in the 21st century will largely depend on its ability to attract immigrants and to capitalize on their talents, training and aspirations. Canada needs an influx of skilled immigrants whose tax contributions will offset the social costs of an aging population and the rising costs of government programs. However, immigrants are not mere instruments for promoting prosperity for the rest of the Canadian community; law and public policy must value them as free and equal individuals. Both the public and immigrants benefit when immigrants are free to use their skills and training to achieve meaningful and prosperous lives.

Unfortunately, many skilled immigrants who arrive in Canada face regulatory barriers that prevent them from working in the professions for which they were trained. Specifically, they often find that Canadian occupational licensing bodies do not recognize the professional credentials they obtained in their home countries. This is often true even when the immigrants in question are eminently qualified professionals whose training was at least as demanding as the Canadian standard is.

This paper describes the types of barriers that immigrants face in obtaining recognition for their professional credentials and permission to work in the occupations for which they were trained. We show that many of these hurdles come at a significant cost to Canada's economic productivity and capacity to generate tax revenue. We also discuss the ways in which these barriers can have a disastrous impact on the economic prospects of thousands of new Canadians and their families. Finally, we describe a number of approaches to policy reform that hold the potential to address barriers to entry for foreign-trained professionals.

This publication of the Frontier Centre for Public Policy makes available, in e-book form, a work recently published in academic journal format in a special edition of the *Asper Review of International Business and Trade Law* journal.

In some circumstances, there are sound reasons for the public regulation of specific occupations. Such regulations are sometimes necessary to promote public safety or to protect consumers in highly specialized areas where they may be unable to accurately assess the quality of the services they are receiving. However, in many cases, licensing requirements and other obstacles to professional practice exist that do not serve these or any other legitimate objectives. Instead, the evidence suggests that the purpose of many barriers that prevent foreign-trained workers from entering their professions is to protect existing service providers from competition.

Governments may directly regulate occupations, or they may delegate regulatory authority to occupational bodies. For both approaches, the empirical evidence suggests that many restrictions to occupational freedom do not advance any identifiable public interest and that, in fact, they frequently harm consumers and the overall performance of the economy. Specifically, studies show that these barriers to professional practice can adversely affect consumers by reducing the number of practitioners, causing prices to rise.

Further, limits to entry to licensed occupations do not necessarily contribute to improved performance among those who are admitted. Empirical evidence in several contexts shows that many barriers to entry have little to no impact on quality and have increased prices and reduced the availability of services.

Additional factors distort the recognition of the credentials and substantive competencies in the case of foreign-trained professionals. Barriers to entry may not only be the product of protectionism on the part of existing providers but also the result of ignorance, stereotypes, and biases about the nature and quality of training, education and testing in other countries. These barriers to entry for foreign-trained practitioners pose an extremely serious problem in Canada. A few examples of the harm caused by these barriers are:

- The unwillingness of some occupational bodies to recognize foreign credentials profoundly impairs the effectiveness of programs that are designed to attract highly skilled immigrants to Canada. Many well-trained foreigners simply choose not to come to Canada because they reasonably fear they will not be allowed to practise their profession.
- For skilled immigrants who do come to Canada, these barriers can destroy their dreams and prevent them from using their talents and training productively.
- Barriers to entry can also deprive the public of the benefit of new ideas and techniques that talented and inspired newcomers acquire abroad, while denying occupational groups the opportunities to qualitatively and quantitatively strengthen themselves.
- Barriers to entry protect existing service providers from competition from foreign-trained workers, resulting in higher prices and lower-quality service for consumers than would exist if fair competition were permitted.

In addition to describing the impediments to professional practice faced by foreign-trained workers, this paper suggests a number of options for policy reform, each of which has the potential to help address barriers to entry for foreign-trained practitioners. Some of the most promising reform strategies are:

- Federal and provincial authorities should strengthen the substance of existing human rights legislation, so that it prohibits unjustified discrimination against foreign-trained workers.
- Provincial governments should enact and strengthen fair access legislation at the provincial level, which would address unnecessary hindrances to entry. Individuals must have the ability to seek and obtain legally binding remedies from an independent tribunal when regulatory authorities do not comply with the legislation.
- The federal government should amend the *Federal Competition Act* to clarify that unnecessary barriers to professions are not allowed.
- The federal government should restructure Canada's immigration laws and practices, particularly by refining the point system for evaluating the strength of applications for immigration. A new formula should emphasize the extent to which an applicant's home country credentials would actually be recognized upon

the applicant's arrival in Canada.

- The federal government should convene a First Ministers meeting to develop a jointly co-ordinated action plan to address these issues. The process by which the Agreement on Internal Trade was developed provides a model that can be followed to help promote co-operation between the provinces and the federal government in removing unfair barriers to professional practice.

Immigrants who are not allowed entry to the profession for which they were trained can feel demoralized and humiliated. The financial burden of pursuing a remedy can be insurmountable if they have just endured the costs of moving from their home country to a new land and have not had a chance to accumulate any kind of financial security through their practice in Canada.

This paper describes the ways in which barriers to professional practice unjustly prevent thousands of highly skilled and well-qualified immigrant professionals from working in the fields for which they were trained. We discuss the harm caused by these barriers, which limit the economic prospects of immigrants while leading to higher prices for consumers and weaker productivity growth and capacity for tax generation for the Canadian economy as a whole. Lastly, the volume explores various policy options that could facilitate liberalization of the regulated professions, so that foreign-trained workers are no longer prevented from practising their occupations. Canada's provincial and federal governments must co-operate now to ensure that foreign-trained workers are no longer "admitted but excluded."

# Introduction

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

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

There are sound reasons for public regulation of many occupations. Economists cite two main justifications for occupational regulation: informational asymmetry and third-party costs.<sup>1</sup> Informational asymmetry occurs when a given service is so highly specialized that potential consumers of that service are unable because of cost, experience or expertise to know whether a service provider is competent and rendering reasonable value for the price. The cost of a mistaken choice may be intolerable; for example, surgical malpractice can inflict extreme suffering. In many contexts, it is unacceptable to allow incompetence to be detected and subsequently rooted out merely by the reports of those who suffer at the hands of the inept or unethical. Incompetent, exploitative, or unethical practice can inflict costs on third parties as well. For example, a consumer who hires an incompetent air pilot for a charter flight may end up contributing to the injury or death of someone on the ground if the plane crashes.

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

occupation, who may have a mix of noble and self-interested motives in wanting to police themselves.

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

Empirical studies into the economics of the licensing model tend to find its use problematic. The elimination of competition can adversely impact consumers. The quantity of practitioners is reduced, prices rise, and some consumers are unable to meet the protected market price or find a provider. Limits to entry to licensed occupations do not necessarily contribute to improved performance among those who are admitted. Even when entry requirements are correlated with a higher quality of service, their costs outweigh their benefits when they are unnecessarily stringent. Those who can neither afford a platinum-calibre service provider nor find one at any price may receive no service whatsoever. A shut-out consumer may also provide the service to himself—often ineptly—or resort to a substitute occupation that is more available but less skilled, unskilled, or dangerous. For example, where there is a shortage of medically trained mental health providers, people suffering from mental illness may try to treat themselves. They may self-medicate through alcohol, recreational drugs or illegally obtained prescription drugs, or by turning to alternatives such as self-described counsellors who may lack skills or ethical training to provide effective treatment. Economists call the denial of services from excessively stringent licensing requirements the “Cadillac effect”. One empirical study from the 1970s found that restrictive licensing measures for electricians led to a lower density of electricians, which was correlated with an increase in accidental electrocutions.<sup>2</sup>

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

that genuinely serves the public interest.

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

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

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

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

Additional factors distort the recognition of the credentials and substantive competencies of foreign-trained professionals. Barriers to entry may not only be the product of protectionism with respect to money and prestige, but also the result of ignorance, stereotypes, and biases about the nature and quality of training, education and testing in other countries. Studies suggest that barriers to entry for foreign-trained practitioners pose an extremely serious problem in Canada. These barriers can destroy the dreams of newcomers and prevent them from productively using their talents and training.

Barriers to entry can also deprive the public of the benefit of new ideas and techniques that talented and inspired newcomers acquire abroad, while denying occupational groups the opportunities to qualitatively and quantitatively strengthen themselves.

There are several possible approaches to addressing barriers to entry to foreign-trained practitioners. Chapter One of this collection explores the use of human rights legislation to eliminate unjustified discrimination resulting from differential and adverse treatment of foreign-trained workers compared with their Canadian-trained counterparts. Provincial human rights statutes prohibit discrimination and permit individuals to bring complaints and obtain legally binding remedial orders from independent bodies. There have been a number of successes through this route, namely, cases where a challenger brought a complaint which was investigated by a human rights commission and then upheld by a human rights body and ultimately by the courts.<sup>4</sup> However, these cases might only represent the tip of the iceberg. The law reports do not record cases that were abandoned or never brought. In my experience as an advocate, I encountered many foreign trained professionals who, when faced with unjustifiable barriers to entry, found the cost of battle too daunting to begin, or too burdensome and painful to sustain.

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

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

This study particularly focuses on the challenge of recognition of the credentials and competencies of foreign-trained workers. Some potential remedies, such as reforms to human rights legislation, might aim to eliminate discrimination of such

workers in comparison with the treatment of people trained in Canada. This path to reform might leave entry requirements in place while eliminating barriers that may result from evaluation criteria that either use unfounded assumptions or stereotypes about foreign training or which are due to a lack of resources and procedures to evaluate equivalency of foreign credentials to those required by Canadian jurisdictions. Other potential reforms, such as enforceable “fair access” legislation, would aim to ensure that occupational entry requirements are substantively necessary and administered in a fair and transparent manner for all workers, whether they are trained in Canada or abroad.

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

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

Chapter Two of this study explores “fair access” legislation at the provincial level that would address unnecessary barriers to entry for both newcomers and applicants of Canadian origin. Several provinces, including Ontario, Manitoba and Nova Scotia have now enacted such laws.<sup>7</sup> Ontario’s statute, the *Fair Access to Regulated Professions Act*, illustrates the potential of these efforts, and their current limitations.<sup>8</sup> *The Fair Access to Registered Professions Act*:

- Requires the regulated professions to maintain admission practices that are “transparent, objective, impartial and fair”;
- Requires the professions to conduct an audit of their practices and report to an independent commissioner;

- Mandates that the report address substantive barriers to entry, as well as procedural errors, specifically, “the extent to which the requirements for registration are necessary for or relevant to the practice of the profession”;
- Mandates that the report address the treatment of internationally trained individuals; and,
- Establish a centre to conduct research and inform foreign-trained individuals about registration practices.

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

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

The review mechanism under the first wave of “fair access laws” such as Ontario’s is limited to having self-regulating professions review their own practices or having an “audit” conducted by a government-appointed official. These laws lack a mechanism that would allow affected individuals to make a formal complaint that, unresolved, would benefit from an external investigative process. Specific cases can be among the most effective means of identifying and understanding the real nature and extent of problems. Individuals will have no incentive to bring forward complaints if doing so will draw attention to their humiliation without reasonable prospects of correcting the issue. The independent appeal body must, like the human rights tribunal, have the authority to make legally binding decisions, and the fair access statute itself, like a human rights act, must override other statutes in case of conflict.

Some regulated professions would undoubtedly resist any measures they perceive as curtailing their autonomy; however, under the laws of Ontario, entry standards are already largely established by public laws and regulations. To the extent that professional bodies have the authority to set their own standards that authority is limited by a statutory duty to act in the public interest, and setting standards may involve the approval of the provincial government as well as the professional body. The establishment of independent oversight bodies and appeal commissions would ensure consistent, province-wide norms concerning the elimination of unnecessary barriers to entry that would be administered by independent bodies. The creation of the regime proposed here would not result in a categorical change to the degree of intrusiveness over the activities of the regulated professions in a jurisdiction like

Ontario; rather, it would somewhat shift the means of public oversight and control of professional regulation to independent bodies such as a fairness commissioner and an independent appellate body. These latter authorities would apply known standards based on evidence submitted by the profession, complainants, or the independent commissioner.

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

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

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

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

There is little case law on the issue of whether the regulated conduct defence also applies to the provisions of the federal competition statute that provide for civil remedies, such as orders that a practice cease or that there be compensation for a party victimized by it. The federal competition bureau might attempt enforcement

action with respect to some civilly enforceable provisions of the federal competition statute. It would try to convince a court that the regulated conduct defence is inapplicable to that particular provision.

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

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

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

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

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

The public international law dimension of occupational freedom for newcomers is

addressed in Chapter Four, which primarily considers the *General Agreement on Trade in Services (GATS)*<sup>14</sup>—part of the World Trade Organization family of global trade agreements that liberalize trade. Canada may enter into commitments that permit, among other liberalizing steps, the temporary entry of foreign nationals to provide services in various occupations. Canada should continue to expand its openness to temporary entry by adding more occupations to its schedule of *GATS* commitments and expanding the scope of existing commitments. Expanded breadth may be achieved through consultation with the provinces by removing some of the reservations Canada has made with respect to the freedoms offered in its existing schedules. Progress on temporary entry will have useful spill over effects by broadening general recognition of foreign credentials. Visitors who are able to practise in Canada temporarily may decide to immigrate, or at least spread the word to others that Canada is a welcoming place to live and work. Furthermore, if Canada would consult with the provinces and self-regulating bodies to ensure that promises of occupational freedom to temporary entrants would be honoured in practice, improved principles and practices concerning the recognition of foreign-acquired credentials and competencies could be developed. These new, and arguably more appropriate refinements would apply to visitors and then could be applied (with any necessary adaptations) to professionals who plan to come to Canada on a long-term or permanent basis.

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

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

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

Although Canada’s ability to liberalize is limited by the willingness of its provinces to co-operate, any steps it takes to permit even temporary entry might succeed in attracting more capable immigrants. Another method of attracting immigrants is for Canada to enter into reciprocal agreements with countries that promise fair access to the regulated occupations in their domestic markets. Canada is already a party to numerous regional trade agreements such as *NAFTA* that provide for a temporary entry procedure similar to the *GATS*’; however, developing broader mutual recognition agreements would further facilitate labour mobility. A promising

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

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

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

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

Various types of occupational associations have collaborated on agreements concerning the mutual recognition of credentials within the framework of the *AIT*.

For example, the “Red Seal” program conducts tests to certify worker credentials that are recognized nationwide. The “Red Seal” program can enhance mobility without prejudicing other paths to mobility, such as the establishment of regimes for mutual recognition of credentials.

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

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

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

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

A far-sighted provincial government could liberalize its labour market, even in the absence of coordinated federal-provincial reform. Provinces that take the lead in establishing fair access to the occupations may sustain short term costs. They will have to overcome political pressure from some self-regulating bodies that feel their autonomy is being undermined, or that their income or prestige will be diluted by liberalization. Cutting edge provinces may also have to sustain the costs of establishing and operating programs to assess foreign credentials, evaluate substantive competence, and provide bridging training to overcome deficits.

However, they would likely obtain a spectacular return on their investment. Enhanced occupational freedom can be achieved in a measured manner that respects public safety. Removing unnecessary barriers to entry would permit more individuals of Canadian origin to make the best use of their talents and training, and it would attract individuals from other provinces and abroad who are happy to find an environment that welcomes their abilities, rather than implementing unnecessary and demeaning barriers. Consumer underwriters of services, including governments in areas such as health care—would find that choice, accessibility, and cost of services improve. The public treasury would benefit from the contributions of more high skilled workers, and these resources could be used to provide better public services and programs. “Admitted and included” is a far more just and socially beneficial scenario than continuing the status quo, which wastes talent, training, competence, and dreams.

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

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

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

## Chapter I

# Human Rights Legislation and the Recognition of Foreign Credentials

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**R**ecognition of foreign credentials has been a topic of discussion in Canada for some time. Many immigrants who have obtained their education, training or work experience abroad face challenges in having their credentials properly recognized in Canada. One method of recourse for these professional immigrants has been through human rights legislation. Several human rights decisions have directly considered whether place of education, training, and work/vocational experience can be considered a prohibited ground of discrimination.

In *Bitonti v British Columbia (Minister of Health)*, the British Columbia Council of Human Rights determined that place of training was highly correlated to place of origin, which is an enumerated ground. Because of this correlation, a distinction based on place of training was found to be discrimination based on place of origin. In the *Meiorin Grievance*, the Supreme Court of Canada provided a procedure to determine whether a prima facie discriminatory employment standard is justifiable. This procedure was subsequently applied in several decisions including *Bitonti*.

Because of existing barriers, achieving full accreditation to work in a regulated occupation in Canada can be a slow, expensive and demoralizing process for those educated abroad. It can result in self-doubt, insecurity and frustration for those holding foreign credentials, and it can also adversely impact Canada's economic and social well-being. This paper recommends that there be:

- Inclusion of "place of education, training, and work/vocational experience" as a prohibited ground of discrimination in human rights codes;
- Improvements made to fair access legislation to allow government administrators to make legally binding orders; and,
- A multi-dimensional approach to reform whereby changes made to human rights legislation and improvements to fair access legislation would provide professional immigrants with several routes to binding dispute resolution.

## Introduction

Professional immigrants face many barriers when first arriving in Canada; attempting to practise within their fields of training remains one of the more exhausting and challenging hurdles to obtaining economic and social success and well-being. Many immigrants who spent years achieving professional success in their home countries are often forced to start over in Canada, even when they are already adequately qualified to work in a given occupation. The process of obtaining accreditation for training received elsewhere may require a significant amount of time, money and effort, forcing some immigrants to simply give up and find alternate employment which is often below their levels of education, training and experience. The result is a significant waste of human capital. One of the major issues regarding foreign credentials remains the inability of regulators to properly assess the qualifications of foreign-trained persons. Many times indicators of competence are often unduly onerous and result in additional expense to emotionally and financially stressed newcomers.

One method of recourse for these newcomers has been through human rights laws. Human rights legislation exists in Canada at the federal level and in each province and territory. Which laws are relevant in given circumstances depends on the division of powers in the *Constitution Act, 1867*.<sup>19</sup> Regulation of employment, professions and trades generally falls within provincial jurisdiction, and is thus subject to the provincial human rights statutes.<sup>20</sup> The federal *Canadian Human Rights Act* applies to the activities of the federal government and the federally regulated private sector, which includes industries such as airlines and telecommunications.<sup>21</sup> Human rights codes have been recognized by the Supreme Court of Canada (SCC) as having a “special nature and purpose [which is] not quite constitutional but certainly more than ordinary”.<sup>22</sup>

The prohibition of discrimination is the central tenet of human rights codes in Canada. In fact “[s]trictly speaking it would make more sense to speak of ... anti-discrimination legislation than of human rights legislation.”<sup>23</sup> The Supreme Court of Canada provided a general definition of discrimination in *Law Society of British Columbia v Andrews*:

Discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual’s merits and capacities will rarely be so classed.<sup>24</sup>

There may be subtle variations in how human rights statutes in the various provinces, territories and at the federal level define “discrimination” as well as which enumerated grounds are included, directly or implicitly, under the various statutes. All of Canada’s human rights statutes include provisions which exempt

certain kinds of discrimination from their scope, or justify those acts. Again, there can be variations in the details of the statutes, but the general approach to justification has been set out by the Supreme Court of Canada in *Meiorin*.<sup>25</sup> There are three requirements articulated in *Meiorin* that are required to justify a discriminatory employment standard. The standard must (i) be adopted “for a purpose rationally connected to the performance of the job,” (ii) have been implemented with “an honest and good faith belief that it was necessary to ... that legitimate work-related purpose,” and (iii) be “reasonably necessary to the accomplishment of that legitimate work-related purpose.”<sup>26</sup>

Early cases found that discrimination can be established either “direct[ly],” or based on “adverse effect[s].”<sup>27</sup> “[D]irect discrimination” is “where an employer adopts a practice or rule which on its face discriminates on a prohibited ground,”<sup>28</sup> whereas

adverse effect discrimination ... arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral ... but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.<sup>29</sup>

More recently, in *Meiorin*, the Supreme Court of Canada found that it is not always easy to place a case completely within one category or the other, and so the same justification test and remedial approach should be taken in all cases.<sup>30</sup> Although *Meiorin* was a case dealing with employment standards outside of the regulated occupations, this new “unified approach” has also been applied to standards established by regulatory bodies.<sup>31</sup>

## Place of Education, Training or Work/ Vocational Experience

Both human rights tribunals and courts have had to grapple with the question of whether discrimination against individuals with foreign training or work experience falls within the scope of an expressly enumerated ground, such as place or origin or birth. In a number of cases, complainants have been able to convince human rights tribunals that a human rights statute has been breached by the manner in which a regulatory authority has treated individuals with foreign training or work experience.

The British Columbia Council of Human Rights’ decision in *Bitonti* suggests that a distinction based on place of education or training may be based on an expressly prohibited ground of discrimination in some circumstances.<sup>32</sup> In *Bitonti*, legislation in British Columbia distinguished medical graduates based on the country where their medical credentials were earned. “Category I” medical graduates included those who obtained their credentials “in Canada, the United States, Great Britain, Ireland, Australia, New Zealand or South Africa; ‘Category II’ included graduates

of medical schools anywhere else in the world.”<sup>33</sup> Graduates of medical schools in “Category II” countries had more onerous requirements to obtain licensure with respect to “post-graduate training.” These graduates had to complete two years of such training “in a Category I country,” and at least one year had to be in Canada. “Category I” graduates only had to obtain one year of this training “in an approved hospital.”<sup>34</sup>

The Council explicitly stated that “‘place of origin’ does not include place of medical training *per se*,” but rather that the distinction based on whether one was trained in a “Category I” or “Category II” country had the *effect* of discriminating based on place of origin.<sup>35</sup> The Council essentially determined that “place of birth in a defined set of countries constitutes a place of origin within the meaning of the *Act*.”<sup>36</sup> Because “the correlation between place of origin and place of graduation is high,”<sup>37</sup> the distinction had the effect of “plac[ing] an obstacle to membership in the College for persons with a Category II medical education, almost all of whom have a Category II place of origin.”<sup>38</sup>

The nature of the decision in *Bitonti*, while illuminating a possible route to bring a human rights complaint based on place of training, also highlights why it would be advantageous to amend human rights codes to include place of education, training, or work/vocational experience as an enumerated ground of discrimination. With such a ground clearly enumerated, it would be significantly easier for complainants to establish direct *prima facie* discrimination. Instead of having to prove, as in *Bitonti*, that there is a high correlation between place of origin and place of education, training or work/vocational experience, one would simply have to show that a distinction is being made based on this ground, and it denies her or him some benefit or advantage that is available to other members of society, or that it imposes some burden or disadvantage that is not faced by other members of society. Adverse effects discrimination would also be easier to establish for the same reason—correlation or analogy to another ground would not need to be proven.

The concept of adverse effects discrimination makes it clear that even if there is formal equality present, a provision can still be discriminatory. In *Siadat v Ontario College of Teachers* for example, “to teach in Ontario’s publicly funded” schools, one had to have a “Certificate of Qualification” from the Ontario College of Teachers.<sup>39</sup> The College had a uniform policy requiring official documents regarding a person’s teacher education program to be sent directly from the educational institution where the credential was obtained.<sup>40</sup> Ms. Siadat was a teacher for sixteen years in Iran, before encountering political persecution and being accepted as a “Convention refugee in Canada.”<sup>41</sup> Ms. Siadat’s main difficulty was that, because of her persecution in Iran, she was unable to have the relevant documents sent from the granting institution, given that they “[were] all held by the Ministry of Education there, which [was], in effect her prosecutor as a political dissident.”<sup>42</sup>

Ms. Siadat did possess an identification card from Iran identifying her as a teacher, as well as “a handwritten copy of what purports to be her transcript,” obtained illegally from a friend in Iran, and “photocopies of her Bachelor’s Degree in

teaching.”<sup>43</sup> As a result of these circumstances, Ms. Siadat sought the provision of “alternate ways of further showing her qualifications.”<sup>44</sup> She made various suggestions to establish her qualifications, including conducting a hearing at which she could be examined and cross-examined about her educational background, reviewing the documents she submitted, and hearing evidence from other teachers who were trained in Iran, or conducting a test aimed at verifying her substantive proficiency.

The court asserted that “Ms. Siadat’s problems with her application to the College directly relate[d] to her place of origin.”<sup>45</sup> Ms. Siadat sought, in addition to the provision of what evidence she had of her qualifications, “accommodation from the usual requirements” which she could not meet because of her origins in Iran.<sup>46</sup> The court determined that the Committee did not adequately address the issue of accommodation, and their decision was “rescinded, and the application ... referred back to the Committee for re-hearing.”<sup>47</sup> Even though Ms. Siadat was only being subjected to the same requirements as everyone else, in her circumstances this amounted to discrimination. There was no overt distinction being made of course, but in effect the measure distinguished based on a prohibited ground and resulted in a disadvantage to her, and limited her access to opportunities that others in society were afforded.

In *Keith v Newfoundland Dental Board*, the Newfoundland and Labrador Supreme Court considered whether the requirements that had to be met for foreign-trained dentists to move from provisional to full licences were discriminatory.<sup>48</sup> The court agreed with a board of inquiry decision that the requirements were contrary to the provisions of the provincial human rights statute. All of these foreign-trained dentists practised in Newfoundland for between eighteen and twenty-seven years with provisional licences, and “[p]reviously they had all been licensed ... in the United Kingdom.”<sup>49</sup> The provisions of their Newfoundland licences had no “clinical restrictions,” but they were “geographically restricted to areas of the Province deemed...to be underserved.”<sup>50</sup> Holding provisional licences would keep them from enjoying the benefits of interprovincial labour mobility provisions in the *Agreement on Internal Trade*.<sup>51</sup> Although these dentists were licensed without requiring the “National Dental Examining Board of Canada (CDAD) certificate” as their Canadian-trained counterparts required,<sup>52</sup> in order to obtain full licensure they were required to finish “an eligibility examination, self-study and assessment by examination administered by Dalhousie University,” at a cost of \$15,000. None of this was required for domestically-trained dentists.<sup>53</sup> Although these requirements were considered less stringent than the CDAD, they still amounted to discrimination.<sup>54</sup> The court noted that the competence of this group of foreign-trained dentists was not contested. It agreed that the Dental Board’s rules “disproportionately, negatively and adversely impacted” these foreign-dentists and it “was based upon their national origin because of the significance placed upon their foreign training.”<sup>55</sup> The court concluded that the requirements were discriminatory because they “impos[ed] a burden ... and den[ied] a benefit (national mobility),” to dentists who the Dental Board clearly thought were well-qualified, because of their lack of clinical restrictions.<sup>56</sup>

In addition to the case law, Quebec’s Commission des Droits de la Personne et des Droits de la Jeunesse (the Commission) considered whether there was discrimination present in that province’s process for selecting candidates for medical residency.<sup>57</sup> The commission determined that certain influencing factors such as the time elapsed since a candidate’s studies and familiarity with medical practice in Quebec, amongst others, “constitute[d] obstacles that [had] a disproportionate exclusionary effect on [international medical graduates].”<sup>58</sup> The commission then determined that this distinction was based on “ethnic or national origin.” This determination was made because “data collected ... establishes a clear relationship between the ethnic origin of the candidate and his or her choice of place of training, considering that in almost every case, the candidates undertake medical training within the geographical areas of their birth.”<sup>59</sup> This correlation between place of birth and place of training corresponds closely to the findings in *Bitonti*.

These decisions in Canadian courts and tribunals have clearly shown that distinctions based on place of education, training, or work/vocational experience can be discriminatory. One of the most important roles of occupational regulatory bodies is to protect the public by establishing licensing requirements which ensure the safe and competent delivery of services. It is a legitimate concern that if additional requirements cannot be placed on those educated in other countries, it could lead to licensed practitioners who are not fully competent delivering services to Canadians, which would be unacceptable. However, providing an avenue through which *prima facie* discrimination can be more easily established would not have this effect; the relevant discriminatory standards can be justified if they can satisfy the “bona fide occupational requirement” test in *Meiorin*.<sup>60</sup>

## Justification for Discrimination

In *Meiorin*, the SCC “revised [the] approach to what an employer must show to justify a *prima facie* case of discrimination.”<sup>61</sup> The Court articulated a “three-step test for determining whether a *prima facie* discriminatory standard is a” Bona Fide Occupational Requirement (BFOR).<sup>62</sup> A *prima facie* discriminatory occupational standard can be justified by an employer by satisfying each of the three aspects of the test “on a balance of probabilities.”<sup>63</sup>

The first step requires one to determine what the “standard is generally designed to achieve.” This purpose must then be shown to be rationally connected to “the objective requirements of the job.”<sup>64</sup> The second step of the test requires demonstration of the fact that the adoption of the standard was “thought to be reasonably necessary,” and “was [not] motivated by discriminatory animus.”<sup>65</sup> The requirement in the third step that the standard be reasonably necessary requires it to “be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.”<sup>66</sup> The SCC clarified that the word “undue” was used because of the reality that “some hardship is acceptable.”<sup>67</sup> The many different ways that “capabilities may be accommodated” must be taken into account.

This includes not only “individual testing,” but also looking at a person’s “skills, capabilities and potential contributions ... [which] must be respected as much as possible.”<sup>68</sup>

The decision in *Meiroin* puts a positive obligation on employers to “build conceptions of equality into workplace standards.”<sup>69</sup> This obligation seems to imply that employers and regulators have a lawful obligation, where discrimination would otherwise exist against individuals with foreign training or experience, to establish mechanisms to accurately recognize foreign credentials or assess the substantive competencies of an individual, or both. The precise nature of the required mechanisms would depend on all the factual circumstances. As a result, a discriminatory standard with respect to foreign credentials established by an employer or regulatory body would not be justifiable if the employer or regulatory body has not actively attempted to accommodate the relevant person or group by establishing appropriate facilitative mechanisms.<sup>70</sup>

## Alternative Avenues: The Charter of Rights and Freedoms

Another possible method of recourse for newcomers having difficulty attaining proper recognition of their credentials is through the *Charter*.<sup>71</sup> In *Eldridge v British Columbia (Attorney General)*, the SCC asserted that an entity can be subject to the *Charter* in one of two ways. First, if “the entity is itself ‘government’ for the purposes of s. 32,” the *Charter* will apply. Whether or not the entity is considered “government” depends on whether it can be characterized as such “either by its very nature or [by] virtue of the degree of governmental control exercised over it.”<sup>72</sup> If it is found that a body is itself “government,” then all of its actions must be guided by the *Charter*.<sup>73</sup> Second, it is possible for an actor that is not “government” per se to be subject to the *Charter* in certain circumstances.<sup>74</sup>

The government is able to give authority to entities that will not be subject to the *Charter* at all, such as private corporations, for example.<sup>75</sup> While private corporations are clearly not subject to the *Charter*, “... other statutory entities ... are not as clearly autonomous from government,” such as the many “public or quasi-public institutions that may be independent from government in some respects, but in other respects may exercise delegated governmental powers or be otherwise responsible for the implementation of government policy.”<sup>76</sup> In these circumstances, “one must scrutinize the quality of the act at issue, rather than the quality of the actor. If the act is truly ‘governmental’ in nature ... the entity performing it will be subject to ... the *Charter* only in respect of that act.”<sup>77</sup>

Because legislation and regulations do not generally set specific entry requirements to regulated occupations, it is the regulatory bodies and their actions which would have to be subject to the *Charter* for a successful challenge to be possible. Regulatory bodies have been found to be subject to *Charter* scrutiny in a number of cases.<sup>78</sup> Whether or not a given body can be considered government *per se*, the erection of barriers to regulated occupations in order to

ensure the safe delivery of services to Canadians is surely “implementing a specific government policy or program.”<sup>79</sup>

The government would not be able to implement its policy of requiring certain barriers to qualification in a discriminatory way by simply delegating the authority to erect those barriers to another entity. From this, we are able to draw the conclusion that regulatory bodies’ establishment of barriers to certification would be bound by the *Charter*.<sup>80</sup>

Section 15 of the *Charter* protects individuals from discrimination on the basis of “race, national or ethnic origin, colour, religion, sex, age or mental or physical disability” or other analogous grounds.<sup>81</sup> Compared with the cases related to human rights codes, there has been a relatively small amount of litigation in this area related to the *Charter*. This is not surprising given the fact that a *Charter* challenge would involve a significant amount of litigation, and would be far more expensive for the complainant than a human rights complaint. Despite the relative dearth of precedents specifically relating to the *Charter*, some of the concepts established in the human rights cases may transfer to a *Charter* challenge. The most important potentially transferrable concept would be that a distinction based on place of training can be discriminatory based on place of origin in some circumstances.<sup>82</sup> This is significant because “national or ethnic origin” is an enumerated ground in the *Charter*.<sup>83</sup>

In *Jamorski*, a 1988 Ontario Court of Appeal case, several graduates of Polish medical schools launched a s. 15 argument, asserting that certain rules in place regarding “admission to ... medical internships” were discriminatory.<sup>84</sup> These internships were required in order to gain entry to the practice of medicine in Ontario.<sup>85</sup> The legislation at issue distinguished between “accredited” medical schools, which included all Canadian and most American schools, and “unaccredited acceptable medical schools” which were ones “listed in the World Health Organization Directory,” and “this distinction ha[d] an important effect on securing an internship.”<sup>86</sup>

The court provided two reasons why this distinction was not considered discriminatory in *Jamorski*. First, the graduates in this case were “not similarly situated to those who have graduated from accredited medical schools,” and it is not reasonable to expect Ontario regulators to treat graduates of an “unknown” system in the same way as graduates from a school that has “been carefully assessed and accredited.”<sup>87</sup> Second, the court determined that “there is nothing invidious or pejorative in the system of classification of medical schools.” If the distinction was based on a prohibited ground in section 15 there may be “an inference ... of an invidious or pejorative nature,” but a distinction based on “different educational qualifications” will not lead to that inference.<sup>88</sup> Additionally, the court stated that “even if it could be said that in some manner which has escaped me that s. 15 applies ... I would have no difficulty in [justifying the *Charter* breach under section 1].”<sup>89</sup>

It is possible that *Jamorski* would be decided differently today. The similarly situated argument used in *Jamorski* was rejected as bad law by the SCC in *Andrews*,<sup>90</sup> and the court in *Jamorski* only considered that distinctions based

on “different educational qualifications” are not discriminatory.<sup>91</sup> It was not considered that a high correlation between place of education and place of origin may result in distinction based on the former resulting in discrimination based on the latter, as was found in *Bitonti*. As the court in *Jamorski* was clearly aware, even if a standard is discriminatory, it could be justified under section 1 of the *Charter*, eliminating the worry that regulatory bodies would be unable to erect reasonable barriers to licensure to ensure the safe and competent delivery of services to Canadians. Only time will tell if the *Charter* route can be successfully taken in relation to barriers to entry to regulated occupations and the recognition of foreign credentials.

## Flexibility in Assessing Competency

The decision in *Meiorin* and the provisions in human rights codes requiring positive accommodative action up to the point where the employer (or regulator) suffers undue hardship raises questions regarding what can be done to properly assess credentials and competencies in a way that is not discriminatory. Where there is simply a requirement for the accurate assessment of an academic credential, facilitative mechanisms that are already being developed could be utilized to determine the Canadian value of a person’s credential.<sup>92</sup> In this case, the only accommodation that may be required would be the regulatory body’s recognition of a credential assessment performed by an independent body. There are numerous circumstances however, where the simple recognition of an academic credential will not be enough, and different mechanisms will be required to properly accommodate a person or group being discriminated against.

The issue is more complex when dealing with experienced practitioners. Typical barriers to entry to professions, such as required examinations, are not appropriate because these practitioners are likely to have been away from some of the material covered by the examination for a significant period of time. This would also be the case if a Canadian-trained and experienced practitioner were required to write the entry examination. The issue is not that these people *could* not pass the examinations, the issue is that such a barrier is unnecessary and would require significant, unneeded periods of study.

Instead of establishing formal equality by requiring every member of a regulated occupation to pass the same test to be allowed to practise, the requirement of these bodies to accommodate should include the establishment of substantive equality through the construction and maintenance of mechanisms to assess and recognize clinical skills and competencies that are necessary for safe practice in the given occupation. Although such mechanisms could be expensive, they would also have numerous benefits. More competent practitioners in these occupations would lead to increased access to these services for Canadians, an increase in competition and a corresponding drop in prices. There would additionally be financial benefits in terms of income tax remittance from these skilled practitioners, and a better life for those holding foreign credentials in Canada.

Such accommodation would only be required if the relevant standard is determined to be discriminatory. As a result, the addition of place of education, training, and work/vocational experience as an enumerated ground would be a very clear and effective way to convey to regulatory bodies that the development of these mechanisms is not optional, but a requirement. It would provide a significant incentive for regulatory bodies to proactively establish appropriate mechanisms, and in circumstances where the required mechanisms would be difficult and expensive to establish and maintain, it may also encourage different jurisdictions to pool financial resources and expertise to develop pan-provincial solutions to problems related to foreign credentials and discriminatory barriers.

## Recommendations

Human rights regimes have contributed to a more enlightened approach to the admittance of foreign-trained individuals to regulated occupations in some provinces. In several cases, they have provided a forum for definitively resolving situations. They have helped to indicate the direction that should be followed as a matter of general policy. This includes the need for professional bodies to establish a variety of routes to test professional competence, including clinical assessment, rather than relying on methods that have the practical effect of excluding able foreign-trained applicants.

The human rights route however, has serious limitations. From the point of view of the complainant, the process can be slow, expensive, and demoralizing. Prolonged delays are often experienced in bringing cases to resolution. In *Blencoe v British Columbia (Human Rights Commission)*, the Supreme Court of Canada held that thirty months was not an abuse of process in human rights cases where there is an attempt at protecting the claimant's rights.<sup>93</sup>

There tends to be a severe imbalance in the power of the contestants when an official body denies recognition to a foreign-trained or experienced applicant. Pursuing a formal complaint exacts a material cost on the applicant who may already be in a state of diminished prosperity, or even poverty, as a result of recognition being denied. Pursuing the complaint costs the applicant time that could be spent earning income and the out of pocket costs that can include hiring legal counsel. It is true that under many human rights systems, such as that in Manitoba, the Human Rights Commission will investigate cases and pursue them on behalf of the complainant, including before tribunals and courts, if it finds the complainant's position to be sufficiently meritorious. In practice, however, in an area as complicated as recognition of the credentials and competencies of foreign-trained professionals, a complainant may have difficulty explaining his case to the commission without the assistance of legal counsel.<sup>94</sup> The entity denying recognition may have "deep pockets;" the money it obtains from membership dues may be very substantial. Furthermore, there is a severe asymmetry in emotional resources. The entity denying recognition will be acting through leaders and bureaucrats who have no great personal investment in a particular outcome in

a single case. By contrast, the newcomer to Canada may find it humiliating and demoralizing to have her professional credentials or competency rejected. An individual may come from a society in which he is highly respected by professional peers and members of the public, and find himself rejected and excluded. The grounds for doing so often appear to the applicant—and justifiably so—as unfair, both to the applicant and the public. Compounding the stress can be the usual difficulties of adapting to a new society, and the shock of discovering that a society that is supposed to be advanced, free and enlightened can adopt practices that appear—and often are—based in economic self-interest, stereotypes or ignorance about other societies and the caliber of their training and testing systems. The entity denying registration often prevails in the war of material and emotional attrition long before a matter can ever be brought to adjudication. The newcomers may find the financial and emotional cost to be unsustainable, and either switch to a different occupation or move to another jurisdiction in which they will be fairly valued.

The human rights system has other inherent limitations as well. Human rights commissions and adjudicators may not be familiar with the issues involved in professional accreditation, and their jurisdiction is limited by the need to tie a case of professional exclusion to an enumerated ground of discrimination. Additionally, the system as a whole is driven by individual complaints in reaction to exclusion, rather than encouraging professional bodies to be proactive about producing across-the-board improvements in their credentialing processes that can benefit all applicants, whether foreign- or domestically-trained.

Under all human rights systems, there is jurisdiction for the commission to pursue a remedy, and for an independent tribunal to grant it, only if the complainant can demonstrate that his case satisfies the legal requirements for the existence of “discrimination” under the relevant statute. In each of the cases surveyed, there was extensive dispute between the parties over whether this requirement was met. The issue of whether differential and burdensome treatment is on the “basis” of some personal characteristic, and whether that characteristic is within the catalogue covered by a particular provincial statute, can be the subject of prolonged disputation. Technical subtleties arise pursuant to a simple and overriding limitation on the scope of human rights regimes: they can only remedy situations where a foreign-trained professional can demonstrate that the source of unfair treatment is discriminatory, but not “merely” because it creates an unnecessary and unfair barrier to the entry into the profession by a competent, even extraordinarily competent, foreign-trained professional.

Some provinces have now established regimes that require fair access to the regulated professions.<sup>95</sup> These statutes address the issue of fair access to the professions generally, and are not confined to addressing only injustices that can be fit without the scope of anti-discrimination statutes. Fair access laws tend to be severely limited by the fact that government administrators have no authority to make legally binding orders, whether on a complaint-driven basis or pursuant to ongoing oversight of a body’s practices. Unless and until there is substantial improvement in the enforceability of these fair access laws, the human rights route will remain one of few that offers even the theoretical possibility of providing

an applicant access to binding dispute resolution.

We recommend that human rights codes be amended to include place of education, training and work/vocational experience as an expressly prohibited ground of discrimination. Doing so would send a clear message to all concerned—applicants, occupational regulatory bodies, human rights investigators and adjudicators as well as the general public—that foreign credential recognition is within the scope of human rights regimes.<sup>96</sup>

Even if legally-binding fair access regimes are finally established at the provincial level, the proposed amendment to human rights law would still be warranted. The unreasonably restrictive treatment of foreign-trained professionals in Canada is a longstanding problem that has proved resistant to change. A multi-dimensional approach to reform is the most desirable way to address this issue. The inclusion of place of education, training and work/vocational experience as an enumerated ground in human rights legislation would confirm that the issue is not just one of fairness in administering licensing regimes, but of eliminating discrimination based on factors such as place of origin. The existence of multiple routes to binding dispute resolution is appropriate for several practical reasons. Even if fair access legislation provided for legally-binding dispute resolution, it would take many years before we would know whether the system works in practice. It would make more sense to offer several possible methods; this way, the more effective route will be organically chosen by those seeking redress. Lessons learned from one remedial track may be useful in improving the other. The human rights track might, in some cases, be more appropriate and effective—for example, in cases where bias and stereotyping of applicants from other countries is a major dimension of the problem.

## Chapter II

# Effective Foreign Credential Recognition Legislation: Recommendations for Success

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*This article is an expansion of an initial treatment of the subject, in the context of Manitoba's legislation, in, "Effective Foreign Credential Legislation: Give it Some Teeth," published in (2009) Vol 6 Underneath the Golden Boy. The authors wish to thank Mary-Ellen Wayne, B.A., J.D. (Manitoba), for editing the original version of the chapter on fair access legislation and drafting supplementary material to update it.*

Ontario, Manitoba, and Nova Scotia have enacted legislation to help streamline the registration process in regulated professions for foreign-trained professionals. This legislation, however, has failed to effectively promote fairness and transparency

A crucial shortcoming of these statutes is the lack of legal authority on the part of independent oversight agencies, which are not authorized to make legally binding orders for professional bodies to change their practices nor even to hear complaints from individuals who believe they have been treated unfairly. "Fair access" statutes across Canada should be clear and multifaceted in addressing the duties of professional bodies. They should go far beyond merely prohibiting procedural unfairness in administering their entry systems.

In order for foreign credential recognition legislation to be effective, the legislation should:

- Incorporate an independent appeal body in order to provide more transparency, accountability, and perceived fairness;
- Increase the cost of non-compliance;
- Define the term "fairness" and specify it includes only those background, training, apprenticeship or testing requirements that are relevant or necessary for effective practice;
- Require professional bodies to consider whether clinical skills-based testing, rather than standardized written tests, are an adequate means of testing competence for some or all foreign-trained professionals;
- Require professions to take reasonable steps to establish mechanisms to assess the value of foreign training, competence, and credentials when presented by applicants;

- Require that any examinations administered by professions are reliable in testing the competencies they are intended to cover, that testing is fairly conducted, and that both domestic and foreign-trained applicants have a fair opportunity to anticipate the nature of the examination and prepare accordingly;
- Where possible, the extent to which foreign qualifications will be recognized should be established prior to the application process, rather than leaving applicants uncertain about how their individual cases will be treated;
- Require professions to work with universities and colleges to establish training programs that can assist foreign-trained professionals in upgrading their skills so as to meet professional standards; and,
- Require professions to maintain and publish data on inquiries, admissions, and rejections of foreign-trained applications.

Overall, the top priority should be producing fair access legislation that is clear, enforceable, and encourages both pro-active measures to improve admission practices and also provides a usable mechanism for individuals who are unfairly denied registration in a regulated profession.

## Introduction

While many would prefer to believe the idea of foreign-trained doctors coming to Canada and ending up driving cabs is an antiquated stereotype, data suggest that painful scenarios such as this may occur more often than we would like to believe. When recruiting abroad, however, Canada's immigration policies have focused on highly educated and financially established populations.<sup>97</sup> Foreign credential recognition roadblocks and other obstacles to the use of the skills of immigrants may be costing Canada's economy billions of dollars annually.<sup>98</sup> Immigration policies and effective strategies to capitalize on the talents of foreign-trained professionals should be an issue of primary concern for governments: by 2011, Canada's net labour force growth will be entirely dependent on immigration.<sup>99</sup> In this new era, failure to attract the best and brightest talent and successfully harness the power of these resources could cost Canada dearly on the global stage.<sup>100</sup> To effectively maximize human capital, the government must work to streamline the registration process for foreign-trained professionals attempting to enter regulated occupations.

Recognition of foreign-earned credentials has been a noteworthy issue in both political and professional circles. This is a logical consideration, as in 2006, a staggering 24.1% of immigrants had a professional occupational skill level.<sup>101</sup> In 2002, as well as in February and October 2004, foreign credential recognition was included in the Speech from the Throne as an issue in which the government was committed to making progress.<sup>102</sup> In 2003 and 2004, the federal government allocated \$68-million over six years to implement the Foreign Credential Recognition program, a collaborative federal intra-governmental effort to address foreign credential recognition issues involving several federal departments.<sup>103</sup>

In 2006, Ontario introduced Bill 124, the *Fair Access to Regulated Professions Act (FARPA)*, intended to promote fairness and transparency in the registration practices of specific self-regulated professions. Manitoba introduced Bill 19, *The Fair Registration Practices in Regulated Professions Act*,<sup>104</sup> in an attempt to provide transparent, objective, impartial, and fair registration practices that would facilitate effective foreign credential recognition. In addition to the legislative efforts of Ontario and Manitoba, Québec introduced Bill 14, *An Act to Amend the Professional Code as Regards the Issue of Permits*.<sup>105</sup> Nova Scotia was another province to take the legislative route with the introduction of Bill 211, the *Fair Registration Practices Act*.<sup>106</sup>

This paper will discuss legislation relating to foreign credential recognition that has been introduced by a number of provinces, specifically Ontario, Manitoba, Nova Scotia, and Québec, and whether this legislation has achieved positive outcomes for foreign credential recognition in those jurisdictions. Above all else, this paper will argue that current and previous federal and provincial governmental initiatives, while well-meaning, have failed to produce any significant recognizable change in the lives of foreign-trained professionals seeking registration in regulated professions. Failure in this vital area should not be taken lightly, as a failure to properly utilize this source of talent results in a tremendous waste of human capital. To understand how the current legislative initiatives ended up with a litany of vulnerabilities, this paper will touch on the development and the strengths and weaknesses of the *Fair Access to Regulated Professions Act (FARPA)*.<sup>107</sup> Finally, the paper will suggest tactics and strategies for making foreign credential recognition legislation effective in accomplishing its stated goals.

## Self-Regulated Professions

Self-regulated professions have been defined as “professions governed in part by government and in part by organizations given self-regulatory powers”.<sup>108</sup> Given the vast amount of knowledge held by these professions, they were given self-regulatory powers on the basis that it would be in the public interest to give the professions this authority. The ability of the professions to adhere to the standards of practice to ensure the public received the highest quality services was also in the public interest.

A substantive amount of literature warns that professional bodies may at times impose requirements for entry that go beyond what is genuinely relevant and necessary for effective practice. The motivation for excessive requirements may include reducing competition and raising consumer costs along with the prestige of the profession. Those who are already admitted to the professions can, and often do, raise additional requirements in the name of quality that they themselves are not required to meet: rather, those already admitted are “grandfathered”.

Unnecessary barriers to entry can be damaging to all constituencies. Many will be unnecessarily denied a chance to pursue a profession that best suits their own talents and ideals. The public may find that unnecessary restrictive standards

leads to higher prices for services, or that the services become altogether inaccessible due to the limited number of practitioners. Members of the public may simply forego the service, attempt to administer it themselves—often at great risk—or pursue dangerous substitutes. A person who cannot access psychiatric or psychological services may try to address her problems by treating herself with alcohol, illegal drugs, or excessive or inappropriate prescription medications. The same individual may settle for counseling from a practitioner who does not have the training or ethics to provide satisfactory assistance.

With respect to foreign-trained professionals, maintaining unnecessary barriers may follow not only from the desire to protect economic and social standing, but also from misunderstanding, stereotypes or hostility with respect to the nature of education, training, practice and standards observed in other jurisdictions.

While human rights statutes can and, on several occasions, have been used to redress discrimination against foreign-trained professionals, there are limitations to their practical usefulness. Such statutes are genuinely complaint-driven, rather than placing pro-active obligations on professional bodies to review and put in place satisfactory systems for policing entry. Furthermore, the statutes are administered by human rights commissions that are often swamped with complaints and slow to act, and they may not readily appreciate the complexities of professional registration systems. A complainant can only achieve redress under the statute if he shows that a barrier to entry is “discriminatory”; the legal and conceptual technicalities standing in the way of a finding of “discrimination” may be substantial. Moreover, human rights regimes cannot provide redress where a barrier to entry is equally unfair to local and foreign-trained applicants. There is, therefore, a strong need for all provinces to put in place “fair access” legislation that ensures fair terms of entry to professions for all.

## Legislative Initiatives

In professional self-regulation, a profession enters into an agreement with the government to regulate the members of a profession.<sup>109</sup> This agreement between the government and the profession is executed through legislation, which stipulates the regulatory framework for the profession and the level of legal authority that has been granted to the regulatory body of the profession.<sup>110</sup> Professional self-regulation allows the government to retain a level of control over a profession, and therefore over the services provided by the members of a profession.<sup>111</sup>

Despite awareness of the flaws of the guild model, in particular when accompanied by monopoly grants for services, self-regulation is growing. Self-regulation remains a cost-effective mechanism for establishing and enforcing requisite standards of quality in providing a service. Governments are increasingly aware of the need to insert regulatory oversight mechanisms to ensure the protection of the public interest. Fair access legislation, particularly when it involves the creation of an Office of a Fairness Commissioner with appropriate oversight power, is an example of how self-regulation is contained in the public interest.

Canadian constitutional law has delegated power over most employment law matters to the provinces. For example, labour-management relations is a matter of provincial jurisdiction, as it falls within civil rights in the province.<sup>112</sup> Regulation of professions and trades also falls within “property and civil rights in the province.”<sup>113</sup> Having those in the profession evaluate the training and credentials of applicants seeking to join the profession raises the issue of conflicts of interest. It was traditionally assumed that the occupational regulatory body was not only obligated to protect public interests, but also to act in the best interests of the members of the profession.<sup>114</sup> It is now common knowledge that this is a flawed assumption. Consequently, in the case of protecting the public interest associated with recognizing foreign credentials, legislation is then enacted by the provinces to prevent these licensing bodies from engaging in practices that provide significant barriers to foreign-trained professionals attempting to have their credentials recognized in Canada.

If the impact of the decisions made by the professional self-regulating bodies is felt by those making them, it is understandable for the decision-makers to make decisions that are favourable to their own interests. This is in contrast to the principles enunciated by the Competition Bureau to assist regulators in developing and maintaining effective and efficient regulations that maximize the interest of the consumer.<sup>115</sup> Obstacles to entry faced by foreign-trained professionals indicate that unchecked self-regulation has not been successful. To ensure impartial decision-making and a competitive market, there must be checks and balances to the system.

## **A. Ontario:**

### ***The Fair Access to Regulated Professions Act, 2006***

Bill 124, the *Fair Access to Regulated Professions Act, 2006*,<sup>116</sup> was introduced to the Legislative Assembly of Ontario on 8 June 2006.<sup>117</sup> The Bill was designed as a mechanism to abolish bureaucratic hurdles and assist newly landed immigrants in finding jobs in their chosen fields in a timely manner. This would be done by requiring that regulatory body registration procedures be quick, fair, and open.<sup>118</sup>

### **Absence of an Independent Appeal Body**

Since the regulatory body’s decision determines the ability of the applicant to practise his or her chosen profession, “access to independent appeal is vital.”<sup>119</sup> However, the need for an independent appeal mechanism will be reduced if fair registration practices successfully increase the effectiveness, fairness, and clarity of internal registration procedures and review processes within regulatory bodies. In addition to the lack of an independent appeal mechanism under *FARPA*, an individual also does not have a right of access to the Office of the Fairness Commissioner. The Fairness Commissioner does not advocate for specific individuals, but acts as an oversight body to ensure progress towards fair registration practices in the professions included under *FARPA*.

The main criticism of *FARPA* remains the lack of an independent appeal body.<sup>120</sup> During the Standing Committee debates, most presenters stated that without an independent appeal tribunal, it would be difficult to achieve objectivity and fairness.<sup>121</sup> This is especially true in the case of appeals of regulatory body decisions that were to be heard by the same regulatory body that originally rejected the application.<sup>122</sup> In the absence of an independent appeal body, the only way an applicant can have his or her case heard by a third party would be through the court system, either by statutory appeal or judicial review. This is not a satisfactory appeal mechanism as court cases can be both expensive and risky, particularly for new immigrants who are often already struggling financially.<sup>123</sup>

An independent appeal body would provide more transparency, accountability, and the "appearance of fairness to the public."<sup>124</sup> As it is, the only provision ensuring objectivity in the internal review prohibits a decision maker involved in the original decision from acting as a decision maker in the review or appeal.<sup>125</sup>

The absence of an independent appeal body was strongly supported by the professional regulatory bodies.<sup>126</sup> While *FARPA* does not seem to ease the plight of foreign-trained professionals, it does present a threat to the regulated professions. The professional bodies found the language of the Bill overly restrictive and confusing. They raised the following concerns:

- The Bill erodes self-regulation and there is the potential it will be replaced by state-regulation.<sup>127</sup> As the Fairness Commissioner has the authority to influence entry requirements, there is the possibility that the office will begin supervising professional bodies. This conflicts with the principle of independence self-regulated professions.<sup>128</sup> This, in turn, may interfere with the ability of regulatory bodies to ensure that applicants meet professional standards.<sup>129</sup>
- The sole contribution of the legislation is another layer of bureaucracy.<sup>130</sup>
- Audits and numerous reporting requirements are costly procedures that reduce flexibility. There is the risk that standardization will replace the individualized registration process. Also, audits may be limited to measuring technical credentials instead of actual competence.<sup>131</sup> Moreover, the additional reporting and auditing costs will eventually be transferred to the applicants.<sup>132</sup>
- The audit standards are unclear: the terms "transparent," "fair," and "objective" must be defined if regulatory body practices are to be assessed against them.<sup>133</sup>
- There is the potential for duplication of reporting duties: conflicts between the obligations under the Bill and those under the professional body's authorizing legislation may exist.<sup>134</sup>

## Limited Role of the Fairness Commissioner

*FARPA* created the Office of the Fair Registration Practices Commissioner (the Commissioner), responsible for the oversight of the compliance of regulatory bodies with *FARPA*.<sup>135</sup> The functions of the Commissioner include assessing the registration practices of regulatory bodies, determining their audit standards, deciding the time when registration practices are to be reviewed, providing

advisory functions to the bodies and applicants, and, most importantly, reporting to the ministers on the registration practices of the regulated professions.<sup>136</sup>

The role of the Commissioner, however, is limited. According to the *Act*, the Commissioner is appointed by the Lieutenant Governor in Council, and reports to the Minister of Citizenship and Immigration.<sup>137</sup> The legislation does not indicate whether the Commissioner is intended to be independent, or if s/he must be independent. The Commissioner could be a member of the minister's staff, bringing into question the legitimacy of the role and of the work of the Commissioner. The Commissioner also does not have authority to intervene in procedures, question the decisions of the regulatory bodies, or represent the interests of an applicant to a body. Although section 26 of *FARPA* does grant the Commissioner the right to exercise discretion and issue compliance orders, there are no listed criteria on what creates grounds for the Commission to exercise this discretion and initiate compliance. As a result, this compliance order power appears to be merely cosmetic. The most visible function of the Commissioner is a series of reports and audits on the practices of the regulated professions.<sup>138</sup> These include an annual report to the Minister of Citizenship and Immigration, who may choose to submit the report to the Lieutenant Governor in Council.<sup>139</sup>

It has now been more than three years since the Office of the Fairness Commissioner was created. In January 2011, the Commissioner released a handout listing improvements implemented to the registration process in 18 of the regulated professions in Ontario.<sup>140</sup> However, these 18 improvements include simple changes, such as a revised College of Ontario Optometrists website "to ensure that registration information, application packages and frequently asked questions are complete, easy to find and easy to understand."<sup>141</sup> While any improvement is better than no progress in this area, this is hardly the substantial change that many were hoping for following the introduction of *FARPA*.

In March 2010, the Commissioner released a report entitled "Clearing the Path: Recommendations for Action in Ontario's Professional Licensing System".<sup>142</sup> The report contained 17 recommendations for regulatory bodies, qualifications assessment agencies, the Government of Ontario, the Government of Canada, and applicants. Many of these recommendations were based on a December 2008 study released by the commissioner involving nearly 3,800 respondents from 37 regulated professions.<sup>143</sup> The study found:

[A] majority (76%) of domestically trained individuals were currently employed in their profession, while less than half (44%) of internationally trained individuals were employed in their field. Three times as many of internationally trained individuals (37%) were unemployed or employed in unrelated field compared to those trained in Canada (11%).<sup>144</sup>

The recommendations proposed by the Commissioner included streamlining the registration processes through faster decision making and the removal of unnecessary steps, and providing stricter oversight when outsourcing assessment of qualifications.<sup>145</sup> While these recommendations could potentially be very helpful to foreign-trained professionals, the Commissioner has limited authority to ensure compliance with these recommendations. As a result, the recommendations can

at best be considered guidelines. This is unfortunate given the positive impact the implementation of these recommendations could have on the lives on foreign-trained professionals seeking registration in a self-regulated profession.

Although the Commissioner has released annual reports, much of these reports consist of a mass of unsubstantiated self-serving statements. What is actually taking place may be “regulatory capture”, where the regulated take *de facto* control over the regulator by issuing cosmetic reports containing information the regulated profession wants to release as opposed to having the regulated profession being required to release specific information. As some outside sources have experienced a lack of access to the Office of the Fairness Commissioner, this may be enabling the continuation of these glossed-over reports.

## **Lack of Tangible Results**

It is unclear whether the Commissioner is achieving any real and substantial change. The study used data extracted from a literature review, an online survey, and five focus groups.<sup>146</sup> Although the Commissioner has conducted studies such as the one listed above, it is difficult to tell which members of the regulated professions were questioned and whether this data is representative of the regulated professions as a whole. This is a closed system with no opportunity for the Commissioner to uncover any data that is not disclosed by the regulated profession. Future compliance may also be difficult to achieve, as the current consequence for non-compliance, a fine of \$100,000 for corporations and a fine of \$50,000 for individuals, may not be sufficient motivation for a professional body focused on their own self-interests to abandon unfair registration practices.<sup>147</sup>

As the Commissioner does not advocate for specific individuals, the role of the Commissioner is merely to observe the practices of professional bodies, and to compose reports for the minister detailing the processes and procedures of all self-regulated professions included under *FARPA*. The position is not independent from the ministry that implemented the legislation, raising questions of the effectiveness and legitimacy of the position. In addition, the role does not come with the authority to fulfill practical purposes such as intervening on behalf of a foreign-educated professional in a dispute with a professional body, or insisting on reconsideration of an applicant’s case.

## **Limited Role of the Access Centre**

*FARPA* established the Access Centre for Internationally Trained Individuals (Access Centre), which also contains significant shortcomings.<sup>148</sup> The Access Centre is designed to provide information regarding requirements for and assistance with registration, to conduct research and analysis on the problems related to the registration of foreign-trained professionals, and to advise and assist various government and community agencies, ministries, institutions, professional associations, employers, and regulated professions on the training and registration of internationally-trained professionals.<sup>149</sup> The sole responsibility of the Access

Centre is to provide information regarding the process.<sup>150</sup> The functions of the Access Centre are limited to orientation and referring foreign-trained professionals to the applicable regulatory body.<sup>151</sup> The Access Centre does not provide legal or professional assistance. As a result, it is the responsibility of the applicant to defend his or her cause before an internal review or appeal panel. Although the Access Centre provides applicants with information regarding the recognition of their credentials, it does not assist applicants in the practical process of obtaining registration in a regulated profession.

While *FARPA* is well-intentioned, it is ineffective. As the legislation does not accomplish its goals for foreign-trained professionals, it is little more than a symbolic gesture.<sup>152</sup> There is a significant difference between the intent of *FARPA* to ensure fair and transparent registration procedures and what it actually delivers.<sup>153</sup> *FARPA* does attempt to tackle issues surrounding fairness, although this is limited to administrative issues. As a result, there are questions as to the practical usefulness of *FARPA*. To achieve results and rectify the foreign credential recognition problems, fairness must be prominent in a practical solution for foreign-trained professionals and the Government of Canada.

## **B. Manitoba:**

### ***The Fair Registration Practices in Regulated Professions Act***

Bill 19, *The Fair Registration Practices in Regulated Professions Act (FRPRPA)*, received Royal Assent on 8 November 2007.<sup>154</sup> The legislation was intended to encourage transparent, objective, impartial, and fair registration practices.<sup>155</sup> The *Act* came into force on 15 April 2009.<sup>156</sup>

During the legislative process of the bill, it became apparent that the regulated professions felt that the bill was drafted in haste.<sup>157</sup> Nineteen presenters outlined their opinions on the bill to the Standing Committee on Justice.<sup>158</sup> Concerns regarding additional bureaucratic red tape,<sup>159</sup> loss of independence,<sup>160</sup> the excessively wide scope of the legislation,<sup>161</sup> unclear and unduly burdensome provisions,<sup>162</sup> and the fact that the commissioner would report to the minister as opposed to the entire house<sup>163</sup> were raised by the regulatory bodies. Despite all of these concerns, only three amendments were made to the bill<sup>164</sup> regarding written decisions,<sup>165</sup> disclosure of personal information,<sup>166</sup> and confidentiality of information.<sup>167</sup>

The Manitoba legislation inherited many of the same flaws as *FARPA*, its predecessor. The *FRPRPA* also does not contain an independent appeal mechanism. In addition, the fairness commissioner is also appointed by the Lieutenant Governor in Council,<sup>168</sup> with an even more limited role than under *FARPA*.<sup>169</sup> Unlike *FARPA*, which requires annual reports, the commissioner is only required to submit a report every two years under the Manitoba legislation.<sup>170</sup> The *FRPRPA* also expressly limits the fairness commissioner from becoming involved in a registration decision on behalf of an applicant.<sup>171</sup> The Manitoba legislation

also does not stipulate an audit process as a responsibility for the fairness commissioner. Notably, the Manitoba fairness commissioner does not have any power to make compliance orders to those professions who are found to have contravened the provisions of the *Act*.

The role of the fairness commissioner under the Manitoba legislation appears to be very limited. The core responsibilities of the fairness commissioner is primarily confined to providing information on the requirements of the *Act*, reviewing registration practices, and advising the professions, government departments, government agencies, and other relevant groups regarding matters under the *Act*. Given this limited role, the Manitoba fairness commissioner, similar to the Commissioner under *FARPA*, is not likely to produce any significant change.

The Manitoba fairness commissioner released her first report to the minister in December 2010.<sup>172</sup> The report encompassed the period from December 2008-December 2010 and identified numerous issues in the registration process for internationally educated persons. These issues included lack of information, misinformation, confusion, testing methods, lack of feedback, and the high cost of the process.<sup>173</sup> In terms of implementing the *Act*, the fairness commissioner states that their work has just begun but is “nurturing change.”<sup>174</sup> Eight regulators are currently undergoing a review of their registration process by the Fairness Commissioner, including three regulators in the pilot program,<sup>175</sup> and five regulators undergoing reviews initiated in 2010.<sup>176</sup> It is hoped that these reviews will result in a more streamlined registration process for foreign-trained applicants.

The cost of non-compliance with the Manitoba *Act* is also much lower than the *Ontario Act*: the penalty for an offence under the *FRPRPA* is capped at a fine of \$25,000,<sup>177</sup> while *FARPA* has a maximum fine of \$50,000 for an individual<sup>178</sup> or \$100,000 for a corporation.<sup>179</sup> To ensure the effectiveness of the legislation, there must be a higher penalty for non-compliance. This will act as a deterrent for offences under the *Act* and encourage those already in violation of the *Act* to revise their practices to comply with the legislation.

The *Manitoba Act* also does not define the term “fairness”. This is concerning given the *Act* is aimed at ensuring fair registration practices in regulated professions. In addition, the *Manitoba Act* does not require professions to work with post-secondary institutions to establish training programs to assist foreign-trained professionals in upgrading their skills to meet registration requirements. At best, the *Manitoba Act* makes the fairness commissioner responsible for advising post-secondary institutions on matters under the *Act*. Lastly, the *Manitoba Act* does not require professions to take reasonable steps to establish mechanisms to assess the value of foreign credentials when presented by applicants. As a result, a profession does not have a specific duty to assess the credentials of a foreign-trained professional in a timely manner, even though it may be in the public interest to do so.

## C. Nova Scotia:

### ***The Fair Registration Practices Act***

Bill 211, the *Fair Registration Practices Act (FRPA)*,<sup>180</sup> received Royal Assent on 25 November 2008.<sup>181</sup> The *FRPA* inherited many of the same flaws as the Ontario and Manitoba legislation. The *FRPA* establishes the role of a Review Officer (Officer) and the responsibilities of the Officer,<sup>182</sup> which is also a limited role similar to the other provincial legislation. Like the Manitoba legislation, the Officer is prohibited from becoming involved in a registration or internal review decision.<sup>183</sup> The cost of non-compliance with the *FRPA* is limited to a fine of \$10,000,<sup>184</sup> the lowest of all the current provincial fair access legislation. The *FRPA* does not require an independent review body or panel.

The first attempt to introduce legislation in this area in Nova Scotia occurred on 24 April 2008 with the introduction of Bill 126, the *Fair Access to Regulated Professions Act*.<sup>185</sup> Second reading of the bill was adjourned on 30 April 2008.<sup>186</sup> Debate was also adjourned on 24 May 2008 after it was revealed the speaker had called the wrong person, when instead he was supposed to call the member who had previously adjourned debate.<sup>187</sup> This adjournment signalled the death knell for Bill 126, as it was never re-introduced.

Bill 126 was in some respects similar to the *FRPA*, although the bill also applied to decisions of regulatory bodies that “propose that an applicant not be granted registration”<sup>188</sup> and when a regulatory body decided to “grant registration to an applicant subject to conditions”.<sup>189</sup> Bill 126 also defined an internationally educated individual.<sup>190</sup> In addition, Bill 126 required the disclosure of “objective requirements for registration by the regulatory body, including a description of the criteria used to assess whether the requirements have been met, together with a statement of which requirements may be satisfied through alternatives that are acceptable to the regulating body.”<sup>191</sup>

This provision is broader than section 7 of the *FRPA*, which does not require disclosure objective admission requirements or a statement of which requirements may be satisfied by alternatives. Bill 126 would be more advantageous to foreign-educated professionals as it would help ensure more information was available to them, reducing the need to spend time searching for this information themselves. By expressly stipulating which alternatives are acceptable, this provision could have helped eliminate discriminatory treatment by ensuring that the regulatory body has to recognize the alternative information from all applicants, as opposed to merely some applicants.

In addition to requiring regulatory bodies and third parties relied on by regulatory bodies to make assessments on qualifications a manner that is “transparent, objective, impartial and fair”,<sup>192</sup> Bill 126 also required assessments on qualifications to be made “in a manner that is compliant with the labour mobility provisions of the *Agreement on Internal Trade*.”<sup>193</sup> This provision was also more advantageous to the applicant as it provided the applicant additional protections. While “transparent, objective, impartial and fair” were not defined in Bill 126, the *Agreement on Internal Trade* was defined and offered a more objective point of reference.

## D. Québec:

### ***An Act to Amend the Professional Code as Regards the Issue of Permits***

On 14 June 2006, Québec enacted Bill 14, *An Act to Amend the Professional Code as Regards the Issue of Permits*.<sup>194</sup> Unlike Ontario and Manitoba, Bill 14 was not intended to ensure the process of registration was fair and transparent. The Québec legislation intended to facilitate the recognition of credentials and diplomas of foreign-educated persons.<sup>195</sup> The goal of Bill 14 was to shorten the period of time it takes to recognize professional credentials before a foreign-trained specialist may start working in his or her field of expertise.<sup>196</sup> Bill 14 establishes three new types of work permits: temporary restricted permit, permanently restricted (or special) permit, and “le permis sur permis” (licence on licence). This legislation will affect the 45 professional bodies in Québec.

The first new type of permit, the temporary restricted permit, allows a foreign-trained professional to apply for employment upon arrival to Québec, with the expectation that he or she will take an accreditation exam in the immediate future.<sup>197</sup> This type of permit may promote the faster integration of immigrants into the province’s labour market. Also, working in a restricted capacity throughout the re-qualification period eases the financial problems faced by many foreign-trained professionals seeking registration in a regulated profession in Canada.<sup>198</sup>

The second new type of permit, the permanently restricted (or special) permit, allows a foreign-trained professional to practise in his or her field of expertise permanently, but it is restricted to the areas he or she practised in the country of origin. This does not require any additional accreditation exams in Québec.<sup>199</sup> The third and final new type of permit, “le permis sur permis”, or licence on licence, automatically grants the foreign-trained professional a local licence upon the presentation of evidence that the foreign-trained professional earned equivalent credentials in their country of origin. This type of permit is possible wherever the professional evaluated the person’s experience, competence, and professional body’s regulations in his or her country of origin, and ruled them to be equivalent to Québec’s standards.<sup>200</sup> Evaluations take place on a case-by-case basis.<sup>201</sup>

According to the Honourable Yvon Marcoux, Québec Minister of Justice at the time of enactment, the amendment gives professional bodies more flexibility to recognize the equivalence of credentials earned abroad.<sup>202</sup> Although the amendment has been seen as an essential step towards the integration of foreign-trained immigrants, it still attracts criticism.<sup>203</sup> Critics argue that no amount of restricted work permits will ever replace the recognition of competencies and evaluation of standards of education in foreign jurisdictions.<sup>204</sup> It is argued that Bill 14 does not introduce anything new. Rather, everything existed previously in the regulations of the professional body.<sup>205</sup> As well, Bill 14 will only affect a small number of immigrants that arrive in Québec annually.<sup>206</sup> As such, the critics recommend cooperation between the government and the professional organizations. Instead of developing purely governmental solutions, the

government should encourage professional associations to act by allocating additional funds to expedite and improve the foreign credential recognition mechanisms.<sup>207</sup>

Notwithstanding substantial criticism, from a practical point of view, Bill 14 seems to support foreign-trained professionals more efficiently than the Ontario or Manitoba legislation. The major advantage of Bill 14 is it presents foreign-trained professionals with the opportunity to engage in their professional labour market before starting the re-qualification process. The automatic recognition of foreign-issued licences in the “le permis sur permis” category is an effective means to quickly allow professionals to enter the labour market. This process does not usurp or infringe Québec’s professional standards, since foreign credentials are still evaluated and compared against those standards. Although Bill 14 does not affect a large number of professionals, it is a benefit to those covered by the legislation.

While Bill 14 is both practical and effective, it does not provide an external review for the decisions of regulatory bodies regarding work permit applications, much like its Ontario and Manitoba counterparts. Also, Bill 14 does not address the problems of systematic bias and discrimination that were raised during the legislative process of *FARPA*.

## E. Summary of Legislative Initiatives

Although *FARPA* is a well-intentioned idea, it falls short of its lofty aspirations. Substituting the recommendation of an independent panel with the Commissioner and the Access Centre detracts from the goal of the legislation. Neither of these attempted solutions serves the practical purpose of facilitating more effective foreign credential recognition. As a result, the legislation does not accomplish its goal of getting more foreign-trained professionals working in their respective professions.

Manitoba’s Bill 19 is based on *FARPA*. The Legislative Assembly of Manitoba passed the legislation with few amendments, as opposed to reviewing the strengths and weaknesses of the Ontario legislation and taking measures to avoid the same pitfalls in Bill 19. As a result, the Manitoba legislation inherited many of the flaws of *FARPA*. The *Fair Registration Practices Act* enacted in Nova Scotia, also modeled off of *FARPA* and the *Manitoba Act*, has inherited the same weaknesses of the previously enacted provincial legislation.

Québec’s Bill 14 seems to have created a more efficient basis to support foreign-trained professionals than any of the other legislative measures. Bill 14 does not cover registration procedures and the administration of registration procedures by the regulatory bodies. Bill 14 creates a desirable result, as fairness must play a prominent role in a practical solution oriented to the facilitation of effective foreign credential recognition.

## Policy Recommendations

- Fair access legislation should apply to a broad range of entities that effectively control access to the occupations, dealing with only certain professions may mean the legislation falls short;
- The norms stipulated by fair access legislation should also be extensive. It is not enough merely to address procedural fairness in administering current systems. Rather, legislation should clearly provide that the gate-keeping entities covered by the legislation:
  - cannot establish substantive requirements for entry that are irrelevant or unnecessary;
  - must ensure that their testing processes are fair, including ensuring that both local and foreign-trained applicants have a reasonable opportunity to understand the nature and breadth of the test and expected proficiencies;
  - must make efforts to ensure that the means to assess credentials acquired in other jurisdiction are effective and expeditious;
  - must also establish mechanisms to evaluate substantive competency for applicants who are trained and practised in other jurisdictions, rather than exclusively or excessively confining admission processes to the evaluation of paper credentials;
- Regulatory bodies must make best efforts to have “bridging” programs in place that permit applicants from other jurisdictions to overcome deficits in their competencies.
- The enthusiasm for compliance on the part of regulatory bodies, and with it their effective cooperation, can be greatly enhanced if provincial governments not only impose requirements on those bodies, but also provide resources to help meet them. One source of resistance to evaluating the proficiency of foreign-trained professionals, for example, can be the sheer cost in time and capital to set up a program whereby current members of the occupation can observe and evaluate the substantive competence of an applicant. Fair access laws should be accompanied by the creation of dedicated funds to which occupational bodies can apply for support in order to fulfill their new, broader mandates. Provincial governments should also play a role in coordinating the efforts of occupational gate-keeping bodies to open doors of educational and training entities, such as high schools, colleges and universities.
- Fair access legislation must include the creation of a Fairness Commissioner whose office holds adequate independence, authority and funding to effectively and pro-actively promote change.
- There must be an independent appeal body to hear and decide complaints from individuals who believe that existing registration practices have been administered improperly, or that the admission practices themselves fall below the standards of procedural and substantive fairness established in the statute.

- The independent appeal body must also have authority to hear and decide cases referred by the Fairness Commissioner pursuant to his own review of the registration practices.
- The oversight body should be mandated to provide regulated and detailed reports on the progress being made towards full compliance by all the occupational entities covered;
- Fair access laws must prevail over other statutes in case of conflict.

## Access to Remedies and the Need for Traffic Control

The recent decision of the Supreme Court of Canada in *Figliola*<sup>208</sup> raises the question of “traffic control” among the various avenues for challenging a decision by an occupational regulator.

In *Figliola*, the applicant asked British Columbia’s Workers’ Compensation Board to apply that province’s Human Rights Code<sup>209</sup> in the context of his case. He lost. The applicant then asked British Columbia’s Human Rights Tribunal to consider the same human rights issue. The case eventually went to the Supreme Court of Canada, which held that the Human Rights Tribunal should have refused to hear the case. The Court reasoned that in the context of these particular overlapping statutory schemes, the tribunal should have applied general legal principles that prohibit repeated litigation of the same issue; one type of administrative tribunal should not, in effect, carry out a judicial review of the decision of another. The only recourse for the applicant should have been moving up the legal hierarchy to a supreme court, rather than horizontally, to another administrative tribunal.

In the context of human rights tribunals—and fair access legislation, as well—*Figliola* suggests that Legislatures will have to carefully consider “traffic control” issues. Legislatures should not leave it to the courts to sort out the interaction of overlapping systems. Foreign-trained applicants tend to have limited resources and legal sophistication, yet they must bear the burden of changing the *status quo*. Confusion and uncertainty over where and how to proceed will deter applicants from even commencing complaints. Furthermore, if the matter of “traffic control” is left to courts, the principles in *Figliola* might generally be applied and might largely preclude applicants from accessing tribunals that are expert in human rights or fair access to regulated occupations. Applicants rejected by occupational bodies might have no option but to go through the exhausting process of pursuing all appeals that are routinely available to a rejected applicant, and then ask a court to intervene on judicial review.

Even if the applicant still has the emotional and financial resources for court-based litigation, the process may be less fair and effective than being able to complain to a body with specialized expertise, such as a human rights tribunal or fair access body. A court engaged in judicial review generally must rely on the factual record and findings of the initial decision makers, whereas a specialized body might have

a mandate to hear fresh evidence, and may even include an investigative arm that is able to assist the applicant in obtaining relevant information. A generalist court may be inclined to defer to the judgment of an occupational body, whereas a specialized tribunal may rightly review itself as having its own distinctive statutory mandate and expertise. The occupational body itself may have no expertise at all in either human rights or fair access legislation, and be composed mostly of members of the regulated profession who may have a predisposition, conscious or not, to support restrictive rules rather than re-evaluate or overrule them when necessary.

Proceeding to court may be costly, and the applicant can be exposed to the risk of paying the occupational body's legal costs if the latter wins. The mandate for human rights or fair access bodies may, by contrast, render the procedures involved less formal, less expensive, and eliminate the risk that an unsuccessful applicant might end up bearing not only his own costs, but that of the occupational body that he has unsuccessfully challenged.

It is recommended, therefore, that in bolstering human rights legislation to deal with regulated occupations and in setting up effective fair access bodies, the Legislature produce systems that interact in a manner that is efficient, expeditious, and not tilted in favour of the *status quo* in the regulated profession.

Consideration should be given to options that ensure that applicants will have continuing and expeditious access to review by human rights tribunals or fair access bodies. Possibilities include:

Providing the applicant the option of proceeding immediately to a human rights tribunal or fair access body to challenge rules that appear unlawfully restrictive, rather than first filing an application with the occupational body;

Ensuring that the routine appeal processes associated with a self-regulating occupation are reasonably accessible to applicants, and not unduly expensive or protected or filled with too many layers;

Providing applicants an option, once rejected at the first level by an occupational self-regulation, of either pursuing the routine occupational process or now proceeding to a human rights or fair access body;

Giving applicants the option, even if rejected after pursuing the routine occupational appeal process, of then proceeding to a human rights tribunal or fair access body;

Drafting human rights and fair access legislation in a manner that makes it clear that they are paramount over the routine legislation, regulations and policies of a regulated professions, and that specialized bodies and courts of law do not owe a duty of deference to the judgment of occupational bodies concerning the interaction of these higher norms and the law that ordinarily would apply.

Another approach that might be considered would be for a Legislature to accept the *Figliola* approach, whereby all occupational registration issues, including those concerning human rights and fair access, would generally be considered by the usual occupational gatekeeper (such as a Registration Committee for a

regulated profession) and their usual appeal and reviewing bodies (such as the Health Professionals Appeal Board in Ontario or courts carrying judicial reviews of administrative decisions). The Legislature would take active measures, however, to:

- Ensure that the ordinary occupational gate-keepers are expressly and clearly instructed by statute to take into account human rights and fair access laws;
- Provide unmistakable legislative direction that these specialized laws, concerning human rights and fair access, override usual registration rules in case of conflict;
- Authorize and direct occupational gatekeepers to take whatever remedial steps are necessary to decision to ensure that particular applications are resolved in a manner consistent with human rights and fair access laws, and to adjust occupational procedures to the extent necessary to bring them into line with human rights and fair access laws;
- Provide that occupational gatekeepers must include in their deliberations at least some individuals appointed by the fair access body or human rights commission or both. Thus, it might be required that an occupational registration committee include at least one individual who designated by the Fair Access commissioner in a particular province, or the chair of its Human Rights commission.

Human rights laws and fair access legislation may prove to be useless in practice unless they are accompanied by legislative efforts to enact and coordinate appropriate enforcement mechanisms.

## Conclusion

The legislative initiatives introduced by the federal and provincial governments have seemingly noble intentions. Governments, recognizing the loss of human capital caused by unemployment or underemployment of foreign-trained professionals, have decided to implement these initiatives in order to affect positive change. Despite these good intentions and the resources spent on drafting and implementing the provincial legislation, these initiatives have fallen short of their goals. They have failed to produce any significant recognizable change in the lives of foreign-trained professionals who are struggling to have their credentials recognized in Canada. Good intentions alone are not enough in this critically important area. Legislation must be effective. Each failed or underachieving federal or provincial initiative, however, signals a continuation of the plight of this underappreciated group.

A chronic issue facing individual professions is the cost of establishing proper systems to evaluate and test foreign-trained applicants. Provinces that enact fair access legislation should at the same time establish a fund to which professions can apply to study and carry out improvements. While millions of dollars may be required each year, the investment may prove to be extremely rewarding.

A modest amount of money invested towards evaluating or upgrading the skills of foreign trained professional can have very large societal benefits, including enabling an individual to provide services to an underserved market. In addition, by fully deploying their skills, these individuals will be in a position to contribute far more to the economy through taxes. The cost of evaluating a foreign-trained professional or upgrading their skills may be a small fraction of training a new professional.

An ideal model would include cross-Canada cooperation on issues such as evaluating foreign qualifications and establishing testing procedures. This cooperation can be achieved in several ways, such as through bodies that include professional regulators from all jurisdictions, and the Government of Canada may have a very useful role in coordinating and providing additional financial support for such bodies. Cooperative efforts may greatly reduce the average cost of evaluating and upgrading skills. If a nation-wide body assesses the value of a degree from a particular country, individual jurisdictions are each spared the cost of assessment. A nation-wide body can also provide a forum to enable sharing of information gleaned by a body in one jurisdiction to other jurisdictions.

Despite the many benefits of cooperation, the requisite level of cooperation may be difficult to achieve. In the absence of adequate national coordination, it is unlikely a province would proceed with the expense of being a leader in evaluating and providing supplementary training to foreign-trained professionals. Even if national cooperation would lower the cost of such an initiative, it can remain worthwhile if conducted independently. In fact, a provincial leader in this area can actually obtain an advantage from attracting a greater share of foreign-trained professionals.

Recognition in one more progressive province would not necessarily be recognized in other provinces. In accordance with the *AIT*, however, a province that wishes to withhold recognition of credentials from another province must have legitimate reasons for doing so. The balanced system in the *AIT* should alleviate concerns that any particular province is going to provide an unreasonably lax gateway to practicing a profession across Canada.<sup>210</sup> It is far-fetched, moreover, to suppose that any particular provincial regulator is going to have unreasonably low standards. Government and professional bodies in each province will remain accountable to their own populations for an individual who is admitted to a profession but performs services in an incompetent or unsafe manner.

While nation-wide cooperation would be ideal, the government and professional bodies would be well advised to proceed boldly on their own if cooperation proves to be slow in coming with respect to various professions. Among the highest priorities includes producing fair access legislation that is clear, enforceable, and encourages both pro-active measures to improve admission practices and a usable appeal mechanism for individuals who are unfairly denied registration in a regulated profession.

## Chapter III

# The Application of Competition Law to Foreign Credential Recognition

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

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

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

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

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

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

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

## Introduction

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

The issue of lowering barriers to entry for foreign-trained professionals is an important one in its own right; however, the issue forms one part of the larger challenge in Canada of ensuring that all competent individuals have fair access to participate in self-regulating occupations. This paper proposes that reforms to the definition and enforcement of federal competition law address the issue of barriers to entry generally, rather than being confined to issues of discrimination against foreign trained individuals seeking entry to an occupation.

This paper will examine how the federal *Competition Act*<sup>211</sup> (the *Act*) may serve to ensure self-regulating organizations do not require more of foreign trained professionals than is reasonably necessary to ensure the safe and effective delivery of services to the public. It will consider the applicable provisions as recently amended, and suggest further amendments so that the *Act* may more effectively oversee self-regulatory actions.

## The Purpose of Regulation

According to the Canadian Competition Bureau, self-regulation of certain professions and vocations is intended to correct two kinds of market failure that occur when professional services are offered in an open market: (1) asymmetric information; and (2) externalities.<sup>212</sup> Asymmetric information means that the knowledge imbalance between supplier and consumer of a service is so great that consumers “cannot accurately assess the quality of the services” they are purchasing.<sup>213</sup> In such circumstances, consumers may be harmed by incompetent providers, or charged high prices for low-quality services.<sup>214</sup> Externalities occur where a consumer’s choices impact parties other than the consumer and supplier. A consumer who chooses an incompetent or unethical lawyer may contribute to considerable harm and injustice being inflicted on third parties with whom that party is negotiating or litigating. Furthermore, the court system may find its resources unnecessarily diverted to dealing with the delay, confusion or complications resulting from the participation of inept counsel.

To maintain confidence in a profession, consumers must feel sure they will receive a competent level of service. However, since the average consumer cannot monitor service quality, the provincial governments have exercised their constitutional power over matters of property and civil rights to correct this market failure by ensuring a minimum standard of service through regulation.<sup>215</sup> In the case of professions and vocations the provinces have passed this regulatory responsibility and authority on to members of the professions, resulting in self-regulation.<sup>216</sup>

Economic studies of regulated occupations often overlook subtle advantages of self-regulation. Members of a group who are responsible to a considerable extent for their own governance and reputation may develop and subscribe to shared values such as competence, honesty and commercial fair dealing. As well, self-regulation limits the extent to which government is unilaterally able to impose its own priorities on professional practice and creates organized bodies which can counterbalance government demands that reflect a lack of expertise by politicians or bureaucrats, or a desire to court popularity at the undue expense of other values. The positive features of self-regulated occupations, however, can often be achieved by granting them the exclusive power to issue a particular designation or certification. This approach occurs in the accounting profession, where only qualified people may call themselves chartered accountants. In contrast, the legal profession has licensing authority, meaning that it maintains the exclusive right to provide a particular service, regardless of the name under which the service is provided. Furthermore, sound public policy can give scope to the value of self-regulating bodies without giving them carte blanche to act on their worst instincts, including economic protectionism. While significant scope for self-regulation might be justified in the context of certain occupations, the status quo is inefficient. A 2007 Competition Bureau (the Bureau) report stated the troubling statistic that Canada’s regulated professions have half the productivity of their U.S. counterparts.<sup>217</sup> The Organization for Economic Co-Operation and Development (OECD) believes that the best chance for increasing labour productivity in the self-regulating professions is to promote competition by reducing regulation.<sup>218</sup> The findings of a 2008 report commissioned

by the Bureau supported this. It found that “10 years after the introduction of Australia’s National Competition Policy, the country had experienced significant productivity ‘surges’ and growth in household incomes.”<sup>219</sup> One of the ways in which regulation could be reduced and competition increased is by re-examining and revising the current approach to licensing foreign trained professionals.

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

## **Problems with the Current Self-Regulatory Model**

Canada has adopted the policy that “competition in a free market system protects both consumers and service providers better than any other alternative.”<sup>220</sup> Therefore it is not legitimate public policy to stifle competition unless “the benefits of regulation demonstrably outweigh the benefits of competition alone.”<sup>221</sup> However, one of the weaknesses of the current system is that self-regulating bodies are granted “very wide” powers without needing cabinet or legislature approval for specific regulations.<sup>222</sup> Currently there is no independent body with legal authority to review the entrance requirements set and to enforce change if required. This raises the concern that “unfounded quality of service arguments may be used to artificially restrict access to the market in which the professionals compete,” where “one group of professionals is reliant on another group of competing professionals for the ability to practise its profession”.<sup>223</sup>

Even if self-regulatory bodies were only required to act in the members’ interests,<sup>224</sup> and could justify onerous entrance requirements to protect their membership, there is no need for such misguided economic protectionism. In Canada there tends to be under-servicing in most professions, particularly in rural and northern communities.<sup>225</sup> In addition, practitioners tend to create their own markets, so there is room for innovation and expansion within professions. The Canadian public wins as it benefits from increased variety and availability of services. This mitigates the effect of the lower prices created by competition on professionals.

Despite this, given the high numbers of foreign-trained professionals who are not working in their fields of expertise, there is concern that self-protectionism has unconsciously crept in, in the form of higher entrance standards than necessary to ensure service quality.<sup>226</sup> In 2007, after surveying six self-regulated professions, the Bureau found that there were circumstances where regulatory bodies had “imposed rules and regulations that...go beyond protecting the public interest and into the protection of professional self-interest.”<sup>227</sup> While self-regulation of entrance requirements clearly plays a valuable role in protecting the public from incompetent potential practitioners, it is important to ensure that each professional organization chooses the “regulatory tool” that most “directly targets” the problem and “has the least effect on competition.”<sup>228</sup>

## The Role of Federal Competition Law

Since the provinces have delegated their power to self-governing entities without creating an independent body to oversee the use of that power, there is a gap in oversight. However, the *Competition Act* (the *Act*) includes three provisions under which the Bureau could effectively fill the legislative hole. This could be done by monitoring and assessing the anti-competitive effects of entrance barriers, and determining whether they are the minimum necessary to achieve their purpose. The *Act* provides a useful mechanism to prevent the closed-shop atmosphere and self-protectionist behaviour, which is an inherent risk of self-regulation; unlike provincial Fair Access legislation, the *Act* allows an independent body to step in not only with suggestions for improvement, but also to enforce change through litigation if the anti-competitive effects of self-regulators’ decisions outweigh the public benefit. When recommending the application of federal law to a matter that appears to be under provincial authority, a discussion regarding the constitutionality of the proposed amendment is necessary. This issue is considered below.

### A. Three Potentially Applicable Provisions of the *Competition Act*

The first of the three relevant provisions is s. 45 which makes it a criminal offence to conspire to “fix, maintain, control, prevent, lessen or eliminate the production or supply of [a] product.”<sup>229</sup> The second, s. 79, is a civil provision prohibiting an entity that “substantially or completely control[s]...any area...of business” from “engaging in a practice of anti-competitive acts” that, in past, present or future, “lessen[s] competition substantially in a market.”<sup>230</sup> The third relevant provision, the recently enacted s. 90.1, can prevent “an agreement or arrangement” between “competitors” that does or “is likely to prevent or lessen, competition substantially in a market”.<sup>231</sup>

The ability to monitor entrance standards for self-regulating professions under the *Act* lies almost exclusively with the Bureau. Only it can bring a matter before the

Competition Tribunal (the Tribunal). If a newcomer believes the barriers set on his entry to a profession are unnecessarily high, lessening competition, he may make an Application for Inquiry to the Commissioner of the Bureau, or bring an action under section 36 before the Federal Court.<sup>232</sup> In this way, the *Act* provides a mechanism for filtering complaints so that amending it to more clearly apply to self-regulating bodies should not cause an unreasonable surge in litigation.

## Elements Common to these Three Sections

Whichever provision the Bureau chooses, some of the same elements must be proven. These will be considered first, followed by the differences between the provisions which make them more or less appropriate for assessing whether entrance requirements are anti-competitive.

### i. “Product” and “Competition”

These sections are applicable to the provision of professional services because “product” includes a “service of any description.”<sup>233</sup> In addition, the term “competitor” includes potential competitors, those “who it is reasonable to believe would be likely to compete with respect to a product in the absence of” an agreement.<sup>234</sup> Therefore an individual with valid credentials from another jurisdiction who applies to a professional body for a licence to provide professional services is clearly a potential competitor for provision of a product.

### ii. “Agreement or Arrangement”

The phrase “conspire, combine, agree or arrange” in section 45 encompasses the idea of competitors “mutual[ly] arriving at an understanding or agreement ... to do the acts forbidden.”<sup>235</sup> Since a self-regulating body is a single entity, a provision requiring agreement between more than one individual does not appear to fit. However, if the professional members of the governing body are considered as individuals, then setting entry requirements may be considered an agreement, arrived at together, to perform an anti-competitive act. This coincides with the Bureau’s interpretation of the word “agreement” in s. 45, which may include “[r]ules, policies, by-laws or other initiatives enacted and enforced by an association with the approval of members who are competitors.”<sup>236</sup> The association would be party to the offence under the *Criminal Code* aiding and abetting provision.<sup>237</sup>

This interpretation of the word “agreement” matches Estey J’s view in *Jabour* that the conspiracy provision’s language is “broad enough to include all the Benchers acting as a group or individually or the Law Society as a corporate entity.”<sup>238</sup> However, his concern with applying the provision to regulated actions is that the provincial legislation is “coercive,” meaning that the Benchers are required to regulate the legal profession, whereas the competition conspiracy provision is aimed at “voluntary combinations and agreements.”<sup>239</sup> This argument would be more convincing if the enacting legislation required a specific means of regulating entry to the profession. Since it merely gives broad power to regulate, the Benchers are free to choose a means of regulation that does not unreasonably

conflict with federal competition law. If they choose more anti-competitive means than are necessary they should be held accountable for the decision as would other competitors, or at the very least, the federal law should be paramount.

As in s 45, the Bureau interprets “agreement” in s 90.1 as encompassing “all forms of agreements and arrangements,” including rules and regulations created by “members of a trade or industry association ... with the approval of members who are competitors.”<sup>240</sup> Since this is not a criminal provision the regulatory body would not be a party to the offence, but could instead be joined as the members’ principal, using agency principles.

## **B. Section 45 – Conspiracy Provision**

Since s. 45 was amended as part of Bill C-10, coming into force in March 2010,<sup>241</sup> for an act to be anti-competitive under the provision, it must fall into one of three categories. It must relate to an agreement to (a) “fix prices;” (b) “allocate markets,” or (c) “restrict output.”<sup>242</sup>

Entry barriers would fit into subsection (c) because unnecessarily high requirements maintain and control the supply of a service.<sup>243</sup> While not strictly reducing the current offering of services, excessive regulation limits expansion because compliance with standards will require more time and expense. Fewer people will comply, particularly newcomers who have the added expense of settling into a new country. The result is fewer entrants to the profession, protecting those currently practicing from new competitors who may innovate, raising service quality or lowering prices in order to break into the market, thereby forcing those in the profession to respond in order to maintain their market share.

One of the significant changes to s. 45 is that the “undueness standard” has been removed.<sup>244</sup> The former wording prohibited an agreement from “prevent[ing] or lessen[ing], *unduly*, competition in the...supply of a product.”<sup>245</sup> It was a high standard, requiring proof of “economic harm” beyond a reasonable doubt in order to obtain a conviction.<sup>246</sup> This was difficult to establish and “involve[d] a complex factual, legal and economic analysis.”<sup>247</sup> The new section creates what the Bureau considers a *per se* offence, and is limited to “agreements that are so likely to harm competition,” with “no pro-competitive benefits,” that they “are *per se* unlawful.” These offenses lead to “significant criminal sanctions” and are “deserving of prosecution without a detailed inquiry into their actual competitive effects.”<sup>248</sup>

A significant reason for changing s. 45 was that it was out of date and did not match what Canada’s “major trading partners” were doing.<sup>249</sup> Another goal was to eliminate “a chill from the old law” because it applied to “all forms of competitor collaboration” even “legitimate” ones which might “discourage firms from engaging in [potentially] beneficial alliances.”<sup>250</sup> The application of the amended section is narrow, limiting s 45 to cases of very serious anti-competitive behaviour. If it is not an “egregious” agreement, nor a merger, then the Bureau will consider whether ss 90.1 or 79 will apply.<sup>251</sup>

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

### **i. Regulated Conduct Defence**

While the *Act* may apply to self-regulated occupations, their governing bodies may attempt to raise the Regulated Conduct Defence (RCD). The RCD removes “liability under the criminal provisions of the *Competition Act* provided the other legislation under which a party has acted is validly enacted, the conduct falls within the scope of the legislation and is required or at least authorized under that legislation.”<sup>252</sup> In other words, if a regulatory body is acting pursuant to, and within the scope of, valid provincial legislation, the RCD may be applicable.

When the *Act* was amended in 2010, the common law RCD doctrine was codified, becoming s. 45(7).<sup>253</sup> In *Garland*, the SCC stated that in order for the RCD to guard an action against criminal sanctions, the provision of the *Act* that is at issue must confer “leeway to those acting pursuant to a valid provincial regulatory scheme.” Specifically, the provision would have to include language such as “unduly” or “the public interest.”<sup>254</sup> By using such language, Parliament would provide “leeway” for the provision only to apply when the action at issue is against the public interest.<sup>255</sup> Since conduct undertaken pursuant to valid provincial legislation cannot “result in an action contrary to the public interest,”<sup>256</sup> the RCD could protect regulated conduct from criminal law in such circumstances. However, since a criminal provision is not the most appropriate way to address barriers to entry, the application of the RCD to civil provisions of the *Act* is more relevant for the purposes of this paper. The RCD’s potential application to s. 79 specifically is considered below.

## **C. Section 79 – Abuse of Dominant Position**

The second provision of the *Act* which could be used to monitor entrance barriers created by self-regulating professional bodies is s. 79.<sup>257</sup> This is a civil reviewable matters provision, enacted under the federal power over trade and commerce. The significant difference between the criminal and civil provisions is that behaviour assessed under a civil provision is “not inherently anti-competitive,” and is only prohibited after “the Competition Tribunal determines it is anti-competitive.”<sup>258</sup> As a result, the remedies are not punitive, but generally “limited to forward-looking” preventative or corrective measures.<sup>259</sup> To obtain an order under s. 79 there are three elements that must be proven: (i) substantial control in a market, (ii) that there is an intent to harm competitors, and (iii) that there is a substantial lessening of competition.

## i. Substantial Control in a Market

First, “one or more persons” must “substantially or completely control,” in any particular area of Canada, “a class or species of business.”<sup>260</sup> Control in this context means having market power, which “is the ability to earn supra-normal profits by reducing output and charging more than the competitive price for a product.”<sup>261</sup> There are two major factors that indicate whether an entity has market power.<sup>262</sup> The first is market share. A self-regulating entity has market power *prima facie* because by law it has a monopoly on deciding who can provide those professional services in a given jurisdiction.<sup>263</sup> Its members collectively have 100% of the market share. This can be seen either by considering the regulatory body as a single entity that has a monopoly on regulating the profession or by viewing the body as acting on behalf of professional members who share “joint dominance,” meaning that they “collectively possess market power.”<sup>264</sup>

The second major indicator of market power, barriers to entry, may be used to rebut the “*prima facie* finding of market power.”<sup>265</sup> In *Canada (Director of Investigation and Research) v D & B Co of Canada Ltd*, the respondent, who had a 100% share of the market, was required to show that there were no barriers to entry to rebut the *prima facie* finding, and in *Canada (Directors of Investigation and Research) v Tele-Direct (Publications) Inc*, the Tribunal required “ease of entry” in order to show that the respondents, who held at least an 80% market share, did not have market power.<sup>266</sup> Barriers to entry are important because if new competitors can easily enter the market, any anti-competitive behaviour on the part of the dominant entity will be corrected by market forces.

An analysis of barriers to entry considers “how easily a new firm can establish itself as a competitor.”<sup>267</sup> Two of the deterrents to entry that are relevant to foreign credential recognition are “regulatory barriers” and “sunk costs.”<sup>268</sup>

Sunk costs can “constitute a significant barrier to entry.”<sup>269</sup> They are costs that “are not recoverable if the firm exits the market.”<sup>270</sup> For a professional these would include any time or expense spent gaining additional training, taking exams, waiting to find out what further qualifications will be required, and duplicating any practical experience. Sunk costs also include the time and expense needed to build a reputation, which is particularly important because “services are an important element of the [professional] product.”<sup>271</sup> Therefore due to the nature of the business, entry barriers can be significant deterrents to entering the market, lessening the potential supply of the professional service.<sup>272</sup> Since the problem is that the current self-regulatory barriers increase the sunk costs incurred in entering the market, making it difficult for foreign-trained individuals to establish themselves as competitors, this reinforces the conclusion that a Law Society, for example, has market power and is in a dominant position.

In assessing market power, the Bureau will look to see if the combined effect of the barriers would likely prevent competitors not only from entering but also from becoming profitable competitors within two years.<sup>273</sup> Since it is unlikely that the process of credential recognition, additional testing or courses, and developing a client base and reputation would occur within two years, both market share and entry barriers reinforce the fact that regulatory bodies can exercise market power

in relation to their respective occupations.

## **ii. Exclusionary Purpose – Intent to Harm Competitors**

Second, the persons in the dominant position must “have engaged in or [be] engaging in a practice of anti-competitive acts.”<sup>274</sup> The Tribunal determines whether a practice is anti-competitive by looking at its purpose, which must be “an intended predatory, exclusionary or disciplinary negative effect on a competitor.”<sup>275</sup> The Bureau may establish proof of purpose “directly by evidence of subjective intent.”<sup>276</sup> However, it may not be necessary to prove that the self-regulators actually intended the effect of the barriers to be negative or to exclude individuals because this subjective intent may also be established indirectly.<sup>277</sup> It is assumed that an act was “intended to have the effects which actually occur” unless there is “convincing evidence to the contrary.”<sup>278</sup> Deterring foreign-trained individuals from entering a regulated occupation may be “the reasonably foreseeable or expected objective” outcome of requiring significant retraining or exams, and subjective “intention may be deemed” from this.<sup>279</sup> After the 2007 Bureau recommendations to selected professions, indirect intent should be easily established if those professions fail to address the anti-competitive effects of their entry barriers.<sup>280</sup>

To help determine whether a practice is anti-competitive under s. 79, s. 78 provides examples.<sup>281</sup> While regulation of entrance requirements does not fit well within any of the s. 78 examples, several subsections do target acts done to bar “entry into ... a market.”<sup>282</sup> All but s. 78(1)(f) describe “exclusionary” conduct that increases market power.<sup>283</sup> Entrance barriers could be considered analogous because they help to maintain market share, increase the time it takes to become established as a competitor, and may deter potential competitors from entering the market at all. The Bureau does not have to point to just one specific act, rather a “practice of anti-competitive acts” can be a pattern of behaviour that, added together over time, has an “intended negative effect on... competitor[s].”<sup>284</sup> To save the Bureau from spending time arguing that entrance barriers are analogous to one of the listed examples, it is recommend adding it to s. 78 as an anti-competitive act.

## **iii. Business Justification**

If the Bureau brought an application under s. 79, the self-regulatory body would likely try to demonstrate a business justification for the action. A business justification, while not a defence, is a factor to consider with regard to proving intent. It is a “credible efficiency or pro-competitive rationale for the” impugned act that “counterbalances the anti-competitive effects and/or subjective intent of the acts.”<sup>285</sup> If the self-regulator can show that the “overriding purpose” of the entrance barriers is to improve service quality or consumer safety then it could negate the inferred intent to negatively affect potential competitors.<sup>286</sup> This is similar to the efficiency exception in section 90.1 where, as long as the entity can show that the requirements are necessary, positively impacting quality of service in the profession, i.e., there is a “valid business rationale” for their actions, the Bureau will probably not pursue the matter.<sup>287</sup>

The purpose of s. 79 is to provide a “market framework within which all firms have an opportunity to either succeed or fail on the basis of their ability to compete.”<sup>288</sup>

It applies to foreign credential recognition because if Canada invites newcomers to reside here they should have equal opportunity to succeed or fail within their chosen occupations provided they meet the minimum competency requirements necessary to maintain public confidence in the profession.

#### **iv. Substantial Lessening of Competition**

The third and final element to prove is that the impugned behaviour does or is likely to substantially lessen competition in the market.<sup>289</sup> This subsection is concerned with the relative difference in competition between the market with and without the impugned act. To determine this, ask: “but for” the alleged anti-competitive act “would the relevant markets – in the past, present or future—be substantially more competitive”?<sup>290</sup>

The court in *Canada Pipe* laid out several factors to consider including whether “entry or expansion” would otherwise be faster, “prices...lower”, or service quality “substantially greater.”<sup>291</sup> One of the reasons the Tribunal found that an order was not justified in that case was that the anti-competitive program “had not deterred entry by foreign and domestic suppliers.”<sup>292</sup> Here, it is precisely those foreign suppliers who are deterred from entering the market because of the significant cost in terms of time, money and lost productivity. Furthermore, studies have found that fees are higher in regulated industries with greater entry requirements, suggesting that without the barriers prices would likely be lower.<sup>293</sup> As with the telephone directory advertising market in *Tele-Direct*, since professions have “distinct [markets] without close substitutes,”<sup>294</sup> even “smaller impacts on competition” may substantially lessen competition because of the significant market power.<sup>295</sup>

#### **v. Future of Section 79**

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

Although self-regulating bodies are clearly in a dominant position regarding entrance to and practice of a regulated occupation, being a monopoly does not automatically result in an order under s. 79. Section 79 is not offended simply because prices are higher and “levels of service and choice” are lower “than would be expected in a more competitive market.”<sup>296</sup> According to government policy, lessening competition is not necessarily bad when it protects the public interest in safety and quality. Since the purpose of s. 79 is to “strike a balance by preventing anti-competitive conduct without deterring firms from aggressive competition,” it could help determine whether a self-regulating body has crossed over into unacceptable restraints on competition.<sup>297</sup> Current Bureau policy is to “vigorously pursue” possible abuse of dominant position infractions, so if a newcomer can show how the three required elements are satisfied this may be a good way to remove any unnecessary or discriminatory anti-competitive barriers.<sup>298</sup>

However, while s. 79 could apply to self-regulated professions as is, it is presently not ideally crafted to fit regulatory acts. First, high entrance requirements for foreign-trained professionals do not appear to fit into any of the types of anti-competitive behaviour described in s. 78. Since s. 78 is non-exhaustive, the Tribunal may consider acts not explicitly listed in the section but it would be clearer that the provision applies if anti-competitive regulatory acts are explicitly enumerated.<sup>299</sup>

The list of anti-competitive practices in s. 78 should be supplemented with an item that encompasses measures by bodies that issue professional or vocational designations in a manner that is unnecessarily restrictive or discriminatory. Parliament should also include a proviso that the conduct of a body, acting pursuant to its lawful directions, is exempt from the application of this new item where the actions of the body are subject to appeal to an independent body that has authority to remedy decisions that are unnecessarily restrictive or discriminatory. The impact of such an amendment on provincial authority would thereby be minimized. An analogy to this approach is to the *Personal Information Protection and Electronic Documents Act (PIPEDA)*,<sup>300</sup> where federal protection of privacy does not apply where provinces have enacted substantially similar legislation.

Such a change could come into effect immediately for self-regulation occurring under federal jurisdiction. However, the provision would not come into effect with regard to entities under provincial jurisdiction for three years. At that time, any province with fair access legislation that met the specified criteria, substantially complying with the federal legislation, would be exempt from the new provision. In order to be exempt, the fair access legislation would have to, at minimum, be legally enforceable and provide an independent review of an impugned decision. Three years would give the provinces time to enact or amend legislation so that it would fulfill the same function as federal competition law. It would also enable each province to decide whether they want to supervise the self-regulated professions or allow the Bureau to do so. In the latter case, the self-regulating organization would maintain authority to enact rules and regulations but the Bureau would assess their effects to determine when an independent legal body, the Tribunal, should review the decision.<sup>301</sup>

As noted above, the federal government has previously filled a legislative gap by bringing legislation into effect in stages, giving provinces the option of creating their own legislation. It enacted *PIPEDA* in 2000.<sup>302</sup> *PIPEDA* was created to balance protection of personal privacy with organizations' increasing ability to collect and use personal information.<sup>303</sup> Due to technological advances this was a quickly changing area and the majority of provinces had failed to sufficiently address the issue through legislation. By legislating in this area, the federal government ensured that there was law in place to protect individuals, while allowing provinces to control the aspect of the subject that overlapped with their jurisdiction if they chose to do so.

On coming into force on 1 January 2001, *PIPEDA* applied to "personal information" related to the "commercial activities" of federal entities and any other

organizations under federal jurisdictions.<sup>304</sup> Three years later implementation of Part 1 was completed on 1 January 2004 when the legislation applied to privacy of personal information related to any “commercial activity” under provincial jurisdiction.<sup>305</sup> It is recommended that the federal government adopt the same approach to amending s. 78. This would give the provinces time to create compliant legislation without forcing them to create a new oversight scheme, because they could choose to leave it to the Bureau.

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

Currently it is unclear whether self-regulating bodies may rely on the RCD in connection with s. 79.<sup>306</sup> Since reviewable conduct is not presumed to be against the “public interest” or unlawful” it is not necessarily a problem to find that valid provincial law results in conduct violating a civil provision.<sup>307</sup> The defence has only been successful in one reviewable matters case, *Law Society of Upper Canada v Canada*, where it was applied with no analysis about why or how it might apply but merely because the parties and Director had agreed that it would.<sup>308</sup> This is important because in all previous regulated industries defence cases the leeway “language of ‘the public interest’ and ‘unduly’ limiting competition has always been present,” and because it was not there in *PHS* the defence was unavailable.<sup>309</sup>

The Competition Bureau, “[i]n the absence of further judicial guidance...is of the view that the RCD may immunize conduct from these provisions in appropriate circumstances.”<sup>310</sup> Because the proposed amendment is specifically identifying certain regulated conduct as anti-competitive, it would be clear that the fact that the conduct is regulated cannot be used as a defence. Additionally, the proposed amendment should be enacted without leeway language. This would make it clear that this is not an “appropriate circumstance” for the RCD to apply to a reviewable matter provision.

In the United States, the State Action Doctrine is comparable to Canada’s RCD. The State Action Doctrine exempts actions from the *Sherman Act* where the action is both authorized *and* supervised by a state, as opposed to the RCD which does not require oversight or supervision.<sup>311</sup> The approach taken in the United States seems particularly appropriate with respect to entry barriers set by self-regulating professions, because of the desirability of minimizing any conflict of interest between the regulators’ dual roles: representing themselves and their colleagues and representing the public interest.

Canadian provinces have been reluctant to provide such supervision. Few provinces have Fair Access legislation. Those that have, Ontario, Manitoba and Nova Scotia, declined to create an independent body to which individuals could apply for a second opinion on decisions and which could intervene even without an instigating complaint.<sup>312</sup> In addition, the legislation that exists lacks effective enforcement mechanisms. Instead of waiting for the provinces to fill the oversight gap it is reasonable to allow the Bureau to take on a supervisory role because these matters overlap into its jurisdiction. The *Act* already has mechanisms in place to enforce compliance. It would be more cost effective than each province creating a new entity to supervise self-regulators and could begin operating more quickly. Provinces that do not wish to incur the extra expense of an independent

body might allow the Act to fill the gap on a long term basis. The proposed amendment to s. 78 would essentially have the effect of requiring a particular provincial action to be both authorized and supervised to exempt it from s. 79 of the *Act*. While another option would be to amend the RCD itself to require supervision of regulated conduct generally, aligning it more closely with the State Action Doctrine, such an amendment would require a broader debate, bringing it beyond the scope of this paper.

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

In *City National Leasing, the Competition Act* (then the *Anti-Combines Act*) was upheld under the general branch of the federal trade and commerce power.<sup>313</sup> The SCC adopted the three indicia of federal competency under this branch of the federal trade and commerce power from *Vapor*, and added two more indicators.<sup>314</sup> These factors were intended to “ensure that federal legislation does not upset the balance of power between the federal and provincial governments.”<sup>315</sup> The listed indicia are not exhaustive, and the presence or absence of any one factor is not determinative of overall constitutionality.<sup>316</sup>

The first two indicia are present in the case of the proposed amendment as a result of the structure of the *Act* itself, as was found in *City National Leasing*.<sup>317</sup> Particularly, when describing the *Act* (then the *Anti-Combines Act*), Dickson CJ stated that there is “a regulatory scheme” present in the *Act*, and it “operates under the watchful gaze of a regulatory agency.”<sup>318</sup>

With respect to the third indicator of validity, the proposed amendment to s. 78 would impact “trade as a whole,” and not only “a particular industry.”<sup>319</sup> Unnecessary entry barriers to regulated occupations can have a significant and negative impact on the Canadian economy as a whole. The economy is increasingly dominated by services, including those provided by the regulated professions. Anti-competitive practices in these regulated professions can impair the price and quality of these services, and many of these professions are integral to wider economic pursuits. For instance, accountants and lawyers provide services to many other business enterprises, often interprovincially, and the price and quality of these services is integral to the best possible functioning of those businesses. As a result, the Canadian economy as a whole is impeded from functioning optimally when there are anti-competitive barriers to these occupations.

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

The final two *City National Leasing* factors form the “provincial inability test.”<sup>320</sup> The first aspect of this test is that the provinces should “be constitutionally incapable of enacting” the legislation. The second part of the test requires the

determination of whether the operation of the scheme in a jurisdiction would be hindered if any other jurisdiction were not included in it.<sup>321</sup> While the provinces may constitutionally be able to address these issues, for example through Fair Access legislation, very few provinces have enacted such laws. The provinces which have enacted these laws neglected to include appropriate remedies and enforcement mechanisms, significantly reducing their effectiveness.<sup>322</sup>

While the operation of the scheme in a given jurisdiction may not be hindered *per se* if another jurisdiction is excluded from the scheme, such an exclusion would cause repercussions across the country. Workers in regulated occupations do offer services to people in other jurisdictions, and the price and quality of the available services would be negatively affected if there are unnecessary barriers to entry to regulated occupations. These barriers can also impede the economic integration of immigrants, which is a substantial federal concern. Professional immigrants may have a particularly difficult time overcoming unnecessary or discriminatory barriers, and this can have wide ranging negative effects.<sup>323</sup> The integration of immigrants across the country is something that is in the interests of all Canadians, even if the immigrants in question are in a different province.

The five indicia of federal competency under the general branch of the federal trade and commerce power are not exhaustive in determining the constitutionality of a federal initiative. Courts also consider whether the federal government is attempting to meet its international obligations, such as the Lisbon Recognition Convention.<sup>324</sup> Expressly adding barriers to entry to the occupations to the Competitions Act would place Canada in a better position to enter into and implement international agreements on the mutual recognition of qualifications.

There is also the possibility that the proposed amendment could be upheld under the federal criminal law power. *Reference re Assisted Reproduction Act* cautions that the criminal law power is not a blank cheque for the federal government to regulate provincial matters.<sup>325</sup> The competition norm proposed here however, could be justified because it is aimed at prohibiting an evil—unnecessary or discriminatory barriers to entry to regulated occupations—rather than attempting to regulate activities that are intrinsically positive from a social perspective (such as providing professional assistance with reproductive issues for patients).

### **viii. Paramountcy and Interjurisdictional Immunity**

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

Hogg describes interjurisdictional immunity as a way to protect the heads of power constitutionally granted to the federal and provincial governments by “attacking a law that purports to apply to a matter outside the jurisdiction of the enacting body ... [by] acknowledg[ing] that the law is valid in most of its applications, but ... should be interpreted so as not to apply to the matter that is outside” the body’s jurisdiction.<sup>326</sup> If successfully argued, the law’s application would be limited

by being read down.<sup>327</sup> While it may seem that this doctrine could be used to read down any amendment to federal legislation related to entry barriers to self-regulated occupations, the doctrine of federal paramountcy is more likely to apply in these circumstances.

Canadian law expressly recognizes only the interjurisdictional immunity of federal entities vis-à-vis provincial laws. Even this recognition is now being confined by the Supreme Court of Canada in the interests of permitting flexibility for provincial orders of government to regulate in the public interest. In *Canadian Western Bank v Alberta*, the SCC considerably narrowed the doctrine of interjurisdictional immunity. Justices Binnie and LeBel wrote that “interjurisdictional immunity is of limited application and should in general be reserved for situations already covered by precedent.”<sup>328</sup> They went on to assert that “[i]f a case can be resolved by the application of a pith and substance analysis, and federal paramountcy where necessary, it would be preferable.”<sup>329</sup> As a result, the paramountcy doctrine would likely apply, with the result that “the provincial law must yield to the federal law,” rendering the provincial law “inoperative to the extent of the inconsistency.”<sup>330</sup> This would allow the relevant provisions of the Act to operate where rules enacted by regulatory bodies are inconsistent with them.

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

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

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

health care. Furthermore, the public are denied the opportunity to access kinds of services they want or need, or must pay unnecessarily high prices for them.

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

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

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

## D. Section 90.1 Agreements that Substantially Lessen Competition

Section 90.<sup>331</sup> is a third potentially applicable provision in the *Act*. It is intended to fill the gap between ss. 45 and 92 (dealing with mergers), and came into force on 12 March 2010.<sup>1</sup> Like s. 79, applications may only be brought by the Bureau and there are three elements to establish: (i) an “agreement or arrangement” which can be “existing or proposed;” (ii) “between persons two or more of whom are competitors” that (iii) “prevents or lessens, or is likely to prevent or lessen, competition substantially in a market.”<sup>332</sup> If established, “the Tribunal may make an order” either “prohibiting” the action or “requiring” action to restore competition.<sup>333</sup> This remedy is quite flexible; instead of just prohibiting the offending behaviour or ordering the respondents to take action that “restore[s] competition,”<sup>334</sup> the new provision enables a broader solution. Section 90.1 grants the Tribunal discretion to order “any person ... to take any other action” provided that they and the Commissioner agree to it.<sup>335</sup>

The s. 90.1 remedy would be adequate, and it also has the advantage of lacking an administrative monetary penalty like s. 79 has. Although not required, the existence of a potential penalty of \$10-million for a first offence and \$15-million for subsequent offences in s. 79 seems to be a harsh penalty for a regulatory body which may have simply made an innocent error in judgment. According to Wakil, the monetary penalties under s. 79 “are highly controversial.”<sup>336</sup> Particularly in relation to unnecessarily restrictive or discriminatory entry barriers, the seemingly punitive fines made possible by ss. 79(3.1) are inappropriate, though the corrective remedies provided in ss. 79(1) and 79(2) would be appropriate. These remedies do allow for the correction of anti-competitive behaviour without a monetary penalty. While the s. 90.1 provision could possibly be applicable, s. 79 is probably the more desirable way to regulate entry requirements to regulated occupations via the *Act*. This is simply because the amendment of s. 78 to include an example relating to unnecessarily restrictive or discriminatory entry barriers seems more elegant than working such an amendment into s. 90.1.

## A Different Approach to Credential Assessment

The current s. 78 examples indicate that the government is concerned about entities in dominant positions impeding the entry of potentially strong competitors into the Canadian market.<sup>337</sup> Arguably the current approach to determining entry requirements to regulated occupations has exactly this effect. While “protecting the integrity of competition is important to ensure the efficiency of the Canadian economy and the prosperity of Canadians,”<sup>338</sup> greater competition may not always result in better quality service. On the contrary, service standards may decrease, causing consumers to lose confidence in the profession as a whole because they cannot adequately discern the quality of a service provider on their own as a result of asymmetric information. Therefore, at least some entry requirements

that limit competition are “clearly in the public interest” because they “ensure the competence of those entering the profession” and “protect vulnerable clients and third parties.”<sup>339</sup>

On the other hand, while there is no proven correlation between higher entrance requirements and increased quality, there is an established relationship between high entrance requirements and higher incomes for those fortunate enough to enter the profession.<sup>340</sup> Competence to offer a professional service can be “acquired through a variety of combinations of training, education and experience.”<sup>341</sup> Therefore, requiring a specific piece of paper or score on an exam may discourage some foreign-trained professionals from becoming licensed without actually improving the quality of service offered to the public.

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

Competence rather than paper-credential based assessment is consistent with the Bureau’s recent direction. In 2007, the Bureau studied several self-regulating professions and recommended how they could better comply with the *Act*. One of the suggestions was that regulators examine their entrance requirements using an Oakes style analysis.<sup>342</sup> It was recommended that regulations should clearly state the “specific objectives” the profession hopes to achieve in order to increase transparency, lessening the chance it will be used for self-protectionism.<sup>343</sup> Second, any requirements should be rationally connected to the objectives by evidence, not just theory.<sup>344</sup> For example, if writing a test on basic knowledge of general family medicine will not “directly” contribute to or assess the competence of a surgeon, then it may not be close enough to be a “clear and verifiable outcome” nor will it be “the minimum necessary to achieve [the] stated objectives,” or “reasonably required” to protect the public interest.<sup>345</sup> This favours assessment of competence as the basis for entry into a profession rather than recognizing only paper credentials.

To implement more competence-based assessment, it would be more efficient to create a national body for each profession whose sole task is to assess credentials based on competency. Professional representatives from each province could sit on its governing board or be consulted as experts. There could also be lay people appointed to represent the interests of different groups affected, such as consumers and professional newcomers.<sup>346</sup> The representatives would be able to express concerns and could offer insight and possible solutions that those within the profession might not have considered. This would address the Bureau’s

concern that the minimum requirements for entrance into some professions vary widely across the country, which suggests that barriers in certain jurisdictions are unnecessarily high because other provinces are using less restrictive alternatives to attain presumably consistent quality standards.<sup>347</sup>

However, this assumes that variety in entrance requirements from province to province is undesirable. This is not necessarily so. The more significant the differences between professionals' service in different provinces the more necessary it is to have different minimum requirements. For example, the law is different in each province whereas pharmacists perform essentially the same tasks no matter which province they are in.<sup>348</sup> Therefore a national program is particularly suitable for professions like pharmacy, but may not suit the practice of law to the same degree.

Looking at the province with the lowest barriers to accreditation and determining whether they "are still achieving the desired level of competence" may help to ascertain the minimum requirements necessary to "protecting the public interest." This does not consider, however, the fact that even with minimal requirements the method of evaluation may not be the most directly connected to the objective of assessing competence.<sup>349</sup> Instead of assessing paper qualifications, the professions could set out the objectives behind the regulations, the minimum skills and knowledge necessary to practise a profession, and then allow professionals to demonstrate their competence, either through a period of supervised practice or by a recognized degree.

A further benefit of creating a national organization to assess competency-based credentials is that it would allow the provinces to pool their resources, making a clinical assessment program more cost effective. This would help counter the increased expense of a competency based assessment model. This is important because the cost of a more individualized program is one of the significant factors that could cause the Tribunal to find that the current practices are "reasonably necessary" because there is no feasible alternative, since there is a valid concern that regulation should not involve "excessive compliance costs," either to the individual or the government.<sup>350</sup> Any added expense could be further offset by the benefit to Canadian residents, through increased tax dollars collected from newcomers working at higher paying jobs and increased accessibility to professional services, particularly if incoming professionals are required to work in an underserved rural area for a period of time.

Even if the provinces cannot agree on national standards or a national assessment agency, clearly setting out objectives would help to streamline the credential recognition and Bureau enforcement processes in several ways. First it would help with a s. 79 application because the self-regulator's business justification for the barrier would be clear, allowing a newcomer to know the evidence they should show in their Application for Inquiry and making it easier for the Bureau to determine the chance of success an application before the Tribunal. Second, clearly defined objectives would increase transparency and guard against the threat of self-interest. Furthermore, it would enable more competence-based credential recognition. If a profession sets out the specific objectives they hope

to achieve, individuals should be able to demonstrate that they meet those. This gives individuals more flexibility to demonstrate their skills and training. It also places the onus on them to show how they meet the standards, since they best understand their training and skills.

Finally, specifying objectives allows the profession and Bureau to determine ahead of litigation whether the objective could be achieved by market forces without the regulation, whether the anti-competitive effects outweigh the benefits, and if there is an “equally effective regulatory mechanism” with less negative effect on competition.<sup>351</sup>

## Competition Bureau Future – Increased Litigation

Currently there is little case law involving the Bureau and self-regulated professions. *Jabour*, from the early 1980s is still one of the primary cases. This may be a result of the Bureau’s preference for addressing its concerns through settlement.<sup>352</sup> However, the current commissioner has clearly stated that the Bureau “will not be afraid to litigate” and “proceed vigorously” if “parties are unwilling to provide an adequate remedy”.<sup>353</sup> This signals a change in policy with the likely result that there will be more cases in the near future.

In 2007, the Bureau gave self-regulating professions two years to implement its recommendations. That time-frame has now passed. The intent behind the 2007 Report was that professions would make changes “voluntarily”; however, the recent Canadian Real Estate Association [CREA] case proved that “the Bureau will not hesitate to get involved to the extent authorized by the Competition Act.”<sup>354</sup>

The Bureau challenged Multiple Listing Service [MLS] restrictions under the Abuse of Dominant Position provision, alleging that the CREA had market power because there were no “adequate substitutes” for the MLS and that the restrictions were “prevent[ing] entry and imped[ing] expansion by competitive business models that provide unbundled residential real estate brokerage services”.<sup>355</sup> Although the CREA had made changes following the 2007 recommendations, these did not fully address the Bureau’s concerns. The Bureau felt that the rules still “explicitly protect[ed] CREA’s ability, at any time, to reinstate anti-competitive restrictions, and possibly more anti-competitive ones.”<sup>356</sup>

The parties reached a settlement, entering a consent agreement to end the case in October 2010.<sup>357</sup> However, the Bureau’s reason for pursuing this case could also apply to overly restrictive credential recognition schemes because they are “focused on striking down... anti-competitive rules” to enable more “innovative services” allowing consumers to “benefit from greater choice” which should exert “downward pressure on...fees in Canada.”<sup>358</sup>

## Conclusion

Self-regulating professional organizations do have “lawful power to impose restrictions on the entry ... of members” to the profession.<sup>359</sup> However, given the arduous process foreign professionals must go through in order to become licensed to practise in Canada, and the varying entrance requirements across provinces, change is necessary to achieve the primary goal of the *Competition Act*: to “maintain and encourage competition.”<sup>360</sup> Greater transparency and an independent committee charged with overseeing self-regulating bodies could make professions more competitive without losing the benefits of self-regulation. The Competition Bureau is a well-suited independent body to review self-regulatory decisions because it has experience assessing an action’s effect on competition and has legal power to enforce change through the Competition Tribunal if necessary. Such oversight could guard against economic protectionism.

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

- Amend the Abuse of Dominant Position section, s. 79, which provides civil remedies where an entity with substantial or complete control in a market acts in a way that has or is likely to prevent or lessen competition. Add as an anti-competitive act under s. 78 “unnecessary regulatory restrictions for the purpose of impeding or preventing a competitor’s entry into, or to eliminate him from, a market.” This would make it clear that s. 79 applies to self-regulatory actions and make it easier for the Competition Bureau to establish the required elements. An additional proviso should be included making it clear that this particular example will not be considered anti-competitive if there is adequate Fair Access legislation in place in a province.
- Adequate Fair Access legislation required to avoid application of s. 79 via the new amendment to s. 78 must include a supervisory component comprising of:
  - Oversight by a senior provincial body that is independent—above and beyond the professional self-regulators;
  - The overseeing body must have a mandate to determine whether registration processes are reasonable, transparent and fair, both procedurally and substantively; and,
  - The overseeing body must be empowered to make legally binding remedial orders based on individual complaints as well as at its own instigation and investigation.
- Implement the amendment to s. 78 in stages like the *PIPEDA*. The amendment should be implemented so that the changes clearly apply immediately to federal self-regulatory action. However, suspend application of the section to provincial regulators for three years in order to allow provinces to create or amend Fair Access legislation that substantially complies with the federal provision.

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

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

Hopefully knowledge that the Competition Bureau may act to enforce competition law will be sufficient encouragement for self-regulatory bodies to find creative ways to streamline the foreign credential recognition process to comply with federal law; failure to do so might spur the provinces to enact legally enforceable fair access legislation to more actively supervise the exercise of provincial regulatory power.<sup>361</sup>

## Chapter IV

# All Talk and No Action: Access to Canadian Markets Under the *General Agreement on Trade in Services*

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**W**ith an increase in international trade in services comes the realization that foreign credential recognition within Canada is affected by international agreements, most notably the World Trade Organization (WTO)'s *General Agreement on Trade in Services (GATS)*. Foreign citizens and temporary residents to Canada often come with foreign credentials and work experience, but many are restricted from working in corresponding Canadian occupations. To demonstrate this as well as the impact other international instruments such as free trade agreements and mutual recognition agreements may have on opening the Canadian marketplace to temporary foreign workers, this paper looks to legal services within Canada as an illustrative example.

To ensure that regulated occupations in Canada are accessible to foreign-trained workers:

- The federal government should work with other WTO Member countries at the Doha Development Round (DDR) to increase the scope of activities enumerated on Canada's schedule under the *GATS* relating to mode four, or workers temporarily in Canada.

To guarantee that domestic regulations do not pose unnecessary barriers to labour mobility for sectors listed in WTO Members' schedules of commitments:

- The Canadian government should work with the Council for Trade in Services under the *GATS*, with input from the provincial governments and professional bodies, to extend the model of the Accountancy Discipline horizontally across other service sectors.

To ensure that timely and effective progress is made towards increasing labour mobility for temporary and long-term service providers:

- The federal government should work alongside provincial and territorial governments to promote agreements with foreign governments, at both the national and sub-national levels, for the mutual recognition of credentials.

To ensure that foreign credentials are appropriately assessed and recognized:

- The federal and provincial governments should encourage professional bodies to negotiate with their foreign counterparts to generate harmonized recognition standards; and
- The federal government should strive to keep recognition assessment criteria and related statistics transparent for the Canadian and international public.

## Introduction

The proverbial example of a foreign-trained brain surgeon who drives a taxicab on arrival in Canada hints at a serious problem currently facing the Canadian public: despite attempts to open them, our markets remain far more restrictive to foreign labour than necessary. While Canada has begun to open its domestic services market, it is not as accessible to foreign-trained workers as it reasonably could be. International instruments such as the mutual recognition agreements, regional trade agreements and the World Trade Organization (WTO)'s agreements, may all help Canada liberalize its labour mobility policies.

High social costs arise from Canada's failure to grant foreign-trained workers fair access to the occupations they studied and practised in their home countries. First, Canada as a whole loses: the economy is artificially constrained, diversity is reduced, innovative transfers are curtailed and consumer choice dwindles. The Organisation for Economic Cooperation and Development (OECD) states that "[overall], the results [of market openness] can be tangibly measured in terms of economic growth, productivity, a higher standard of living, further innovation, stronger institutions and infrastructure, and even promotion of peace."<sup>362</sup> A closed market, in contrast, may not allocate resources economically and does not allow for incremental market adjustments reflecting the true marketplace. Countries that maintain closed markets risk eventual dislocation, or forced market correction with little ability for countries or their leaders to direct or control the correction. These dislocations often come with harsh consequences: closed systems typically crumble under the weight of their own inefficiency. Second, long-term workers face challenges and frustrations relating to relocating, integrating into a new society, and seeking employment in their chosen fields. A Statistics Canada survey from 2005 found that roughly half the skilled workers who immigrated to Canada were employed in their intended occupations.<sup>363</sup> Examinations and mandatory retraining, some of which may not be strictly needed, pose financial as well as time burdens on newcomers. Short-term workers, however, also face heavy restrictions though they are of a different variety. In most cases, the qualifications of short-term workers must be recognized and approved by the appropriate bodies before arrival or entry will be denied. Difficult and restrictive recognition procedures serve to robustly limit mobility of short-term workers to Canada. This denies these workers an opportunity to broaden their professional experiences and skills in Canadian society.

The study of foreign credential recognition and granting of market access is no longer confined to domestic norms and practices alone. With growth in international trade and agreements, recognition of foreign qualifications has

necessarily and gradually taken on more of an international component. The primary document currently regulating recognition procedures for temporary foreign workers is the WTO's *General Agreement on Trade in Services (GATS)*.<sup>364</sup> This agreement is global in its scope and, for our purposes, relates exclusively to temporary labour mobility. Continuing to implement the *GATS*, however, could have significant domestic spill-over effects. Temporary workers might choose to immigrate to Canada or, on return to other countries, encourage other workers to visit or immigrate to Canada following their work-term experience. A broader domestic impact of the *GATS* stems from the framework it is intended to set up: under the *GATS*, the federal government is strongly encouraged to work alongside the provincial governments and self-regulating professions to develop principles and methods best-suited for evaluating foreign competencies. With the proper adjustments, these developments could also apply to long-term service workers and immigrants to assist their permanent entry into Canadian regulated professions. The *GATS* also allows for mutual recognition agreements and trade agreements that affect labour mobility; if these agreements are pursued vigorously by the Canadian government, they could also serve as a valuable tool for increasing short and long-term, as well as permanent, labour mobility.

Appreciating the role of international agreements on labour mobility requires exploring the *GATS* context and its system of rules as well as recent developments in the area, including the proliferation of regional and bilateral agreements. For the reader's convenience, this article will discuss labour mobility by referencing the legal services sector. The goal of this paper is to set out coherent and plausible recommendations that will encourage temporary and eventually long-term labour mobility in Canada through an appropriate application of the *GATS*.

## **GATS**

The rising importance of "trade in services for the growth and development of the world economy"<sup>365</sup> prompted a closer look at the service industry during the Uruguay Round, which lasted from 1986 until 1993.<sup>366</sup> To illustrate this importance, services now represent the global economy's fastest growing sector, accounting for one third of the world's employment and almost 20% of international trade.<sup>367</sup> In recognition of this, the drafters of the *General Agreement on Trade in Services (GATS)* set out to encourage more growth by formulating a regime that called for Members to continually open services markets by reducing trade barriers; this is known as progressive liberalization.<sup>368/369</sup> The *GATS* formally came into effect, along with the World Trade Organization itself, in January 1995.<sup>370</sup> It was the "first multilateral, legally enforceable agreement covering cross-border trade, investment and movement of producers or consumers in the service sector."<sup>371</sup>

The *GATS* is a government-to-government agreement that applies to all measures by all Members of the WTO. 'Measures by Members' refer to any steps affecting trade in services taken by central, regional, or local governments and authorities.<sup>372</sup> The *GATS* also applies to measures taken by non-governmental bodies through

exercised delegated authority, such as self-regulatory professional bodies or law societies.<sup>373</sup> There is, all the same, no private cause of action available for individuals to enforce the trade in services provisions laid down by the *GATS*.<sup>374</sup>

Most interestingly, the *GATS* does not define 'services.' Only "services supplied in the exercise of governmental authority," defined as services not supplied in competition or on a commercial basis, are generally exempt from the application of the *GATS*.<sup>375</sup> The *GATS*, similarly, does not apply to individuals looking to permanently join a domestic employment market and it is not to affect measures relating to citizenship or residency, except possibly in a secondary capacity.<sup>376</sup> For the purposes of the *GATS*, then, what constitutes a service?

The *GATS* categorizes trade in services under four modes of supply.<sup>377</sup> The modes are classified according to where the service is provided and where the service provider is located. Mode one addresses cross-border supply, where a service is supplied from one territory into any other territory.<sup>378</sup> Mode two is concerned with consumption abroad, where a service is provided in one state to a consumer from another state.<sup>379</sup> Mode three speaks to the commercial presence of a service supplier of one state in the territory of another.<sup>380</sup> Mode four looks at natural persons from one country temporarily in another state offering services. Physical presence, or mode four, is of particular interest to this paper and the broader study of recognizing foreign credentials, though discussion surrounding the *GATS* does not directly concern or affect immigration or residency policies.<sup>381</sup>

When it comes to structure, the *GATS* is a complex system that contains eight annexes, a series of national schedules and various working papers. It recycles many of the central concepts from its predecessor, the *General Agreement on Tariffs and Trade (GATT)*,<sup>382</sup> such as most-favoured-nation, national treatment and transparency. However, the *GATS* gives its Members more control and greater flexibility in determining how to adopt the agreement.<sup>383</sup> In practice, the *GATS* operates as a hybrid agreement, using a positive list where Members choose which sectors they commit to liberalize, along with a negative list where Members may specifically limit their obligations.<sup>384</sup> Members may make different commitments for each sector, as well as for each mode of supply within each sector.<sup>385</sup> In this way, Members may decide the exact degree to which they will liberalize certain sectors.

The rules that are enshrined within the twenty-nine articles of the *GATS* apply on two distinct levels. One set of rules applies generally to all measures that affect trade in services, subject only to the above listed constraints. The other set is sector-specific and applies only according to positive, voluntary commitments made by each Member.<sup>386</sup> Therefore, the *GATS* imposes both unconditional and conditional obligations on its Members. With respect to unconditional obligations, member states must meet requirements of most-favoured-nation, transparency, and progressive liberalization, amongst others, to be discussed below in further detail.<sup>387</sup> When it comes to specific commitments Members enter into in their schedules, the primary provisions countries must adhere to are obligations regarding national treatment, market access and domestic regulation. A brief overview is contained in Table 1: Overview of the *GATS* Structure, which can be found below. We shall begin our discussion by looking at some of the unconditional obligations.

**TABLE 1**

## Overview of the *GATS* Structure

### Unconditional Obligations

These provisions apply whether or not a Member has made a specific commitment in a given service sector.

Element or Rule	Article	Description	Example
Most Favoured Nation	II	A principal of non-discrimination MFN obliges Members to treat like services regardless of their country of origin.	
Exceptional Opt-outs	II	Initial exemptions were permitted for up to 10 years, subject to negotiation after 5 years.	Bulgaria & Singapore, amongst others, exempted legal services.
Economic Integration Agreements	VI	Members may enter into economic agreements with other countries outside of <i>GATS</i> in order to facilitate trade provided the agreements do not raise the overall barriers to trade.	<i>NAFTA</i> , Austria.
Recognition	VII	Members may recognize professional qualifications obtained in other countries unilaterally or through an agreement; other Members must be given the opportunity to show their professional standards ought also to be recognized.	Quebec-France Understanding of Mutual Recognition of Credentials.
Transparency	III	Members must take all measures that pertain to the <i>GATS</i> publicly available; they must also notify the WTO of the introduction of new, or changes to, existing laws, regulations, or administrative guidelines which significantly affect trade in services covered by the Members' specific commitments under the <i>GAT</i> .	The National Committee on Accreditation (NCA) regularly publishes Policy Guidelines.
Progressive Liberalization	XIX	A built-in agenda that requires Members to enter into successive rounds of negotiation to determine specifically how the <i>GATS</i> will govern trade in services.	The Doha Development Round (DDR)
<i>Domestic Regulations</i> Review	VI.2	Members must have a way to review administrative decisions affecting trade in services.	See e.g. s9 <i>Ontario's Fair Access to Regulated Professions and Compulsory Trades Act Accountancy Disciplines</i>
Developed Disciplines	VI.4	This provision gives the Council on Trade and Services mandate to create disciplines so that domestic regulations across various sectors do not pose unnecessary barriers.	

### Conditional Obligations

These provisions apply whether or not a Member has made a specific commitment in a given service sector.

Element or Rule	Article	Description	Example
Market Access	XVI	Members must provide access to their services markets in a manner that is no less favourable than what is provided in their schedules; any barriers to market access must be specifically provided in the Member's Schedule of Comments.	Canada may not restrict access to the Canadian legal services market more than is scheduled. Where a Member chooses to remain.
National Treatment	XVII	Domestic and foreign service providers must be treated equally within a market; any derogation from that non-discrimination.	Canada's horizontal commitments allow for different treatment of foreign and domestic professionals for tax purposes.
<i>Domestic Regulations</i> All Measures	VI.1	All measures affecting trade in services must be applied in a reasonable, objective and impartial manner.	The NCA sends a confirmation email within 10 business days of receiving the application and applicants can expect to wait at least 3 months for a decision. These standards and procedures are outlined in the NCA's Policy Guidelines.
Reasonable Time	VI.3	Members must inform applicants to supply services of their decision within a reasonable time.	
Qualification Requirements	VI.3	Qualification requirements must be based on objective and transparent criteria, they must be no more onerous than necessary and should not restrict trade.	
Awarding Recognition	VI.6	Members must have standards and procedures toward recognition.	

## A. Unconditional Obligations

### Most-Favoured-Nation (MFN)

The Most-Favoured-Nation (MFN) provision in Article II is a cornerstone of the *GATS*.<sup>388</sup> In essence, MFN is a principle of non-discrimination that obliges each Member to immediately and unconditionally give both services and service suppliers of any other Member “treatment no less favourable than that it accords to like services and service suppliers of any other country”.<sup>389</sup> The rule, succinctly, is “favour one, favour all.”<sup>390</sup> Preferential treatment, including preference through reciprocal agreements, is prohibited.<sup>391</sup> Demanding that the best access conditions given to one country be automatically extended to all Members, by definition, seeks to install a rule-based system that equalizes nations lacking political or economic influence with nations wielding clout.<sup>392</sup> It is worth noting that MFN does not actually require any degree of market openness.<sup>393</sup> Rather, it merely requires that to the extent a Member chooses to provide access to its markets, the same access must be extended equally to all WTO countries.

### Exceptions to MFN

There are three exceptions to MFN: opt-outs, economic integration agreements and recognition.<sup>394</sup>

#### i. Opt-Outs

Opt-outs originate from the formation of the *GATS*. At that time, or upon accession for acceding countries, Members could choose to seek exemptions to MFN for specific sectors.<sup>395</sup> These can be found in the country-specific lists and Schedules. In principle, these exemptions were not to exceed ten years and, after that time, they were to again come under review and be subject to negotiation in the following negotiation round for progressive liberalization.<sup>396</sup>

#### ii. Economic Integration Agreements

The second exception arises through Article V, or the economic integration provision, which allows Members to negotiate economic integration agreements that permit preferential treatment.<sup>397</sup> To qualify under this provision, such agreements must, among other things, “be designed to facilitate trade between the parties to the agreement and shall not in respect of any Member outside the agreement raise the overall level of barriers to trade in services within the respective sectors or subsectors”.<sup>398</sup> Economic integration agreements, also known as free trade agreements (FTAs) or regional trade agreements (RTAs),<sup>399</sup> are often referred to as preferential trade agreements (PTAs) under the *GATS* scheme as the agreements are preferential in nature because they exclusively benefit their signatories.<sup>400</sup> NAFTA is an example of such an agreement between the US, Canada, and Mexico.<sup>401</sup>

To create a trade agreement outside of the *GATT* or the *GATS* that is exempt from MFN, Members must notify the WTO and give notice of any subsequent changes to the agreement. Members must also make periodic reports.<sup>402</sup> These economic agreements may address a wide range of topics, including recognition of qualifications, investment rules and competition laws.<sup>403</sup> Like *NAFTA*, these agreements may also strive for increasingly higher levels of market openness while allowing for greater integration between negotiating parties. Bargaining bilaterally or with a small group of regionally connected nations may be more effective and more fruitful than multilateral negotiations,<sup>404</sup> as we shall consider shortly.

### iii. Recognition

The last exemption to MFN occurs via the recognition provision of *GATS*, which permits differential and even preferential treatment of WTO Members. This section allows Members to fully or partially recognize qualifications of foreign service suppliers, either autonomously or through negotiated agreements with other countries, without necessarily extending the same recognition to all service suppliers.<sup>405</sup> Arguably, this recognition article is not actually an exemption to the MFN principle; despite any agreements or unilateral decisions, similar qualifications from different states ought to be treated more or less the same. The *GATS* orders that all Members not included in a recognition agreement or given preferential treatment under a Member's domestic regime must be afforded adequate opportunities to either negotiate a similar recognition agreement or to demonstrate that "education, experience, licenses, or certifications obtained or requirements met in that ... Member's territory should be recognized."<sup>406</sup> Standards for recognition must also not be discriminatory or amount to a "disguised restriction on trade in services."<sup>407</sup> Recognition decisions must thus be based on relevant criteria, such as international standards or, in the case of self-regulating professions, recognition criteria developed by intergovernmental and non-governmental organizations.<sup>408</sup> Members also have ongoing obligations to notify the WTO about their recognition measures, agreements and subsequent modifications.<sup>409</sup> This allows the WTO to monitor each Members' procedures and degrees of market openness with respect to recognizing foreign credentials.

Mutual recognition agreements (MRAs) allow individuals to avoid repeating already completed education and training.<sup>410</sup> These agreements can be very relevant for accredited and regulated professions such as law.<sup>411</sup> An MRA signifies that the regulatory authority in charge of authorization within a host country accepts, either in whole or in part, the authorization already given by a home country for an individual to act in a particular capacity.<sup>412</sup> Generally, recognition is associated with the terms 'acceptance' and 'equivalency'.<sup>413</sup> Rarely does this mean that foreign professionals receive automatic or unrestricted access to a host country's market; the host country retains residual powers and, in the case of law especially, there may still be limitations on a foreign professional's access.<sup>414</sup>

While there may be exceptions where recognition is based on trust between regulators and acceptance that there may be multiple ways to achieve competence through a certificate-for-certificate recognition model, in practice recognition is normally based on equivalency between qualifications in the home and host countries. This is complicated by localized rules and regional variations in credentials that require countries to assess visitors' education and work experience. A host country's regulatory objectives are addressed by regulations or requirements already present in its education system; foreign workers must be brought within that context. Recognition is defined within Canada as the "acknowledgement and/or acceptance of prior academic, professional, or vocational training, work experience, or credentials, and the granting of full or partial credit for it or them with respect to entry into an academic institution...or a trade or profession."<sup>415</sup>

Unless a country is bound by a recognition agreement, domestic regulations govern how a foreigner's credentials are assessed. Assessment may occur through tests, examinations or other prescribed activities.<sup>416</sup> Assessing qualifications in order to grant recognition is often a difficult task that greatly impedes recognition: regionalized standards and divergent systems may be very complex to compare.<sup>417</sup> This requires looking at "frameworks established to meet different sets of cultural and social circumstances."<sup>418</sup> The effectiveness of comparing credentials depends on the degree of similarity between the different systems and traditions of the countries involved.<sup>419</sup> The *GATS* encourages mutual recognition agreements (MRAs) based on multilaterally agreed criteria to further facilitate this process.<sup>420</sup> Even with the possibility of forming agreements, global heterogeneity makes recognition across all WTO Members impracticable for a sector such as law because practices are simply too divergent. In other words, it would be more likely that recognition could be achieved in common law Canadian jurisdictions for lawyers from England, as these nations share a common legal tradition and language, in contrast to lawyers from Germany, which shares neither. While full recognition is rare and partial recognition is more common legal credentials from a country such as Sri Lanka, which employs customary, civil and common law, may not be adequately equivalent to common law Canada for full recognition to be granted.

These three MFN exceptions allow Members greater flexibility in determining how they wish to reduce barriers to trade in services. They permit Members to autonomously liberalize outside the *GATS* framework on a bilateral or regional basis rather than solely at the more cumbersome multilateral level.

## Transparency

Transparency is a fundamental principle of the *GATS*. It requires Members to promptly publish all relevant measures affecting the Agreement, with limited exceptions. There are exceptions for confidential information that would be prejudicial to legitimate commercial interests, contrary to the public interest, or that would hinder law enforcement if released.<sup>421</sup> Members are also required to answer any inquiries by other Members and to set up enquiry points to provide

information to other Members. Where Members have made specific commitments, they are required to notify the WTO at least once a year of any new rules or changes to existing laws that would affect trade in services of specified sectors.<sup>422</sup>

## Progressive Liberalization

Article XIX, the progressive liberalization provision of the *GATS*, requires Members to participate in successive rounds of negotiations “with a view to achieving a progressively higher level of liberalization.”<sup>423</sup> This gives Members an opportunity to bargain for increased specific commitments for themselves and other Members. The provision explicitly states that negotiations are to occur five years or less after the *GATS* came into effect and periodically thereafter.<sup>424</sup> Pursuant to this, new services negotiations began in January 2000 and the Doha Development Round (DDR) officially commenced in late 2001, when a comprehensive negotiation agenda was agreed upon.<sup>425</sup> The DDR was scheduled to conclude no later than January 1, 2005;<sup>426</sup> however, that deadline was not met and many negotiations continue to be stalled.<sup>427</sup> This is primarily due to disagreement over agricultural barriers; some Members require substantive agricultural progress before they are willing to move ahead with negotiations in any other sector.<sup>428</sup>

## B. Conditional Obligations

Conditional obligations apply to Members depending on the sectors and respective modes they choose to liberalize in their Schedules of Commitments. A Member’s Schedule may contain horizontal commitments, which apply across all services, as well as sector-specific commitments. For specific commitments, first a sector is listed positively in a Member’s Schedules, following which a Member may enumerate limitations or conditions respective to each mode of supply.<sup>429</sup> Such limits may affect obligations known as market access or national treatment and they may have an impact on possible domestic regulations. As such, countries are free to open their markets fully, not at all, or partially depending on their commitments.<sup>430</sup> Members, while bound to the commitments, may also legally modify their schedules by following the procedures set out in article XXI of the *GATS*.<sup>431</sup> There appears to be sufficient international pressure once a commitment has been made, however, not to modify or revoke it except in exceptional cases. To date, only two WTO Members, the EU and the US, have submitted modifications under the *GATS* framework.<sup>432</sup>

Some writers have argued that the market access and national treatment provisions within each Member’s Schedules essentially create a “standstill” in that sector. This is because commitments must be met unless a Member chooses to modify its obligations. While Members are obliged to enter into progressive liberalization negotiations no provision specifically requires Members to continually open their service markets; members are only required to negotiate. There is no enforceable rule that a country must persistently make market access less restrictive.<sup>433</sup> Members could choose to autonomously grant greater access to

their service markets, but without reciprocal agreements guaranteeing similar and corresponding access for its citizens elsewhere, this possibility seems somewhat unlikely.<sup>434</sup> Strong offers and counter-offers in the negotiations stage could serve as the best impetus for Members to liberalize their respective sectors.

## Market Access

Article XVI, the market access provision, requires that where a particular sector is scheduled the Member must provide access to that sector in a manner no less favourable than is set out in its schedule.<sup>435</sup> Specifically, the market access obligation requires Members to abstain from six forms of trade restrictions unless Members schedule proper limitations. These restrictions include limits on: the number of service suppliers, the value of service transactions, the number of operations or quantity of output, the number of people supplying a service, the type of legal entity or the use of foreign capital.<sup>436</sup> These limitations would not necessarily be discriminatory against foreign service suppliers and could equally apply to national suppliers.<sup>437</sup> The question market access asks is not whether domestic providers are favoured, but, more broadly, whether access to the market, under any of the modes, is hampered in any capacity.<sup>438</sup>

## National Treatment

National treatment is covered in Article XVII. It obliges a Member to accord no less favourable treatment to foreign service suppliers “than it accords to its own like...service suppliers.”<sup>439</sup> National treatment is concerned with operations within a market, whereas market access deals with entry to a market.<sup>440</sup> Once access to a market has been granted, the national treatment provision states that foreign and domestic service providers must be treated equally.<sup>441</sup> This equal treatment obligation can be met by providing formally identical treatment or different treatment, whichever does not modify the conditions of competition in favour of domestic service suppliers.<sup>442</sup> Notice, however, that how “like...service suppliers” is defined—and it is not defined within the text itself—could substantially change the impact of this provision.

## Domestic Regulation

Domestic regulations address the qualitative components in a Member’s domestic scheme that affect trade in services.<sup>443</sup> This typically involves looking at qualification requirements and procedures, technical standards and licensing requirements within the domestic regime.<sup>444</sup> Most of these measures are not listed in a Member’s Schedule of commitments, which implies that in order to have a full understanding of the barriers that may face foreign service suppliers, one must look beyond the Schedules alone. This undoubtedly complicates the procedure for individuals from other Member countries who wish to practise abroad, and reduces the effectiveness of the *GATS*. For the purpose of the *GATS*, the domestic regulation provisions attempt to create a fair playing field for foreign-trained workers wishing to gain entry into a domestic service industry.

The domestic regulation provision contains six subsections, four of which apply only to scheduled services.<sup>445</sup> Subsection one is critical in that it requires Members to ensure that “all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.”<sup>446</sup> Under subsection three, Members must inform applicants of the status of the decision relating to their applications within a reasonable period of time.<sup>447</sup> Pending the enactment of more disciplines, which provide guidance for a given sector, Members are limited by subsection five in how they can apply qualification requirements.<sup>448</sup> For example, measures related to qualification requirements must be based on objective and transparent criteria, they must be no more onerous than necessary to ensure quality control, and licensing requirements may not restrict the supply of the service.<sup>449</sup> International standards are used to determine whether these stipulations are met.<sup>450</sup> The last subsection that applies exclusively to scheduled services, subsection six, specifies that Members who make commitments for professional services must “provide for adequate procedures to verify the competence of professionals of any other Member.”<sup>451</sup> Therefore, recognition itself is not required, but reasonable steps must be taken to corroborate decisions on granting recognition.

While subsection six was meant to ensure fairness and objectivity in determining recognition, the term “adequate” is not defined within the text. However, in 1995, the Council on Trade in Services set out three objectives for the Working Party on Professional Services (WPPS), one of which was to recommend guidelines for recognizing foreign qualifications.<sup>452</sup> In 1997, the WPPS incorporated their suggestions into the *Accountancy Disciplines*: verification of qualifications on the basis of equivalency of education and/or experience requirements should occur within six months the application’s submission.<sup>453</sup> Complete or substantial re-qualification may only be required where it is necessary to meet legitimate policy objectives such as quality of service.<sup>454</sup> Where re-qualifications are required, Members must identify what applicants lack.<sup>455</sup> The *Accountancy Disciplines* give Members some indication of what is expected of them and what is meant by the word ‘adequate.’

The remaining two subsections within Article VI are applicable generally and therefore unconditionally because they apply whether or not a service sector has been scheduled. The first subsection obliges Members to establish a system of administrative review for decisions that affect trade in services.<sup>456</sup> The second provides the Council on Trade in Services with a mandate to develop any necessary disciplines, or comprehensive rule systems governing each service sector, aimed at ensuring that domestic regulations “do not constitute unnecessary barriers to trade in services.”<sup>457</sup> *Disciplines* work towards facilitating entry for foreign workers while at the same time recognizing legitimate objectives that may take precedence over immediate access. Where Members have made specific commitments for a service sector that subsequently comes to be governed by a discipline, those members are then bound by the discipline.<sup>458</sup> To date, however, the *Accountancy Disciplines* is the first and only discipline and it has yet to come into full effect.<sup>459</sup> It compels Members who have scheduled the accountancy sector to maintain transparency, consider bilateral and mutual recognition agreements

and remove citizenship or nationality requirements, amongst other topics.<sup>460</sup>

Table 2: Highlights from the *Accountancy Disciplines*, below, provides more information about how Member countries ought to approach the accountancy sector. In particular, the *Disciplines* set out standards for how the accountancy profession ought to be regulated; much of this applies generally in order to facilitate access for foreign-trained workers though some aspects, such as qualification requirements, set out how foreign credentials are to be evaluated. Discussions persist about extending the *Accountancy Disciplines* to other service sectors. All Members with commitments have an interest in the outcome of those discussions, as do the service industries themselves. The many stakeholders complicate this process but contribute valuable input to the Council on Trade in Services.<sup>461</sup>

While Members may be limited by the domestic regulations they may enact, they nevertheless retain the power to regulate their respective economies for legitimate national policy reasons.<sup>462</sup> For the *Accountancy Disciplines*, these legitimate reasons include protecting consumers, ensuring quality and competency and preserving the profession's integrity. The goal of the limitations on domestic regulations is to increase transparency, which further improves legal certainty, accountability, legitimacy, and, thereby reduces arbitrariness. However, the limits placed on possible domestic regulations are commensurate with the goal of the *GATS*, which is not necessarily to promote de-regulation but to increase access in a way that is advantageous to all involved in trade in services.<sup>463</sup>

**TABLE 2**

**Highlights from the *Accountancy Disciplines***

Element or Rule	Article	Description
Purpose	I:1	Facilitate trade by ensuring domestic regulations are not more trade restrictive than necessary to fulfill <i>legitimate objectives</i> .
Legitimate Objective	II:2	<ol style="list-style-type: none"> <li>1. Protecting consumers.</li> <li>2. Maintaining quality of accountancy services.</li> <li>3. Ensuring professional competency.</li> <li>4. Preserving the integrity of the accountancy profession.</li> </ol>
Transparency	III:3-7	Ensuring information regarding professional titles, regulated activities, licensing requirements, technical standards compliance is monitored, the review procedures for administrative decisions, as well as the names and addresses of licensing authorities are all public; Members must be prepared to give legitimate reasons for any domestic regulations restricting trade.
Licensing Requirements and Procedures	IV:8-13 & V:14-18	<p>Amongst other requirements, licensing requirements and procedures must:</p> <ul style="list-style-type: none"> <li>- Be pre-established, publicly available and objective;</li> <li>- Be as least restrictive as possible while meeting the Members' legitimate objective; this includes re-considering residency requirements, not demanding unreasonable format requirements and allowing for the least burdensome authorization of documents;</li> <li>- Include only fees that are a reflection of the associated administrative costs and do not pose a burden;</li> <li>- Provide applicants with a decision within a reasonable time, suggested to be within 6 months;</li> <li>- Allow unsuccessful applicants to receive reasons if they so request.</li> </ul>
Qualification Requirements and Procedures	VI:19-21 & VII:22-24	<p>Members must:</p> <ul style="list-style-type: none"> <li>- Consider qualifications from within other Member states based on the equivalency of education, experience and/or examinations, giving an answer within a reasonable time, suggested to be 6 months;</li> <li>- Further examinations or qualification requirements must be offered regularly, or at least annually, and relevant to the specific activities for which the applicants seek authorization.</li> </ul>
Technical Standards	VIII:25-26	Develop, enact and use technical standards to fulfill a legitimate objective; internationally recognized standards may help determine if this is done.

# Legal Services

## A. How do Legal Services Fit within the *GATS*?

Legal services act as an illustrative example of the functioning, failures and challenges facing the *GATS* system in liberalizing trade in services.

Even the most restrictive definition of “service”<sup>464</sup> is met by legal services, which thereby fall under the Agreement. Specifically, in the *GATS*’ optional classification system, legal services are in the “business services” sector and within the further sub-sector of “professional services”.<sup>465</sup> The optional services sector classification system aimed to allow comparisons and on par obligations between Members, and thus was intended to facilitate commitments.<sup>466</sup> The system simplified detailed categories from the United Nations’ Central Product Classification (CPC) and permits recourse to the CPC system if the distilled version is unclear.<sup>467</sup>

Despite consensus that the legal profession is a part of the global service industry, a single definition for legal services remains elusive.<sup>468</sup> In the same way that law itself is localized and may vary widely, the role of a legal professional, and thus services offered, may also vary widely.<sup>469</sup> Under the CPC definition, legal services include representational and advisory services in different branches of law, including administrative law, as well as documentation and certification.<sup>470</sup> Note that the administration of justice, or prosecutions, along with the role of the judiciary, is expressly excluded from the *GATS* because it falls under the article I:3(b) exception as a service supplied under governmental authority.<sup>471</sup>

This working definition of legal services, however, was over-broad to reflect the realities of international trade in legal services.<sup>472</sup> Instead, in order to better reflect the degree of market openness in any given country, Members chose to distinguish legal practice not based on the specific *type* of law being practised (family, business or criminal law, for example), but instead based on the *jurisdictional nature* of the service offered. Legal services are categorized into advisory and representational services relating to (a) host country law (the local domestic law), (b) home country law and third country law (the domestic law of other nations where a foreign national is entitled and qualified to practise), and (c) international law. Legal services include (d) legal documentation and certification, along with (e) other advisory and informational services as well.<sup>473</sup> International arbitration and mediation have also been considered their own respective categories of practice.<sup>474</sup> Each class of legal service is then further divided into the four modes of supply described above, like all other services and sectors encompassed by the *GATS*. For further reference as to how these modes apply in the legal sector, see Table 3: Modes of Supply below. A multifaceted, use-based definition, such as is employed for legal services, allows Members a great deal of flexibility in determining licensing and qualification requirements; it enables Members to vary limits for each category of law and each respective mode of supply.<sup>475</sup>

**TABLE 3**
**Highlights from the *Accountancy Disciplines***

Mode of Supply	Description	Where a consumer is from Country A and a service provider is from Country B	Example in legal services
Cross Border Supply	The supply of a service from one territory into another territory without physical movement by the consumer or the service supplier.	The consumer is at home in Country A, the service provider is at home in Country B.	A lawyer in one country provides a legal product or advice to a client in another country, either by mail (physical or electronic) or telephone.
Consumption Abroad	The supply of a service to a consumer from one state in another state.	The consumer is abroad in Country B, the service provider is at home in Country B.	A citizen of one country uses the services of a foreign lawyer abroad.
Commercial Presence	The supply of a service through the establishment of presence of commercial facilities in another country.	The consumer is at home in Country A, the service provider is at home in Country B, but the business has been exported into Country A.	Foreign lawyers establish a permanent commercial presence in another country, for instance through a branch office.
Presence of Natural Persons	Persons temporarily travelling to another country to provide a service.	The consumer is at home in Country A, the service provider is abroad working in Country A.	An individual lawyer working abroad.

## Why Liberalize Legal Services and Expand Recognition of Foreign Credentials?

Affording foreign-trained legal professionals a greater opportunity to work within their chosen occupation benefits foreign visitors, and continued liberalization of trade in legal services also benefits the Canadian public, Canadian consumers and the Canadian legal profession.

Economically-speaking, opening the Canadian legal services market to qualified foreign-trained workers makes sense. Services generally are a dynamic division of international trade and their growth has exceeded that of trade in merchandise since the 1980s.<sup>476</sup> Likewise, growth in the legal profession has taken on a similarly important economic role and continues to do so.<sup>477</sup> There is an increasing worldwide demand for legal services, especially in the realms of business law, international trade and investment.<sup>478</sup> Factors such as larger law firms, higher revenues, more outsourcing, increased travel, internationalization of the economy and a desire for “one-stop shopping” have all influenced this growth.<sup>479</sup> In 2009, Datamonitor, an independent data collector, estimated that global legal services accounted for \$581-billion of profits in the 2008 fiscal year, with a predicted annual growth rate of 5%.<sup>480</sup> Canada alone experienced 30% growth in exports of legal services from 2001 to 2005.<sup>481</sup> Predicting the exact size of the Canadian legal services market or declaring the most profitable division of law (host, home, third country or international) or mode of supply in order to facilitate trade exclusively in those areas is nearly impossible: in practice, legal services are not divided by practice areas or modes and instead they may regularly be aggregated in general business costs.<sup>482</sup> The efficiency and ease of arranging international transactions would encourage more international trade deals within Canada, thus encouraging more exportation of Canadian legal services.<sup>483</sup> Nevertheless, legal services already play an important role in the international and Canadian economies. Any increased access to Canada’s legal services sector would allow Canada to share in those hefty profits through domestic use, increased exports and expanding international transactions.

Foreign lawyers wishing to work in Canada may be impeded from doing so by recognition difficulties and closed practice areas or restricted modes of supply. The consequences of non-recognition and delayed or prohibited access are surely less drastic for temporary visitors regulated under the *GATS* than for permanent residents or new immigrants. Some of the hardships will not be so different, however: possible financial hardships, emotional distress and robust roadblocks to practise may discourage and ultimately prevent skilled foreigners from venturing to Canada. Removing these barriers and facilitating recognition encourages more movement while providing viable opportunities for skilled workers wishing to work temporarily within Canada.

One side-effect of open services markets is increased competition between local providers. This results in significant benefits accruing to different stakeholders as it “can help boost growth prospects and enhance welfare.”<sup>484</sup> Consumers have the benefit of a larger, more diverse and more competitive market.<sup>485</sup> Clients are finally provided with alternatives<sup>486</sup> and benefit from the increased “breadth,

depth and quality of legal services” that become available.<sup>487</sup> Foreign nationals may be able to address market needs and niches that the current Canadian legal landscape does not provide for by offering services that were otherwise unattainable or not readily available. The availability of cost-effective, quality legal advice, be it on domestic, foreign or international law, impacts the potential success of business transactions.

There is also an incentive for domestic lawyers to improve their services<sup>488</sup> and for domestic law firms to rise to their full potential. Competition between foreign and local lawyers in France, for example, has “encouraged excellence at the French bar”.<sup>489</sup> National legal institutions and law societies are strengthened and infused by more dynamic practitioners. This encourages Canadian legal practitioners to meet constantly rising standards in the market place, making them more apt and ready to compete on a worldwide scale. A further benefit of liberalization is that foreign professionals who practise in Canada, even short-term, can facilitate transfers of knowledge, sharing innovative techniques and unique perspectives with local practitioners. Even foreign-trained workers who are only in Canada temporarily can make long-lasting and meaningful contributions to Canada’s legal profession. Furthermore, the high degree of transparency that is required of a domestic system in order for foreign professionals to have their qualifications duly recognised helps invigorate the values of the legal profession, strengthen the profession itself, and maintain independent legal systems.<sup>490</sup>

## **B. Special Considerations**

Potential benefits of opening Canadian legal service markets to foreign professionals are countered by significant challenges posed by some of the unique aspects of the legal profession. Four attributes of the legal profession in particular complicate liberalization: the national or regional character of law, the vulnerability of the public, protectionist tendencies and the self-regulatory nature of professions.

### **Localized Character of the Law**

The national, or even regional character of law and legal education is largely responsible for inconsistent requirements for admission to the practice of law between jurisdictions. This is the main obstacle to trade in legal services.<sup>491</sup> Unlike fields such as medicine or engineering, there is no single fixed body of material making up the study and practice of law. In some cases, variations in laws and legal systems can be seen as extensions of social norms or business customs, driven in part by interests and priorities defined by individual cultures.<sup>492</sup> The heterogeneity across legal systems and families of law reduces the transferability of legal qualifications since knowledge of the local law is one of the main aspects of a lawyer’s education and skill-set. Understanding how a legal system adapts, as well as how law is interpreted and rights are held, often requires that lawyers possess specific knowledge of the local laws as well as the governing legal

structures before they can properly practise.<sup>493</sup>

The inherent uniqueness of each legal system means that every jurisdiction requires its own standards and procedures to ensure that legal practitioners within its borders are sufficiently qualified. The fact that foreigners might be less familiar with the local law and legal system is a multifaceted concern which primarily speaks to an individual's competency and capacity to practise. The different legal families and traditions within each jurisdiction mean that a foreign lawyer's education and experience may not provide the necessary competence to practise law within a different state, especially host country law. This at least partially explains why there are greater degrees of recognition between countries sharing the same legal origins than between countries with varying systems.<sup>494</sup>

Some critics also warn against granting access to individuals who do not have a sense of national loyalty to the host country arguing they do not share the same values as other members of the local legal profession.<sup>495</sup> This argument, however, overlooks the fact that members of the legal profession globally do adhere to common overarching principles.<sup>496</sup> Furthermore, it ignores the diverse viewpoints present in any local regime.

Generally competence concerns due to the localized character of law can be met by well-crafted screening techniques, such as examining the extent and relevance of foreign training and experience as well as supplementary educational or testing requirements, if necessary. Market-based arguments might also apply: clients would seek qualified, competent and skilled legal advice. If the foreign-trained workers were not found to be qualified, competent or skilled in local law, one would expect clients to obtain advice elsewhere.

## **A Vulnerable Public**

The variability of law implies a need for great care and attention when determining if a professional meets the requirements to practise in the host country. Legal practice places lawyers in a trump position "as officers of the courts, defenders of citizen rights and guardians of the Rule of law."<sup>497</sup> This relationship speaks to clients' vulnerability and the position of authority legal professionals assume. This, along with the important function lawyers perform within the legal system, explains in part why they are, and must be, subject to a great deal of scrutiny. Maintaining confidence in the justice system requires enforcing full compliance with codes of ethics and professional conduct, as well as ensuring quality legal work. In their duties, lawyers and the quality of service they offer must command the confidence and respect of the public.<sup>498</sup> Clients ought to be assured of the "integrity, competence and loyalty" of their legal professionals.<sup>499</sup>

The public must be protected from professionals who are unfit or incompetent to practise law. Legal professionals are held to high standards of practice and the public ought to be able to anticipate and expect the same basic level of competency from anyone holding him or herself out to be a lawyer.<sup>500</sup> One side of this is the need for substantive knowledge of the law and procedures, relevant experience and skills, without which a legal professional cannot accurately practise

law. Another angle, however, involves adherence to core values of the respective Member country's legal profession, which determines how legal services are provided and how they are regulated. These values may include such elements as refraining from taking on cases where one does not have the relevant competency required and instead referring the client to another practitioner.<sup>501</sup>

It may be that these competency requirements could be met without specific regulations regarding recognition of foreign credentials. After all, many of the codes of conduct governing local professions place members offering legal services under legal and ethical obligations to meet an appropriate level of competency.<sup>502</sup> In principle, foreign lawyers could be subject to the same standards as local practitioners and merely held to account if they are found to be lacking. However, there may be legitimate concerns about the proper way to police for competency and how to redress a wrong if one were to arise.<sup>503</sup> If foreign practitioners were permitted to practise law within Canada during a temporary stay, they very well might not have significant ties to the local community or the country at large. This may be an obstacle if a client needs to enforce a judgment.<sup>504</sup> At the same time, liability insurance is frequently a requirement of practice which would remedy this problem.

Nevertheless, it is, after all, the public and clients who are injured if legal professionals are permitted to practise without sufficient training or skills.<sup>505</sup> The entire profession would be negatively affected if unfit professionals were permitted to practise. Establishing competency and ensuring practitioners carry professional liability insurance are essential.

## Status Quo

Despite the adaptability of the law and the benefits of liberalizing the legal profession, status quo arguments and policies abound when it comes to the self-regulated legal services sector. Various concerns, conscious and unconscious, may be behind the slow pace of change. Concerns about meeting knowledge and competency requirements can be addressed in a sound manner that still permits much wider access for foreign trained professionals. Current members of the profession may fear being forced to reinvent themselves in order to meet the needs of a leaner, tougher marketplace; they may be in part motivated by an intention to maintain their income levels through restricting competition. For those individuals, the status quo is working just fine. Public policy, however, should generally favour open entry and competition; it should not work to prop up the incomes of one sector of society at the expense of the rest. Any concern that "too much competition" would lower lawyers' ethical standards likely represents an unduly jaundiced view of the ethical character of lawyers and the effectiveness of its self-regulatory bodies. It should also be noted that there is an extensive problem in Canada of consumers lacking access to legal assistance;<sup>506</sup> concerns about glutting the market, should therefore not be exaggerated. Another concern may be that an influx of foreign trained professionals would result in changes to professional norms and cultures. The addition of professionals with skills and perspectives developed in other countries, however, may positively enrich the base

of ideas and techniques used in the profession. At the same time, the best values and practices of the Canadian legal profession should be able to remain in place based on their intrinsic merit.

## Self-Regulation

Integrating skilled legal professionals into the workforce is a “complex and multi-faceted process involving a number of different stakeholders,”<sup>507</sup> not least of which includes varying levels of government, law societies, bar associations, law firms, practitioners and the public. Regulating legal services is complicated by the fact that in many jurisdictions, including everywhere in Canada, the profession is self-governing. The importance of an independent judiciary and legal profession is linked to protecting and maintaining the rule of law, and both components are often considered essential for democracy to flourish.<sup>508</sup> The ‘wide-berth’ demanded by an autonomous, self-governing and self-regulating legal profession, however, may complicate instituting a trade agreement such as the *GATS*.<sup>509</sup> Governments are unable to act unilaterally: they need regulating bodies on their side for any agenda they wish to put forth... this creates a serious negotiating weakness.<sup>510</sup>

Canada has multiple sub-national, self-governing legal bodies; in fact, each province and territory has its own law society. Each law society aims to protect the public interest of Canadians by establishing and enforcing standards of conduct. Reaching consensus on a controversial topic such as liberalization is severely hampered by the multitude of organizations present during Canada-wide negotiations. The Federation of Law Societies of Canada (FLSC) seeks to simplify this and facilitates negotiations by acting as a united voice for the fourteen legal professions across Canada. The government continues to be at a disadvantage when it comes to enforcement, however, as it cannot dictate orders to the legal profession.

## C. Finding the Middle Path

The benefits of liberalizing trade in legal services are tempered by legitimate concerns for maintaining the integrity of a Member’s domestic legal system. Recognition and access to legal services markets are important, but so is ensuring public safety. Members have largely dealt with this matter through employing the five-part legal services definition described above. Through this, countries can make precise determinations of what they commit to liberalize or, conversely, what they restrict. One by-product of this definition is a growing trend for foreign-trained legal professionals to practise home country law, third country law or international law within a host state.<sup>511</sup> These service providers are known as ‘foreign legal consultants’ (FLCs).

Foreign legal consultants face fewer barriers to entry because they merely seek to do in one country what they are already qualified to do in their home country.<sup>512</sup> Note that domestic law is excluded from their scope of practice.

Thus, a lawyer from Mexico authorized as an FLC in Canada would be permitted to practise Mexican law and would be restricted from practising Canadian law, either provincially or federally. In Canada, FLCs have latitude to practise their home country law and nothing else; in some jurisdictions they may also practise international law. Typically, FLCs do not require much more than a permit and a promise to submit to a local code of ethics in order to begin practising within a host jurisdiction.<sup>513</sup> In some cases, FLCs may be required to pass an examination, usually in the local language, and they must not hold themselves out to be members of the legal profession per se.<sup>514</sup> Overall, this trend towards FLCs allows foreign legal professionals to work within a host country while still managing to reach a balance in protecting the domestic market against undesirable practices.

# Current Status of Trade in Legal Services

## A. Generally

### Obligations

During the initial years following the Uruguay Round, 47 Members made commitments regarding legal services.<sup>515</sup> Of those, most chose to liberalize international law and home country law, and there was more emphasis on advisory services than representation.<sup>516</sup> The majority of Members who scheduled legal services allow for FLCs in some capacity. It is less likely for domestic law to be listed in a country's Schedule though, and even rarer for commercial presence to be other than "unbound," which means a country has made no commitment in that respect.<sup>517</sup>

### Common Limitations

As discussed previously, there are possible limitations on any service listed in a Member's Schedule. The most common restrictions for legal services fall in market access and national treatment, which Members must specifically list in their respective Schedules. MFN exemptions also come into play, though they are relatively rare. Only four Members included exemptions specifically for legal services<sup>518</sup> while four others exempted "professional services" during the initial negotiations.<sup>519</sup> Those Members were exempt from any market access or national treatment obligations so long as legal services remained off their Schedules of Commitments.

#### i. Market Access

There are various limitations affecting trade in legal services that fall under market access. Restrictions on movement, on legal form, or nationality requirements are all examples of market access limitations.<sup>520</sup> Nationality requirements, especially, remain quite common in legal services.<sup>521</sup>

These requirements can be justified and perhaps overlooked where they apply to public positions that fulfill a 'public function.'<sup>522</sup> Nationality criteria are often justified by pointing to the need to ensure a foreign lawyer's competence in a new jurisdiction, under the host country's law and culture.<sup>523</sup> However, the relationship between nationality and consumer protection is tenuous and public safety could be virtually guaranteed by other means. For example, if a non-national lawyer were willing to obtain and demonstrate the requisite knowledge for practice in the domestic market and take out appropriate liability insurance, public safety concerns could be addressed. This could be demonstrated through completing a full legal education in the host country, passing examinations and fulfilling any other additional requirements imposed on national lawyers.<sup>524</sup> In many cases, nationality requirements are unjustifiably burdensome domestic regulations. This idea was supported by the Supreme Court of Canada in its decision, *Andrews v Law Society of British Columbia [Andrews]*,<sup>525</sup> which looked at equal protection and treatment of non-nationals under the *Canadian Charter*.<sup>526</sup> The Supreme Court decided in a split decision that the Law Society of British Columbia's citizenship requirement for admission to the bar was a form of unequal treatment that could not be justified under the government's Section 1 limitations clause.<sup>527</sup> In her court of appeal decision, Wilson J, as she then was, wrote that the citizenship requirement is not "carefully tailored" to its goals.<sup>528</sup> Citizenship alone does not achieve or ensure familiarity with Canadian institutions and customs, nor does it demonstrate a real connection to Canada.<sup>529</sup> Furthermore, the argument that lawyers fulfill a public function is over-broad and could be dealt with in a less restrictive manner.<sup>530</sup>

## ii. National Treatment

Any treatment that discriminates against a foreign service provider is prohibited by national treatment, unless it is expressly provided for in the Schedules. Members have tended to schedule these limits as residency and language requirements that allow recognition of foreign degrees for nationals who studied abroad but not for foreigners, and as requirements that foreign endeavourers be competitive or successful in their home countries before being granted entry.<sup>531</sup>

Residency requirements take multiple forms and can manifest as requirements for prior or permanent residency, and domicile.<sup>532</sup> Prior residency is the most restrictive, as it provides an advantage to service suppliers who have already been resident in the country for a period of time. This potentially places all foreign legal service providers at a disadvantage and it definitely disadvantages temporary foreign skilled workers. However, although residency requirements can amount to discrimination, it is worth noting that they are eventually surmountable and relatively minimal for foreign lawyers who are living in the country.<sup>533</sup> This concession does very little to encourage temporary workers or to ease the transition and arrival of foreign-trained workers planning to stay in Canada on a long-term basis.

Education requirements, another national treatment limitation which may either oblige legal service suppliers to be graduates of a national university or only

grant recognition for foreign degrees earned by nationals, may not be so easy to overcome. The former is an example of formally identical treatment that causes *de facto* discrimination since foreign lawyers are unlikely to have attended a university in the host country.<sup>534</sup>

These requirements could result in the necessity of full requalification without the opportunity to have qualifications obtained in the home country taken into account.<sup>535</sup>

Aside from explicit limits Members may list in their Schedules, for legal services commitments, the non-discrimination burden Members must meet is further limited by the qualification in the national treatment provision: non-discrimination is required only in the case of “like services and service suppliers.”<sup>536</sup> What is a “like service supplier”? Is a foreign-trained civil lawyer “like” a common law Canadian lawyer? Is a foreign-trained common law lawyer in an English-speaking country “like” a common law Canadian lawyer? The meaning may not always be clear. Because a lawyer’s training is so jurisdiction-specific, foreign lawyers are arguably not *like* domestic ones; under that approach, the national treatment clause loses much of its practical value for legal services.

National treatment might be more valuable in achieving increased liberalization if it prevented Members from imposing excessive measures in pursuing their legitimate policy objectives or enacting measures that clearly discriminate against foreign professionals without a bona fide purpose. For example, if the knowledge required to practise domestic law could be obtained other than by complete requalification, then requiring legal service suppliers to be graduates of a national university would arguably be inconsistent with national treatment. This is also true where consumer protection could be achieved in a less burdensome way than through residency requirements.

In theory, the concept of qualification requirements being as un-burdensome as possible is already enshrined within the domestic regulation provision, but the primacy accorded to national treatment exemptions makes this less significant. If a Member preserves the right to discriminate through national treatment limitations, any positive changes to domestic regulation become meaningless since a foreign lawyer may not be permitted to take advantage of them.<sup>537</sup>

National treatment is an important safeguard against regulatory protectionism.<sup>538</sup> Therefore, removing national treatment limitations in the legal services sector is a worthy goal. This would take place under track one of the liberalization regime, to be discussed below.

## **Progressive Liberalization**

When it comes to services, there are two distinct methods, or “tracks,” mandated by the *GATS* to liberalize services, an overview of which may be found in Table 4: Progressive Liberalization, below. The first involves increasing scheduled commitments while the second consists of creating a common rubric to guide and regulate Members’ domestic regulations for specific professions by creating ‘disciplines.’ Together, these tracks are meant to assist in further opening services

markets. Track two aims to develop disciplines and thereby establish qualitative formulas for Members to meet across specific service sectors or modes of supply. The disciplines complement the request-offer negotiations occurring under track one by providing guidance and ensuring that commitments are upheld.<sup>539</sup> As such, the disciplines “can play a significant role in promoting and consolidating domestic regulatory reform.”<sup>540</sup> Furthermore, it has been posited that without disciplines regulating domestic regulations and recognition procedures, “market access commitments on mode 4 will have only notional value.”<sup>541</sup> Liberalization in respect of the first track has taken place primarily outside the Doha Development Round (DDR), though success under either track is largely dependent on a deal being reached under the DDR. Without building momentum and reinvigorating the DDR negotiations, progressive liberalization obligations and the successful conclusion of the negotiations will continue to stagnate under either track. Failure to reach a settlement would likely lead to reversals under both tracks, the possibility of increased protectionism and an amplified threat of trade wars.<sup>542</sup>

**TABLE 4**

## Progressive Liberalization

Goal: Strive for all WTO Members to continue liberalizing trade-in services to establish an open services market.

How?	Track I	Track II
<b>Article</b>	XIX: 1	VI: 4
<b>What does progressive liberalization look like?</b>	A commitment to participate at successive rounds of negotiations between other WTO Members.	The Council on Trade in Services is working to develop and implement multilateral disciplines on domestic regulations for various sectors
<b>Current Status</b>	Negotiations are on-going: the Doha Development Round (DDR) began in 2001 and continues to the present, with no foreseeable end date.	The Accountancy Disciplines are established and negotiations are under way to extend these disciplines horizontally, on a sector-specific basis or not at all.
<b>Progress Made</b>	Negotiations under the DDR have become frustrated and little to no progress has been made towards continuing to liberalize trade in services through expanding the scope of Members commitments.	The Accountancy Disciplines were developed in 1993; the Council on Trade in Services has since been working to find ways to extend these disciplines horizontally to other service sectors.
<b>Future Recommendations</b>	<ul style="list-style-type: none"> <li>- encourage revising the multilateral negotiating structure of the DDR;</li> <li>- create a short-term negotiating agenda of less controversial topics;</li> <li>- encourage bilateral negotiations such as mutual recognition agreements or economic integration agreements.</li> </ul>	<ul style="list-style-type: none"> <li>- move toward implementing a single horizontal discipline that is both adequately broad and flexible to cover multiple service sectors.</li> </ul>

## i. Track One Negotiations

Track one comes from Article XIX (1) and it involves a commitment to participate at successive rounds of trade negotiations.<sup>543</sup> The first negotiating round was to begin not more than five years after the GATS was enacted in 1995.<sup>544</sup> A new round of trade talks, the Doha Development Round (DDR) or the Doha Development Agenda (DDA), was launched in November 2001 in Qatar in order to address development of less developed nations and fulfil the progressive liberalization obligation within the *GATS*.<sup>545</sup> The aim of the DDR was to increase the scope and security of market access<sup>546</sup> by filling sectoral gaps and strengthening levels of commitments through removing exemptions.<sup>547</sup> Therefore, the negotiating round deals with negotiating specific commitments, encouraging commitments in new sectors, and extending existing market access commitments.<sup>548</sup> This is to be achieved by employing a multilateral negotiating framework and making collective requests.

However, the DDR did not exclusively include negotiations on trade in services. As mentioned briefly, it included broad and controversial topics as well, such as agricultural and non-agricultural market access. Despite the original deadline set for January 2005, negotiations became frustrated and the round was necessarily extended. Delays to progress in trade in services arose for various reasons, but certainly the multilateral nature of the discussions was a factor.<sup>549</sup> Also, some countries chose to make their willingness to negotiate on trade in services dependent on levels of reciprocity or advancements made in other areas. Indeed, already plagued by political, economic, bureaucratic and methodological concerns, Members informally agreed to set aside negotiations on services until a conclusion could be reached on both agricultural and non-agricultural market access, which included controversial issues regarding government agricultural subsidies.<sup>550</sup> Some have since called this a “huge mistake, indeed counterproductive” to the DDA’s mandate.<sup>551</sup> It certainly did not help to advance liberalization in services.

That was not the end of frustrated negotiations: discussions persisted after the original deadline came and went though negotiating roadblocks have abounded. Members have found new areas of conflict and continue to struggle with the many perspectives and positions within the WTO. Initially, Members debated agricultural subsidies; more recent discussions have moved onto removing import tariffs, with some Members advocating for parity-based duties while others remain adamant that this was never a goal of the *GATS*.<sup>552</sup> The multilateral nature of the DDR mixed with the sophisticated set of issues Members are attempting to address makes consensus and the potential of the DDR reaching a satisfactory conclusion understandably more complicated. While the DDR has not yet concluded or been declared futile, it very well may be “the first outright failure ... in the postwar era.”<sup>553</sup> After more than a decade, the DDR is now considered the “longest-running negotiation” in modern times, with no end in sight.<sup>554</sup>

It has been said that insanity is doing the same thing time and time again while expecting different results. This is not unlike the current DDR.<sup>555</sup> One approach to revitalizing the round would allow some countries or group of countries to assume a greater leadership role. Canada, for example, could clean its own hands by

eliminating supply management and push for major reform in areas such as trade in agriculture. It could make the powerful case that protectionism in developed countries is having a devastating effect on the economic growth potential of many undeveloped countries. The parameters for negotiations might also be adjusted to achieve some concrete outcome. One possible solution is to establish a more limited agenda of less contentious trade areas and set a reasonable yet timely target conclusion date. Doing this would at least have the advantage of achieving some kind of progress and it might also encourage collaborations on more controversial topics at a later time.<sup>556</sup> Failing to take steps that reinvigorate and restore faith in the DDR and the *GATS* could be fatal to both. The WTO seems to have recognized the dire position of the DDR and, by extension, the *GATS*: it has started a recent push to revitalize negotiations and encourage a settlement. Pursuant to this, a revised set of negotiating documents was released by the WTO in April 2011, including additional information and reports to assist Members in establishing their positions.<sup>557</sup> However, even with this assistance, Pascal Lamy, the current Chair of the WTO's Trade Negotiation Committee, considers the differing political views to be "effectively blocking progress and putting into serious doubt the conclusion of the Round this year."<sup>558</sup> Even if the ambition of the Doha round has to be scaled back somewhat, very significant steps towards liberalization talks, however, do seem feasible.

When it comes to discussing how legal services specifically have been affected under track one, it warrants beginning with scheduled commitments before turning to liberalization trends and determining where there is room for further liberalization. Compared to commitments listed in other sectors, relatively few commitments have been listed in legal services.<sup>559</sup> To date, roughly 78 countries have made commitments to liberalize legal services, either through the Uruguay Round or through accession to the WTO.<sup>560</sup> To put this in context, there are more than one hundred and fifty WTO member states. A little over twenty of the Members that scheduled legal services also made commitments with respect to host country law (both for advice and representation) across all four modes. Commitments in the area of home country law were much more common, with closer to seventy Members scheduling commitments.<sup>561</sup>

There are two main areas for liberalization of trade in legal services. The first involves encouraging roughly half the WTO Members to make initial commitments. The second, which we shall look at more closely because this is where progress will be made within Canada, involves expanding the scope of already-listed obligations by removing permissible restrictions to market access and national treatment. For legal services especially this means paying particular attention to establishing commitments with regards to host country law and mode 4 (commercial presence).

Requests for talks on legal services have been tabled in the DDR and little progress has been made. Some discussion relating to services did occur initially, but progress has been especially limited since July 2008. There has been almost no change for legal services since 2007.<sup>562</sup> When legal services were discussed, Members appeared to stay within "the relatively narrow confines of liberalizing rules relating to foreign legal consultants".<sup>563</sup> With other issues taking precedence,

there has been low priority given to individual lawyers' access to domestic markets in this round. Economically, international trade in legal services tends to affect business and international law—where foreign-trained legal professionals are more likely to work—more so than traditional areas of domestic law.<sup>564</sup> However, politically, mode 4 is also the most controversial of the modes of supply, affecting not only the global economy but also many national and regional issues. These national policies range from positions on immigration law, stances on how or if competition should be regulated, what would constitute permissible effects on the local economy, to whether it is good international policy to potentially inflict brain-drain on other Members and ideas about how to address national security concerns.<sup>565</sup> Furthermore, even in the few cases where Members made full commitments to practicing of host-country law foreign lawyers still face high domestic regulatory barriers.<sup>566</sup> Qualification requirements and variations in legal practice as well as education mean that host country law continues to play only a marginal role in international trade of legal services.<sup>567</sup> This does not appear likely to change in the near future.

Mode 4 has largely been underrepresented in trade in legal services. This is not entirely unusual: in spite of its increasing importance, there are far fewer and more limited commitments with respect to global mobility than for other modes of supply across all service sectors.<sup>568</sup> When it comes to legal services, even Canada, the US, the EU and Japan did not make mode 4 commitments guaranteeing national treatment in the legal services sector.<sup>569</sup>

Current negotiations have been called a “non-starter” when it comes to making headway regarding legal services and mode 4.<sup>570</sup> This is due, partially to the complex issues associated with the movement of people.<sup>571</sup> Furthermore, legal services have lacked the “economic magnitude and political heft” to feature primarily under *GATS*.<sup>572</sup> Just the same, facilitating the supply of legal services under mode 4 is not completely off the global radar: it was identified by at least some participants at a 2005 meeting as one of the objectives for the current round of negotiations.<sup>573</sup> In addition, most of the 32 WTO Members that participated in the Services “Signalling” Conference in July 2008 indicated a readiness to improve access conditions for mode four generally.<sup>574</sup>

Australia has also presented a collective request in legal services on behalf of itself, Canada, the EU, Japan, New Zealand, Norway and the USA.<sup>575</sup> It does not address barriers to full local licensing, though, among other things, it requests Members make new or improved mode 4 commitments with a special emphasis on independent professionals. The request seeks permission for foreign lawyers to practise in multiple jurisdictions (a combination of the practice of foreign, domestic and international law but not full authorization to practise domestic law). It goes on to say that where Members are able to comply with the request, “they should also consider permitting foreign lawyers, subject to satisfying domestic licensing requirements, the right to provide legal services in domestic law.”<sup>576</sup> In other words, even where members do undertake further mode 4 liberalization, conferring the right to provide legal services in domestic law remains optional and conditional on compliance with domestic regulation, though the request does encourage it. There is no mention of making non-discriminatory domestic

regulations less restrictive since, as noted by the request, it is not within the scope of schedules of specific commitments.<sup>577</sup> Ongoing obligations related to domestic regulations are being dealt with under the second track of negotiations with the formation of disciplines.

Nonetheless, despite some small progress and efforts made by Members, to date few tangible results have been achieved in liberalizing legal services in either host country law or mode four. Even with the eventual benefits of liberalizing mode 4 and expanding the scope of legal practice, liberalizing trade in either area is a controversial topic. For those seeking results and real progress towards opening the legal services market, this might not be the best time to depend on the effectiveness of the already-weak DDR. However, there might be another, less controversial, means of achieving this without entering full-blown multilateral negotiations. Many Members chose to schedule legal services commitments that were more restrictive than practices already in place on the ground, meaning that Members would be able to enforce more restrictive policies if they so desired.<sup>578</sup> In doing this, much of the initial value of the national treatment and market access provisions to reduce protectionism was lost,<sup>579</sup> though the inherent implication is that now there is room for further liberalization of existing commitments to meet practices already in place.<sup>580</sup> Furthermore, persuading Members to increase their scheduled commitments, even if the commitments themselves are already being met, will help maintain transparency and stability of market access.<sup>581</sup> In terms of actually moving ahead to liberalize legal services, especially under the fourth mode of supply, there may be a greater likelihood of success if negotiations and agreements were to take place bilaterally or regionally through agreements. This will be addressed shortly.

## ii. Track Two Negotiations

### History

The second track of progressive liberalization is mandated by the domestic regulation provision of the *GATS* and is specifically in the control of the Council for Trade in Services.<sup>582</sup> As international services have become more sought after and more easily traded, there is a growing need for multilateral disciplines to form a common, world-wide harmonization of consistent criteria and to ensure domestic regulations “do not constitute unnecessary barriers to trade in services.”<sup>583</sup> Members and international bodies representing diverse sectors have been able to make significant contributions and suggestions to this process. Creating strong disciplines to monitor commitments may nevertheless be a challenge: despite the fact that the framework used to create the disciplines was largely elucidated in the *GATS*, WTO Members would likely hesitate to agree to measures that appear to restrict national sovereignty and limit regulatory freedom.<sup>584</sup>

The mandate to create multilateral disciplines fell initially to the WTO entity the Working Party on Professional Services (WPPS). In 1998, the WPPS developed multilateral disciplines on domestic regulation for the accountancy sector: the *Accountancy Disciplines*.<sup>585</sup> These disciplines address five areas: licensing and

qualification requirements and procedures, and technical standards.

Please see Table 2: Highlights from the *Accountancy Disciplines*, above, for a more detailed overview. The disciplines were adopted in 1998 by the WTO: however, they do not have any legal effect until “all the disciplines developed by the WPPS are ... integrated into the *GATS* [before the DDR ends] and will then become legally binding.”<sup>586</sup> Members did agree not to take steps that would be inconsistent with the disciplines unless such legislation was already in place at the time.

Soon after the development of these disciplines, the WPPS was replaced by the Working Party on Domestic Regulation (WPDR) because it was widely believed within the WPPS that work on disciplines for domestic regulation should proceed on a horizontal, rather than sectoral, basis.<sup>587</sup> The decision that created the WPDR, however, expressly recognized the possibility of developing disciplines specific to individual sectors, such as legal services, instead of merely one discipline for all.<sup>588</sup> The authority to determine the appropriate way forward was left with the WPDR which, for the last decade, has examined the feasibility of applying the *Accountancy Disciplines* horizontally across all sectors, including of course the legal services sector. With input from Members, the WPDR continues in its attempts to create a single, horizontally applicable discipline and is currently in the midst of another intensive drafting process.<sup>589</sup> Despite the suspension of many negotiations under the first track, Members have continued to negotiate this issue, which is at the centre of track two.<sup>590</sup> With respect to legal services, determining whether there even ought to be a discipline, a sector-specific discipline or a horizontal discipline, has become a hot topic.<sup>591</sup>

## No Discipline

The International Bar Association (IBA) objects to a global discipline for legal services on the basis of “heterogeneity of substantive knowledge”.<sup>592</sup> Legal education and training are so individualized by jurisdiction that even creating a single international standard for legal practice would be difficult or quite possibly entirely inappropriate.<sup>593</sup> Although many legal principles are similar across jurisdictions, they may be applied differently according to local law and traditions.

## Sector-Specific Discipline

Many legal regulators and members of various bars, including the Canadian Bar Association (CBA), insist that the legal services sector requires its own discipline. Members and the WPDR have taken pains to receive input from professional international bodies though, the professional legal bodies have strongly opposed extending the *Accountancy Disciplines* to legal services. This means that governments are unlikely to agree to extend the disciplines horizontally unless they are willing to ignore these strong objections.<sup>594</sup> Recalling the impossibility of enforcing obligations on self-regulating bodies, however, means that progress seems more than a little unlikely without the profession coming on side. The power wielded by law societies and the legal profession globally may be the strongest

argument against creating a horizontal discipline so long as these bodies oppose it. This represents a significant roadblock for establishing a universal horizontal discipline.

There are also multiple reasons why a sector-specific discipline would be well-suited to the legal profession. A horizontal discipline would likely be easier to implement than developing a new, sector-specific discipline, but enforcement and application of such a generalized discipline would be both costly and difficult if the sector itself were to have detailed regulations.<sup>595</sup> Contrarily, compliance with a sector-specific discipline would be less costly, less ambiguous and easier to apply if the sector were already highly regulated.<sup>596</sup> Legal services represent such a sector. Furthermore, establishing a sector-specific discipline would take more time to create than a horizontal program, but there would also be a higher rate of predictability as to how the discipline would work before it came into effect,<sup>597</sup> and issues specific to the nature of the legal sector could be better addressed.

## Horizontal Discipline

The starting point for considering a horizontal discipline which would apply across all sectors is the *Accountancy Disciplines*.<sup>598</sup> Commencing with a sector-specific discipline was in no way meant to be an indication that disciplines would henceforth be on a sector-to-sector basis; in fact, the *Accountancy Disciplines* provide helpful context for a discussion about disciplines.<sup>599</sup> Main themes that can be drawn from it that would be used to launch a set of horizontal disciplines are necessity, transparency, equivalence and international standards.<sup>600</sup>

Proponents of a single horizontal discipline contend that legal services are not so unique that relevant domestic regulations could not fit within this overarching framework. The same economic and social factors, including regional and cultural variations, exist across all sectors, including legal services.<sup>601</sup> Implementing a single comprehensive discipline that has broad impact on many sectors would also be a more efficient and less time-consuming process than creating multiple sector-specific disciplines. Creating a single discipline would prevent over-regulation of any given individual sector<sup>602</sup> and would provide impetus for further and future liberalization by holding most Members and all sectors to the same level of responsibility.<sup>603</sup>

While there are clear benefits to installing a horizontal discipline, the legal profession has legitimately unique qualities that may not be adequately addressed in a general program. Overall, extending the *Accountancy Disciplines* horizontally calls for applying objective, transparent and fair criteria in a Member's domestic regulations: in principle, the legal profession would generally comply with these requirements,<sup>604</sup> and these criteria should be almost universally applicable. The burden should be on those resisting the horizontal extension to provide specific explanations on what is supposedly different about their profession, and to put forward refinements that go no further than necessary to address those differences. Defining "law" and laying out what a "legal service" would be a good first step toward alleviating misunderstandings.<sup>605</sup>

The CBA made a submission regarding the applicability of the *Accountancy Disciplines* to the legal profession in which it discussed five main concerns.<sup>606</sup> In particular, the CBA highlighted important values such as the independent and self-governing nature of the legal profession and lawyers, the significant role of client confidentiality and the importance of avoiding conflicts of interest.<sup>607</sup>

Many other professions, including accountancy, have their own confidentiality and conflict of interest rules, and must also coordinate duties to the client with overriding legal requirements designed to protect the public interest. While lawyer-client privilege might be stricter than confidentiality requirements in some other professions, it is not at all clear why foreign-trained professionals would find it difficult to appreciate and abide by Canada's requirements in this respect. With respect to "third party" oversight of professions, lawyers are not granted absolute autonomy; governments and legislatures routinely play a role, even in Canada, in helping to define professional standards, and subjecting them to overriding legal regimes such as human rights legislation or (we hope eventually) fair access legislation.

The necessity test in the *Accountancy Disciplines* is the CBA's second main concern. The disciplines require that measures not be "more trade-restrictive than necessary to fulfil a legitimate objective".<sup>608</sup> What this means exactly is unclear: neither "necessary" nor "legitimate objective" are defined. Adding a specific definition would help ensure certainty and reduce fears held by some stakeholders that a necessity test could threaten legitimate regulatory autonomy. The definition of "legitimate objectives" for lawyers could specifically include such values as ensuring lawyers respect legal and ethical requirements of privilege and confidentiality, that they do not abuse powers over third parties and fulfill their duties to the court as well as to their client. The issue of necessity could be addressed by setting out that both expert evidence and empirical studies may be used in defending restrictions. Concerns by the profession can also be addressed by pointing out that legislatures can put enact suitable means for determining necessity. Self-regulating bodies in the legal profession would have a continuing role in establishing requirements, and would have standing to defend their requirements if and when they are challenged before independent oversight bodies.

Answering this question may prove unnecessary: both the necessity test and the 'legitimate objective wording' were excluded from the equivalent provision in the 2009 Draft Disciplines.<sup>609</sup> Rather, the draft required measures relating to licensing and qualification procedures and requirements and technical standards to be "pre-established, based on objective and transparent criteria and relevant to the supply of the services to which they apply."<sup>610</sup> The draft further specified that "nothing in these disciplines prevents Members from exercising the right to introduce or maintain regulations in order to ensure provision of universal service", although this must be done "in a manner consistent with their obligations and commitments under the GATS."<sup>611</sup> More recently, following an April 2011 drafting session, the necessity test was again included in the most up-to-date copy of the draft disciplines. Significant debates have continued though and in principle nothing is final until the whole document is finalized and agreed to in full.<sup>612</sup>

A third concern held by the CBA, and occasionally advanced by the IBA deals with technical standards. The legal profession, after all, does not share a global set of standards or common practices.<sup>613</sup> Without internationally recognized standards to form the basis for multilateral ethical rules, it would be futile to subject the legal profession to an even broader horizontal discipline.<sup>614</sup> But there are commonalities in ethical standards between most Members that allow for common international codes of conduct, such as the International Bar Association's *International Code of Ethics*, which was first adopted in 1956, and the Council of Bars and Law Societies of Europe (CCBE)'s *Code of Conduct*, that governs cross-border transactions in Europe.<sup>615</sup> These international documents could help legal regulators reach common ground to establish a legal discipline.<sup>616</sup> Indeed, the legal profession has ethical rules such as loyalty, confidentiality and avoidance of conflicts of interest that appear to have a universal element. There are no easily measurable technical standards in the legal profession and finding ways to measure ethical adherence would not be straightforward, nor would it be impossible. The current draft attempts to define technical standards and spells out that technical standards provisions are only those standards that are "applicable" to the relevant service sector.<sup>617</sup> This problem is largely a definitional issue that does not seem so significant as to prevent extending the disciplines horizontally.

The fourth and fifth concerns held by the CBA involve recognizing qualifications. The *Accountancy Disciplines* originally stated "[a] Member shall ensure that its competent authorities take account of qualifications acquired in the territory of another Member, on the basis of equivalency of education, experience and/or examination requirements." As the CBA explained, "[i]t is unlikely that foreign qualifications will be of great relevance to the practice of law in Canada."<sup>618</sup> While in some cases this may be true, foreign qualifications are often of great relevance. A lawyer with training and experience in a common law system, like that of the United Kingdom, Australia or the United States, may have many transferable competencies when coming to Canada. The European Union experience shows that even the free movement of lawyers from civil law to common law systems can operate effectively. In any event, the disciplines do not in fact demand recognition, only that qualifications are to be taken into account on a fair and transparent basis. Canada already does this, presumably along with other countries. If these qualifications are found not to establish the necessary competence to practise host-country law, there is no obligation to award recognition. Thus, taking a stance that this provision is generally acceptable, such as the European Union's CCBE did, seems reasonable.<sup>619</sup>

In an effort to make a universal discipline more amenable to all sectors, the WPDR responded to many concerns initially posited by its opponents by amending the 2009 draft and then again allowing alternative provisions in the most recent 2011 draft.<sup>620</sup> The evolution of the disciplines is a testament to the complex process of multilateral negotiations and the importance placed on creating a functional horizontal discipline. The 2009 draft spoke to ensuring that adequate procedures exist to verify and assess qualifications and, where relevant, giving due consideration to professional experience as well as membership in a "relevant professional association".<sup>621</sup> This remains one of three possible alternatives;<sup>622</sup> all

the provisions of the 2011 draft disciplines are divided into three categories based on their progress and how much agreement has been reached. Little consensus has been achieved so far on this aspect of the qualification requirements.<sup>623</sup>

The second concerning provision states “[t]he scope of examinations and of any other qualification requirements shall be limited to subjects relevant to the activities for which authorization is sought.”<sup>624</sup> The unease in the legal profession lies in the fact that lawyers are not always licensed to practise in specific areas of law. In this case, the ‘activity for which authorization is sought’ means becoming a full member of the bar.<sup>625</sup> In some jurisdictions, however, the legal profession is divided into areas of practice and it may be possible to seek more specific authorization.<sup>626</sup> The reality of an undivided Canadian legal practice hardly seems to make the provision so inappropriate that it should thwart the entire effort to extend the disciplines, though it would seem that if practice is undivided and unrestricted, an individual must seek access to the entire profession. This provision was also replaced with a less controversial version in the 2009 draft. So long as an applicant presents all required supporting evidence of his or her qualifications, the Member state must identify any deficiencies and explain what is needed to compensate for that deficit. The Member state may suggest or prescribe course work, examinations, training or work experience.<sup>627</sup> This continues to be an alternative and a possible provision in the 2011 draft disciplines.<sup>628</sup>

Efforts to extend disciplines to cover the legal services sector, either horizontally or specifically, have achieved “few practical results.”<sup>629</sup> Disciplines on domestic regulation could play an important role in the reduction of unnecessary barriers to entry to the domestic legal market; hopefully, progress will be made more quickly in the future. In future discussions, representatives of the legal profession should take into account the amount of time it takes to draft sector-specific disciplines and remember that many other professions also claim to be unique; these considerations have led to scepticism about the “‘unique nature’ of the legal profession and the need for specificity”.<sup>630</sup> Achieving a legal services market that is open to foreign professionals may require law societies and regulating bodies to take a broader view of the profession and how competency may be established, this may include “accepting non-[domestic] educational qualifications as complete or partial fulfillment of the necessary standards” and eliminating citizenship and residency requirements.<sup>631</sup>

Pending the adoption of domestic disciplines, Article VI: 5 subjects all new domestic regulations to transparency, objectivity and necessity criteria. However, existing requirements and those which could be foreseen at the time the GATS came into force are expressly excluded. If changes are to be made to overly restrictive domestic measures and further liberalization is to be achieved, it is crucial that disciplines are developed: the progressive liberalization negotiations under track one do not delve into domestic regulations. Success in both tracks is needed to allow for market openness through the *GATS*.

Horizontal and sector-specific disciplines would both assist in opening the legal profession to foreign workers, though a single horizontal discipline appears to be the ideal choice. It would allow for almost immediate implementation of a

new liberalizing regime without developing an individualized program for each service sector. Although the unique features of the legal profession would need to be accounted for, it appears that the *Accountancy Disciplines* could be generally applicable to legal services,<sup>632</sup> not to mention that the 2009 draft also resulted in positive changes to the disciplines, making them increasingly appropriate for the legal services sector. On-going debates and the new 2011 draft, which still is very much a work in progress, suggest that a horizontal discipline may yet be feasible. Despite objections, there seems to be room to compromise on how the accountancy disciplines would form the basis of a horizontal discipline applying to the legal services sector.<sup>633</sup>

### **iii. Reality about Further Liberalization under the GATS Negotiations**

Exploring steps taken under both tracks of the current progressive liberalization negotiations shows that little progress has been made. Few scheduled commitments have been expanded under track one. Modest strides have been taken regarding track two, though the current status of the 2011 draft does seem to point the WPDR closer to forming a horizontal discipline. Despite these hiccups, there remains great potential for expansion in trade in services. It is estimated that services compose 70% of the global economy, though only 20% of world trade is in services.<sup>634</sup> Not only would further liberalization allow Members to seize opportunities under this neglected market area, using the *GATS* structure would provide a secure framework for regulating trade in services.<sup>635</sup> In the interest of expediency and achieving lasting results, it is suggested that Members temporarily move away from the *GATS* and create regional or bilateral agreements to liberalize trade in services. The advantages of the *GATS* are multi-fold, but such bilateral agreements could help kick start the *GATS* with a spirit of cooperation. Reconsidering the current DDR plurilateral negotiating structure to allow for meaningful and timely deals may also facilitate liberalization while seeking to maintain the multilateral nature of trade in services that the *GATS* aims to establish. Without overriding concerns from the legal profession, a horizontal discipline should also be applied to trade in legal services under the second liberalization track for the sake of expediency and pragmatism.

# Canada

In 1994 Canada made a commitment during the Uruguay Round to schedule legal services.<sup>636</sup> Canada's Schedule includes market access and national treatment limitations that strongly affect Canada's commitment to liberalize legal services. Gaining an accurate picture of Canada's true commitment under the *GATS* requires investigating permissible horizontal restrictions before moving to sector-specific ones.

## Legal Services Obligations

### i. Horizontal Commitments

There are only limited restrictions that apply horizontally to foreign legal professionals in Canada. There are no relevant market access or national treatment exceptions under the first or second modes, cross-border trade and consumption abroad, though there are allowances for certain tax measures.<sup>637</sup> Under mode three, commercial presence, there is a market access limitation requiring foreigners to seek permission before acquiring control of Canadian businesses.<sup>638</sup> There are also national treatment limitations permitting public sector subsidies and allowing for taxation variations, which would otherwise not be allowed.<sup>639</sup>

The fourth mode, the movement of natural persons, is the most pertinent to a discussion about foreign credential recognition. Officially, Canada is unbound, which means that Canada has no commitment to liberalize this mode, for both market access and national treatment, with only specific exceptions listed where Canada has made commitments.<sup>640</sup> These exemptions include, amongst others, business visitors, intra-company transferees and professionals.<sup>641</sup> There are rules relating to each of these categories.

For example, under the *GATS*, business visitors are permitted to enter Canada to participate in business meetings, to set up contracts or to conduct negotiations for a period of no more than 90 days. They may not, however, receive remuneration from within Canada or participate in sales or supply services directly to Canadians.<sup>642</sup> Legal professionals choosing to enter Canada as business visitors would not be permitted to practise law while in the country.

Professionals, in contrast, are natural persons who hold academic credentials and professional qualifications for a covered field. In Canada, foreign legal consultants (FLCs) qualify as professionals under the *GATS* ("lawyers" or other "legal professionals" do not qualify as professionals for the purpose of Canada's *GATS* commitments). To be an FLC, an individual is generally required to hold a Canadian baccalaureate degree in law or its equivalent.<sup>643</sup> Where an individual seeks to enter a regulated profession with licensing requirements in Canada, such as law or working as a FLC, "a work permit [cannot be issued under the *GATS*] unless the applicant has obtained, prior to arrival in Canada, a temporary

or permanent license from the appropriate province.”<sup>644</sup> Once the professional applicant has obtained a licence from the regulatory body and a work permit is subsequently granted, the individual may enter Canada temporarily for a period of 90 days or less, or for the time it takes to complete the service contract they are coming to Canada to fulfill, whichever ends first.<sup>645</sup>

No extensions are permitted after the 90 days expire and secondary employment not covered in the working permit is not allowed under these working categories.<sup>646</sup> These are important limits to bear in mind when looking to the sector-specific sections: business visitors, intra-company transferees and professionals have restricted, and rather short-term, access to the Canadian services market under the *GATS*. Note as well that licensing requirements fall outside of the agreement as primarily domestic regulations, though they nevertheless pose a significant barrier to accessing the Canadian legal services market.

## **ii. Sector-Specific Commitments**

Canada did not schedule legal services *per se* in its Schedule. Indeed, Canada made commitments for “Foreign Legal Consultants,”<sup>647</sup> which restricts a foreign legal professional’s practice area to foreign or international law and excludes domestic Canadian law. Canada made no exceptions for market access or national treatment under the first two modes and only one exemption under mode three, where commercial presence is restricted to either a sole proprietorship or a partnership under market access. Canada again remains unbound for mode four, apart from the applicable horizontal exceptions and specific market access exemptions (business visitors, professionals and intra-corporate transferees). Those market access provisions permit PEI, Alberta, Ontario and Newfoundland to retain permanent resident requirements and allow Quebec to maintain citizenship requirements.<sup>648</sup> Citizenship or permanent residency requirements will almost entirely restrict foreign lawyers wishing to enter Canada temporarily and practise law, even foreign or international law, from doing so. In the additional commitments column, some provinces have scheduled commitments to grant temporary permission to practise without the same criteria as for full accreditation. In some respects, the requirements for temporary practice are the same as for long-term practice as a FLC. In Saskatchewan and British Columbia, for example, the foreign legal professional must be in good standing in the home country’s legal profession, and in Ontario the individual must have five years of experience practising law in the home country.<sup>649</sup> This offers a gradation system which helps facilitate temporary market access without posing an unnecessary burden on visiting foreign professionals. Please see Table 5: Canada’s Sector-Specific Commitments for Foreign Legal Consultants on the following page to view this specific Schedule.

**TABLE 5**

## Canada's Sector-Specific Commitments for Foreign Legal Consultants

Modes of Supply: 1. Cross-border supply 2. Consumption abroad 3. Commercial presence 4. Presence of Natural Persons

Sector or Sub-sector	Limitations on Market	Limitations on National Treatment	Additional Commitments
<b>II. Sector-specific Commitments</b>			
1. Business Services	1. None	1. None	Foreign Legal Consultants
A.* Professional Services	2. None	2. None	The right to practice without meeting accreditation requirements is granted temporarily in British Columbia, Saskatchewan and Ontario on the following basis:
a*) Foreign Legal Consultants (advisory services on foreign and public international law only) (CPC 861*)	3. None, other than Commercial presence must take the form of a sole proprietorship or partnership.  4. Unbound, except as indicated in the horizontal section, and,  Lawyers (Prince Edward Island, Alberta, Ontario and Newfoundland): Requirement to be	3. None  4. Unbound, except as indicated in the horizontal section.	
			1. In British Columbia and Saskatchewan the FLC must be a "member in good standing" of the legal profession in his/her home country.  2. In Saskatchewan, the FLC must have practised the law of his/her country for at least three complete years and in Ontario for at least five preceding years.

# Other Limitations to Canada's Commitments

## Opt-Out Provision

Canada did not take advantage of the one-time opportunity to “opt out” of the MFN principle for legal services and chose not to list legal services, foreign legal consultants or professional services generally on its MFN exemption list in 1995.<sup>650</sup>

## Economic Integration Agreements

Canada has six economic integration agreements or preferential trade agreements (PTAs) currently in effect with ten countries and more in differing stages of negotiations.<sup>651</sup> Two of these agreements have only recently reached the final stages of negotiations: during the Prime Minister's tour through South America this past August, a free trade agreement (FTA) with Columbia officially entered into force<sup>652</sup> and Prime Minister Stephen Harper also announced that bilateral negotiations for an FTA with Honduras have concluded.<sup>653</sup> These agreements all grant preferential market access to signatories and serve as a general exception to the *GATS* trade rules between Canada and the nations involved.

Not all of these agreements consider trade in services, however, and those that do encompass services vary in scope. Canada's FTA with Jordan, for example, covers only goods.<sup>654</sup> Canada's agreements with Costa Rica and the European Free Trade Association (EFTA) both recognize the growing importance of trade in services and speak to providing parties with information on matters affecting trade in services as well as encouraging professional bodies to work together towards mutual recognition.<sup>655</sup> The agreement with the EFTA goes a step further with a provision to facilitate temporary access for intra-corporate transferees and business visitors and their families.<sup>656</sup> *NAFTA* is perhaps the best known of these agreements and, like the EFTA, addresses both services and temporary labour mobility.<sup>657</sup>

*NAFTA* covers almost all aspects of cross-border trade in services and mandates transparent, fair, non-discriminatory treatment of cross-border service providers between the signatories. The agreement does not permit permanent migration, though it does provide for temporary movement of individuals falling in one of four categories: business visitors, traders and investors, intra-company transferees and professionals.<sup>658</sup> Business visitors who move between Mexico, the US and Canada without intending to establish permanent residency or receiving remuneration in the host country, are granted temporary entry under the agreement without requiring a working permit or certification.<sup>659</sup> Business visitors may seek an unlimited number of visas or extensions. Foreigners applying as professionals and intra-corporate transferees still require working permits and must “meet licensing or certification requirements respecting the exercise of a profession,” though applying through *NAFTA* expedites the application process.<sup>660</sup> *NAFTA* creates a

Trade NAFTA, or TN, visa that is issued once an applicant demonstrates that he or she has a Canadian job offer. Work permits may be issued for professionals, including lawyers who meet licensing criteria set by the appropriate regulatory body and who hold a law degree,<sup>661</sup> for a three year period, with no limit on the number of extensions an individual may seek.<sup>662</sup>

While Canada's trade agreements change the legal landscape for trade in services and how the *GATS* applies, overwhelmingly these agreements are not being found to have much effect on labour mobility or, by extension, how or if foreign credentials are recognized. In the few cases, such as *NAFTA*, where these agreements attempt to facilitate labour mobility, "the movement of workers is constrained by national immigration and security frameworks ... [and] everyone who enters the country must abide by the requirements of the 2002 *Immigration and Refugee Protection Act* and other relevant immigration and security screening rules."<sup>663</sup> *NAFTA* alone does not seem to promote widespread labour mobility: while figures are lacking for inflows into Canada under the specialized working categories, in 2006 the Office of Immigration Statistics of the US Department of Homeland security reported that only 64,633 Canadians and 9,427 Mexicans took advantage of this device.<sup>664</sup> The corresponding Canadian figures are likely much lower. On *NAFTA*'s tenth anniversary, Demetrios Papademetriou, a co-founder of the US Migration Policy Institute, wrote that an important question was still relevant: "[a]re free-trade negotiations and agreements a valid forum for addressing migration per se?" He added: "[t]he *NAFTA* negotiators' answer was a very timid 'maybe.'"<sup>665</sup> That FTAs and PTAs have so far not been able to expand labour mobility any more than the *GATS* may speak to the overall lack of political will pushing for greater labour mobility. Lant Pritchett draws attention to this dilemma in his work by referring to "Everything but Labor Globalization."<sup>666</sup>

## Recognition

Recognizing foreign credentials is an important component of liberalizing trade in legal services that affects how the *GATS* applies, especially for mode four.<sup>667</sup> Recognition may be achieved one of two ways: through an agreement (either a mutual recognition agreement (MRA) or a PTA that touches on recognition), or unilaterally. Canada does not fully or automatically recognize legal professionals from particular countries, either unilaterally or by way of an agreement; instead, each applicant is examined on an individual basis.<sup>668</sup> The particulars of this arrangement will be explored in relation to domestic regulations.

Canada is, however, party to PTAs that consider recognition, though these agreements have largely been ineffective in dealing with labour mobility or in establishing much beyond an encouraging atmosphere for developing mutual recognition criteria.<sup>669</sup> International MRAs do not play a large role in Canada, least of all for legal services. There are presently no specific MRAs for legal services anywhere in common-law Canada. Quebec holds a Mutual Recognition of Occupational Qualifications Agreement with France, which allows for recognition of civil legal qualifications between Quebec and France.<sup>670</sup> More broadly, Canada

holds MRAs for certified management accountancy, general accountancy and engineering.<sup>671</sup> Having limited recognition agreements is not a particularly unique situation: MRAs have typically been difficult and slow to develop.<sup>672</sup> Certainly for a field such as law, regional differences in practice and in education are strong impeding factors.<sup>673</sup>

## 2. Practising Law in Canada: Domestic Regulations and On the Ground Roadblocks

### Full Members of the Canadian Bar

There are two stages for gaining access to practise domestic law as a full member of the Canadian legal profession. The first involves applying for national accreditation and the second requires applying to the respective provincial bar once a Certificate of Qualification has been issued.<sup>674</sup> The process is considered “lengthy at best” even in the scenario of virtual equivalency.<sup>675</sup>

The legitimacy of some form of domestic regulation in the market is not in question—recall that the *GATS* recognizes a Member’s right to regulate. In fact, such regulation is needed to guarantee the protection of the public, the integrity of the legal profession, and public confidence in the administration of justice, which are all valid policy concerns. The issue, however, is ensuring that these measures are the least restrictive possible in achieving a valid purpose. They ought not amount to protectionism. As such, this means that education and experience obtained in the home jurisdiction should be given due consideration in evaluating competence and ability within the host country.<sup>676</sup> In principle, this already occurs within the Canadian framework, though it may be possible to do so in a less restrictive and costly manner.

Foreign lawyers with overseas legal education must apply to the National Committee on Accreditation (NCA). This standing committee of the Federation of Law Societies of Canada (FLSC) evaluates an applicant’s legal training and professional experience to determine what additional education and/or training he or she must complete in order to gain entry into a bar admission program.<sup>677</sup> Individuals are assessed on a uniform standard, regardless of where in Canada they plan to practise. They must all pay the same initial reviewing fee, which is non-refundable, of \$450 CAD.<sup>678</sup> The NCA seeks to establish the degree of equivalency between an applicant’s previous education and experience and that of a Canadian LLB program. To be most effective, the NCA has attempted to individualize this process and awards recognition on a per-applicant basis. Comprehensive evaluation guidelines allow the NCA to develop a keen sense of what particular applicants may be lacking. In particular, the NCA looks at such

factors as the degree conferred on the individual, the individual's standing in his or her courses, the subjects she or he followed and the content of those courses, the quality of education received, the length of the program, and whether the individual took a pre-law post-secondary degree.<sup>679</sup> This assessment, however, is weighted heavily towards an applicant's educational background, to the detriment of individuals with more experience.<sup>680</sup>

After the review is completed, the NCA issues the results of the assessment by way of a list of required subjects that, when completed, would make the applicant's legal training comparable to that of a Canadian common law degree program. There is a general focus on Canadian content, which implies that even foreign professionals with very similar legal backgrounds to Canadians can expect some re-training requirements.<sup>681</sup> There is also a concern to address core common law topics. Complete requalification without any credit for existing qualifications may be required where the differences between legal systems are large enough.<sup>682</sup> It is not abnormal for there to be a wide spectrum of rules governing how, as well as the extent to which, foreign lawyers may apply to re-qualify across divergent jurisdictions.<sup>683</sup> In cases where the legal system from which an applicant originates is considered too divergent from the Canadian system, however, such as where an applicant entirely lacks any common law experience, the applicant can expect to receive notice that she must complete a full Canadian common law degree program. This is the most onerous potential outcome of the NCA assessment. Otherwise, the NCA may require that equivalency be achieved through a minimum of four challenge exams, each one with a financial cost to writers as well as a self-study component, or, as mentioned, a requirement to return to law school. Individuals may be recommended to return to law school for something less than a full degree.<sup>684</sup> Once the foreign lawyer meets the requirements listed by the NCA, apart from finishing a Canadian law degree, the NCA then issues a Certificate of Qualification.

The NCA-issued certificate is accepted by most law societies in Canada as equivalent to a common law degree (LL.B. or J.D.) for bar admission, though not by those in any of the Canadian territories.<sup>685</sup> Rules of admission to the various provincial and territorial Bars are not consistent. Generally, all foreign-trained lawyers are expected to participate in a provincial or territorial bar admission course once they have completed an LLB/JD or its equivalent, typically demonstrated through the NCA's certificate. Foreign professionals enter the Canadian legal workforce the same way Canadian law graduates do, despite their possible practical knowledge or experience: they take the bar admission course and must act as interns.<sup>686</sup> The rationale behind this is that the bar course as well as the student-at-law internship period known as articles both focus on practical skills and procedures that may be unique to the jurisdiction in which the applicant is seeking authorization to work in.<sup>687</sup>

Completing this process takes time and the cost of compliance and requalification for foreign professionals is often high. Financial and time constraints can limit applicants from studying for challenge exams or returning to law school.<sup>688</sup> Compliance with entry requirements often results in reduced earnings for foreign professionals as they are forced to remain under-employed or even unemployed.<sup>689</sup>

Following articles, lawyers may be fully licensed to practise and begin their respective practices, but, in many ways, these individuals are put on a track that requires re-starting their careers, often as junior-level associates despite their previous levels of achievement.<sup>690</sup>

The NCA strives to acknowledge receipt of an application within ten days of receiving it and aims to send applicants a completed assessment within three months. However, the NCA functions on a first-come, first-served basis and backlogs occur. Upon receiving an assessment, individuals may be required to apply to a Canadian law school and complete a degree plus a year of articles. Individuals ought to reasonably expect this process to take between four and five years if they are able to complete their studies as full-time students. Individuals assessed at the other end of the spectrum, requiring only the four minimum courses or challenge examinations (Principles of Canadian Administrative Law, Canadian Constitutional Law, Canadian Criminal Law and Procedure, and Foundations of Canadian Law), may complete their studies within a single semester or at the speed they are able to self-study and write the exams, likely not much less than four months. These individuals must then also complete roughly a year of articles and the provincial bar course. It follows that applying to be a full legal practitioner in Canada as a foreign legal professional can take somewhere between two and five years.

## Foreign legal consultants

Becoming an FLC can be a complicated process, though it is undoubtedly less complex and less time consuming than applying for full status under the Canadian Bar. In this case, foreign legal professionals are not usually required to complete more course work or take challenge exams. Still, they must apply for assessment, though in this case it is the provincial or territorial law society in the common law province they hope to practise in that conducts the assessment: the NCA is not involved. Individuals must meet the criteria set out by the provincial body they apply to and each province has a somewhat different system for awarding permits. The overarching criteria, however, are similar to those summarized in model legislation created by the Federation of Law Societies of Canada (FLSC): applicants must be in good standing in their domestic legal profession, they must be of good character and repute, they must have practised law for at least three years or be prepared to work under the direct supervision of a person who is.<sup>691</sup> Applicants must promise to follow local codes of ethics, carry liability insurance as well as a fidelity bond or other form of security, and not to handle trust funds, amongst other requirements.<sup>692</sup> Individuals must also submit a non-refundable permit/application fee, which in some cases may be fairly expensive: applying to the Law Society of Upper Canada (Ontario) or the Law Society of Manitoba costs \$500 CAD. Hopeful FLCs may also be required to submit their curriculum vitae, reference letters, proof of liability insurance and other pertinent documentation.<sup>693</sup> After assessment by the provincial law society, successful applicants are granted permits to practise their home country law within that province.

This procedure, which mainly involves verification of submitted documents, is relatively simple and far less complex than being admitted as a full lawyer within Canada. There is little direct assessment and more assessment by the law societies. The time to complete the assessment process once a complete application is submitted likely varies based on the province and the volume of applications, though there is no legislated time limit for law societies to make a decision and inform applicants. Law societies are generally mandated to consider each application and inform each applicant whether his or her request is to be granted or rejected however.<sup>694</sup> Permits to work as FLCs typically last for a full calendar year and, with the proper forms and fee, later extensions are permitted. This is one way for foreign professionals to temporarily enter the Canadian service market, though their FLC applications must be accepted by a provincial law society before arrival and they will be restricted to a maximum 90-day stay as a professional under the *GATS*.

## **Moving Ahead: Liberalization Techniques**

### **i. Internationally**

#### **Bilateral or Regional Agreements or the *GATS*?**

To date, Members have begun taking advantage of the MFN exemption allowing for trade agreements between Members.<sup>695</sup> In fact, since the establishment of the *GATS* and the WTO in 1995, more than 300 additional trade agreements have been notified to the WTO, compared to 123 agreements from 1948 to 1994.<sup>696</sup> The average number of PTAs a WTO Member is party to has now risen to 13.<sup>697</sup> Foreign policy reasons and economic plans, including Members' desires to foster ambitious trade regimes that are transparent, stable and liberalized, may in part explain this new trend.<sup>698</sup> Certainly the recent stagnation of trade negotiations under the DDA and growing concerns over the slow rate of liberalization under the WTO are factors pushing Members to seek other alternatives, including other trade instruments.<sup>699</sup> The DDR and the *GATS* are simply taking too long.

These various trade agreements fluctuate in terms of content, scope and signatories.<sup>700</sup> Yet, they all help open markets by initiating reciprocal bargaining between parties, providing forums for regulatory matters and often encouraging greater transparency of domestic regimes.<sup>701</sup> Some of the agreements achieve greater transparency by mandating clearer schedules with complete annexes that provide a full and accurate idea about the extent of existing domestic regulations.<sup>702</sup> The costs and skills involved in forming bilateral or regional trade agreements are also significantly less than under the multilateral *GATS* framework: negotiations are far less complex, bargaining is more effective

and results come more swiftly.<sup>703</sup> Fewer signatories mean the costs to adjust agreements are lower if the need arises. Furthermore, achieving higher integration of recognition requirements and greater regulatory harmonization is more straightforward and more feasible between fewer countries.<sup>704</sup>

Regional trade agreements and PTAs are relatively easy to create, they help build momentum for trade reform and encourage incremental global change while also strengthening political alliances. Parties can also seek the best alternative instead of the lowest common denominator, as occurs in multilateral talks. More dialogue between signatories creates an atmosphere of trust that is nurtured by transparent, open policies and less competition. Not only might this help develop PTAs, this might also encourage functional recognition agreements as the parties will be better versed in each other's domestic regulations and internal policies.

While the speed and potential outcomes of trade agreements outside the *GATS* are enticing, and they certainly can be interpreted as having a positive impact on trade, there is tension: the choice "is between a first-best multilateral approach, which may be stalled because of lack of agreement among countries worldwide, and a second-best regional or bilateral approach that achieves liberalization between the partners but creates discrimination against the rest of the world."<sup>705</sup> Furthermore, despite the possibilities of expanding market access through PTAs, these agreements have been unable to do much towards liberalizing trade in professional services generally<sup>706</sup> and the potential for trade agreements to advance labour mobility and liberalization of trade in services has not yet been met.<sup>707</sup>

It may be best, where possible, to treat these agreements as an interim solution to current delays and setbacks: there are good reasons to strive for an eventual multilateral agreement or at least a wider regional agreement. Real long term progress might be made if PTAs were used to complement the multilateral process.<sup>708</sup> Some have argued that PTAs or RTAs "are a mechanism to enhance the pressure to move on the multilateral front, and they act as laboratories for international cooperation on behind-the-border policy issues."<sup>709</sup> At a conference in 2007, the Director-General of the WTO, Pascal Lamy, plainly stated that "it would be fair to say proliferation [of regional trade agreements] is breeding concern—concern about incoherence, confusion, exponential increase of costs for business, unpredictability and even unfairness in trade relations."<sup>710</sup> These concerns have not evaporated or been adequately addressed since they were raised. Bilateral or regional trade agreements continue to promote trade diversion: the most competitive services and service suppliers may not necessarily be given market access while potentially less competitive services (national or otherwise) are protected.<sup>711</sup> Pursuant to this, regional trade agreements usually accord developing nations less bargaining power and give those nations less say on the scope of rules covered under the agreements or in determining whether reciprocity is a pre-condition to bargaining.<sup>712</sup> Reluctant developing nations may choose not to take part in the agreements, perhaps to their disadvantage but also to that of more developed nations wishing to trade. The multiplicity of agreements, as Lamy noted, also has the potential of wreaking havoc on the international trading system. The complicated maze of different regional trade deals effectively stifles

international trade on a large scale as governments, businesses and individuals alike require technical expertise of a multitude of agreements in order to participate.<sup>713</sup>

A multilateral trade agreement allows the market to rule and provides a single unified trading framework. Creating such an agreement will require more time and more negotiating than a regional agreement. However, expecting nations to stop bargaining for bilateral agreements and to start serious talks at the DDR is unrealistic. The DDR remains active but ineffective while Members 'vote with their feet' and in practice emphasize the importance of bilateral and regional agreements.<sup>714</sup> Regional and multilateral trade arrangements do not necessarily "serve the same purpose or satisfy the same needs:"<sup>715</sup> they can be used to promote specific types of trade and build political alliances; there are a wide range of economic and political motives behind PTAs.<sup>716</sup> Just the same, the proliferation of PTAs means that a growing number of countries are receiving similar trade preferences under different agreements. In turn that means the importance of PTAs is dwindling as Members reach roughly the same footing.<sup>717</sup>

There are examples of preferential trade agreements beginning regionally before circulating more broadly and other countries are invited to join.<sup>718</sup> Perhaps, then, continuing to seek regional and bilateral trade agreements has promise. Certainly these agreements have positive impacts on their own, but eventual amalgamation regionally or even globally, conceivably within the *GATS* structure, could offer even greater advantages. Theoretically the question becomes "whether preferential tariff opening would eventually lead to multilateral opening."<sup>719</sup> Practically one must ask how PTAs can be made coherent within the WTO system. The WTO, in its 2011 World Trade Report, explored four proposals:

- 1) accelerate opening multilateral trade by extending these agreements non-discriminatorily to other Members;
- 2) address and fix the WTO's legal deficiencies that do not expressly cover or regulate PTAs;
- 3) use PTAs to complement the already-existing WTO legal framework by adding more transparency; and,
- 4) multi-lateralize regionalism.<sup>720</sup>

Determining the outcome of this complex issue and how it ought to be resolved is well beyond the scope of this paper, though it seems logical that if PTAs are to fit within the WTO's multilateral system, the WTO will need to become more involved with these agreements. Establishing a legally binding and effective discipline that covers various service sectors could also assist in this integration process.

## Recognition

Recognition, either unilaterally or through a negotiated agreement, is yet another way countries such as Canada can achieve greater levels of liberalization of trade in services. Any progress made in improving access to domestic legal markets through recognition agreements cannot be attributed to the *GATS* in more than an ancillary way; the *GATS* merely permits these agreements and other preferential arrangements notwithstanding MFN obligations. MRAs are not likely to eventually evolve into a multilateral framework, however. As one *GATT* Counsellor has noted, the *GATS* will likely not be able to multi-lateralize such individualized arrangements or force countries to treat all foreign qualifications equally.<sup>721</sup> Just the same, if these agreements prove to be effective in reducing trade barriers and promoting labour mobility, their importance should not be overlooked or discredited merely because they do not fit within the *GATS* framework.

Despite impediments to recognizing foreign legal credentials, there are nevertheless examples of recognition agreements, even for legal services specifically, that show such agreements are in fact feasible and quite possibly worth the initial effort. One interprovincial example is the *National Mobility Agreement* made by the Federation of Law Societies of Canada (FLSC).<sup>722</sup> While this is not an international agreement, with a mandate to “facilitate temporary and permanent mobility of lawyers between Canadian jurisdictions,” it does serve as a model for overcoming regionalized variations and it could provide the foundation for a more extensive international agreement.<sup>723</sup> Subject to a few limitations, this agreement permits Canadian lawyers authorized in one jurisdiction to practise in another jurisdiction without a permit, provided the duration of an out-of-province lawyer’s stay does not exceed 100 days.<sup>724</sup> Labour mobility to and from Quebec, however, continues to be restricted. This limit on labour mobility is influenced by language differences and its distinct legal system.

The European Union has exemplary functioning mutual recognition agreements that apply generally and that are specific to law. One such example is the *Lisbon Recognition Convention*<sup>725</sup> which was signed by all member States of the Council of Europe in 1997 and other States that were parties to the UNESCO *Convention on the Recognition of Studies, Diplomas and Degrees Concerning Higher Education*,<sup>726</sup> including Canada.<sup>727</sup> The goal of the agreement was to address developments in higher education, including growth of private institutions and increased academic mobility<sup>728</sup> by establishing that states recognize educational qualifications for the purpose of academia—including degrees and periods of study—unless the State could show there are “substantial differences in qualifications”.<sup>729</sup> Recognition allows an individual either to continue with further studies in a different country or to make use of an academic title. The benefits of such an MRA are multi-fold in attracting top research candidates, encouraging further studies and fostering a diverse academic setting. Canada was one of the initial signatories to the agreement, signalling its desire to facilitate recognition of foreign education and provide better access to information about Canada’s higher education system.<sup>730</sup> Unfortunately this recognition agreement is not part of Canada’s recognition landscape. Canada—alongside four other signatory members—has so far failed to

ratify this convention and it remains ineffective for foreign professionals visiting Canada.<sup>731</sup>

The European Union is very much a leader when it comes to recognizing legal qualifications. In an attempt to develop a single internal services market, the EU instituted two directives that deal with legal qualification requirements.<sup>732</sup> The first, from 1977, gave authorized legal service providers permission to provide services in their home country law in all other EU countries without needing to register with the host state.<sup>733</sup> The most recent directive from 1998 was somewhat more comprehensive.<sup>734</sup> While registration is now required in a host EU state, legal service markets have been substantially opened. This directive permits a lawyer registered in one EU Member State to practise domestic law in another EU Member State with no limits on scope of practise and no requirements to be supervised by a domestic lawyer.<sup>735</sup> Practice must be under a foreign lawyer's home title, however, for the first three years, but after that time a foreign lawyer is free to practise host country law without any qualification exams.<sup>736</sup> Thereafter, the lawyer maintains the same status as domestically qualified lawyers.

The EU does not extend this liberal regime to lawyers from non-EU Member States; qualification requirements still pose significant trade barriers for non-EU practitioners. Nonetheless, the EU experience at least shows that mutual and nearly full recognition is possible in the legal profession at the multilateral level, despite different legal systems and regionally distinct laws. The local law societies worked together and encouraged this step.<sup>737</sup> It could be that convincing the Canadian legal profession of the importance of opening its market is essential. This is a significant achievement that Canada and other countries should look to as a prototype for guidance on establishing recognition requirements.

There are cases of PTAs containing commitments for the recognition of foreign qualifications, though few are actually binding.<sup>738</sup> For example, the Annex on Professional Services in the *Australia-United States Free Trade Agreement (AUSTFA)* only goes so far as to encourage developing mutually acceptable standards for the licensing of professionals.<sup>739</sup> *NAFTA* states that qualification requirements ought to be based on objective criteria; they ought not be more burdensome than necessary and must not constitute a disguised barrier on cross-border trade.<sup>740</sup> It also includes an article stipulating that residency requirements be removed as prerequisites to providing cross-border services.<sup>741</sup> While in principle these provisions go beyond the *GATS* and ought to guide participating countries towards levels of increasing liberalization, the language used is nonetheless more suggestive than obligatory. Nonetheless, some advancements have been made through *NAFTA*, especially related to growth in trade and increased temporary labour mobility, and more could be encouraged.<sup>742</sup> Some agreements do foster higher levels of integration, however. For example, "[t]he Central America and Caribbean Community (CARICOM) allows university graduates to move among member countries without passport requirements and allows university graduates, professionals, skilled persons, and workers from some selected occupations to work without a permit."<sup>743</sup>

Not unlike the lack of progress under PTAs, there has not been significant

advancement in developing harmonized standards with specific countries in order to facilitate recognition. Under this method of encouraging recognition, Canada could begin by developing harmonized national standards as a starting base for recognition agreements. Not only could such a step simplify the application process for foreign professionals wishing to practise in Canada, it could eventually have a reciprocal effect for Canadian professionals wishing to practise abroad. From this harmonization, common curricula and training obligations that meet equivalent criteria across the participating nations would be developed.<sup>744</sup> Professional associations representing each nation, or possibly each region, could come together to generate these harmonized standards.<sup>745</sup> While theoretically possible, heterogeneity in law severely complicates this method of recognition.

It is also possible to conduct an in-depth evaluation of educational, training, and licensing criteria in other jurisdictions, compare those findings to Canada's domestic requirements and determine, possibly unilaterally, for which countries recognition should be awarded. This comparison and evaluation, however, is not only difficult, complex and costly, it is also very time-consuming.<sup>746</sup> The intricate nature of law, as well as its fundamental local character, significantly impedes evaluating equivalency. Furthermore, it becomes increasingly difficult to determine full or partial equivalency where cultural and societal factors impact the profession, such as in the case of legal practice.<sup>747</sup>

## ii. Domestically

Having said that, the recognition method just described is essentially the scheme Canada has adopted, though on a more individualized level. Such a complex system is even more time-consuming and more expensive than determining a 'one-size fits all' decision for all legal professionals from a particular country. The lack of a national standard for domestic common law degrees, the absence of a rubric for qualification assessment, and the inconsistent requirements between provinces do nothing to facilitate recognition. A recent study revealed a need to harmonize credential assessment in Canada in order to improve consistency and access.<sup>748</sup> While there have been improvements to interprovincial mobility protocols which allow lawyers to practise in other jurisdictions without first passing qualifying examinations, this does not assist with the initial recognition process and thus does not assist foreign legal professionals hoping to work temporarily in Canada.

Most importantly, the current assessment system within Canada may not be adequately transparent. There can be wide discrepancies between the courses or examinations the NCA determines individual candidates must complete before certification is issued, without sufficiently detailed explanations.<sup>749</sup> Two individuals coming from similar legal backgrounds may be assessed differently due to variations in individual performance or the specific courses each individual studied. However, as the current system stands now, there is no set guide that allows applicants to accurately anticipate what their requalification requirements might look like. There are documented cases that appear to show overarching shared

experiences where individual candidates are nevertheless assessed differently and required to complete a different number of challenge exams.<sup>750</sup> One would think that in order to maintain consistency and fair assessments, the NCA would use some type of formula for evaluation. The National Committee on Accreditation has recently posted on its website broad estimated assessments for the number of courses or examinations applicants may expect to be required to take based on their legal system of origin.<sup>751</sup> Such a move will help to encourage consistency and transparency while still allowing for individual consideration; it ought to be commended. A more in-depth evaluative prescription presumably exists, however. There does not appear to be any reason not to publish it; indeed, this would only serve to encourage predictability within the Canadian accreditation system. It would also provide applicants with a better idea of how their applications may fare and what re-qualifications might be necessary before they would be allowed to practise in Canada.

Furthermore, recent statistics suggest there has been a 34% increase in applications to the NCA from applicants seeking recognition within Canada.<sup>752</sup> This shows there is interest in working in the Canadian legal system, and that there is possibly also a growing skill set that Canada can use to the mutual benefit of applicants and Canadian society at large. It may be worth moving beyond establishing merely a more transparent system in order to also seek effective and safe alternative methods to establish equivalency. This would encourage growth in this area.

Despite interest in the Canadian legal system, very few NCA applicants have gained access to the Canadian legal market through NCA-issued certificates. From 1999 to 2009, some 4,515 foreign-trained lawyers applied for NCA assessment, of whom, merely 1,708 applicants eventually received a Certification of Qualification.<sup>753</sup> Such a low success rate suggests a need to take steps to overhaul the Canadian recognition system. There must be a way to make use of these skills and afford other mechanisms for determining equivalency.

Legislation enacted in Manitoba, Ontario and Nova Scotia requires self-regulating professions to develop and maintain entry requirements that are objective, fair and transparent.<sup>754</sup> This legislation is meant to reduce barriers for skilled newcomers. However, the effectiveness of this legislation is in question and transparency continues to be an issue.<sup>755</sup> Moreover, legislative intent is related to internal concerns over labour shortages as well as fairness and transparency in registration practices.<sup>756</sup> There is no suggestion of a motivation connected to international trade and the *GATS*, though if this legislation furthers either purpose it may nevertheless be relevant.

One positive step taken by the Ontario government in conjunction with the University of Toronto is dubbed the 'Internationally Trained Lawyer' (ITL) program. It is a recent effort that began in September 2010 to help foreign-trained lawyers prepare for challenge examinations and for entering the Canadian legal profession. Individuals are only allowed a one-time re-write of challenge exams and, in part due to the self-study nature of the material, failure rates are considered high. The ITL program also focuses on addressing language and cultural fluency in order

to assist foreign professionals to better integrate into Canadian society, which is somewhat considered in the NCA evaluation. Currently set up as a one-year long course, the ITL program also includes legal work placements to assist foreign-lawyers enter the job market and make local connections. This program has yet to be evaluated for its success rate, but it appears to fulfill an important role in bridging a gap for foreign lawyers.

Apart from seeking significant steps towards progressive liberalization of trade in legal services through opening Canada's assessment of equivalency doctrines, perhaps to mirror the EU model for example, other potentially less drastic steps would also improve the system as it currently stands. Increasing transparency by publishing a basic rubric of assessment criteria would be a first step. Likewise, the NCA could work to publish more specific statistics relating to foreign applicants' credentials matched with their level of required re-assessment. The individual law societies and provincial and territorial governments should also seek to promote transparency and fairness through their respective criteria for bar admission. Finally, developing programs such as the ITL course implemented by the Government of Ontario will hopefully help facilitate entry of foreign lawyers into Canada and ensure a higher success rate for challenge examinations.

## Roadblocks

While an increase in human capital may be advantageous to Canada, various concerns might be raised. One such concern is that facilitating access will unfairly drain talent from other countries, including those that are economically undeveloped. However, Canadian public policy makers can legitimately take this into account, and emigration of talented individuals has positive as well as negative effects on source countries. Many foreign nationals send financial remittances to their hard-pressed families back home. While some will stay long term, many eventually return to their source countries and take with them enhanced knowledge, skill and experience. Commentators often speak of "brain circulation" rather than simply "brain drain".<sup>757</sup> Those who stay abroad are often able, by virtue of their continuing knowledge and connections with their original home, to assist in enhancing their original home's trade and intellectual connections with their new home. The availability of an "exit" option for skilled workers may also encourage their home countries to adopt policies that encourage talented individuals to stay, and in so doing, improve the quality of life for the population generally.<sup>758</sup>

As a practical matter, any attempt to assist other countries by restricting intake of their skilled workers is futile. Potential immigrants who cannot come to Canada are likely to find other developed countries that will host them. If Canada finds that its welcoming policies are actually damaging to foreign countries, the appropriate response should not be to restrict the free movement of people; rather, it should be to create positive measures such as facilitating the movement of its own skilled workers to developed countries, whether on a temporary or longer term basis, and providing support in other countries for local education and training.

Concern might also be expressed about Canada taking measures such as negotiating MRAs with other states that will facilitate the emigration of skilled Canadians. If the view is adopted that outflows are, on balance, damaging to Canada, then a utilitarian calculus might suggest adopting a strategy of facilitating immigration, and only negotiating reciprocal agreements to facilitate movement when the likely result is that more human capital will arrive here than will exit. But there is no clear evidence that Canada loses more than it gains when its residents are able to go abroad to practise their professions or vocations. As is the case in less developed countries, many Canadians who practise their skills and trades abroad eventually return, and do so with enhanced knowledge, skills and perspectives. Furthermore, competitive pressure for talent can have a positive effect on Canadian governmental policy. If professionals are leaving Canada because they find regulations unduly restrict their ability to make use of the latest and best practices and techniques, governments have an incentive to adopt positive measures to retain and attract talented individuals. For example, concerns about the outflow of top minds encouraged Canada to take the positive step of establishing its Canada Research Chair program at Canadian universities.<sup>759</sup>

The lack of political will mentioned earlier is also a significant concern. While developed nations continue to experience high level of unemployment, “political resistance to all forms of labour mobility is extremely high.”<sup>760</sup> Recognizing the public’s impact and the inevitable politics involved in moving ahead to a further liberalized service market and increased temporary labour mobility, it might be more productive and realistic to achieve this when unemployment rates reach more normal levels.

## Recommendations

Overall, there is much room for expansion of Canada’s obligations in order to truly reach a state of liberalized legal services. First, Canada could work to expand the scope of its commitments, both by opening its obligations to the practice of domestic law and by committing to liberalize mode 4 beyond the business visitors, professionals and intra-corporate transferees exceptions. One aspect of this that could promote increased labour mobility would be removing the 90-day limit and restriction on renewal permits for these visitors, such as *NAFTA* already allows. In a current revised offer affecting Canada’s horizontal obligations, some strict residency requirements have been replaced with more liberal ones.<sup>761</sup> However, complete removal of residency and citizenship requirements would be best. Similarly, encouraging provinces to offer special and expedited accreditation procedures for foreign legal professionals wishing to work as FLCs on a temporary basis would also be helpful.

Along the same lines, encouraging the provinces and territories to create harmonized standards for bar admission would increase accessibility to the Canadian market for foreign professions while also potentially facilitating recognition agreements in the future. The Canadian government could commence negotiations with the provincial and territorial governments while also encouraging

legal professional associations, such as the CBA and the FLSC, to work with their international counterparts to develop large-scale harmonized requirements and practices. Furthermore, Canada could enter into negotiations with other Members, on a bilateral or multilateral basis, in order to adequately evaluate equivalency of each legal system, licensing program and educational requirements. Looking to the European model as well, Canada could aim to be more lenient on labour mobility between Quebec and common-law Canada as well as on foreign legal professionals originating from non-common law countries, whether they are from civil, mixed or religious legal traditions.

Lastly, mixing labour mobility with immigration federally may be damaging to the viability of foreign workers working in Canada on a temporary basis. "In nearly all countries, the agency that deals with the influx of foreign labor is the immigration authority, whose concern is to regulate and restrict, not to promote."<sup>762</sup> Beyond that, immigration authorities are normally more concerned with permanent migration than temporary movement.<sup>763</sup> As such, labour mobility becomes subject to many of the same concerns as immigration, though they do not necessarily go hand in hand: one deals with market access, the other with citizenship and political rights.<sup>764</sup> Keeping the two separate would help to eliminate some of the complex roadblocks to working temporarily in Canada.

## Conclusion:

### To Liberalize or Not to Liberalize?

Numerous strategies to encourage labour mobility in legal services in Canada have been suggested throughout this paper. The advantages of opening the Canadian legal services market through the various methods looked at would accrue not only to foreign practitioners wishing to practise in Canada temporarily or on a long-term basis but also to members of the local profession and the Canadian public. As we have seen, internal protectionist tendencies can form real barriers to opening markets, however the benefits of liberalization tend to overcome these restrictive policies overall.

Absent any demonstration of significant harm to society as a whole, Canada should act on the basis that the free mobility of individuals—including the movement of skilled individuals from Canada—is warranted by the rights and interests of those individuals themselves. A free society respects and values individuals as ends in themselves. If a Canadian resident believes that he can best realize his ends in life by deploying his talent and training in another part of the world, Canada should be supportive of that choice, rather than attempt to retain its human capital by relying on unreasonable barriers to entry maintained by other countries. Federal and provincial governments, and the professional bodies they establish or regulate, should therefore work individually and in cooperation in the international arena to promote the movement of professionals and skilled workers. These measures can include working within the *GATS* or outside the *GATS* framework. The overarching concern is fostering greater labour mobility, however that may be

achieved. The *GATS*, after all, is not necessarily at the forefront of rule-making, and is not entirely living up to its initial aspirations or desired functions.<sup>765</sup> Possible steps to assist in achieving increased labour mobility to Canada include:

- Increasing the scope of professions, trades and other service activities that are listed on Canada's schedule under the *GATS*, with a particular emphasis on facilitating mode four—the supply of services in Canada by foreign nationals—by expanding listed exemptions and visiting periods;
- Working with the *GATS* Council for Trade in Services to continue its efforts to establish the Accountancy Disciplines, and to extend these liberalizing principles horizontally, with appropriate refinements, to many other professions and services;
- Working much more vigorously, in the context of government-to-government agreements (including agreements involving provinces, as well as Canada's federal government), for provisions on the mutual recognition of credentials;<sup>766</sup>
- Encouraging professional and trade bodies to work with their counterparts in other jurisdictions, both in Canada and abroad, to develop harmonized standards of recognition;<sup>767</sup>
- Increasing transparency for recognition assessment criteria.

The failure of the Uruguay Round to lead to significant liberalization in the practice of host country law is understandable considering the difficulty of obtaining meaningful commitments for legal services in multilateral negotiations.<sup>768</sup> However, the lack of progress suggests that the current structure of *GATS* might not be the most effective vehicle for bringing about the desired change.<sup>769</sup> This suggestion is further supported by the lack of progress achieved under both tracks of negotiations in the current round. While the *GATS* may have assisted in putting the issue of regulation of legal services on the world stage, this is the extent of its contribution to the issue under consideration; it has managed to bring about few actual achievements.<sup>770</sup> Despite the importance of a multilateral negotiation framework, if it is entirely ineffective, as the *GATS* has been, less desirable bilateral and unilateral arrangements become relatively more desirable and important; at the very least, they are effective. An increase in regional agreements and agreements allowing for the mutual recognition of credentials could fill the gap that the *GATS* was intended to fill for temporary labour mobility. As these peripheral arrangements are more tailored to participants and regional conditions, they could also more directly lead to labour mobility on a long-term or semi-permanent basis. As international agreements go, the aims of the *GATS* are ambitious and valuable, though the current negotiating strategy is undoubtedly flawed; however, WTO member states should avoid inaction where "the best is the enemy of the good". A more refined approach to multilateral negotiations could assist in revitalizing the *GATS* and mutual recognition agreements permitted under the *GATS* could fill in during the interim. When it comes to progress in labour mobility and recognition of credentials in the legal profession to date, the contribution of *GATS* has been limited to discussion rather than concrete results; it has been all talk and no action.

## Chapter V

# Improving Foreign Credential Recognition through Reform in Immigration Law and Policy

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**I**mmigration is of paramount importance to Canada and its present and future economic prosperity. Immigrants make considerable contributions to the nation's economy, and to effectively maximize these contributions, foreign credential recognition is of particular significance. Canada accepts a large number of immigrants each year, many of whom possess foreign credentials, and a significant proportion of these immigrants are unable to work in occupations that correspond appropriately to their skills and training. Alterations in immigration law and policy can help to address these issues.

To ensure that the points awarded for education in the federal skilled worker immigration category are commensurate with the actual value of the academic credentials in Canada, and to provide full disclosure to immigrants with respect to the value of their credentials in Canada:

- The federal government should consider awarding points for education in the federal skilled worker immigration category based on a credential's value in Canada, as opposed to the credential's standing in the country in which it is earned.

To encourage and facilitate the immigration of people who are guaranteed to have credentials that are recognized in Canada, and who either have or are guaranteed to obtain valuable Canadian work experience:

- The federal government should consider allowing the educational portion of the Canadian Experience Class of immigration's requirements to be satisfied by credentials from Canadian university campuses abroad. The additional requirement for one year of skilled work experience in Canada for those with Canadian post-secondary credentials could also be altered; a concrete offer of employment in a skilled occupation, or one year of previous skilled work experience in Canada, should be adequate to satisfy this requirement.

To increase transparency in the immigration process, and to minimize the false hopes that some immigrants experience:

- The federal government should establish and maintain a database of "match rates" for specific regulated occupations for immigrants from key immigration source countries. This database should be available online to anyone who wishes to access it.

## Introduction

Foreign credential recognition in Canada is directly and intricately linked to immigration. Before discussing the immigration law and policy that affects foreign credential recognition, it is prudent to briefly survey current issues in immigration, and immigrants' actual experiences with credential recognition processes.

In November 2009 Jason Kenney, Canada's Minister of Citizenship and Immigration, asserted that Canada was "maintaining the world's highest relative levels of immigration" at 0.8% of the population annually, approximately 250,000 people per year, and that "no country in history has maintained that kind of velocity of demographic change."<sup>771</sup> Minister Kenney reiterated in March 2010 that "[w]e intend to continue with historic high levels for immigration."<sup>772</sup> Many of these immigrants hold international credentials, and it can be reasonably inferred that with historically massive levels of immigration, foreign credential recognition is currently playing, and will continue to play, a key role in Canada's economic prosperity. The government of Canada wants these immigrants to integrate both socially and economically. For successful economic integration, Canada must develop effective mechanisms to facilitate the recognition of foreign academic credentials and substantive competencies.<sup>773</sup> In addition to desirable changes in other areas, alterations in immigration law and policy can be an important part of the solution.

Foreign credential recognition processes must be made fair, transparent, consistent and timely, and assessment results should be portable across Canada.<sup>774</sup> Although there have been efforts put forth to improve foreign credential recognition in Canada, and important progress has been made in some areas, Canada's present immigration law and policy does not adequately facilitate the most efficient and effective economic integration of immigrants. This paper addresses problems related to the false expectations experienced by some immigrants whose credentials are considered relevant for the purposes of immigration, but then not recognized for employment purposes upon arrival, the need for increased transparency in the immigration system, and the importance of recognizing immigrants' foreign credentials once they are in Canada in an accurate and expedient manner.

## The Immigration Debate

There is not a consensus that high levels of immigration are desirable or helpful to Canada economically. Some assert that rather than spending time and money improving foreign credential recognition and facilitating economic integration, immigration levels should be significantly lowered. It has been argued that Canada's immigration levels are already much too high, with the problem potentially being compounded as the leaders of all of Canada's major political parties promise even higher immigration levels.<sup>775</sup> Proponents of this view argue that even during times of prosperity, immigrants are a great burden on the country economically.

One study contends that the 2.9 million immigrants who arrived in Canada between 1990 and 2002 “received \$18.3-billion more in government services and benefits than they paid in taxes” in 2002.<sup>776</sup>

This study should only be considered in light of the assumptions made in it. The findings are arrived at based on the fact that in Canada income is distributed “from high to low income earners,” and immigrants generally earn less income than those born in Canada. The result is lower income taxes paid by these immigrants, while they benefit equally from social services.<sup>777</sup> It is also asserted that the lower average income of immigrants results in them paying less in sales taxes and “taxes on their asset holdings.”<sup>778</sup> The key point is that the precise tax remittance numbers were estimated based on assumptions, and it was determined based on this that in 2000 “the value of government services consumed by the average immigrant who arrived in 1990 exceeded the value of the taxes paid by \$6,294.”<sup>779</sup> This number is then used for each of the 2.9 million immigrants who arrived in Canada between 1990 and 2002, and the conclusion is reached that these immigrants as a whole cost Canadian taxpayers \$18.3-billion in the year 2002 alone.<sup>780</sup> This assertion is, the author admits, “based on a number of important assumptions, some spelled out and some implicit. Only further work can establish the extent to which the results were influenced by unrealistic assumptions.”<sup>781</sup> These calculations should only be used with caution to influence immigration law and policy, simply because the assumptions made cannot be confirmed. It should also be noted that the economic value of immigration is not solely based on the first years that a person is in Canada, but on the contributions of an immigrant over a lifetime.

Some are extremely critical of the point of view that immigrants are a burden to Canadian society. In 2009, 73,000 immigrants came to Canada under the Federal Skilled Worker program;<sup>782</sup> immigrants in this class are selected based on the perceived likelihood they will succeed economically.<sup>783</sup> Additionally, the “baby boom generation” is beginning to enter retirement, and all of these workers cannot be replaced by Canadian-born workers.<sup>784</sup> It has been estimated that by 2011, all of Canada’s net labour force growth may be derived from immigration, and by 2030 immigration may produce all of Canada’s population growth.<sup>785</sup>

It is true that immigrants face higher levels of poverty than Canadian-born people, and many immigrants “face a tough time in establishing themselves in our country, partly because their prior skills and experience often go unrecognized.”<sup>786</sup> Improvements in foreign credential recognition in Canada can undoubtedly facilitate the stronger and faster economic integration of immigrants upon arrival. “[T]he cost of untapped potential is estimated to range between \$2.4- and \$5.9-billion annually,”<sup>787</sup> which highlights the importance of facilitating immigrants’ economic integration to Canada generally.

Some argue that affluence is not dependent upon labour force growth, but on “sound economic policies,” and effective and efficient use of the current labour force.<sup>788</sup> The postulation that these things alone would lead to greater prosperity for the country than they would in addition to labour force growth is contradicted by statistics relating to Canada’s aging population. In 2006 “the ratio of the

population age 65 and over to the population of traditional working age (18-64)“ was 20%.<sup>789</sup> It is estimated that “based on current fertility rates, current immigration levels and moderately rising life expectancy,” this ratio will increase “to 46 percent in 2050.”<sup>790</sup> This would mean that for every 100 Canadians between the ages of 18 and 64, there would be 46 Canadians aged 65 or older.<sup>791</sup> It is argued that the extreme level of immigration needed to maintain a ratio of 20% is unsustainable, and this shows “clearly that immigration cannot realistically be used to solve Canada’s problem” in this area.<sup>792</sup>

Immigration should not be disregarded as part of the solution simply because it will not solve the problem alone. It would not be reasonable to suggest that immigration rates should be increased to maintain a dependence rate of 20%. To do this, if the age distribution of immigrants remains the same, the required increase would be “immediate and colossal,” bringing Canada’s population to 56.6 million by 2020, and 165.4 million by 2050.<sup>793</sup> Using immigration alone to solve this problem is simply unrealistic,<sup>794</sup> but relatively high levels of immigration can alleviate the rising dependence ratio to an extent. Lowering immigration rates significantly, as some suggest is desirable, would ostensibly result in the dependence ratio rising higher and faster than the above estimations suggest, given that those estimations are based on maintaining current immigration rates.<sup>795</sup> Relatively high levels of immigration combined with the efficient and effective use of Canada’s present and future labour force is a desirable means to maintain affluence across the country.<sup>796</sup> Immigration is part of the solution, and Canada owes it to its future immigrants and its present citizens and permanent residents to develop strong and effective foreign credential recognition processes to assist in the economic integration of a large portion of Canada’s labour force.

## **Economic Integration: The Cost of Failing to Recognize Foreign Credentials**

In 2007, approximately 55% of immigrants to Canada were accepted under the economic category,<sup>797</sup> and in 2008, almost 45% of Canada’s immigrants held university level degrees.<sup>798</sup> Many economic class immigrants are accepted at least partially because of their internationally obtained academic credentials and work experience. These people will require assessment and recognition of their credentials and competencies if they are to properly integrate economically.

There is an economic cost to Canada that results from the inability to properly recognize these foreign credentials. The Parliamentary Standing Committee on Citizenship and Immigration estimates the cost at \$2.4- to \$5.9-billion annually.<sup>799</sup> It is clear that there are significant benefits to establishing adequate credential recognition mechanisms.<sup>800</sup> Such mechanisms will facilitate economic integration, leading to financial advantages for both Canada and individual immigrants, while enhancing Canada’s reputation abroad as a destination of choice for highly educated and skilled immigrants.

The foreign credential recognition problem is especially significant in the regulated occupations, where regulatory bodies often define stringent and specific credentials that one must hold in order to enter a given occupation in a certain jurisdiction.<sup>801</sup> In 2006 there were 1.8 million people in Canada holding degrees that would “typically lead to work in a regulated occupation.” Of these people, slightly over 600,000 were immigrants, and slightly over 400,000 of those immigrants were educated abroad.<sup>802</sup> If any considerable portion of the 400,000 immigrants with the required credentials from institutions abroad cannot have those credentials properly recognized and work in their appropriate occupations, the result is a significant waste of human capital. This leads to what is colloquially termed the “doctors driving cabs” problem. The quandary is highlighted by the unemployment rates of these highly educated and skilled immigrants being significantly higher than their Canadian educated counterparts.

Foreign-educated immigrants with degrees that would normally lead to regulated occupations had an unemployment rate of 7% in 2006, compared to their Canadian counterparts’ rate of just 2.5%.<sup>803</sup> Even further stressing credential recognition problems in Canada, only 24% of these foreign-educated immigrants were working in the fields that their credentials would normally entitle them to work, compared to 62% of Canadian-educated workers.<sup>804</sup> In order to maximize the well-being of these immigrants, and to maximize the utilization of their potential contributions to Canada, efforts must be made to ensure that those with foreign credentials are able to work in jobs commensurate with their skills, training and experience. Canada is presently failing its immigrants in this regard.

## **Immigrants Finding Work Commensurate with their Skills and Training**

An immigrant to Canada may find herself unable to work in an occupation for which she is qualified for a number of reasons.<sup>805</sup> These reasons can include a “lack of foreign credential recognition,” a lack of both Canadian work experience and “connections in the job market,” the discounting of foreign work experience, and not having adequate support networks, such as friends and family, to help.<sup>806</sup> Any of these things may lead to a person not being able to work in a position that she or he is qualified for. This occurs too often in Canada, and is an inexcusable waste of human capital.

It has been suggested that the large number of immigrants coming from Asian countries with educational systems about which relatively little is known may cause some employers to be suspicious of a credential, and this can result in an immigrant experiencing difficulty finding a job commensurate with his education and abilities.<sup>807</sup> This trend appears when comparing immigrants who arrived prior to 1991 with more recent ones arriving between 1991 and 2006. In 2006, 21% of male immigrants with university degrees who had arrived in Canada between 1990 and 1994 worked in low-skilled occupations, compared to only twelve percent of university educated immigrants in 1991 who had arrived between 1975 and

1979.<sup>808</sup> This highlights the importance of providing ways to assess a person's competencies, and not only their academic credentials.

The "match rates" (working in the occupation that one's credentials would typically lead to)<sup>809</sup> for people educated in Canada are higher than for foreign-educated immigrants, regardless of how long an immigrant has been in Canada. Match rates do increase with time for people with foreign credentials,<sup>810</sup> but it is unclear whether that is the result of additional training and/or education. The match rates for those with foreign credentials for some specific occupations are abysmal. The lowest match rates are in law (12%), engineering (19%), and teaching (20%).<sup>811</sup> The fact that the match rate for engineering is so low is particularly troublesome, because 52% of foreign-educated immigrants with credentials that normally lead to regulated professions have degrees in engineering.<sup>812</sup>

For Canadian-educated workers, the match rates are very high in medicine (92%) and nursing (73%), but this is not the case for foreign educated workers who have match rates of only 56% for both of those occupations. Foreign-trained optometrists have a match rate of 38% compared to 95% for those educated in Canada.<sup>813</sup> This is disturbing considering that labour shortages were reported in all three of these occupations in 2006, and these shortages were expected to persist over the next decade.<sup>814</sup>

The match rates for workers in all regulated occupations combined for those with credentials from certain countries vary depending on the destination province. For all foreign-educated workers, match rates range from a low of 19% in Quebec to a high of 60% in Newfoundland and Labrador, and the national average is 24%.<sup>815</sup> Newfoundland's match rate of 60% for foreign-educated individuals is just three percent lower than that province's match rate for Canadian-educated people, but the number of foreign-educated immigrants is very small (605).<sup>816</sup> The match rates for domestically-trained workers also vary by province, from a low of 59% to a high of 65%.<sup>817</sup>

Generally, immigrants who earn credentials in countries with education systems similar to Canada's have higher match rates. The highest are for those educated in Ireland (59%) and New Zealand (57%), and the countries with the lowest match rates are Kazakhstan (7%), Moldova (9%), and Morocco (9%).<sup>818</sup> The top three countries from which Canada's economic immigrants are currently derived are China, India, and Pakistan.<sup>819</sup> India and Pakistan both have match rates of 21%, and China's is 15%.<sup>820</sup>

Many immigrants to Canada feel that their expectations are not met, and economic immigrants are the most likely to feel this way.<sup>821</sup> It is postulated that the explanation for this could be that economic immigrants have higher expectations regarding their employment prospects before arriving in Canada, and subsequently have "difficulty realizing these."<sup>822</sup> These high expectations may be at least partially the result of Canada assigning points in the immigration system for their educational achievements, but then failing to properly recognize that education for employment purposes.

To increase transparency for potential immigrants, the government of Canada should consider the establishment and maintenance of a public database identifying match rates each year for immigrants holding credentials from specific countries that typically lead to specific occupations. This would provide a greater degree of transparency from the Canadian government regarding the success of immigrants, and would assist potential immigrants in deciding whether to come to Canada. Such a database would also act as a gauge for Canada to measure its progress regarding the improvement of its foreign credential and competency recognition processes, and the effectiveness with which its most highly educated and skilled immigrants are integrating economically.

## Summary

The facts outlined above should serve as a catalyst for change in the area of recognition of foreign credentials in Canada. Canada accepts large numbers of immigrants each year, and by failing to provide adequate means of recognizing their foreign credentials, the country is causing frustration and economic hardship for these immigrants, while also diminishing their potential contributions to Canada. Internationally obtained credentials and competencies need to be accurately assessed and recognized, which would increase the ability of people holding these credentials to work in occupations that correspond to their skills and experience.

It is important to maintain barriers to professional licensure to the extent required to guarantee the safe and competent delivery of services to Canadians. While overly restrictive barriers may be sufficient to achieve the goal of public protection, they are not necessary to achieve that goal. Combined with the removal of unnecessary barriers to regulated occupations,<sup>823</sup> accurate assessment and recognition of foreign credentials and competencies would ensure the safe provision of services to Canadians, increase Canadians' access to these services, promote competition in these occupations, and facilitate the economic integration of many immigrants.<sup>824</sup>

Immigration law and policy is one avenue through which positive change can be achieved. The government decides who will be allowed to immigrate to the country, and often bases this decision partly on a person's education. In doing this, the government of Canada has an obligation to see that these credentials are accurately recognized in terms of their Canadian equivalents, for the good of the immigrants themselves, the Canadian economy, and for Canada's future stature as a desirable destination for highly educated and skilled immigrants.

## **The *Immigration and Refugee Protection Act***

The criteria based upon which immigrants are selected, and the processes in place to facilitate their integration are often defined, and always influenced, by immigration law and policy. Immigration in Canada is governed by the *Immigration and Refugee Protection Act (IRPA)*.<sup>825</sup> Under *IRPA*, the government develops immigration plans each year; these plans attempt to balance three important goals. One goal is to ensure the continued economic prosperity of Canada. An additional objective is to see family reunification in Canada, and the final goal is to “uphold Canada’s international humanitarian obligations.”<sup>826</sup>

There are several different categories under which one can immigrate to Canada. The three broad categories correspond to the main objectives of Canada’s immigration plans. These categories are the Economic Class, the Family Class, and Protected Persons; within the Economic Class there are subcategories.<sup>827</sup> Different types of Economic Class immigrants include federal skilled workers, “provincial and territorial nominees, the Canadian Experience Class, and live-in caregivers, as well as their immediate family members.”<sup>828</sup> For those outside of the economic class, and even for some within it, educational credentials do not affect the decisions made regarding one’s immigration status. This paper mainly focuses on categories in which education is a factor, but it should be noted that although educational considerations are not relevant for some immigrants in terms of their immigration statuses, many of these people still hold foreign credentials which they will rely on during the economic integration process.

*IRPA* was amended in 2008 in response to a large backlog of potential immigrants awaiting responses to their applications.<sup>829</sup> These amendments will be discussed first, followed by considerations regarding the categories of immigration, and what could be done to manipulate immigration law and policy to better facilitate foreign credential recognition and the economic integration of immigrants.

## **The 2008 Amendments to the Immigration and Refugee Protection Act (IRPA)**

In June 2008, Canada’s parliament approved amendments to *IRPA*, that were meant to improve efficiency in “the processing of select skilled worker applications.”<sup>830</sup> The concern was that because of extended wait times resulting from the backlog that had amassed, “Canada [was] losing out on talented immigrants who [were] choosing to go to other countries such as Australia where the wait time [was] six months, not six years.”<sup>831</sup> Improving wait times is a very important objective in improving Canada’s immigration system, and it is encouraging that there is recognition that Canada has to be aware of the possibility of losing highly skilled and educated immigrants to other countries. In addition to potentially losing immigrants due to long wait times, there is also a danger of losing immigrants to countries with better processes for recognizing internationally-obtained credentials and competencies. Conversely there is

an opportunity for Canada to develop both competency-based and academic credential recognition processes that act as an attractive force to highly educated and skilled immigrants.

Canada's constitutional division of powers delegates various powers that impact foreign credential recognition to the provinces/territories and the federal government.<sup>832</sup> The provinces and territories have jurisdiction over education, the trades and most regulated professions, while the federal government's role stems from "its responsibilities for the immigration system, national labour market policies, and providing leadership and national tools to strengthen the economic union."<sup>833</sup> With respect to immigration, it is notable that the 2008 *IRPA* amendments take into account the need for faster processing of applications for those who have credentials in areas that are in demand in Canada, but the amendments remain silent regarding the recognition of those foreign credentials.

Under the amended *IRPA*, Canada is no longer required to assess every immigration application received, which was previously the case.<sup>834</sup> It may seem that all applications should at least be reviewed, but the requirement to consider each candidate led to a massive backlog in the immigration system that reached about 925,000 applications in 2008.<sup>835</sup> There was a fear that if nothing was done, the backlog had the potential to reach 1.5 million people by 2012.<sup>836</sup> The government of Canada is still required to process each application that was received before these amendments came into effect, but since all new applications do not need to be considered, the backlog should stop growing.<sup>837</sup> Of the 925,000 accumulated applications, approximately 640,000 were in the economic category. That portion of the backlog has been reduced by over 40%, to 374,827 (as of 31 March 2010).<sup>838</sup>

The Minister of Citizenship and Immigration may now issue instructions regarding which applications are eligible to be processed under *IRPA*.<sup>839</sup> If an application in the Federal Skilled Worker category meets the required criteria as set out in the instructions, then the application is "processed according to the six selection factors in the skilled worker points grid."<sup>840</sup>

These instructions will impact tens of thousands of potential immigrants each year. For example, Canada's 2011 immigration plan calls for up to 161,300 economic immigrants, up to 65,500 immigrants under the family reunification category, up to 29,000 protected persons, and as many as 9,200 "others," who are mostly admitted on compassionate or humanitarian grounds.<sup>841</sup> Up to 80,400 of the economic class immigrants can immigrate under the federal skilled worker category.<sup>842</sup>

The current Ministerial Instructions were published on June 26, 2010, replacing the original ones issued in 2008.<sup>843</sup> Minister Kenney asserted in 2010 that due to implementation of the original instructions "processing times have improved, with the majority of new applications processed in six to 12 months."<sup>844</sup> "[R]ising volumes of new federal skilled worker applications prompted an exploration of options to update the Ministerial Instructions to ensure sustained progress on the Action Plan for Faster Immigration," which resulted in the development of the new instructions.<sup>845</sup>

It is now indicated that “[f]or [an] application to be eligible for processing, [applicants] must include the results of [a] language proficiency test, and either” have a year of full-time or equivalent paid experience in one of 29 listed occupations, or “have a valid offer of arranged employment.”<sup>846</sup> It should be noted that the requirement for submission of a “language test result” is new, and will apply to the Canadian Experience Class as well as the Federal Skilled Worker category.<sup>847</sup>

A limit has also been placed on the absolute number of applications that will be considered “eligible for processing” each year under the 29 listed occupations. A cap of 20,000 applications in all of the listed occupations each year has been established, and there is also a limit of 1,000 applications that can be considered for any single listed occupation. It is worth noting however, that “[t]he limit does not apply to applicants with a job offer.”<sup>848</sup>

## The Economic Class of Immigration

### i. Federal Skilled Workers

The skilled worker category includes both federal and Quebec-selected skilled workers. Quebec selects these workers based on its own needs and criteria.<sup>849</sup> For the rest of Canada, skilled immigrants are selected based on a points system. Points are awarded based on a person’s “level of education, previous work experience, knowledge of English and/or French, age, arranged employment, and adaptability.”<sup>850</sup> Federal skilled workers are often admitted to Canada based heavily on their educational attainment abroad. Once they have been admitted on this basis it is disingenuous to then convey to them that their credentials are not valued in Canada.

Of the maximum 161,300 economic immigrants to be accepted into Canada in 2011, up to 80,400 spots are designated for federal skilled workers.<sup>851</sup> When applying *IRPA*, Citizenship and Immigration Canada employees “consult operational chapters and operational bulletins for guidance.”<sup>852</sup> “OP 6,” the “Federal Skilled Workers” operation manual<sup>853</sup> provides ample insight regarding how applications are processed in this category. It is clarified that when awarding points for education in an immigration application, Visa Officers are to “assess programs of study and award points based on the standards that exist in the country of study. The Regulations do not provide for comparisons to Canadian educational standards.”<sup>854</sup>

Up to 25 points are available on the basis of a person’s educational attainment, which will be discussed in more detail below. If an immigrant has arranged employment that she “is able to perform and is likely to accept and carry out,” that person can receive an additional 10 points on her immigration application.<sup>855</sup> In order to receive these points, the offer needs to meet certain requirements. If a person is presently employed in Canada, then her employer “must have made an offer to give [her] a permanent job if [she is] accepted as a federal skilled worker,” and her temporary work permit has to be valid throughout the entire process.<sup>856</sup>

Additionally, the person's "work permit must have been confirmed by Human Resources and Skills Development Canada (HRSDC) through a positive labour market opinion," or the person's occupation must be one "that is exempt from an Arranged Labour Opinion" (AEO).<sup>857</sup> If the person is not presently employed in Canada, an offer "is valid if [his] prospective employer" has both made a job offer for an indefinite amount of time and "has obtained a positive Arranged Employment Opinion," or the occupation is one that is exempt from requiring an AEO.<sup>858</sup> In addition, if the job offer is in a regulated occupation, the person must "meet all required Canadian licensing or regulatory standards" that are relevant.<sup>859</sup>

Perhaps more points should be awarded where there is arranged employment, because it would be advantageous to increase the probability of a person with such an offer being accepted to immigrate to Canada. Statistics indicate that for immigrants who arrived in Canada between 2000 and 2001, "having a pre-arranged job at landing is the strongest correlate of work experience recognition: 87% compared to 42% for those without a prior employment arrangement." In addition, arranged employment increased the "predicted probability of credential recognition," from 29% for those without arranged employment to 40% for those with it.<sup>860</sup>

Immigrants who have obtained employment before arrival will almost immediately begin to contribute to Canada's overall economic prosperity, and the economic integration of these people will be greatly facilitated by this first Canadian job. The immigrant would have more time to go through any foreign credential recognition processes that are required, without needing that recognition immediately to obtain adequate employment. This would also likely result in a decrease in the frustration and disappointment felt by many immigrants who come to Canada with the expectation of finding suitable employment, only to have those expectations dashed due to issues relating to their foreign credentials.

Up to 10 points for adaptability can also be awarded. Half of these points are based on the "educational credentials of the accompanying spouse or common law partner." The other five are awarded if the accompanying spouse has completed at least two years of study in Canada, even if no diploma was awarded for this education. Only one spouse can obtain adaptability points based on the other's educational credentials.<sup>861</sup> This compounds the importance of foreign credential recognition; it is conceivable that a person nearing the 67 total points required to be admitted to Canada as a permanent resident<sup>862</sup> will pass that threshold due to the combination of credentials held by that person and his or her spouse, only to find that the credentials are not fully or properly recognized in Canada. In total, 35 of the required 67 points can be awarded on the basis of educational attainment. The remaining points are awarded on the basis of age (10), proficiency in French and/or English (24), arranged employment (10) and experience (21). There are 100 points available in total.<sup>863</sup>

## ii. A Discussion Regarding the Points System

A major dilemma with Canada's points-based system is that it may leave immigrants with the idea that their credentials have been assessed by the Canadian government, and will be considered equivalent to corresponding Canadian credentials. The points system currently lacks any connection to credential recognition, and this problem is plainly visible in the *Premakumaran* case,<sup>864</sup> which frames this defect in a striking way. The Premakumarans are an immigrant couple who argued in a lawsuit against Citizenship and Immigration Canada:

[T]hat the points system used to select skilled immigrants is deceptive and flawed, as the process misrepresents that selected applicants have been screened for special occupational skills and experience that will be readily transferrable to the Canadian labour market.<sup>865</sup>

The case was dismissed,<sup>866</sup> but it still serves as an important voice for immigrants, and a significant warning for Canada, illuminating a flawed system that can lead to frustration and disappointment.

Some may argue that instead of placing such a heavy value on education in the points system, Canada should require pre-arranged employment. If this approach is adopted, foreign credential recognition issues would have to be addressed by an immigrant and employer prior to immigration. It is argued that this approach, which is taken in the United States, eliminates the foreign credential recognition problem, and that "vulnerabilities related to miscommunication about realistic expectations of employment opportunities are less important... in the United States, compared to their Canadian counterparts."<sup>867</sup> In the United States however, there is also a "bottleneck" in the immigration system causing delays and frustration for both employers and immigrants. To get around this, some employers have begun using potential immigrants as temporary foreign workers until the immigration process can be completed.<sup>868</sup> The problem with this is that it leaves the potential immigrant vulnerable to exploitation, because the employer can remove the offer of employment at any time and dash the immigrant's hopes of permanently moving to the United States.<sup>869</sup> Requiring pre-arranged employment would be a major shift in Canadian immigration policy, and may hinder efficiency in the system based on the experience of the United States. Canada currently considers an offer of employment as a factor rather than a requirement, awarding points to federal skilled workers with such offers. This is probably the correct approach in conjunction with economic immigration already based on labour market needs (the ministerial instructions).

The points system is a practical way to attempt to ensure immigrants coming to Canada have the most advantageous educational backgrounds and other characteristics to become productive members of society. The reasons for the current setup in the immigration points system should be considered before recommending any substantial change to it. *IRPA* regulations state that the federal skilled worker class is intended to be "a class of persons who are skilled workers and who may become permanent residents on the basis of their ability to become

economically established in Canada.”<sup>870</sup> To determine whether a person “will be able to become economically established in Canada, they must be assessed on the basis of,” among other things, “education, in accordance with section 78.”<sup>871</sup> Points are to be awarded based on the level of education attained, to a maximum of 25 points; the number of points awarded for a given academic credential ranges from five for a secondary school diploma to 25 for a “master’s or doctoral level” credential.<sup>872</sup>

While only 28% of immigrants arriving between 2000 and 2001 that held foreign credentials had them recognized in their first four years in Canada,<sup>873</sup> the “principal applicants” in the federal skilled worker category for this period had better “recognition rates... (38% for credentials and 51% for work experience)... than any other group.”<sup>874</sup> This seems to suggest that the points system does presently produce its desired results to an extent, but the fact that 62% of these people did not have their credentials recognized within four years of arrival in Canada also implies that there is room for improvement.

Awarding points for education and other desirable attributes is a prudent method for seeking those who will be likely to succeed and integrate economically, but for an educational credential to most accurately predict economic success, that credential’s value in Canada would have to be established. Assigning points based on a credential’s value in Canadian terms would be an effective avenue through which the intention of awarding points for education can be more accurately realized.

Awarding the points based on a credential’s value in the country in which it is earned is undoubtedly an efficient way to go about awarding points, because this information is likely more readily available. Although this method is relatively inexpensive in terms of making a decision on a potential immigrant, finding an efficient way to award points based on a more accurate valuation of a foreign credential would have several advantages. It would decrease the level of unrealistic expectations felt by immigrants, and it would benefit Canada as a whole by awarding points in the immigration system based on a credential’s value in Canada, thus awarding more points to those who would be in better positions to integrate economically upon arrival.

More education “probably makes workers more flexible and more adaptable.”<sup>875</sup> One could argue that this would be the case whether or not a credential is actually recognized. As a result, it may be advantageous to Canada to have highly educated immigrants, even if these people’s credentials will not be recognized. This argument is a valid one, but Canada has a responsibility to be up front with potential immigrants about this. By providing potential immigrants with a very accurate idea of the values of their credentials in Canada during the application process, the expectations of those whose credentials will not be fully recognized will be more realistic.

The government of Canada should consider amending *IRPA*’s regulations to award points in the federal skilled worker category based on a credential’s value in Canadian terms, not based on the credential’s standing in the country in which it is earned. As it presently stands, a nursing degree (or any other degree) from Kazakhstan is awarded the same number of points as a corresponding degree

from Ireland. This is significant, because 49% of immigrants from Ireland with degrees typically leading to regulated occupations work in the occupations those degrees normally lead to, whereas that is the case for only seven percent of their Kazakhstani counterparts.<sup>876</sup> Part of this large discrepancy may be explained by Canadian regulators and assessors having a stronger understanding of the Irish education system. It is reasonable to assume, however, that a significant portion of the discrepancy is the result of Kazakhstani credentials reaching Canadian standards less often than Irish ones do.<sup>877</sup>

- One implementation option that could be considered is introducing legislation allowing the federal government to adopt the decisions of standalone credential assessment agencies<sup>878</sup> for immigration selection purposes. The federal government could then retain the services of these agencies to perform assessments of academic credentials, and award points based on the assessed Canadian value of the credential. Another implementation option would be for the federal government to develop the capacity to assess the credentials on its own, and award points based on the outcome of these assessments.
- The costs of assessment and recognition of credentials are not entirely avoided by basing points on the value of the credential in the country in which it was earned, but the cost is simply borne at a different time in the immigration process. Presently the cost of assessment and recognition of credentials is usually not paid for by the federal government; assessment fees are often covered by the immigrants themselves, employers, regulatory bodies or provincial governments.<sup>879</sup> Funding options for this recommendation include the federal government providing all funding, consortium funding from the federal government and the provinces, putting the cost on potential immigrants by increasing immigration application fees, or some combination of these options. Funding determinations should be considered in light of the fact that if this recommendation is adopted, the cost of assessments as a whole would not only temporally shift, but would also increase. The increases would be the result of the fact that many immigrants presently do not have their credentials assessed at all. This is demonstrated by the fact that for immigrants who arrived between 2000 and 2001, about 40% did not have those credentials assessed during their first four years in Canada.<sup>880</sup> Additionally, the credentials of many of those whose immigration applications are not ultimately accepted would also be assessed. The result would be a significantly larger number of actual assessments being performed.
- Implementation of such a recommendation would be a large departure from present practice in the federal skilled worker category. Before adopting the recommendation, further research regarding feasibility and the most effective and efficient mechanisms to carry out the recommendation would be prudent. This would ensure that adequate capacity to carry out the increased number of assessments is developed. It is also important to note that implementation of this recommendation could further heighten the expectations of immigrants regarding the type of employment they can attain in Canada. Hopefully these higher expectations would then be met with better and more consistent outcomes.

### iii. The Canadian Experience Class

The Canadian Experience Class (CEC) is a relatively new economic immigration category, established in September 2008. This category is intended for temporary foreign workers and foreign students who have graduated from Canadian educational institutions.<sup>881</sup> In order to apply for permanent residence under this category, one must “plan to live outside the province of Quebec,” be either a “temporary foreign worker with at least two years of full-time (or equivalent) skilled work experience in Canada,” or a foreign student who has graduated from “a Canadian post-secondary institution with at least one year of full-time (or equivalent) skilled work experience in Canada.” This study and/or work must have been legally authorized, and the application must be received while the person is still in Canada, or within one year of that person’s departure.<sup>882</sup> Skilled work experience means “skill type 0,” “skill level A,” or “skill level B” based on the Canadian National Occupational Classification.<sup>883</sup>

Immigrants coming under the CEC will not have the same foreign credential recognition difficulties that their fellow newcomers often encounter. This is simply because they will possess Canadian credentials and experience. It may be advantageous to consider extending the CEC’s reach to certain foreign-educated immigrants. There is a piece of legislation that has already been approved by India’s cabinet, and is currently before Parliament in that country called the *Foreign Educational Institutions (Regulation of Entry and Operations, Maintenance of Quality and Prevention of Commercialisation) Bill*. This bill would allow foreign post-secondary educational institutions to establish satellite campuses in India.<sup>884</sup> If a Canadian post-secondary institution is granting a credential in India, and there is assurance from that institution that the standards of the programs are on par with Canadian standards, then the educational portion of the CEC should be satisfied by such a credential. Alteration of the requirement for both a Canadian post-secondary credential and a year of skilled work experience in Canada could also be considered. A concrete job offer in a skilled occupation in Canada for an indefinite term should be adequate in lieu of a year of past experience. This way, a person educated at a Canadian university abroad would be eligible to apply to immigrate in the CEC once that person obtains an acceptable job offer in a skilled occupation, ensuring work commensurate with her or his skills upon arrival in Canada.

If someone is permitted to immigrate to Canada in the CEC only on the basis of a credential from a Canadian university campus abroad and an offer of employment in Canada, it may seem that one of the rationales for the CEC would be undermined. These people’s “experience in Canada” is an important factor in selection, which is intended to facilitate “a more seamless social and economic transition.”<sup>885</sup> This is a legitimate concern. For immigrants arriving in Canada between 2000 and 2001, “when controlling for the effect of individual characteristics ... the probability of [a person having his] foreign credentials” recognized within four years increased from 29% to 43% if the person had “[l]ived in Canada at least one year before landing,” and the likelihood of these people’s foreign work experience being recognized also increased (44% to 51%).<sup>886</sup> Clearly

there are advantages to having Canadian experience, but a similar increase in the predicted likelihood of credential recognition was found in cases where there was arranged employment (29% to 40%). There was also a very substantial increase in the predicted likelihood of these immigrants having their foreign work experience recognized (42% to 87%).<sup>887</sup> Although implementation of this recommendation may result in immigrants arriving without the same advantages that current CEC immigrants have, they would be very likely to attain very similar advantages in their first few years in Canada.

The only Canadian post-secondary institution that has expressed serious interest in setting up a campus in India is York University's Schulich School of Business,<sup>888</sup> but if successful, it is possible that others would follow. This type of strategy would not need to be reserved for India, because similar laws are already established in China, Singapore, The Philippines, and Vietnam.<sup>889</sup>

Whether the Canadian government should subsidize the establishment of foreign campuses of Canadian post-secondary institutions should also be considered. Perhaps subsidizing an academic institution that serves the population of a foreign country seems unattractive, but if there are a reasonable number of students attending this institution who are considering applying to immigrate to Canada, it may be advantageous. This subsidization would also assist foreign students planning to stay in their home countries who attend the institution, and this would reduce the extent to which Canada is siphoning human capital out of these countries.

## The Family Class

A Canadian citizen or permanent resident may sponsor a family member coming to Canada, and upon approval the sponsored person will become a Canadian permanent resident.<sup>890</sup> Once the family member is in Canada as a permanent resident, the sponsoring person is held responsible for the sponsored person for a period of time ranging from three to 10 years; this is done to ensure the sponsored person does not rely on social assistance.<sup>891</sup> A person may sponsor any "eligible relative," which includes spouses, common law partners, conjugal partners, dependent children, parents, grandparents, siblings, nephews or nieces, and grandchildren who are orphaned, less than 18 years old, and not married or in a common law relationship, or "another relative of any age or relationship, but only under specific conditions."<sup>892</sup>

The Supreme Court of Canada recently ruled in a unanimous decision that "the risk of a rogue relative properly lies on the sponsor, not the taxpayer."<sup>893</sup> Even if the government does not desire to collect repayment of relevant welfare expenditures from a sponsor, they have only "limited discretion ... to delay enforcement action having regard to the sponsor's circumstances ... but not simply to forgive the statutory debt."<sup>894</sup> Essentially, regardless of the personal circumstances that a sponsor is in, the government is obliged to secure recovery of any welfare payments that went out to the relatives they sponsored.

Family Class immigrants who arrived between 2000 and 2001 and held foreign credentials had a “predicted probability” of having those credentials recognized within four years of arrival of just 20%.<sup>895</sup> The possible burden of supporting the person that one has sponsored is a significant responsibility to take on. This situation highlights the importance of foreign credential recognition, as well as competency-based assessment, even in non-economic immigration categories.

If the government expects the sponsored person to come to Canada and become a self-sustaining member of society quickly, it must provide adequate mechanisms to facilitate economic integration. Although immigrants in this class are not admitted on the basis of educational attainment, many still possess credentials that are required or advantageous for their desired occupations.

## Conclusion

There is room to improve foreign credential recognition in Canada by making some changes to immigration law and policy. Awarding points based on an academic credential's Canadian value would be an effective way to ensure that those who are admitted to Canada based on their educational attainment actually have credentials that will facilitate economic integration. It makes little sense to admit a person to Canada as a permanent resident based on a credential that does not meet Canadian standards. This practice results in unrealistic expectations from immigrants regarding the type of work available to them in Canada, and from Canada regarding the expectation that the immigrants will be able to quickly integrate economically.

Immigration law and policy has been adapted to ease foreign credential recognition issues to a degree, with the establishment of the Canadian Experience Class in 2008. Encouraging those with Canadian credentials and experience to apply to immigrate circumvents credential recognition issues because the applicants possess Canadian credentials. The expansion of this program to allow those with credentials from Canadian university campuses abroad and concrete job offers in skilled occupations will only increase the degree to which these issues can be avoided.

Although these and other alterations to immigration law and policy can improve foreign credential recognition in Canada, these changes alone are not sufficient. Changes in immigration law and policy are one piece of the puzzle needed to create the most effective foreign credential recognition regime possible, along with improvements in facilitative mechanisms, international and interprovincial labour mobility agreements, fair access legislation, human rights laws and competition legislation. Ensuring that immigrants who come to Canada have the proper credentials to integrate economically must be accompanied by the elimination of barriers to fair and proper recognition, as well as the establishment of mechanisms to actually recognize credentials and competencies, while ensuring they are adequate to allow for the safe and competent delivery of services to Canadians. The federal government must expend time, money and effort to assist provinces in taking active steps to facilitate the economic integration of immigrants. This includes assistance with the recognition of academic credentials, help with the clinical assessment of applicants where required, and with bridging programs where there are legitimate gaps in education or skills.

## Chapter VI

# Improving Labour Market Integration and Interprovincial Mobility for Immigrants Holding Foreign Credentials

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While interprovincial labour mobility is beneficial to Canadians in general, it is especially so for immigrants who possess foreign credentials. Despite the fact that Canada's immigrants now possess more education than their Canadian-born counterparts,<sup>896</sup> they still have an elevated unemployment rate<sup>897</sup> and are more likely to have low incomes compared to those holding Canadian credentials.<sup>898</sup> In addition to these problems, the historic trend of immigrants narrowing the earnings gap between themselves and Canadian-born workers as the immigrants spend more time and gain more experience in Canada is beginning to disappear.<sup>899</sup>

Some significant measures that can be taken to address this problem include the development or improvement of laws and mechanisms to facilitate the proper recognition of foreign credentials and ensure substantive fairness with respect to access to the regulated professions in Canada. An additional aspect of the solution is to ensure interprovincial labour mobility in Canada's regulated occupations, in compliance with chapter seven of the *Agreement on Internal Trade*.<sup>890</sup> This will allow those possessing foreign credentials, once they have undergone the arduous process of obtaining licensure in a regulated occupation in one Canadian jurisdiction, to have the opportunity to pursue employment opportunities in every other jurisdiction, without having to prove their qualifications again.

This type of labour mobility creates a larger pool of candidates for employers to consider, and a larger pool of employers for Canadians to consider. More competition from across Canada for the services of skilled immigrants may drive their incomes higher. The increased number of job opportunities these people would be able to pursue also creates the potential of reducing the unemployment rate of this disadvantaged group.

To encourage compliance with the interprovincial labour mobility provisions of the *Agreement on Internal Trade (AIT)*, and to secure a stronger job market for both internationally and domestically-trained individuals:

- Regulated occupations in Canada that are not yet compliant with the labour mobility provisions of the *AIT* should consider developing inter-jurisdictional agreements similar in nature to the one created by Engineers Canada.

To promote the most fair and efficient interprovincial labour mobility possible in Canada:

- The new *AIT* model of mutual recognition of credentials should be maintained, with limited exceptions. It is acceptable for provinces to agree on a “gold seal” standard that guarantees mobility in all cases, but this should supplement the mutual recognition scheme rather than becoming a prerequisite to mobility.

To promote fairness in labour mobility in the skilled trades covered by the Interprovincial Standards Red Seal Program (Red Seal Program):

- As far as is practical, the Red Seal Program should ensure that its written and clinical examinations are appropriate for both internationally and domestically-trained and experienced workers.

## Introduction

Throughout Canada’s history there have been barriers to interprovincial trade in goods and services. Regarding labour mobility specifically, Canadian workers are generally able to work in any province or territory they want, however this is not always the case for those employed in regulated occupations.<sup>901</sup> There is often a large degree of similarity across jurisdictions regarding requirements to enter regulated occupations, but in many cases “workers have encountered barriers when they move from one jurisdiction to another because of differences in certification requirements.”<sup>902</sup>

The *Canadian Charter of Rights and Freedoms* guarantees Canadians’ mobility rights. The right to pursue gainful employment anywhere in the country is granted to both Canadian citizens and permanent residents.<sup>903</sup> Additionally, the recently amended chapter 7 of the *Agreement on Internal Trade (AIT)* attempts to ensure more efficient and expansive labour mobility in Canada, “enabl[ing] any worker certified for an occupation by a regulatory authority of one Party to be recognized as qualified for that occupation by all other Parties.”<sup>904</sup> The *AIT* also makes it possible for the provinces and territories to create exceptions to labour mobility for given occupations in some circumstances.<sup>905</sup>

All provinces and territories in Canada except Nunavut are parties to the *AIT*,<sup>906</sup> but complete compliance with the labour mobility provisions by all parties has remained elusive. Labour mobility in Canada is “a key element of labour market efficiency [which] contributes to sustaining economic growth, innovation, productivity and Canada’s competitiveness in an increasingly knowledge-based global economy.”<sup>907</sup> Interprovincial labour mobility allows easier access to jobs for workers in regulated occupations, while creating stronger pools of talent for employers who are seeking skilled workers. Labour mobility also facilitates the labour market integration of immigrants in a similar way. Once an immigrant goes through the demanding process of having foreign credentials recognized in a Canadian jurisdiction, and obtaining certification to practise in a regulated occupation, there will be substantial benefits to that immigrant, and to the country as a whole, if there are employment opportunities for her across the country

instead of only in one jurisdiction.<sup>908</sup>

## ***Agreement on Internal Trade***

### **Overview**

In order to “eliminate barriers to” interprovincial trade in goods, services and investments, the federal government and “Canada’s First Ministers” signed the *Agreement on Internal Trade (AIT)* on 1 July 1995.<sup>909</sup> The original agreement included a chapter dealing with labour mobility, but challenges continued to arise. In August 2007 the premiers of the provinces “agreed to strengthen the *AIT* through a five-point action plan.” One of these points was “full labour mobility,”<sup>910</sup> and in August 2009 the labour mobility chapter of the *AIT* was amended.<sup>911</sup> Implementation of the newly amended chapter (chapter 7) involves a multitude of key players. These players include both federal and provincial/territorial governments and numerous occupational regulatory bodies across Canada.<sup>912</sup>

In August 2009, the Forum of Labour Market Ministers (FLMM) released guidelines to aid regulatory bodies in the understanding of chapter 7 of the *AIT*, and “how to comply with its obligations.”<sup>913</sup> The parties to the *AIT* have now agreed that because 15 years have elapsed since the *AIT* was first introduced, “the reasonable period of time initially set out for achieving compliance has expired. Compliance is now mandatory.”<sup>914</sup> The parties must now ensure that regulatory bodies and regional governments within their borders are compliant with the labour mobility chapter of the *AIT*.<sup>915</sup>

### **The *AIT*’s General Rules: Chapter Four**

Chapter 4 of the *AIT* sets out six “general rules” which apply to all of Part IV of the *AIT* unless otherwise specified, which includes chapters 5 through 15.<sup>916</sup> These general rules were not amended when the provisions specific to labour mobility were, but which rules are applicable to the labour mobility chapter of the *AIT* did change. The general rules provided in chapter four are Reciprocal Non-Discrimination, Right of Entry and Exit, No Obstacles, Legitimate Objectives, Reconciliation, and Transparency.<sup>917</sup> The Legitimate Objectives and Reconciliation rules identified in chapter 4 do not apply to chapter 7, but the remaining four rules do.<sup>918</sup> Before the amendments, the Reciprocal Non-Discrimination, Right of Entry and Exit, and No Obstacles rules did not apply to chapter seven.<sup>919</sup> For the purposes of chapter 7, if any references are made to the Legitimate Objectives section of chapter 4 within any of the general rules that are applicable, it is to be construed as a reference to the Legitimate Objectives section of chapter seven.<sup>920</sup>

The Reciprocal Non-Discrimination general rule requires each party to the *AIT* to treat the “persons, services and investments of any other Party ... no less favourabl[y] than the best treatment it accords” its own services, persons and investments, or the best treatment any other jurisdiction receives in those areas, whether a party to the *AIT* or not.<sup>921</sup> The Right of Entry and Exit general

rule simply restricts any party from having measures in place that prevent the interprovincial movement of persons, services, or goods.<sup>922</sup> The No Obstacles general rule requires that all Parties “ensure that any measure it adopts or maintains does not operate to create an obstacle to internal trade.”<sup>923</sup> The Transparency general rule requires all parties to make all “legislation, regulations, procedures, guidelines, and administrative rulings” accessible if they relate to the *AIT*. If a party intends to adopt or alter a measure that will affect another party in relation to the *AIT*, the affected party must be notified of the measure.<sup>924</sup> All four of these general rules are subject to article 708 (Legitimate Objectives) when they are being considered in relation to chapter 7.<sup>925</sup>

## **The *AIT*’s Labour Mobility Provisions: Chapter Seven**

Under the current *AIT*, in addition to the general rules discussed above, articles 705 (Residency Requirements) and 706 (Certification of Workers) also apply subject to the legitimate objectives in article 708.<sup>926</sup> What qualifies as a legitimate objective is basically the same in the amended *AIT*, with one exception. In the original labour mobility chapter, “labour market development” was included in the definition of legitimate objectives,<sup>927</sup> but it is not included in the post-amendment definition.<sup>928</sup>

The Residency Requirements article in chapter seven restricts a party from requiring that a person be a resident of the province or territory in which employment is sought to be eligible for employment or certification for an occupation.<sup>929</sup> A party may, however, “require that a person reside within a certain distance” of the workplace for reasons of “safety or response time.”<sup>930</sup>

Chapter 7’s Certification of Workers article is a key provision with respect to labour mobility, and states that generally, if a person is certified to work in a given occupation in a jurisdiction controlled by a party, then that person “shall, upon application, be certified for that occupation by each other Party which regulates that occupation without any requirement for any material additional training, experience, examinations or assessments.”<sup>931</sup> Additional non-material requirements may be imposed, and each party will “determine what additional measures it deems as material.”<sup>932</sup> A non-material requirement may be signing a document swearing one has read certain legislation, whereas a material requirement would be to require one to pass an examination based on that legislation.<sup>933</sup> This article applies whether the worker in question is domestically-trained or possesses international credentials. Once a worker is certified by one party, that party indicates that the person “has met the occupational standard that identifies the necessary abilities, skills, and knowledge,” and as a result “an internationally-trained individual ... cannot be treated any differently for certification purposes than a domestically-trained worker.”<sup>934</sup> This article also specifies that all persons with certification endorsed by the Red Seal Program<sup>935</sup> shall be deemed qualified to work in any party’s jurisdiction.<sup>936</sup>

Article 707 deals with Occupational Standards. Parties have the right to develop, implement and maintain any occupational standard deemed necessary to establish

appropriate levels of public protection, however parties agree to reconcile these standards where it is practical.<sup>937</sup> Occupational standards that are implemented by a party should be based on interprovincial standards, like the Red Seal Program, or “international standards.”<sup>938</sup> If a party is going to establish, implement or alter occupational standards, then they have to inform the other parties of such intent, and “afford them an opportunity to comment on the development of those standards.”<sup>939</sup> Article 707 is not subject to the Legitimate Objectives article. In meeting article 707 requirements, parties “should continue or initiate interprovincial/territorial dialogue to explore, where appropriate, the adoption of interprovincial standards.”<sup>940</sup>

Chapter 7’s Legitimate Objectives section states that if a measure adopted or maintained by a party is inconsistent with any of the articles mentioned above, except article 707, that provision is still permissible if it meets the test set out in article 708. To satisfy this test (i) “the purpose of the measure [must be] to achieve a legitimate objective,” (ii) “the measure [must not be] more restrictive to labour mobility than necessary to achieve that legitimate objective” and (iii) “the measure [must] not create a disguised restriction to labour mobility.”<sup>941</sup> In order to maintain an exception to labour mobility, a party “must provide written justification of why the measure is necessary to meet a legitimate objective.”<sup>942</sup>

Regarding the certification of workers, if two provinces have different requirements for “academic credentials, education, training, experience, examinations, or assessment methods” for licensure in an occupation, that will not justify additional certification requirements in those areas as required to meet legitimate objectives. For additional requirements to be justified to meet a legitimate objective, an “actual material deficiency in skill, area of knowledge or ability” must be shown.<sup>943</sup> An example where “additional education, training or experience requirements may be justified” is if there is a considerable difference in the “scope of practice” of an occupation from one jurisdiction to another, and that due to this difference, a “worker lacks a critical skill, area of knowledge or ability required to perform the new scope of practice.”<sup>944</sup> If a party decides to use a legitimate objective to justify additional requirements, that party must notify the Forum of Labour Market Ministers of the measure, informing them of the justification for, and duration of, the provision.<sup>945</sup>

The legitimate objectives which can be used to justify additional requirements under article 708 are listed in article 711, the Definitions section. There are eight legitimate objectives listed: (i) “public security and safety,” (ii) “public order,” (iii) “protection of human, animal or plant life or health,” (iv) “protection of the environment,” (v) “consumer protection,” (vi) “protection of the health, safety and well-being of workers,” (vii) “provision of adequate social and health services to all its geographic regions,” and (viii) “programs for disadvantaged groups.”<sup>946</sup> If a dispute arises in relation to chapter 7, it is handled in accordance with the AIT’s dispute resolution section, chapter 17.<sup>947</sup>

For a jurisdiction to set and maintain an exception, it must specify the legitimate objective it is attempting to achieve, identify the additional requirement(s), which other jurisdiction(s) it is going to apply to, the justification for the extra

requirement, and the “[d]uration of the additional requirement(s).”<sup>948</sup> Through its own mechanisms, the province or territory must approve the exception, at which point the party will inform the Forum of Labour Market Ministers, and the exception and relevant information will be posted on the *AIT* website.<sup>949</sup>

## Currently Held Exceptions to the *AIT*

Currently nine provinces and two territories have exceptions posted on the *AIT* website, Nova Scotia being the only party with no exceptions posted. Of those with posted exceptions, Alberta has the most with exceptions for ten occupations, while the Northwest Territories, British Columbia, and Prince Edward Island each have only one exception posted.<sup>950</sup> An example of a labour mobility exception that all parties except Nova Scotia and New Brunswick have posted is for lawyers (as of July 2011). The common law jurisdictions of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Prince Edward Island, Newfoundland and Labrador, the Yukon and the Northwest Territories all cite this exception.<sup>951</sup> Each of these jurisdictions creates an exception to labour mobility for lawyers certified in Quebec, using the legitimate objective of consumer protection.<sup>952</sup> The rationales provided by these common law provinces are all quite similar. To provide an example, Ontario’s justification is that “[t]here are significant differences in the foundational legal systems and in the way the law is developed and codified,” and people qualified to practise law in Quebec’s “civil law system will not possess the necessary knowledge or expertise to practice in a common law system.”<sup>953</sup> The relevant exceptions from each of these provinces are limited to lawyers with Quebec credentials. Quebec has a similar exception which applies to all other parties to the *AIT*, and provides a similar justification.<sup>954</sup> The expected duration for all of these exceptions is indefinite.<sup>955</sup>

## New West Partnership Trade Agreement

Originally in 2006 the *Trade, Investment and Labour Mobility Agreement (TILMA)* was signed by Alberta and British Columbia.<sup>956</sup> The general rule in *TILMA* regarding labour mobility was that “any worker certified for an occupation by a regulatory authority of a Party shall be recognized as qualified to practice that occupation by the other Party.”<sup>957</sup> The revised provisions in chapter seven of the *AIT* “largely duplicate the labour mobility provisions of *TILMA*.”<sup>958</sup> *TILMA*’s labour mobility provisions dealt with two main principles: (i) “no obstacles” and (ii) “non-discrimination.” No obstacles meant that government measures could not “operate to restrict or impair trade between or through the territory of the Parties,” and non-discrimination meant that workers from one province should not be given preferential treatment over workers from the other.<sup>959</sup> *TILMA* established that if a worker was certified in one province, that worker had to be certified to work in the other. The British Columbia and Alberta governments were also expected to “mutually recognize or otherwise reconcile their existing standards and regulations that operate[d] to restrict ... labour mobility.”<sup>960</sup>

Beginning on 1 July 2010, the *New West Partnership Trade Agreement (NWPTA)* between British Columbia, Alberta and Saskatchewan came into effect, replacing *TILMA*.<sup>961</sup> Regarding labour mobility, there will be no changes under the *NWPTA* as opposed to *TILMA* for British Columbia or Alberta. For Saskatchewan, labour mobility provisions will be the same, with the exception of “full labour mobility for financial services occupations,” which “will be implemented by 1 July 2013.”<sup>962</sup> In exercising control over their own jurisdiction’s regulations, these “governments must ensure that their measures are non-discriminatory and do not impose any more restrictions on trade, investment and labour mobility than absolutely necessary.”<sup>963</sup> While the *NWPTA* is a significant agreement for achieving labour mobility between these three provinces, it is important that its parties still put forth efforts to comply with the *AIT*, and not be satisfied with only *NWPTA* compliance.

## Layers of Labour Mobility in Canada

There are three distinct layers of labour mobility in Canada: (i) the “province-by-province certification approach,” (ii) the “mutual recognition approach” and (iii) the “gold seal approach.” Each layer affords different levels of efficiency and simplicity to the interprovincial movement of services.

The province-by-province certification approach ensures that each jurisdiction in the country has its own requirements for particular types of work. If a person is certified to work in a given occupation in one jurisdiction and wants to work in that occupation in another jurisdiction, the person will have to meet the requirements of, and obtain certification from, the new jurisdiction. This approach results in high barriers to interprovincial mobility.

Under the mutual recognition approach, the certification of a worker in one jurisdiction is automatically recognized in all other jurisdictions, subject to certain exceptions. This is the approach taken in the *AIT*, and it is desirable because it guarantees that once a person has met the minimum requirements in one jurisdiction, he will automatically be able to obtain certification in any other jurisdiction, unless there is a legitimate reason to create an exception in the circumstances. This allows for efficient labour mobility, because it provides open access to job markets across Canada for workers in each jurisdiction. It is based on trust between jurisdictions, that their minimum requirements are sufficient to ensure the safe and competent delivery of services to Canadians across the country. This approach also respects provincial autonomy by permitting parties to post exceptions when it is reasonable to do so.

In the “gold seal” approach, a person who is already certified for a given occupation in one jurisdiction can obtain a further qualification which will guarantee certification in other Canadian jurisdictions without being subject to any exceptions. An example of such an approach in Canada is the Red Seal Program. In this program, a person who is certified in a skilled trade in a Canadian jurisdiction can take a Red Seal examination, and upon successful completion of

this examination, that individual will receive a Red Seal endorsement. The Red Seal endorsement then allows the person to obtain certification in any jurisdiction without having to meet any further requirements.<sup>964</sup>

It is important to distinguish between the mutual recognition and passport approaches. When regulated occupations are attempting to comply with the *AIT* and achieve the requisite labour mobility, the mutual recognition approach should consistently be used, with the “gold seal” approach serving as a possible supplementary means of promoting mobility. What should be avoided is attempts by consortiums of provincial regulators to use the “threat” of interprovincial mobility as an excuse to insist that all provinces should adopt a new and unnecessarily heightened set of requirements for certification; similar requirements are typically visited on new entrants, whereas existing practitioners are grandfathered. Provinces should presumptively be able to trust each other’s certification standards because it is unreasonable to assume that provincial governments would risk the safety of their own consumers by adopting unreasonably low standards. Professional self-regulatory bodies, for reasons of economic and prestige-oriented protectionism, are likely to err on the side of recommending or imposing excessively onerous requirements. The “safety valve” permitted by the *AIT* creates a transparent mechanism which a province can invoke if it has legitimate reasons to reject the certification mechanism of another province.

## **Interprovincial Mobility in Specific Professions and Compliance with the *AIT***

All regulated occupations in Canada have not achieved *AIT* compliance, but there is substantial work currently underway to comply in a number of these occupations.<sup>965</sup> In an attempt to address concerns that “the enforcement of panel rulings of non-compliance with the *AIT* [was] weak,” the government of Canada introduced the *Improving Trade Within Canada Act* on 25 November 2010.<sup>966</sup> This legislation, which was still before Parliament at dissolution in 2011,<sup>967</sup> would allow for financial penalties of up to \$5-million for “[n]on-compliance with *AIT* obligations.”<sup>968</sup> The possibility of facing such a penalty may mobilize the parties to spur faster action from the regulatory bodies within their own jurisdictions. Even in the absence of these penalties however, given the advantages of interprovincial labour mobility discussed above, it is in the interest of the parties and of Canada generally to attain *AIT* compliance as soon as is reasonably possible.

## **The Engineering Profession**

The engineering profession has been one of the more progressive regulated occupations in terms of complying with the *AIT*’s labour mobility provisions. According to Engineers Canada, “[p]rofessional engineers in Canada enjoy full

mobility between [provinces and territories] under the federal government's Agreement on Internal Trade."<sup>969</sup> The *AIT* has overtaken the former labour mobility agreement which was in place in the engineering profession, the *Agreement on Mobility of Professional Engineers within Canada (AMPEC)*.<sup>970</sup> The engineering profession is complying with the *AIT* in the absence of a separate agreement between the various jurisdictional regulatory bodies, but this is not the case for all regulated occupations across Canada.

Formerly, under the *AMPEC*, engineers were able to move within Canadian jurisdictions and obtain licensure "with relative ease."<sup>971</sup> In the first nine years of the agreement, 17,000 engineers in Canada applied for certification in a new province or territory, with licensure being refused though the *AMPEC*'s notwithstanding clause only 238 times.<sup>972</sup>

The *AMPEC* was signed by regulatory bodies representing ten provinces and two territories, excluding only Nunavut. The stated objective of the *AMPEC* was simply "to achieve and maintain mobility among associations/Ordre."<sup>973</sup> The *AMPEC* stated that a professional engineer in a Canadian jurisdiction had to be certified in any other jurisdiction upon application, as long as that person met five stated criteria.<sup>974</sup> These criteria included that the applicant had to be "in good standing" with her or his current jurisdiction and the person must not have been professionally disciplined in the past. Additionally, the applicant had to provide information pertaining to these conditions, and allow her current jurisdictional regulatory body to release this information. All information that a regulatory body normally required also had to be provided, and any "continuing competence/continuing professional development requirements" in the new jurisdiction would have to be met.<sup>975</sup>

The *AMPEC*'s notwithstanding clause allowed any of the regulatory bodies that were parties to the agreement to "review the qualifications of any applicant from another Canadian jurisdiction." The regulatory bodies could then "assign additional requirements for admission they deem[ed] necessary, consistent with their admission procedures."<sup>976</sup>

This agreement was clearly effective given that the notwithstanding clause was only invoked in 1.4% of cases in the first nine years the agreement was in effect.<sup>977</sup> To truly attain *AIT* compliance with such an agreement, exceptions would have to be posted for situations where the notwithstanding clause could be invoked. Additional exceptions would also have to be posted with respect to some of the additional requirements that were part of the *AMPEC*. For example, the legitimate objective of consumer protection could be used to post an exception for those who are not in good standing with another regulatory body. This would ensure that anytime certification is denied, it can be justified. This agreement, with slight modifications, is an excellent example of the admissive approach to labour mobility. Regulatory bodies governing other occupations that are not yet compliant with the *AIT* should consider negotiating and adopting agreements at a pan-provincial level that are similar in nature to *AMPEC*.

Although the *AMPEC* is no longer utilized in the engineering profession, this type of agreement is a clear and effective path to follow to attain *AIT* compliance.

It provides a simple framework that allows for ease of licensure across jurisdictions so long as several reasonable requirements are met. At the same time, it also allows each jurisdiction to invoke the notwithstanding clause in order to assign additional requirements where necessary. Both interprovincial mobility and provincial autonomy are respected in this type of agreement. Such an agreement ensures mobility based on certification within a jurisdiction, not based on a common national examination that all workers in a given field must complete. Labour mobility under an agreement like the *AMPEC* is based on trust between regulatory bodies, and is a good form of agreement to consider when a regulated occupation is attempting to achieve *AIT* compliance.

## Labour Mobility and Physicians

Some in Canada's medical community were initially skeptical, but many have since altered their positions regarding interprovincial labour mobility for physicians. Traditionally, most physicians certified in one Canadian jurisdiction have been able to obtain certification in other provinces, but there was some apprehension when the amendments to chapter seven of the *AIT* were first passed.<sup>978</sup> The amended *AIT* concerned some because it does not allow for additional barriers, such as examinations, to be imposed on physicians certified in other jurisdictions. An example of the foreseen problem is that a person certified as a physician in Alberta, which does not require the Licentiate of the Medical Council of Canada (LMCC), can move to a jurisdiction where the LMCC is required, and must be certified without obtaining the LMCC.<sup>979</sup> It was feared that this would result in "the jurisdiction with the most flexible standards for registration becom[ing] the *de facto* standard for registration in Canada."<sup>980</sup>

Despite prior disagreement in the medical community over whether or not this direction is desirable, the community in general has realized that having varying registration requirements for doctors across the country is not sensible, given that there are "at least 120 different registration categories in Canada."<sup>981</sup> Accepting that there is a complex problem that needs to be addressed in this area is an important step in favour of moving toward compliance with chapter seven of the *AIT*.

Many foreign-trained doctors working in Canada have restrictions on their licences which limit mobility out of remote locations, at least for a prescribed period of time. International medical graduates account for 22% of physicians in Canada, and 53% "of new physicians starting practice in rural or remote areas."<sup>982</sup> Dr. Bryan Ward, the President of the Federation of Medical Regulatory Authorities of Canada, argues that there are two severe consequences "if the federation cannot agree on common standards and unfettered mobility is actually permitted."<sup>983</sup> First, Ward asserts that there will be an exodus out of these remote areas by doctors who were formerly bound to stay there, and second there would be "no systems to monitor their practice as there might have been in the jurisdiction where they registered."<sup>984</sup> This worry seems unfounded. Article 706 of the *AIT* does allow placing conditions on a licence if a similar condition was already on it in

the original jurisdiction. A jurisdiction is also able to refuse licensure if there is a condition on a person's certification in another jurisdiction and no similar condition is available.<sup>985</sup>

The medical community is considering a proposal to create "a set of criteria for one national 'gold standard' for full medical licensure for independent practice."<sup>986</sup> This proposal seems to be straying from the admmissive approach to labour mobility in favour of the passport approach. Pan-Canadian recognition of certification from all jurisdictions should be the goal, as opposed to raising minimum standards in order to achieve labour mobility. Jurisdictions must be able to trust each other's minimum requirements to be sufficient to ensure the safe delivery of services, even if a jurisdiction's requirements are different. There may still be a place for a "gold standard" type program however, if it works in a way akin to the Red Seal program. If interprovincial mobility is guaranteed subject to certain legitimate, posted exceptions to the *AIT*, then it may be reasonable to have an optional "gold standard" designation available that would allow a person to avoid those exceptions. Such a designation should be optional, and not be required for labour mobility generally.

Certificate-for-certificate recognition is complicated by a number of factors. One such complication is that there are many different certification categories across Canada, and they often differ from one jurisdiction to another. There has been consideration for "a national set of restrictions and conditions on full licensure," and a "national route for those licensed with restrictions and conditions to make the transition to a full license."<sup>987</sup> These potential national sets of restrictions, conditions and routes to full licensure could substantially benefit physician mobility in Canada. There would be no need for licensure in one jurisdiction to be refused due to a restriction that is on a person's licence in another jurisdiction. An additional, and potentially advantageous, undertaking is to consider reconciling registration categories across jurisdictions. This would alleviate any issues arising with respect to scope of practice in a given category. High levels of cooperation are required in the case of physician mobility and, in order for compliance to be attained, the country's regulators will need to "trust one another."<sup>988</sup>

Labour mobility across Canada for physicians has gained significant ground recently. The Federation of Medical Regulatory Authorities of Canada (FMRAC) is a body made up of all of Canada's jurisdictional medical regulatory authorities. Its mission is to "consider, develop and share positions and policies on matters of common concern and interest."<sup>989</sup> The FMRAC has developed an "Agreement on National Standards," which was most recently updated in February 2011.<sup>990</sup> This agreement is intended to facilitate interprovincial labour mobility among physicians by "set[ting] the tone and basis for the work to be done by FMRAC and its Members." Specifically, it relates to the "document[ation] and standardiz[ation], to the greatest extent possible, [of] the various practices used by the provincial and territorial medical regulatory authorities for registration and licensure."<sup>991</sup> Great care must be taken by these regulatory authorities when attempting to standardize registration and licensure procedures across Canada not to raise current minimum standards. Rather, common standards should be adopted only to a level that is necessary to ensure the safe and competent delivery of services to

Canadians.

In addition to important developments with inter-jurisdictional cooperation, provincial legislatures have been working to establish *AIT* compliance. In Manitoba for example, the *Regulated Health Professions Act* specifies that “[i]n approving an application for registration, the registrar or the board of assessors ... must comply with the obligations under Chapter 7 (Labour Mobility) of the [*AIT*].”<sup>992</sup> It is also specified that all regulations made under the *Act* must comply with chapter seven.<sup>993</sup> The College of Physicians and Surgeons of Ontario states that applications for licensure by someone who is licensed in another Canadian jurisdiction (except Nunavut) “will be assessed under the labour mobility provisions in Ontario’s *Regulated Health Professions Act* relating to the *Agreement on Internal Trade*.”<sup>994</sup> “These *AIT*-related provisions enable application on the basis of holding a current Canadian out-of-province license ... however ... the usual credentialing requirements ... still apply.”<sup>995</sup> Ontario’s *Regulated Health Professions Act (RHA)* specifies that “[t]he *Ontario Labour Mobility Act, 2009*, except sections 21 to 24, does not apply to any College.”<sup>996</sup> This effectively ousts the general legislation adopted by Ontario to conform to the *AIT*, but provisions within the *RHA* are present for the purpose of “support[ing] the Government of Ontario in fulfilling its obligations under Chapter Seven of the” *AIT*, and “to eliminate or reduce measures established or implemented by the College that restrict or impair the ability of an individual to obtain a certificate of registration when the individual holds an equivalent out-of-province certificate.”<sup>997</sup>

These legislative provisions appear to be steps in the right direction, but they are very new amendments and their application in practice is what is important. There still appears to be significant hurdles to complete compliance with the *AIT*’s labour mobility provisions for physicians. This is particularly true with respect to those with restricted or provisional licences,<sup>998</sup> who are very often immigrants with foreign credentials. Despite recent encouraging steps, it is clear that continued work, funding and cooperation are required as the profession moves toward compliance.

## The Interprovincial Standards Red Seal Program

The Red Seal Program was established in 1959,<sup>999</sup> long before the *AIT* was first signed in 1994. A tradesperson (an apprentice who has completed her training and received certification) can obtain a Red Seal endorsement on her certificate by passing a Red Seal exam. The Red Seal endorsement is placed on a person’s provincial or territorial certificate, and is meant to ensure certification anywhere in Canada without further examination.<sup>1000</sup>

The Red Seal Program is industry-driven. There are more than 300 apprenticeship programs in various Canadian jurisdictions, and Red Seal endorsements are available for fifty-two trades.<sup>1001</sup> About ninety percent of Canada’s 300,000 registered apprentices work in one of these occupations.<sup>1002</sup> The Canadian

Council of Directors of Apprenticeship (CCDA) administers the program, and is continuously seeking expansion of the program into new areas.<sup>1003</sup> Within the CCDA, the Interprovincial Standards and Examination Committee (ISEC) works out national standards for each trade on a case by case basis, and these standards are “regularly reviewed and adapted as required.”<sup>1004</sup> A Red Seal examination is designed to determine if a person meets these established “national standard[s] in a particular Red Seal trade.”<sup>1005</sup>

With the revised labour mobility chapter in the *AIT*, workers certified in one province must be certified in any other upon application, regardless of whether a person has a Red Seal endorsement, subject to exceptions.<sup>1006</sup> It may initially seem that this diminishes the value of Red Seal, but advantages to obtaining a Red Seal endorsement remain. The *AIT* states that “each Party shall recognize any worker holding a jurisdictional certification bearing the Red Seal endorsement under the Interprovincial Standards Red Seal Program as qualified to practice the occupation identified in the certification.”<sup>1007</sup> In addition, although a Red Seal endorsement is not required for certification in a new jurisdiction, certification does not guarantee employment. The Red Seal endorsement signals that a person has met national standards as determined by industry,<sup>1008</sup> and may provide a person with an advantage in a competitive job market.

Although a Red Seal endorsement is not required for labour mobility, obtaining a Red Seal endorsement may allow one to avoid any exceptions to *AIT* labour mobility posted by a jurisdiction. This “passport approach” may be a desirable route for some workers, particularly if there is a relevant *AIT* exception posted that could be avoided, or a real possibility of one being posted. Because of the important role that the Red Seal Program continues to play, it should be ensured as much as possible that all Red Seal examinations are appropriate for both domestically and internationally educated and trained workers, so as to ensure that those holding credentials obtained abroad are afforded the same advantages as those trained in Canada.

## Conclusion

Efficient interprovincial labour mobility in Canada holds substantial benefits for both employees and employers across the country. When workers in a profession are able to pursue suitable work in any jurisdiction, there are more opportunities for workers and a larger talent pool for potential employers to choose from. This is a great advantage for Canadian businesses and Canadian workers, particularly those trained abroad who often have more difficulty finding appropriate employment.

The federal government should use the *AIT* as a model to reduce barriers to entry to the regulated professions. The agreement provides an existing framework with a proven record of success for lowering such barriers and improving inter-provincial mobility. Subsequent meetings involving Canadian agencies, including the self-regulating professions, have achieved significant progress in this regard.

The *AIT* is well-suited to generate measures to reduce barriers to entry to the occupations for foreign workers as this is simply an extension of what it already does.

The right to pursue employment anywhere in the country is guaranteed, to a very limited extent, by the *Charter of Rights and Freedoms*, but this guarantee is subject to laws enacted by the provinces, and is silent regarding the recognition of certification from other Canadian jurisdictions.<sup>1009</sup> This essentially opens the door for governments to establish laws that hinder labour mobility within Canada. The *Agreement on Internal Trade* was developed by the federal government and all Canadian jurisdictions except Nunavut, and the labour mobility provisions within it attempt to facilitate full labour mobility across Canada, while allowing for reasonable exceptions to be created by provinces where appropriate.

Some professions are still struggling to bring themselves into compliance with the *AIT*. The *AMPEC* agreement made in the engineering profession is an excellent model to use as a template for an agreement between occupational regulatory bodies that would establish *AIT* compliance. An agreement stating that certified workers in one jurisdiction will be certified in each other jurisdiction upon request is a simple and effective way to comply with the *AIT*. The notwithstanding clause in the *AMPEC* would have to be altered to be *AIT* compliant. This is simply because the clause in the agreement allows for “material additional training, experience, examinations or assessments” without an approved exception published on the *AIT* website. If the notwithstanding clause is altered to allow additional material requirements only where there is an approved exception created by a jurisdiction, the profession will be *AIT* compliant with a simple and effective agreement. Such an agreement is a desirable way for professions to achieve *AIT* compliance using the admmissive approach, because of its uncomplicated nature and demonstrated effectiveness.

## Chapter VII

# Facilitating Credentials Recognition at Frontline Agencies

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**W**hen the Canadian government breaks down barriers to foreign credential recognition, it facilitates the economic integration of those educated and experienced abroad. When the federal government conveys to provinces that foreign credentials must be properly recognized by implementing certain provisions in competition legislation, and when provincial governments attempt to aid such recognition through human rights laws or fair access legislation, the construction of mechanisms to facilitate the proper recognition of credentials and substantive competencies moves from simply being desirable to being necessary. Properly recognizing foreign credentials and competencies can be difficult and expensive. As a result, active and coordinated steps must be taken by the federal and provincial governments to provide mechanisms to perform accurate and consistent assessments of foreign academic credentials and of competencies obtained abroad.

This article considers relevant existing federal and provincial mechanisms, and opportunities to alter or expand these programs to improve their effectiveness. Important steps in the development and establishment of many facilitative mechanisms have been taken over the past decade, but there is room for continued improvement.

To promote the efficient and effective dissemination of pertinent information regarding foreign credential recognition and labour market integration to all newcomers:

- The Canadian Immigration Integration Program should continue to be expanded until it is available to virtually all immigrants before they arrive in Canada.

To ensure fair and effective assessment of foreign credentials and competencies, and to provide adequate avenues to fill legitimate gaps in qualification:

- Federal and provincial governments should fund and facilitate the establishment of clinical assessment/Prior Learning Assessment and Recognition (PLAR) programs where required in the regulated occupations, preferably at the pan-Canadian level.
- Federal and provincial governments should continue to fund and facilitate the establishment of “bridging programs” to fill legitimate gaps where only partial qualification for certification in a regulated occupation is recognized.

To promote fair, efficient, accurate, transparent and consistent assessment and

recognition of academic credentials obtained abroad:

- The Alliance of Credential Evaluation Services of Canada (ACESC) should consider loosening its membership criteria to allow any agency that assesses credentials to join. If this is done, then a framework to enforce compliance with a new pan-Canadian quality assurance framework for academic credential assessment should be considered. This could be done by requiring an assessment from an ACESC member for a foreign academic credential to be used to enter a regulated occupation in Canada.

## Introduction

The federal and provincial/territorial governments have made efforts to improve foreign credential recognition in Canada through several key initiatives. The provinces have constitutional jurisdiction over education and most regulated occupations,<sup>1010</sup> but the federal government still has an important role to play in foreign credential recognition through immigration law and policy,<sup>1011</sup> and by providing funding and helping to coordinate cooperative efforts across Canadian jurisdictions.

Recognizing foreign academic credentials is important in both regulated and non-regulated occupations. In non-regulated occupations, verification that a foreign academic credential is equivalent to a given Canadian one can provide an immigrant with important advantages in the labour market. In regulated occupations, not only is recognition advantageous, but possession of a certain academic credential is often legally mandated. These regulated occupations, however, present a more complex problem than simply accurately assessing and recognizing academic credentials. There are often examinations or other similar barriers required to gain entry to these occupations. These barriers, along with the required academic credentials, are intended to ensure safe and competent delivery of services to Canadians. However, these barriers are designed to assess recent graduates from Canadian institutions. For an immigrant who comes to Canada after practicing in his chosen occupation for many years, these requirements may not be appropriate or necessary to ensure public protection.

Immigrants who were trained abroad in occupations that are regulated in Canada have expressed a great deal of frustration with unnecessary or discriminatory barriers<sup>1012</sup> to these occupations. Some have been required to have their credentials assessed by multiple agencies or bodies, which significantly increased the time and cost of the process.<sup>1013</sup> Often, those trained abroad were required to take additional courses in order to obtain a licence, and many were unsure why this was required.<sup>1014</sup> This was especially pronounced in those who had already been practicing in a profession in another country, with one focus group participant stating “if I had known that I would have to study again the same courses that I studied 8 years ago, I wouldn’t have come.”<sup>1015</sup> Another participant said “everybody is talking about the shortage of engineers and doctors, but when you come you only find there are obstacles.”<sup>1016</sup> Another said:

There are many professionals with very good skills and knowledge in their specialties, but when they come, they are being assessed as a fresh medical graduate, that I don't think is fair ... why not benefit from the experience of that person as a specialist?<sup>1017</sup>

It is patently unfair to judge an experienced specialist in a profession on the same terms as someone who has recently completed studies at a professional school. A person could be an outstanding neurosurgeon and yet struggle to pass an examination that is partly based on material she has not studied in years. A person could be a renowned litigator, but still struggle to pass a bar exam after specializing in a certain area and spending years away from some of the material. For experienced practitioners, clinical assessment or Prior Learning Assessment and Recognition (PLAR) programs which judge the knowledge, competencies and skills that such a worker in Canada is expected to possess would be more appropriate than requiring these people to obtain licensure by overcoming the same barriers as new graduates. Such assessment programs may be difficult and expensive to establish and maintain. Where it is practical, it would be more efficient for the provinces and federal government to pool their financial resources and expertise to develop pan-provincial solutions to this issue.

The establishment and maintenance of facilitative mechanisms is an essential aspect of ensuring that those educated and experienced abroad are able to integrate economically as smoothly as possible. These mechanisms must include assessment and recognition of both academic credentials and substantive competencies. Because of the division of powers in Canada's constitution, a high level of cooperation is required between provinces, occupational regulatory bodies, academic credential assessment services, and the federal government.

## **The Federal Government's Central Initiatives**

Human Resources and Skills Development Canada (HRSDC), Citizenship and Immigration Canada, Health Canada and Service Canada all play important roles in the improvement of foreign credential recognition in Canada. These departments work with each other and in conjunction with provinces, territories and regulatory bodies that govern specific occupations.<sup>1018</sup> Well-coordinated and multi-faceted solutions are required to improve foreign credential recognition in Canada, and these solutions must involve numerous stakeholders.<sup>1019</sup> Because the constitutional division of powers delegates authority over education, the trades and most regulated professions to the provinces,<sup>1020</sup> the federal government's initiatives in relation to foreign credential recognition are generally limited to establishing programs that provide funding for relevant projects, or that disseminate relevant information to those holding foreign credentials.

The Foreign Credentials Referral Office (FCRO)<sup>1021</sup> was first launched in May 2007, with \$32.2-million in federal funding over its first five years.<sup>1022</sup> The FCRO's objective is to provide immigrants with information before they actually arrive in Canada.<sup>1023</sup> Information dissemination is important both for facilitating the

economic integration of immigrants, and for allowing immigrants to make informed choices about coming to Canada in the first place. Although access to information is an integral part of effective foreign credential recognition, information regarding how to access mechanisms that are sometimes inefficient and ineffective will be of limited value. While the FCRO has an important role to play, to maximize the effectiveness of information dissemination instruments, the facilitative mechanisms about which information is being dispensed must function in an effective way.

One specific information dissemination program is the Canadian Immigration Integration Program (CIIP). It is run by the Association of Canadian Community Colleges, and is funded by Citizenship and Immigration Canada;<sup>1024</sup> over three years (2010-2013), \$15-million has been established for this program.<sup>1025</sup> One of the reasons the CIIP is valuable to Canada is its role in improving foreign credential recognition.<sup>1026</sup> Currently, the program is delivered at three in-person at locations, in China, India and the Philippines.<sup>1027</sup> A fourth location will be added in the fall of 2011 in London, England. With the addition of the fourth location, the program will be available to 44% of immigrants in the provincial nominee immigration category, and 75% of immigrants in the federal skilled-worker category.<sup>1028</sup> The program is open to immigrants in “the final stages of the immigration process,” but before arrival in Canada.<sup>1029</sup> The program consists of day-long seminar sessions about the “Canadian national economy and trends,” including issues with foreign credential recognition, and “[j]ob search techniques and tools.”<sup>1030</sup> There are also hour long one-on-one counseling meetings, during which an immigrant receives assistance in the creation of an individualized action plan to help with her economic integration.<sup>1031</sup>

HRSDC identified some needs of foreign trained people in 2010, one of which was “information, preferably before arriving in Canada, about the [foreign credential recognition] process,” and about what can be “realistically expect[ed] in Canada, both in terms of regulatory requirements and labour market prospects.”<sup>1032</sup> The CIIP directly addresses these issues, and as a result it should continue to be expanded<sup>1033</sup> until it is available to virtually all immigrants, in all immigration categories, who wish to participate. Because of the high cost of establishing new in-person centres everywhere they would be required, technology could be used to mitigate the cost of the program’s expansion. Online seminars could be hosted from a central location in Canada for those unable to travel to one of the four in-person locations. The one-on-one meetings could then be completed using web-chat software or the telephone.

The Foreign Credential Recognition Program (FCRP)<sup>1034</sup> is another significant federal initiative intended to facilitate foreign credential recognition in Canada. Funding was first provided in 2003,<sup>1035</sup> and the program is intended to ensure fair, accessible, coherent, transparent, and rigorous foreign credential recognition processes in Canada.<sup>1036</sup> The FCRP provides strategic funding to “provincial and territorial partners and stakeholders, including regulatory bodies, sector councils and post-secondary educational institutions to develop systems and processes for assessing and recognizing foreign qualifications in targeted occupations and sectors.”<sup>1037</sup> Numerous projects have been funded over the past several years, and

some have substantially benefited foreign credential recognition in Canada.<sup>1038</sup> It is important to have a program which can provide funding for projects that will improve foreign credential recognition processes in Canada. From the 2008-2009 fiscal year onwards, the FCRP will receive \$8-million each year in ongoing funding.<sup>1039</sup>

A review of the FCRP's effectiveness was completed in 2010.<sup>1040</sup> In this review, project selection was questioned as it relates to achieving the FCRP's medium-term goals,<sup>1041</sup> and there was a minimal amount of progress shown toward achieving its long-term goals.<sup>1042</sup> While it is important for a program to be available to provide funding for projects used to improve foreign credential recognition in Canada, it must be ensured that the projects that are funded are likely to lead to practical and effective mechanisms to recognize foreign credentials and competencies.

A third major initiative from the federal government is the Internationally Educated Health Professionals Initiative (Health Professionals Initiative).<sup>1043</sup> This program is part of a health human resource strategy, and is intended "to increase the supply of health professionals into the Canadian workforce."<sup>1044</sup> There is ongoing funding of \$18-million per year established for the program.<sup>1045</sup> Examples of Health Professionals Initiative projects are present online,<sup>1046</sup> and in "Pan-Canadian HHR Strategy Annual Reports."<sup>1047</sup> These examples reveal numerous projects with the potential to significantly contribute to increased numbers of foreign-trained health professionals working in various provinces and territories, and to improve the consistency in the assessment of internationally educated health professionals across Canadian jurisdictions.<sup>1048</sup> One project in Nunavut was completed in 2009, and resulted in 23 internationally-educated nurses and one internationally-educated doctor attaining licensure and working in that jurisdiction. This project also resulted in "[i]mproved capacity to orient and support new [internationally-educated nurses] and increased ability to share experiences with other" northern regions looking to achieve similar results.<sup>1049</sup> It is valuable to have a program which can effectively facilitate an increase in qualified medical personnel able to practise in Canada, and the Health Professionals Initiative appears to be achieving significant results. The ongoing funding for this program should be maintained as long as the need and demand for funding of these types of projects exists.

In addition to academic and competency-based recognition issues, one of the most common obstacles to labour market integration for immigrants is a lack of recognition of foreign work experience; such experience is often "almost completely discounted."<sup>1050</sup> "Apprenticeships and internships" have been suggested to address this problem, "particularly in non-regulated occupations."<sup>1051</sup> Some federal government departments (CIC and HRSDC) have developed internship programs aimed at new immigrants to assist them in attaining Canadian work experience.<sup>1052</sup> These programs are currently done on a relatively small scale, but if expanded to other departments and to provincial government departments, they have the potential to have a more significant positive impact on labour market integration of immigrants in Canada. Another option that could be explored to make such internship opportunities available to significantly more immigrants was posited by the Parliamentary Standing Committee on Citizenship and

Immigration.<sup>1053</sup> It was suggested that incentives be created for private businesses to create short-term employment opportunities to provide newcomers with Canadian work experience.

While the federal government has clearly identified foreign credential recognition as an important issue both with words and action, there is room for continued improvement in the area. Through the Foreign Credentials Referral Office, the Foreign Credential Recognition Program, and the Internationally Educated Health Professionals Initiative, some progress has been made,<sup>1054</sup> and by providing ongoing funding for these programs, the federal government has conveyed its desire and intention to improve credential recognition programs and mechanisms in Canada moving forward. The FCRP and Health Professionals Initiative in particular have important roles to play in terms of providing federal funding for the development of a variety of assessment and recognition tools, such as those discussed below.

## Provincial Governments' Efforts

### Overview

Provincial governments' efforts to facilitate foreign credential recognition generally take different forms than the federal government's funding and facilitative initiatives. The constitutional division of powers delegates different aspects of credential recognition to the jurisdiction of the provinces/territories and federal government.<sup>1055</sup> The provinces and territories have jurisdiction over education and most regulated occupations,<sup>1056</sup> which puts them in a position to impact foreign credential recognition with a relatively large amount of force and ease within their own jurisdictions. Provinces and territories seem somewhat reluctant to take the lead in assessing credentials and substantive competencies, perhaps because to facilitate effective foreign credential recognition processes, a province would have to take on powerful regulatory bodies, some of which may not welcome such reforms.<sup>1057</sup>

Improving or establishing mechanisms to assess academic credentials, and especially mechanisms to assess clinical competencies, would be difficult and expensive, but there are relatively efficient ways to take such steps. An efficient way to develop mechanisms for the assessment of academic credentials and substantive competencies is for the federal and provincial governments to pool financial resources and expertise to develop national testing centres. It may be more efficient, for example, for colleges of physicians throughout Canada to agree on methodologies to test the competency of foreign-trained medical professionals, and establish several centres across the country where this can be done. This would require extensive negotiation among regulators, which may be complicated by disagreements over who should fund what. Apart from such collaboration, a particular province that wishes to move ahead and become a national leader in assessing credentials and testing competencies would likely find the investment well worthwhile. It would become the natural place in Canada for skilled

immigrants to settle. Once these people have established homes, families, friends and professional networks, they would likely wish to remain in the province that facilitated their entry to their desired occupations.

HRSCD's 2010 evaluation of the Foreign Credential Recognition Program expressed that one of the needs of foreign-educated persons was "supports...to overcome gaps in credentials and knowledge;" one example provided of such support was "bridging programs."<sup>1058</sup> Numerous "bridging programs" are in place in the provinces and territories.<sup>1059</sup> They are meant to supplement education and training obtained abroad to bring one up to Canadian standards. It is important for the federal and provincial/territorial governments to provide adequate funding for the establishment and maintenance of such programs where there is a demand for them, because they provide an efficient route to labour market participation for those whose current credentials only partially meet Canadian standards. Where bridging programs are available, a person's existing competencies are respected and supplemented, as opposed to requiring a person to start over to become qualified to work in a given occupation. These programs must be coupled with sustained efforts to ensure that credentials and competencies are assessed accurately. Accurate assessment ensures that bridging programs are only utilized by those who have legitimate gaps in qualifications that need to be filled in order to provide services to Canadians in a safe and competent manner. These programs also require adequate capacities to meet the needs of those who wish to participate, and they should be offered at times that will allow access for those who are already working in full time positions (for example on evenings and weekends).

With respect to bridging programs, the federal government recently announced the creation of a loan program "to help with tuition and training costs that are required to have foreign credentials recognized in Canada."<sup>1060</sup> Sometimes the required bridging programs can cost immigrants a substantial amount of money, some as much as \$25,000, and this new program is intended to help immigrants who are unable to secure normal student loans or private other loans.<sup>1061</sup> This program has the potential to help immigrants enter their chosen fields, and signals the federal government's continuing commitment to improving foreign credential recognition.

## Foreign Credential Assessment and Recognition Performed by Occupational Regulatory Bodies<sup>1062</sup>

Occupational regulatory bodies often legally mandate which particular qualifications are required to work in the occupations they govern. Regulatory bodies frequently assess a person's foreign academic credentials, and some also offer clinical assessment programs<sup>1063</sup> to facilitate licensure. Such programs are particularly important for practitioners who are experienced abroad, or who obtained competency in a different way than the normal route taken in Canada. Assessing the knowledge and competence of such practitioners in a clinical setting is far more desirable and fair than requiring these people to pass examinations that are meant for new graduates in a field to obtain licensure. This is simply because experienced professionals, whether trained in Canada or abroad, may struggle to pass examinations that are partly based on material that a person has been away from for years. It is important for the federal and provincial governments to properly fund and facilitate the establishment and operation of such clinical assessment programs, because they allow for the fair and effective recognition of the foreign qualifications of experienced professionals.<sup>1064</sup>

Some regulatory bodies, such as the College of Optometrists of Ontario and the College of Dental Technicians of British Columbia, utilize the Prior Learning Assessment and Recognition (PLAR) approach "to evaluate the knowledge and skills of internationally trained applicants wishing to enter their professions."<sup>1065</sup> PLAR is a process used to assist "adults to demonstrate and obtain recognition for learning that they acquire outside of formal education settings."<sup>1066</sup> In PLAR, the knowledge and skills gained from experience, as opposed to the experience itself, are recognized. The focus of PLAR is "what the person knows and can do."<sup>1067</sup> PLAR is one approach that occupational regulatory bodies could utilize in place of normal entrance examinations in order to determine if someone with foreign experience meets relevant standards to gain certification in a given occupation. Various "benchmarks and principles of good practice [have been] established," however there have not been any "widely accepted Standards of Good Practice in PLAR."<sup>1068</sup>

A number of needs and challenges of occupational regulatory bodies have been identified by HRSDC. The main challenges faced by these bodies are a deficiency in understanding of foreign credential recognition in general, and the "need for improved processes to assess programs or educational/credit systems in other countries."<sup>1069</sup> Other specific needs of regulatory bodies include the need for "more capacity to undertake assessments," and for "more tools and more sharing/closer collaboration among regulatory bodies and stakeholders."<sup>1070</sup> It has been suggested that these issues could largely be addressed by the FCRP, and "greater attention to this stakeholder group may be beneficial."<sup>1071</sup> This is an important realization, given the central role often played by regulatory bodies in foreign credential recognition. The federal and provincial governments should ensure that adequate funding and cooperative efforts are available for the establishment and

maintenance of appropriate mechanisms for recognition of foreign credentials in the regulated professions at the pan-Canadian level. These mechanisms include bridging programs and clinical assessment or PLAR programs, but there is also an opportunity for regulatory bodies to contribute to and benefit from the wider credential recognition community, particularly with respect to assessment of academic credentials, as outlined below.

## **The Alliance of Credential Evaluation Services of Canada and Third Party Credential Assessment Agencies**

The Alliance of Credential Evaluation Services of Canada (ACESC)<sup>1072</sup> is made up of the five provincially mandated or recognized standalone credential assessment services.<sup>1073</sup> Membership in ACESC is voluntary, and is available to any credential assessment service which meets ACESC's "quality assurance standards."<sup>1074</sup> ACESC touts that membership in the Alliance is an "assurance of excellence". The Secretariat of ACESC is the Canadian Information Centre for International Credentials (CICIC).<sup>1075</sup>

In order to maintain membership in ACESC, a service must continuously meet all quality assurance guidelines, and proof that these guidelines are being met is based on each agency's self-evaluation.<sup>1076</sup> These self-evaluations include "a review of assessment procedures, experience, file management, personnel qualifications, documentation methods and reference material base."<sup>1077</sup>

The five provincially mandated or recognized standalone credential assessment agencies that make up ACESC's membership<sup>1078</sup> are Alberta's International Qualifications Assessment Service, British Columbia's International Credential Evaluation Service, Manitoba's Academic Credentials Assessment Service, Ontario's World Education Services Canada, and Quebec's Centre d'expertise sur les formations acquises hors du Quebec. There are two standalone agencies which are not provincially mandated or recognized, the Comparative Education Service, at the School of Continuing Studies, University of Toronto, and the International Credential Assessment Service of Canada, which is located in Guelph, Ontario.<sup>1079</sup> The Governments of the Northwest Territories and of Saskatchewan provide assessments through an interprovincial agreement with the Government of Alberta. The International Qualification Assessment Service performs academic credential assessments for those jurisdictions.<sup>1080</sup> Canada's seven standalone credential assessment services perform approximately 48,000 academic credential assessments annually.<sup>1081</sup>

## ACESC's Quality Assurance Framework

To attain and maintain membership in ACESC, several requirements must be met as part of compliance with the quality assurance framework. The services must be operated, mandated or recognized by a province or territory.<sup>1082</sup> The services rendered must be extended to "a broad-based clientele," not just a single type of customer. For example, services cannot serve only a single profession. The service must also "provide multi-purposed assessments ... and cover a full range of countries of origin, disciplines, and levels of credentials."<sup>1083</sup> Members must also engage in "[c]ontinuous research" in order to ensure that all of the information required to assess a credential is available.<sup>1084</sup> The employees who actually carry out the assessments must do so in a "fair and consistent" way. They must also possess at least a "bachelor degree or the equivalent," and must have completed "a documented training program in educational credential assessment."<sup>1085</sup> All ACESC members are also required to comply with the "General Guiding Principles for Good Practice in the Assessment of Foreign Credentials."<sup>1086</sup>

These and other standards must be met and complied with for at least one year, and the assessment service must have completed at least 250 assessments in that time to establish membership. The agency must then display conformity to these requirements "through the self-assessment survey process" to maintain membership.<sup>1087</sup>

## The General Guiding Principles for Good Practice in the Assessment of Foreign Credentials

The General Guiding Principles for Good Practice in the Assessment of Foreign Credentials (Guiding Principles) are not only followed by ACESC members, but are also voluntarily followed by Canada's two other standalone assessment services, Comparative Education Service and the International Credential Assessment Service of Canada.<sup>1088</sup> The guiding principles recommend, in a general way, what should be considered when performing an actual academic credential assessment, which documents are normally required, and what the ideal verification procedures for those documents should be.<sup>1089</sup> The recommended processes are intended to ensure impartial and consistent assessments. It is specified that these processes should be reviewed regularly to eliminate "undue complications."<sup>1090</sup> Additionally, assessment methods "should take into account the diversity of educational traditions in the world."<sup>1091</sup>

## Assessment of Academic Credentials Earned Abroad: Moving Forward

Although all of Canada's standalone credential assessment agencies follow the Guiding Principles and ACESC members are required to follow the quality assurance framework, each individual agency essentially uses its "own methodology" in assessing credentials.<sup>1092</sup> While "there may be no assurance that an immigrant will receive a consistent evaluation of their credentials from one evaluation service to another, evaluations offered in most cases are far more similar than they are different."<sup>1093</sup> However, because the agencies do not use uniform methodology and resources, the potential does exist for inconsistent assessment results depending on which standalone assessment service is used. This can have several drawbacks. It can lead to "a convoluted and confusing system for the immigrant client." It can also lead to impediments to labour market integration, or could even lead a person to "shop around" for the agency that will give one's credentials the best chance at being recognized.<sup>1094</sup>

Several needs of these standalone assessment bodies were identified in the HRSDC's report on the Foreign Credential Recognition Program. These needs included "common standards/approaches for assessment" and "more sharing of information, and tools and databases."<sup>1095</sup> The Pan-Canadian Quality Standards in International Credential Evaluation report (Quality Standards Report) was created in an attempt to "lay the groundwork for a set of pan-Canadian policy and practice standards to guide the work of all credential assessing bodies."<sup>1096</sup>

The Quality Standards Report contains several recommendations. The recommendations do address the need for a quality assurance framework with a pan-Canadian reach, but not the need for effective enforcement of compliance with that framework.<sup>1097</sup> There are several reasons why even ACESC members, who are presently required to follow a quality assurance framework, are not always producing consistent results. One of these reasons is that ACESC's quality assurance framework does not require standardization of key aspects of assessments, such as document requirements, verification policies, and the information bases from which the agencies work. While the Quality Standards Report recommendations do attempt to address these issues, the need for an effective enforcement mechanism is not addressed. The ability to enforce compliance is desirable, because even if all of the agencies agree to certain verification policies for example, but there is no way to enforce compliance, there is nothing to stop an agency from straying from that policy.

The Canadian Information Centre for International Credentials (CICIC) is presently working on the second phase of the Quality Standards Report project,<sup>1098</sup> with \$941,955.00 in funding over two years.<sup>1099</sup> In this phase of the project, important steps are being taken to develop various tools to improve the consistency and portability of academic credential assessments across the country. These include new "Terminology Guides" meant to establish "a commonly understood assessment language," and to minimize any confusion resulting from the "multiple terms and definitions" presently in use in the area.<sup>1100</sup> There is presently a lack of "made in

Canada' resource materials for academic assessors to use in evaluations," and as a result "non-Canadian references" are relied on.<sup>1101</sup> Different assessors utilize "their own unique combination of these resources," and this raises concerns regarding the consistency of assessment results.<sup>1102</sup> The project currently underway aims to create "profiles for two major source countries of immigration."<sup>1103</sup>

In addition to the creation of two country profiles, a "needs and issues analysis to determine whether the development of shared databases of assessment results, resources and methodologies at a pan-Canadian level as well as a document verification tool" would be the ideal solution for promoting "greater mutual recognition and transparency of assessment processes."<sup>1104</sup> This database would also promote increased consistency and "a database accessible by all groups performing assessments could be used as a repository for a variety of valuable assessment-related data."<sup>1105</sup> If all assessors in Canada were to utilize such a database, it would "organically standardize the type of research performed ... to foster a culture of cooperation within the assessment community."<sup>1106</sup>

A new quality assurance framework is also being developed. As mentioned above, the perception that there is a potential for inconsistent results depending on who is assessing a credential "can encourage newcomers to 'shop around' for the most favourable assessment," and it could also "erode the willingness of end-users to accept evaluations for the purpose of admitting an individual into the workforce or an educational institution."<sup>1107</sup> A draft of this new pan-Canadian quality assurance framework was released in April 2011.<sup>1108</sup> This new quality assurance framework is intended to "be used by all organizations" involved in the assessment of academic credentials in Canada, and to "provide them with a reference tool, to facilitate the mutual recognition of international academic credential assessment practices in Canada and thereby enhance the consistency and portability of ... assessments throughout the country."<sup>1109</sup> The draft QAF includes a "Pan-Canadian Code of Good Practice in Assessment of International Academic Credentials" (the Code). The Code is "largely based on 'General Guiding Principles for Good Practice in the Assessment of Foreign Credentials'", which is itself "based on the 'Recommendation on Criteria and Procedures for the Assessment of Foreign Qualifications', produced ... in connection with the Lisbon Recognition Convention, 1997."<sup>1110</sup> The Code "contains 38 principles and recommendations subscribed to by all the organizations [who are] involved in assessment ... and are members of the Pan-Canadian Quality Assurance Framework for the Assessment of International Academic Credentials."<sup>1111</sup>

There is a clearly conveyed desire to commit to perpetual improvement of the new quality assurance framework over time. The governance of the framework is vested in the Council of Ministers of Education, Canada (CMEC), and it "also requires a Support Committee made up of representatives of international academic credential assessment services."<sup>1112</sup> "[S]ustained collaboration leads to the identification of the improvements to be made to the QAF and its tools on a regular basis."<sup>1113</sup> It is contended that "[t]his makes the QAF dynamic, open-ended and perfectible."<sup>1114</sup> Once the quality assurance framework has been in use for between three and five years, it will be "reviewed to correct the weaknesses that its use has revealed and to adapt the QAF to new conditions."<sup>1115</sup>

ACESC is listed in the draft of the new framework as a partner, whose “unifying capabilities and its power of advocacy make it, if need be, a central organization in efforts to achieve consistency.”<sup>1116</sup> ACESC’s unique position in the credential assessment community also makes it a possible centre that can be used to achieve enforceability of compliance with the new quality assurance framework. ACESC is presently an organization of government-sanctioned academic credential assessment services, but it is not being used to its full potential.

The current requirement of being affiliated with a provincial government in order to be permitted membership in ACESC should be abandoned.<sup>1117</sup> This will allow Canada’s other two standalone credential assessment services to join. The current requirement that member agencies serve a “broad based clientele” should also be abandoned,<sup>1118</sup> which will allow occupation-specific assessment bodies, such as regulatory authorities or individual employers, to join. The new pan-Canadian quality assurance framework could then be adopted by ACESC, along with the other tools currently under development in the second phase of the Quality Standards Report, substantially standardizing very important aspects of the academic credential assessment process across the country.

Once ACESC membership becomes more inclusive and open to all credential assessing bodies, legislators should consider using it as a vehicle to enforce compliance with the new quality assurance framework, and to ensure standardization of processes used to assess academic credentials. At a specified date in the future, membership in ACESC could become mandatory for an organization’s assessments of foreign credentials to be used for entry into occupations where a certain credential is required by law in Canada. Since education and most regulated occupations fall under provincial jurisdiction,<sup>1119</sup> cooperation from the provinces and territories is required for such a law to be effective and constitutionally valid. More informal assessments by non-members of ACESC for occupations where a credential is not legally required obviously cannot be outlawed, but ACESC members could still assess credentials in such situations. Membership to ACESC would be open to any assessing agency or body meeting ACESC’s current requirements, with the exception of the government affiliation and broad-based clientele requirements. Membership would then be maintained by all members who adhere to the newly developed pan-Canadian quality assurance framework. The required adherence to the same quality assurance framework by all assessment agencies would immediately make assessments processes across the country more consistent. As the new framework evolves and more common tools and standards are adopted by ACESC, the consistency and standardization of processes and outcomes of academic credential assessments across the country would continue to improve.

Presently the only real benefits to ACESC membership are the use of the ACESC name and logo, and the inference that membership means an assessment agency follows the Guiding Principles and the current quality assurance framework. If mandatory membership were required to perform assessments for credentials required by law for given occupations, an assessing body’s survival may depend on membership in ACESC. This is simply because a large portion of the agency’s client base would require an assessment from a member for it to be of any value.

This allows the ability to truly enforce compliance to the new quality assurance framework, which would be required to maintain membership. To further develop compliance with this new framework, conformity should no longer be measured by members' self assessments, but by assessments performed by an independent body reporting to ACESC.

These recommendations regarding the utilization of ACESC to establish standardization of assessment methods and enforceability of compliance to the new quality assurance framework would require a high level of cooperation between jurisdictions, as well as financial support from the federal government and the provinces. Adequate time would also need to be provided to determine the most effective and efficient way to implement these changes.

## Conclusion

Canada has the world's highest relative immigration levels,<sup>1120</sup> and as a result foreign credential recognition is vitally important to Canada's present and future economic prosperity. A significant number of immigrants to Canada hold foreign credentials, which will require recognition if an immigrant is going to find work in Canada that is commensurate with her education, training, skills, and abilities. The federal government has made efforts to improve foreign credential recognition through programs like the Foreign Credentials Referral Office, the Foreign Credential Recognition Program, and the Internationally Educated Health Professionals Initiative, but continued effort and funding is required to ensure adequate mechanisms are in place to facilitate fast and effective economic integration of immigrants in Canada.

There are numerous agencies and organizations that assess foreign credentials in Canada. Standalone academic credential assessment services, occupational regulatory bodies, post-secondary academic institutions, and individual employers across the country all assess foreign credentials on a regular basis. Aside from the Alliance of Credential Evaluation Services of Canada members' requirement to follow its quality assurance framework, there are currently no uniform standards that all of these agencies are required to meet, and this leads to cases of inconsistency, inaccuracy, and a lack of portability of assessments. ACESC's unique position in the credential assessment community should be utilized to enforce compliance with pan-Canadian standards, which will result in improved consistency, accuracy and portability of assessments of academic credentials across the country.

These proposed alterations with respect to ACESC would be a significant step in favour of ensuring consistent and accurate academic credential assessments across Canada. The importance of competency-based assessments must also be stressed. Methods and processes to assess substantive competencies can be difficult and expensive to develop, but are just as important as academic credential assessments. The most efficient way to develop such processes would be through cooperation and coordination between regulatory authorities in a

given occupation to develop the appropriate clinical assessment or Prior Learning Assessment and Recognition programs. If this course is taken, there would be consistency across the country established immediately for the occupation at issue. Not only would this help those holding foreign credentials by allowing them to qualify to work in their occupations by demonstrating competency, but there would be numerous other benefits. Canada's reputation abroad as a desirable destination for highly educated and skilled immigrants would be enhanced, the national economy would function with increased efficiency, and these immigrants would be able to utilize their creativity and ingenuity within these occupations to increase the quality and variety of services to available to Canadians. Even in the absence of pan-provincial cooperation, many of these benefits would still accrue to individual provinces that decide to take the lead in this area.

Effective facilitative mechanisms are an essential component in the overall improvement of foreign credential recognition in Canada. Improvements in other aspects of credential recognition will be much less effective if there continues to be a lack of adequate mechanisms. Conversely, the establishment and maintenance of proper facilitative mechanisms will strengthen measures to improve foreign credential recognition taken in other areas such as immigration law and policy, competition legislation, human rights legislation, fair access laws, and interprovincial and international labour mobility.

# Endnotes

1. See e.g. George A Akerlof, "The Market for "Lemons": Quality Uncertainty and the Market Mechanism" (1970) 84 *Quarterly Journal of Economics* 488 at 500; Thomas G Moore, "The Purpose of Licensing" (1961) 4 *JL & Econ* 93.□
2. Sidney L Carroll & Robert J Gaston, "Occupational Restrictions and the Quality of Service Received: some Evidence" (1981) 47:4 *Southern Economic Journal* 959 at 965.
3. See Morris M Kleiner, *Licensing Occupations: Ensuring Quality or Restricting Competition?* (Kalamazoo: W E Upjohn Institute for Employment Research, 2006); Timothy R Muzondo & Bohumir Pazderka, "Income-enhancing effects of professional licensing restrictions: a cross-section study of Canadian data" (1983) 28:2 *The Antitrust Bulletin* at 397; but see Marc T Law & Sukoo Kim, "Specialization and Regulation: The Rise of Professionals and the Emergence of Occupational Licensing Regulation" (2005) 65:3 *Journal of Economic History* 723.
4. See e.g. *Bitonti v British Columbia (Minister of Health)* (1999), 36 CHRR D/263 (BCCHR); *Keith v Newfoundland Dental Board* 2005 NLTD 125, 37 Admin LR (4th) 106 [Keith].
5. See e.g. *Law Society of British Columbia v Andrews* [1989] 1 SCR 143, 56 DLR (4th) 1 at para 37.
6. Keith, *supra* note 4.
7. *Fair Access to Regulated Professions Act*, SO 2006, c 31 [Fair Access Act]; *The Fair Registration Practices in Regulated Professions Act*, SM 2007, c 21; *Fair Registration Practices Act*, SNS 2008, c 38.
8. *Fair Access Act*, *ibid*.
9. OECD, *Economic Policy Reforms 2010: Going for Growth – Canada* (Paris: OECD, 2010).
10. *Competition Act*, RSC 1985, c C-3419 (2nd Supp) [Competition Act].
11. *Garland v Consumers' Gas Co*, 2004 SCC 25 at paras 77-79, [2004] 1 SCR 629; *Canada (AG) v Law Society of British Columbia* [1982] 2 SCR 307 at 348-361, 137 DLR (3d) 1.
12. *Competition Act*, *supra* note 10, s 72.
13. SC 2000 c 5.
14. *General Agreement on Trade in Services*, 15 April 1994, 1869 UNTS 183, 33 ILM 1167 (entered into force 1 January 1995), being Annex B to the *Agreement Establishing the World Trade Organization*, 15 April 1994, 33 ILM 1143 (entered into force 1 January 1995).
15. WTO, *Disciplines on Domestic Regulation in the Accountancy Sector*, Council for Trade in Services, S/L/64 (17 December 1998), online: WTO <<http://docsonline.wto.org>>.
16. *Québec-France Agreement on the Mutual Recognition of Professional Qualifications*, 17 October 2008, online (in French): Ministère des Relations internationales <<http://www.mri.gouv.qc.ca/fr/informer/ententes/pdf/2008-12.pdf>>.
17. *Convention on the Recognition of Qualifications concerning Higher Education in the European Region*, 11 April 1997, Lisbon, European Treaty Services, Number 135, 11.IV.1997, online: Council of Europe <<http://conventions.coe.int/Treaty/en/Treaties/Html/165.htm>>.
18. *Agreement on Internal Trade Consolidated Version*, 2010, online: *Agreement on Internal Trade* <<http://www.ait-aci.ca/>> [AIT].
19. "Human Rights Law Basics", online: *Canadian Human Rights Reporter* <<http://www.cdn-hr-reporter.ca>> [Human Rights Law Basics].
20. *Constitution Act*, 1867 (UK), 30 & 31 Vict, c 3, s 92 reprinted in RSC 1985, App II, No 5.
21. *Ibid* at s 91.
22. *Ontario (Human Rights Commission) v Simpsons Sears Ltd*, [1985] 2 SCR 536 at para 12, 23 DLR (4th) 321 [Simpsons Sears, cited to SCR].
23. Stanley Corbett, *Canadian Human Rights Law & Commentary*, (Markham, Ont: LexisNexis Canada, 2007) at 24.
24. [1989] 1 SCR 143, para 37, [1989] SCJ No 6 [Andrews, cited to SCR].
25. See *British Columbia (Public Services Employee Relations Comm) v British Columbia Government and Service Employees' Union (BCGSEU) (Meiorin Grievance)* [1999] 3 SCR 3, 176 DLR (4th) 1 [Meiorin, cited to SCR].
26. *Ibid* at para 54.
27. *Simpsons Sears*, *supra* note 4 at para 18.
28. *Ibid*.
29. *Ibid*.
30. *Meiorin*, *supra* note 7 at paras 28-31, 50-53; *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* [1999] 3 SCR 868, at paras 16-17, 181 DLR (4th) 385 [Grismer, cited to SCR].
31. *Bitonti v British Columbia (Minister of Health)* (1999), 36 CHRR D/263 (BCCHR) at paras 193-194 [Bitonti].
32. *Ibid* at para 190; see also *Neiznanski v University of Toronto and John Provan* (1995), 24 CHRR D/187 (Ont Bd Inq) ("[o]stensibly, they are discriminated against on the basis of their foreign credentials. However, the effect often is to exclude groups linked to their place of origin, race, colour, or ethnic origin" at para 51); see also *Grover v Alberta (Human Rights Comm)* (1996), 28 CHRR D/318 (Alta QB) (the court implies that a distinction based on place of training could be considered discrimination based on place of origin, but only where "there [is] a link between the facts and 'place of origin.'" In the factual circumstances in this case "place of origin of a person ... cannot be stretched to include the place where the person received their PhD degree" at para 42); contra *Fletcher Challenge Ltd v British Columbia*

(Council of Human Rights) and Grewal (1992), 18 CHRR D/422 (BCSC) (in considering whether language requirements are discriminatory, the court said "language is directly related to ... place of origin. But it cannot be said to be necessarily related. Apart from its capacity to convey culture, language is also a communication skill that may be learned, and the ability to learn any language is not dependent on race, colour or ancestry" at para 32).

33. Bitonti, supra note 13 at para 1.
34. Ibid at para 32.
35. Ibid at paras 158 & 176.
36. Ibid at para 161.
37. Ibid at para 147.
38. Ibid at para 180.
39. Siadat v Ontario College of Teachers (2007) 83 OR (3d) 401 (Div Ct) at para 3, [2007] OJ No 65.
40. Ibid at para 7.
41. Ibid at para 9.
42. Ibid at para 11.
43. Ibid at paras 12-14.
44. Ibid at para 16.
45. Ibid at para 46.
46. Ibid at para 47.
47. Ibid at para 65.
48. Keith v Newfoundland Dental Board, 2005 NLTD 125, at para 1, 37 Admin LR (4th) 106.
49. Ibid at para 3.
50. Ibid.
51. Ibid at paras 6-8.
52. Ibid at para 4.
53. Ibid at para 9.
54. Ibid at para 28.
55. Ibid at para 32.
56. Ibid at para 35.
57. Investigation on its own Initiative of the Commission des Droits de la Personne et des Droits de la Jeunesse, (Commission des Droits de la Personne et des Droits de la Jeunesse, 2010), online: <[http://www2.cdpedj.qc.ca/en/img/Documents/traduction\\_resolution\\_anglais\\_medecins\\_etrangers.pdf](http://www2.cdpedj.qc.ca/en/img/Documents/traduction_resolution_anglais_medecins_etrangers.pdf)>.
58. Ibid at 7.
59. Ibid.
60. See Meiorin, supra note 7.
61. Ibid at para 3; see also The Human Rights Code, CCSM c H175, of Manitoba at s 14(6) ("[n]o trade union, employer, employers' organization, occupational association, professional association or trade association" can "discriminate in respect of the right of membership or any other aspect of membership in the union, organization or association," unless there is a bona fide and reasonable cause ... for the discrimination"; See also Grismer, supra note 12.
62. Meiorin, supra note 7 at para 54.
63. Ibid at para 54.
64. Ibid at paras 57-58.
65. Ibid at para 60.
66. Ibid at para 54.
67. Ibid at para 62.
68. Ibid at para 64.
69. Ibid at para 68.
70. See e.g. Chapter 7: Facilitating Credentials Recognition at Frontline Agencies.
71. Canadian Charter of Rights and Freedoms, s 15(1), Part I of the Constitution Act, 1982, being schedule B to the Canada Act 1982 [UK], 1982, c 11 [Charter].
72. Eldridge v British Columbia (Attorney General), [1997] 3 SCR 624 at para 44, [1997] SCJ No 86 [Eldridge, cited to SCR].
73. Ibid.
74. Ibid.
75. Ibid at para 35.

76. Ibid at para 36.
77. Ibid at para 44.
78. See e.g. *Black v Law Society of Alberta* [1989] 1 SCR 591, 58 DLR (4th) 317 [Black]; see e.g. *Histed v Law Society of Manitoba*, 2007 MBCA 150, 287 DLR (4th) 577 [Histed]; see e.g. *Rocket v Royal College of Dental Surgeons of Ontario* [1990] 2 SCR 232, 71 DLR (4th) 68; see e.g. *Andrews*, supra note 6.
79. See *Eldridge*, supra note 54 (“[i]n order for the Charter to apply to a private entity, it must be found to be implementing a specific governmental policy or program” at para 43).
80. See Peter W Hogg, 2009 Student Edition *Constitutional Law of Canada* (Toronto: Carswell, 2009) (“[s]ince neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter. Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to ... all other action ... which depends for its validity on statutory authority” at 787); see also *Histed*, supra note 60 (“[t]he Charter applies to the exercise of statutory authority regardless of whether the actor is part of the government or is controlled by the government”. The Charter was found to apply to the Law Society of Manitoba because their “mandate under the Act is part of a regulatory scheme established by the Manitoba legislature to govern the affairs and activities of the legal profession” at para 43); see also Mary Cornish, Elizabeth McIntyre & Amanda Pask, “Strategies for Challenging Discriminatory Barriers to Foreign Credential Recognition” (Paper delivered at the National Conference – Shaping the Future: Qualification Recognition in the 21st Century, Toronto, 12-15 October 1999), online: Cavalluzzo, Hayes, Shilton, McIntyre & Cornish <<http://www.cavalluzzo.com>>.
81. *Charter*, supra note 53, s 15.
82. See e.g. *Bitonti*, supra note 13.
83. *Charter*, supra note 53, s 15(1).
84. *Jamorski v Ontario (Attorney General)* 5 Imm LR (2d) 312 at paras 1-2, 49 DLR (4th) 426 [Jamorski].
85. Ibid.
86. Ibid at paras 8-9, 18.
87. Ibid at para 20.
88. Ibid at para 21.
89. Ibid at para 22.
90. *Andrews*, supra note 6 at para 30.
91. *Jamorski*, supra note 66 at para 21.
92. See Chapter 7, *Facilitating Credentials Recognition at Frontline Agencies*.
93. *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307 at paras 11 and 134.
94. But see “Guide to a Human Rights Hearing”, online: The Manitoba Human Rights Commission <<http://www.gov.mb.ca/hrc/publications/guidelines/guide-to-a-human-rights-hearing.pdf>> (in Manitoba, the complainant is not required to hire counsel (though he or she can), because the Manitoba Human Rights Commission’s “[c]ounsel is responsible for presenting the case”, while the respondent can either “represent him or her self or be represented by his/her own lawyer”).
95. See *Fair Access to Regulated Occupations Act*, SO 2006, c 31; see *The Fair Registration Practices in Regulated Professions Act*, SM 2007, c 21; see also Chapter 2, *Effective Foreign Credential Recognition Legislation: Recommendations for Success*.
96. The provisions of *The Human Rights Code* in Manitoba are unusual in that a ground of discrimination can be the basis for a complaint even if it is not on the expressly enumerated list of prohibited grounds, such as race, ethnicity or gender (s 9(1)(a)). “Failure to make reasonable accommodation” (s 9(1)(b)), however, is only considered discrimination in relation to the grounds enumerated in s 9(2), and not to the “analogous” grounds contemplated by s 9(1)(a). Even if grounds such as place of education, training and work experience could be inferred as included under s. 9(1)(a), therefore, the protection afforded to individuals with respect to such discrimination would be relatively limited. In Manitoba as in other provinces, therefore, the best approach would be to make it clear that place of education, training and work experience is an expressly prohibited ground of discrimination. Doing so would remove any uncertainty about whether such a ground of discrimination is to be read into the less protective s 9(1)(a) or are “proxies” for grounds in s 9(1)(b).
97. “Skilled workers and professionals: Who can apply”, online: Citizenship and Immigration Canada <<http://www.cic.gc.ca>>; see also *Immigration Law and Policy Chapter*.
98. Canada, Parliamentary Information and Research Service, *Recognition of the Foreign Experience and Credentials of Immigrants* (Ottawa: Library of Parliament, 2004) at 1. For a more recent study, from the Library of Parliament, see Sandra Elgersma, *Recognition of Foreign Qualifications of Immigrants*, Publication No 2004-29E, Revised 2 April 2012.
99. Conference Board of Canada, *Renewing Immigration: Towards a Convergence and Consolidation of Canada’s Immigrant Policies* by Douglas Watt, Tim Krywaluk & Kurtis Kitagawa (Ottawa: Conference Board of Canada, 2008) at 5 [Renewing Immigration].
100. Ibid.
101. *Renewing Immigration*, supra note 3 at 3.
102. Supra note 2 at 5.
103. “Foreign Credential Recognition Program”, online: Human Resources and Skill Development Canada <<http://www.hrsdc.gc.ca>>; see Chapter 7, *Facilitating Credentials Recognition at Frontline Agencies*.
104. 1st Sess, 39th Leg, Manitoba, 2007 (assented to 8 November 2007), SM 2007, c 21.
105. 2nd Sess, 37th Leg, Quebec, 2006 (assented to 14 June 2006), SQ 2006, c 20.

106. 2nd Sess, 60th Gen Ass, Nova Scotia (assented to 25 November 2008), SNS 2008, c 38 [Fair Registration Practices Act].
107. Fair Access to Regulated Professions Act, 2006, SO 2006, c 31 [FARPA].
108. Competition Bureau, *Self-Regulated Professions: Balancing Competition and Regulation* (Gatineau, QC: Competition Bureau, 2007) at 13, online: Competition Bureau <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Professions%20study%20final%20E.pdf/\\$FILE/Professions%20study%20final%20E.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Professions%20study%20final%20E.pdf/$FILE/Professions%20study%20final%20E.pdf)>.
109. Glen E Randall, "Understanding Professional Self-Regulation", online: Ontario Association of Veterinary Assistants <[http://www.oavt.org/self\\_regulation/docs/about\\_selfreg\\_randall.pdf](http://www.oavt.org/self_regulation/docs/about_selfreg_randall.pdf)>.
110. *Ibid.*
111. *Ibid* at 2. Self-regulated professions are ordinarily required to develop and enforce rules that help ensure the public is receiving services in a competent and ethical manner. In addition, self-regulation generally includes a complaints and discipline model that allows the public to bring forward concerns about a member of the profession. The penultimate purpose for these measures is to "protect the public from incompetent or unethical practitioners."
112. Peter Hogg, *Constitutional Law of Canada*, loose-leaf (consulted on 3 August 2011), (Toronto: Carswell, 2010), ch 17 at 20.
113. *Ibid*, ch 21 at 10.
114. Todd-Jeffrey Weiler, "Professional Self-Regulation and Federal Competition Policy: The Calarco Case" (January 1997) 7 *Windsor Rev Legal Soc Issues* 119 at 126.
115. *Ibid* at 37-39.
116. FARPA, *supra* note 11.
117. Bill 124, *An Act to Provide for Fair Registration Practices in Ontario's Regulated Professions*, 2nd Sess, 38th Leg, Ontario, 2006 [Bill 124].
118. Ontario, Ministry of Citizenship and Immigration, *Results-based Plan Briefing Book 2007-2008*, online: Ministry of Citizenship and Immigration <[http://www.health.gov.on.ca/english/public/pub/ministry\\_annual/annual\\_rep07\\_08/annual\\_rep07\\_08.pdf](http://www.health.gov.on.ca/english/public/pub/ministry_annual/annual_rep07_08/annual_rep07_08.pdf)>.
119. *Ibid* at ix & xviii. The report recommended enabling appeal processes on the following decisions: to deny registration, to grant or deny provisional or limited registration, lack of registration decision in reasonable timelines, refusals to accept or process applications.
120. George M Thomson, *Review of Appeal Processes from Registration Decisions in Ontario's Regulated Professions: Report to the Ontario Minister of Citizenship and Immigration* (November 2005), online: Legislative Assembly of Ontario. <<http://www.ontla.on.ca/library/repository/mon/13000/257188.pdf>>.
121. An independent appeal tribunal exists under the Regulated Health Professions Act. Decisions of health care professional regulatory bodies may be appealed to the Health Profession Appeal and Review Board (HPARB). However, there are no such tribunals for many other professional regulatory bodies. See Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 2nd Sess, No T-15 (15 November 2006) at 198-199 (Anne Coghlan) [Standing Committee (15 November 2006)].
122. Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 2nd Sess, No 101 (3 October 2006) at 5173 (Peter Tabuns) [Debates (3 October 2006)]. The need for an independent appeal tribunal was emphasized by the College of Medical Laboratory Technologists of Ontario, Policy Roundtable *Mobilizing Professions and Trade*, MP Olivia Chow. Also, Institute of Chartered Accountants of Bangladesh, North American Chapter; Chinese Professionals Association of Canada; Thornclyff Neighbourhood Office; and others. See Standing Committee (15 November 2006), *ibid.* See also Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 2nd Sess, No T-16 (21 November 2006) [Standing Committee (21 November 2006)].
123. *Debates* (3 October 2006), *ibid.* (Peter Tabuns).
124. Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 2nd Sess, No T-17 (22 November 2006) at 231 (Mr. Chinniah Ramanathan), online: <<http://www.ontla.on.ca>> [Standing Committee (22 November 2006)].
125. FARPA, *supra* note 11, s 9(5). See also *Debates* (3 October 2006), *supra* note 26 (Peter Tabuns).
126. Standing Committee (22 November 2006), *supra* note 28 (Professional Engineers Ontario).
127. Standing Committee (15 November 2006), *supra* note 25 (Ontario College of Teachers).
128. Standing Committee (22 November 2006), *supra* note 28 (Law Society of Upper Canada). This was also the reason the Law Society of Upper Canada supported the government's decision not to create an independent appeal body. Also see Standing Committee (22 November 2006), *supra* note 28 (Ontario College of Social Workers and Social Services Workers & College of Physicians and Surgeons Ontario).
129. The Fairness Commissioner may impose different requirements or restrictions in respect to any class of regulated professions. FARPA, *supra* note 11, s 14(c). See also Standing Committee (15 November 2006), *supra* note 25 (College of Nurses of Ontario).
130. Standing Committee (22 November 2006), *supra* note 28 (Ontario College of Social Workers and Social Services Workers).
131. *Ibid* (College of Physicians and Surgeons Ontario & College of Medical Radiation Technologists of Ontario).
132. *Debates* (3 October 2006), *supra* note 26 at 5167 (Elizabeth Witmer). See also The College of Physicians & Surgeons of Ontario (CPSO), "Legislative Update: CPSO's Response to Bill 124", online: CPSO <<http://www.cpso.on.ca>>. Regarding additional costs of the audits see also Standing Committee (15 November 2006), *supra* note 25 (Association of Professional Geoscientists of Ontario). Also see Standing Committee (22 November 2006), *supra* note 28 (Ontario College of Social Workers and Social Services Workers & Ontario Association of Architects).
133. Standing Committee (15 November 2006), *supra* note 25 (Ontario College of Teachers & Association of Professional Geoscientists of Ontario).
134. For example, under the Regulated Health Professions Act, health professions have a duty to report annually to the Ministry of Health. Standing Committee (15 November 2006), *supra* note 27 (College of Medical Laboratory Technologists of Ontario). Also see Standing

- Committee (22 November 2006), supra note 28 (Ontario College of Social Workers and Social Services Workers & Ontario Association of Architects).
135. Bill 124, supra note 21, art 13(1)-(2). For more information about the Office of the Fairness Commissioner, and of the role of the Commissioner see "The Office of the Fairness Commissioner", online: Office of the Fairness Commissioner. <<http://www.fairnesscommissioner.ca>>.
  136. The Commissioner may also advise regulatory bodies, government agencies, community associations as well as ministers on the broad scope of matters. See Bill 124, *ibid*, art 13(3). Also see Ontario, Citizenship and Immigration, "Assessing and Recognizing Credentials in Canada: Ontario's New Fair Access to Regulated Professions Act, 2006" (Public Policy Forum Seminar, Regina, SK, 19 April 2007) at 7-8, online: Public Policy Forum. <[http://www.ppforum.ca/common/assets/fcr/nuzhat\\_jafri.pdf](http://www.ppforum.ca/common/assets/fcr/nuzhat_jafri.pdf)>.
  137. FARPA, supra note 11, ss 13(1), 13(3).
  138. *Ibid*, ss 13(3), 15.
  139. *Ibid*, s 15(6). According to the legislation, the Minister must submit a copy of the report to the Lieutenant Governor in Council who will cause it to be laid before the Assembly if it is in session or, if not, at the next session. However, it does not specify a timeframe for the report's submission by the Minister to the Lieutenant Governor in Council. For a copy of the 2007 report see "Publications", online: Office of the Fairness Commissioner <[http://www.fairnesscommissioner.ca/pdfs/ofc\\_annual\\_report\\_2007-2008\\_english\\_online.pdf](http://www.fairnesscommissioner.ca/pdfs/ofc_annual_report_2007-2008_english_online.pdf)>.
  140. Ontario, Office of the Fairness Commissioner, Fair Registration in the Professions: Regulators Make Improvements (Toronto: Office of the Fairness Commissioner, 2011), online: Office of the Fairness Commissioner. <[http://www.fairnesscommissioner.ca/en/downloads/PDF/OFC\\_Regulators-Make-Improvements\\_Jan-2011\\_Handout-EN.pdf](http://www.fairnesscommissioner.ca/en/downloads/PDF/OFC_Regulators-Make-Improvements_Jan-2011_Handout-EN.pdf)>.
  141. *Ibid* at 2.
  142. Ontario, Office of the Fairness Commissioner, Clearing the Path: Recommendations for Action (Toronto: Office of the Fairness Commissioner, 2010), online: Office of the Fairness Commissioner <[http://www.fairnesscommissioner.ca/en/downloads/PDF/Clearing-the-Path\\_Recommendations-for-Action\\_2010-03-30.pdf](http://www.fairnesscommissioner.ca/en/downloads/PDF/Clearing-the-Path_Recommendations-for-Action_2010-03-30.pdf)> [Recommendations for Action].
  143. Ontario, Office of the Fairness Commissioner, Getting Your Professional Licence in Ontario: The Experiences of International and Canadian Applicants (Final Report) (Toronto: Office of the Fairness Commissioner, 2010) [Experiences of International and Canadian Applicants].
  144. *Ibid* at 15-16.
  145. Recommendations for Action, supra note 46 at 4.
  146. Experiences of International and Canadian Applicants, supra note 47 at 2.
  147. See FARPA, supra note 11, s 30(3)(b).
  148. Bill 124, supra note 21, art 17(1).
  149. *Ibid*, art 17(2)(a)-(d).
  150. Ontario, Legislative Assembly, Official Report of Debates (Hansard), 38th Parl, 2nd Sess, No T-20 (7 December 2006) at 311 (Riet Verheggen).
  151. Ontario, Legislative Assembly, Official Report of Debates (Hansard), 38th Parl, 2nd Sess, No 110 (19 October 2006) at 5648 (Rosario Marchese) [Debates (19 October 2006)].
  152. Bill 124: Second Reading (3 October 2006), *ibid* at 5173 (Peter Tabuns).
  153. Ontario, Legislative Assembly, Official Report of Debates (Hansard), 38th Parl, 2nd Sess, No 104A (10 October 2006) at 5324 (Frank Klees) [Debates (10 October 2006)].
  154. For first reading see Manitoba, Legislative Assembly, Debates and Proceedings (Hansard), 39th Leg, 1st Sess, No 10 (26 September 2007) at 333 (Hon. Nancy Allan), online: Manitoba Legislative Assembly <<http://www.gov.mb.ca/legislature/hansard/1st-39th/hansardpdf/10.pdf>>; for second reading see Manitoba, Legislative Assembly, Debates and Proceedings (Hansard), 39th Leg, 1st Sess, No 24B (23 October 2007) at 1586-1595; for minutes of the Manitoba, Legislative Assembly, Standing Committee on Justice, 39th Leg, 1st Sess, No 2 (29 October 2007) at 10-47; for third reading see Manitoba, Legislative Assembly, Debates and Proceedings (Hansard), 39th Leg, 1st Sess, No 33 (7 November 2007) at 2019-2023.
  155. Manitoba, Legislative Assembly, Debates and Proceedings (Hansard), 39th Leg 1st Sess, No 24B (23 October 2007) at 1586 (Hon Nancy Allan) [Debates (23 October 2007)].
  156. See The Fair Registration Practices in Regulated Professions Act, RSM 2007 c 21 [FRPRPA]. Manitoba Gazette 28 March 2009. Little has changed since the enactment of this legislation apart from a regulation registered on 9 October 2009 adding The College of Dental Hygienists of Manitoba to the Schedule of the Act (Regulation 169/2009).
  157. Debates (23 October 2007), supra note 58 at 1586-1595 (Mavis Taillieu).
  158. Manitoba, Legislative Assembly of Manitoba, Standing Committee on Justice, 39th Leg, 1st Sess, No 2 (29 October 2007) at 9.
  159. *Ibid* at 10-13 (Sharon Eadie).
  160. *Ibid* at 14-15 (Douglas Bedford).
  161. *Ibid* at 18-19 (William D.B. Pope).
  162. *Ibid*.
  163. *Ibid* at 14-15 (Douglas Bedford).
  164. Manitoba, Legislative Assembly, Standing Committee on Justice, 39th Leg, 1st Sess, No 2 at 45-47.
  165. *Ibid* at 45.

166. Ibid at 46.
167. Ibid at 46.
168. FRPRPA, supra note 60, s 11.
169. Ibid, s 12(1)(a)-12(1)(g).
170. Ibid, s 13(1).
171. Ibid, s 12(3).
172. Office of the Manitoba Fairness Commissioner, *The Fair Registration Practices in Regulated Professions Act: A Report on its Implementation and Effectiveness (December 2008-December 2010)* (Winnipeg: Office of the Manitoba Fairness Commissioner, 2010), online: Office of the Manitoba Fairness Commissioner <[http://www.manitobafairnesscommissioner.ca/wp-content/themes/fairness/images/OMFC\\_Report\\_Minister\\_web.pdf](http://www.manitobafairnesscommissioner.ca/wp-content/themes/fairness/images/OMFC_Report_Minister_web.pdf)>.
173. Ibid at 26-29.
174. Ibid at 34.
175. The College of Registered Nurses of Manitoba, The College of Occupational Therapists of Manitoba, and The College of Midwives of Manitoba participated in the pilot review of registration processes. See *ibid* at 36.
176. Regulated professions that underwent a review of their registration processes in 2010 were The Association of Engineers and Geoscientists of Manitoba, The Certified Technicians and Technologists Association of Manitoba, The Licensed Practical Nurses of Manitoba, the Professional Certification Unit of Manitoba Education (Teachers), and Apprenticeship Manitoba (Trades Qualification). See *ibid*.
177. FRPRPA, supra note 58, s 17(2).
178. FARPA, supra note 11, s 3(a).
179. FARPA, supra note 11, s 3(b).
180. Fair Registration Practices Act, supra note 10, s 14(1)(a)-14(1)(f).
181. Nova Scotia, House of Assembly, *Debates and Proceedings*, 60th Leg, 2nd Sess, No 08-55 (25 November 2008) at 6475.
182. Fair Registration Practices Act, supra note 10, s 14(1)(a)-14(1)(f).
183. *Ibid*, s 14(5).
184. *Ibid*, s 20(3).
185. Nova Scotia, House of Assembly, *Debates and Proceedings*, 60th Leg, 2nd Sess, No 08-17 (24 April 2008) at 1905 (Hon Mark Parent).
186. Nova Scotia, House of Assembly, *Debates and Proceedings*, 60th Leg, 2nd Sess, No 08-21 (30 April 2008) at 2398.
187. Nova Scotia, House of Assembly, *Debates and Proceedings*, 60th Leg, 2nd Sess, No 08-38 (27 May 2008) at 4074-4075.
188. Bill 126, *An Act Respecting Fair Access to Regulated Professions*, 2nd Sess, 60th Leg, Nova Scotia, 2008, cl 2(h)(ii) (first reading 24 April 2008) [Bill 126].
189. *Ibid*, cl 2(h)(iv).
190. *Ibid*, cl 2(d).
191. *Ibid*, cl 7(c).
192. *Ibid*, cls 9(2)-9(3).
193. *Ibid*.
194. *An Act to Amend the Professional Code as Regards the Issue of Permits*, supra note 9.
195. Québec, National Assembly, *Journal des débats*, 37th Leg, 2nd Sess, No 41 (9 June 2006) (M. Yvon Marcoux) (French) (translated by the authors) [*Journal des débats* (9 June 2006)]. Also see "Quebec Bill Would Speed Up Accreditation of Foreign Professionals." CBC News (11 May 2006), online: CBC <<http://www.cbc.ca>>.
196. *Ibid*.
197. "New Law Will Ease the Way for Professional Credentials Recognition in Quebec", online: Canadavisa.com <<http://www.canadavisa.com>>.
198. *Journal des débats* (9 June 2006), supra note 99.
199. This kind of permit fits the legal profession and resembles a foreign consultant licence. *Ibid*..
200. *Ibid*.
201. Foreign-trained professionals seeking to join professional associations in Québec will have to meet an additional requirement, such as knowledge of the French language. See *ibid*.
202. Minister of Justice introduced the Bill to the National Assembly of Québec. See "Quebec Bill Would Speed Up Accreditation of Foreign Professionals", supra note 99.
203. For example, it has been stated that restrictive permits would fail to promote integration, but would only allow foreign-trained professionals to practice in a very restricted domain. See *Journal des débats* (9 June 2006), supra note 99 (Stéphane Bédard).
204. *Ibid*.
205. Québec, National Assembly, *Journal des débats*, 37th Leg, 2nd Sess, No 43 (13 June 2006) (Elsie Lefebvre) (French) (translated by authors) [*Journal des débats* (13 June 2006)].
206. It has been argued that of the estimated 30,000 newcomers, who may experience difficulties regarding integration into the labour market,

- the Bill will affect no more than 5,000 professionals. Ibid.
207. Ibid.
208. British Columbia (Workers' Compensation Board) v Figliola, 2011 SCC 52, 337 DLR (4th) 413, 25 Admin LR (5th) 173; see also College of Nurses of Ontario v Trozzi, 2011 ONSC 4614, 207 ACWS (3d) 537.
209. Human Rights Code, RSBC 1996, c 210.
210. See Chapter 5, Improving Foreign Credential Recognition through Reform in Immigration Law and Policy.
211. Competition Act, RSC 1985, c C-3419 (2nd Supp) [Competition Act].
212. Canada, Competition Bureau Canada, Self-Regulated Professions: Balancing Competition and Regulation (Gatineau: Competition Bureau, 2007) at 18 [Bureau, Regulated Professions].
213. Ibid.
214. See generally *ibid* at 18-19.
215. Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, s 92(13) reprinted in RSC 1985, App II, No 5 [Constitution Act, 1867].
216. Canada (Attorney General) v Law Society (British Columbia), [1982] 2 SCR 307 at 335, 137 DLR (3d) 1 (SCC) [Jabour] (There are both advantages and disadvantages to self-regulation. The benefits include "familiarity of the regulator with the fields, expertise in the subject of the services in question, [and] low cost to the taxpayer" since the administrative agency must "recover its own expenses without" provincial funding. However, the downsides include "conflict of interest, an orientation favourable to the regulated, and the closed shop atmosphere"). The first positive result is that those in the profession best understand what skills and knowledge are necessary to practice competently and have a vested interest in ensuring that service quality, and consequently the public confidence in the profession remains high. Those outside the profession do not have the specialized knowledge needed to properly assess competence. Regulation from within the profession allows those most qualified to set licensing requirements. The highly-trained, specialized nature of certain professions justifies self-regulation. A negative effect is that members of the profession have a personal interest in keeping the profession's membership from expanding too quickly, limiting supply of the service, so that it is in demand and can be charged at a higher rate.
217. Bureau, Regulated Professions, *supra* note 2 at 5.
218. Ibid.
219. Melanie L Aitken, "Remarks to the Economic Club of Canada" (Speech delivered in Toronto, 4 May 2010), online: Competition Bureau Canada <<http://www.competitionbureau.gc.ca>> [Aitken, 4 May 2010].
220. Bureau, Regulated Professions, *supra* note 2 at v.
221. Ibid.
222. Todd-Jeffrey Weiler, "Professional Self-Regulation and Federal Competition Policy: the Calarco Case" (1997) 7 WRLSI 119 at 126.
223. Letter from The Competition Bureau to the Paralegal Standing Committee (Ontario) (25 January 2007), online: Competition Bureau <<http://www.competitionbureau.gc.ca>> [Bureau, Letter to the Paralegal Standing Committee].
224. Law Society of Saskatchewan v Nolin, [2008] LSDD NO 158 [Nolin] (a self-regulating body's "paramount" duty is "to protect the public and the public's confidence in the ... profession's ability to govern itself" at para 105).
225. See e.g. Raymond W Pong & J Roger Pitblado, Geographic Distribution of Physicians in Canada: Beyond How Many and Where, (Ottawa: Canadian Institute for Health Information, 2005) at 16-17, 26-27, 35-37, online: Canadian Institute for Health Information <[http://secure.cihi.ca/cihiweb/products/Geographic\\_Distribution\\_of\\_Physicians\\_FINAL\\_e.pdf](http://secure.cihi.ca/cihiweb/products/Geographic_Distribution_of_Physicians_FINAL_e.pdf)>; see also David Hay, Judi Varga-Toth & Emily Hines, Frontline Health Care in Canada: Innovations in Delivering Services to Vulnerable Populations, (Ottawa: Canadian Policy Research Networks, 2006) at v, 16-22, 25-26, online: Canadian Policy Research Networks <<http://www.cprn.org/documents/45652.en.pdf>>.
226. See Danielle Zietsma, "Immigrants Working In Regulated Occupations" (2010) 11 Perspectives on Labour and Income 13 at 15, online: Statistics Canada <<http://www.statcan.gc.ca/pub/75-001-x/75-001-x2010102-eng.pdf>>.
227. "Competition Bureau Study Report – Summary of Findings", online: College of Opticians of Ontario <<http://coptont.org>> [Summary of Bureau Report].
228. Bureau, Regulated Professions, *supra* note 2 at 34.
229. Competition Act, *supra* note 1, s 45(1)(c).
230. Ibid, s 79(1).
231. Ibid, s 90.1(1).
232. Ibid, ss 36(1), (3).
233. Ibid, s 2(1) ("'[P]roduct' includes an article and a service," and "'service' means a service of any description" including a "professional one).
234. Ibid, ss 45(8), 90.1(11).
235. Regina v Armco Canada Ltd and 9 other corporations, (1977) 13 OR (2d) 32 at 41.
236. Canada, Competition Bureau Canada, Competitor Collaboration Guidelines, (Gatineau, QC: Competition Bureau, 2009) at 8, online: Competition Bureau. <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf/\\$FILE/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf/$FILE/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf)> [Bureau, Competitor Collaboration Guidelines] (in their sample scenario "members of the [manufacturing a]ssociation" would "very likely ... be considered competitors" for purposes of these provisions (at 46). The key difference between this example and professional entrance requirements is that entry barriers are generally not voluntary nor can individuals "engage in the supply of the relevant product outside of the agreement" at 26).

237. Ibid at 8; Criminal Code, RSC 1985, c C-46 s 21.
238. Jabour, supra note 6 at 354.
239. Reference re The Farm Products Marketing Act (Ontario), [1957] SCR 198 at 219-20 [Farm Products], cited in ibid at 355.
240. Bureau, Competitor Collaboration Guidelines, supra note 26 at 19-20.
241. Competition Bureau Canada, News Release, "New Laws for Competitor Agreements" (23 March 2010), online: Competition Bureau Canada <<http://www.competitionbureau.gc.ca>> (amendments to the Competition Act were part of the Budget Implementation Act, 2009, c 2 – Bill C-10 which received royal assent 12 March 2009).
242. Bureau, Competitor Collaboration Guidelines, supra note 26 at 1; Competition Act, supra note 1, s 45(1)(a),(b),(c).
243. Bureau, Competitor Collaboration Guidelines, supra note 26 at 12.
244. Omar Wakil, The 2010 Annotated Competition Act (Toronto: Thomson Reuters Canada, 2009) at 99-100.
245. Competition Act, supra note 1, s 30; Competition Act, 1991, c 47, s 714, s 45(1)(c) [emphasis added] [Former Competition Act].
246. Wakil, supra note 34 at 99-100.
247. Ibid at 100.
248. Bureau, Competitor Collaboration Guidelines, supra note 26 at 6; ibid (the fact that the Bureau considers this a per se offence is supported by the fact that, according to Wakil, it had "suggested" the former s 45(1)(b) was a per se offence because it did "not require ... undue lessening of competition," but he also points out that "this position" was not "fully judicially tested" at 96).
249. Melanie L Aitken, "The Senate Banking, Trade and Commerce Committee Hearings Regarding Competition Act Amendments" (Speech delivered in Ottawa, 13 May 2009), online: Competition Bureau Canada <<http://www.competitionbureau.gc.ca>> [Aitken, 13 May 2009].
250. Ibid; Aitken, 4 May 2010, supra note 9.
251. Ibid; see Bureau, Competitor Collaboration Guidelines, supra note 26 Fundamentals of Canadian Competition Law, 2d ed (Toronto: Canadian Bar Association, 2010) at 306.
- 252.
253. Competition Act, supra note 1, s 45(7); ibid at 307-308.
254. Garland v Consumers' Gas Co, 2004 SCC 25 at paras 77-79, [2004] SCR 629.
255. Ibid at para 79.
256. Jabour, supra note 6 at 348-349.
257. Competition Act, supra note 1, s 79(1).
258. Wakil, supra note 34 at 211.
259. Ibid at 212.
260. Competition Act, supra note 1, s 79(1)(a).
261. Canada (Director of Investigation and Research) v Laidlaw Waste Systems Ltd (1992), 40 CPR (3d) 289 at 325, [1992] CCTD No 1 [Laidlaw].
262. Canada (Director of Investigation and Research) v NutraSweet Co (1990), 32 CPR (3d) 1 at 28, [1990] CCTD No 17, [NutraSweet].
263. Laidlaw, supra note 51 at 325; Wakil, supra note 34 at 210 (there is no "prima facie finding of dominance" if the market share is below 50%. In practice each section 79 ruling has involved a market share of over 80%).
264. Canada, Competition Bureau Canada, The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) (Draft for Public Consultation, January 2009) at iii, online: Competition Bureau Canada <<http://www.competitionbureau.gc.ca>> [Bureau, Abuse of Dominance Guidelines].
265. Ibid at 13, n 27.
266. Canada (Director of Investigation and Research) v D & B Co of Canada Ltd (1995), 64 CPR (3d) 216 at 255, [1995] CCTD No 20 [Nielsen]; Canada (Directors of Investigation and Research) v Tele-Direct (Publications) Inc (1997), 73 CPR (3d) 1 at 83, 85, [1997] CCTD No 8 [Tele-Direct].
267. Laidlaw, supra note 51 at 325.
268. Bureau, Abuse of Dominance Guidelines, supra note 54 at 14.
269. Canada, Competition Bureau Canada, Merger Enforcement Guidelines, (September 2004), at 28, online: Competition Bureau Canada <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/2004%20MEGs.Final.pdf/\\$file/2004%20MEGs.Final.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/2004%20MEGs.Final.pdf/$file/2004%20MEGs.Final.pdf)> [Bureau, Merger Enforcement Guidelines].
270. Ibid.
271. Ibid at 29.
272. Michael J Trebilcock, "Regulating the Market for Legal Services" (2008) 45:5 Alta L Rev 215 at 220 (entry barriers are not equally anti-competitive across all self-regulating professions because in some cases applicants enter the profession by certification rather than licensure. Certification means that the qualified individual receives a certificate showing they have completed certain training but people without the certificate can still compete in the market (e.g. accounting). Licensure means that the individual must have a particular licence in order to practice the profession (e.g. law)).
273. Bureau, Abuse of Dominance Guidelines, supra note 54 at 14, n 31.

274. Competition Act, *supra* note 1, s 79(1)(b).
275. Canada (Commissioner of Competition) v Canada Pipe Co, 2006 FCA 233 at para 66, [2007] FCR 3 [Canada Pipe].
276. Bureau, Abuse of Dominance Guidelines, *supra* note 54 at 16.
277. *Ibid* at 5; Canada Pipe, *supra* note 65 at para 72.
278. Laidlaw, *supra* note 51 at 343.
279. Canada Pipe, *supra* note 65 at para 67.
280. See Bureau, Regulated Professions, *supra* note 2.
281. Competition Act, *supra* note 1 at s 78; Wakil, *supra* note 34 at 206 (the word “includes” indicates that the list is non-exhaustive. In addition, the Court has recognized that other non-enumerated acts qualify as anti-competitive).
282. Competition Act, *supra* note 1, s 78(1).
283. Wakil, *supra* note 34 at 207.
284. NutraSweet, *supra* note 52 at 35.
285. Canada Pipe, *supra* note 65 at para 73; Bureau, Abuse of Dominance Guidelines, *supra* note 54 at 17 (the Bureau describes an “efficiency or pro-competitive rationale” as including “activities that improve a firm’s product, service or some other aspect of the firm’s business”).
286. Canada Pipe, *supra* note 65 at para 73.
287. Bureau, Abuse of Dominance Guidelines, *supra* note 54 at 18; Laidlaw, *supra* note 51 at 341 (although “long-term exclusive contracts” did not necessarily “raise significant anti-competitive issues” on their own, they were found to be anti-competitive because “there was no credible explanation for many of the provisions other than to create barriers to entry for would-be competitors”).
288. Bureau, Abuse of Dominance Guidelines, *supra* note 54 at 1-2.
289. Competition Act, *supra* note 1, s 79(1)(c).
290. Canada Pipe, *supra* note 65 at paras 36, 38.
291. *Ibid* at para 58.
292. Wakil, *supra* note 34 at 214; see *ibid* at para 52.
293. Bureau, Regulated Professions, *supra* note 2 at 27.
294. Tele-Direct, *supra* note 84 at 17.
295. *Ibid* at 247.
296. Bureau, Abuse of Dominance Guidelines, *supra* note 54 at 1.
297. *Ibid* at iv.
298. *Ibid* at 3.
299. *Ibid* at 6.
300. Personal Information Protection and Electronic Documents Act, SC 2000, c 5 [PIPEDA].
301. Richard F Devlin and Porter Heffernan, “The End(s) of Self-Regulation?” (2008) 45:5 Alta L Rev 169 at 201-202 (this is similar to some of the current international reforms).
302. PIPEDA, *supra* note 90.
303. *Ibid*, s 3.
304. Canada, Office of the Privacy Commissioner, Your Privacy Responsibilities: Canada’s Information Protection and Electronic Documents Act, (Ottawa, Office of the Privacy Commissioner, 2009) at 3, online: Office of the Privacy Commissioner, <[http://www.priv.gc.ca/information/guide\\_e.pdf](http://www.priv.gc.ca/information/guide_e.pdf)> (health information was excluded in the first stage. The following year, 1 January 2002, health information was covered by the act as the second stage of coming into force).
305. *Ibid*.
306. Bureau, Competitor Collaboration Guidelines, *supra* note 26 at 5; see Bureau, Abuse of Dominance Guidelines, *supra* note 54 at 28; Musgrove, *supra* note 42 at 308-309.
307. Competition Bureau Canada, Technical Bulletin, “Technical Bulletin on ‘Regulated’ Conduct” (29 June 2006) at n 7, online: Competition Bureau Canada. <<http://www.competitionbureau.gc.ca>>.
308. *Ibid* at nn 12, 21.
309. PHS Services Society v Canada (Attorney General), 2010 BCCA 15 at para 144, [2010] BCJ No 57.
310. Musgrove, *supra* note 42 at 308.
311. Brian A Facie & Dany H Assaf, Competition & Antitrust Law: Canada and the United States 3d ed (Markham, Ont: LexisNexis Canada, 2006) at 442; see California Retail Liquor Dealers Assn v Midcal Aluminum, Inc (1980), 445 US 97 for articulation of the test that must be met for the State Action Doctrine to apply.
312. See George M Thomson, Review of Appeal Processes from Registration Decisions in Ontario’s Regulated Professions, (Report to the Ontario Minister of Citizenship and Immigration), (Toronto, Queen’s Printer for Ontario, 2005) online: Legislative Assembly of Ontario <<http://www.ontla.on.ca/library/repository/mon/13000/257188.pdf>> at viii-ix.
313. General Motors of Canada Ltd v City National Leasing Ltd, [1989] 1 SCR 641 at para 2, [1989] SCJ No 28 [City National Leasing].

314. Ibid (“[f]irst, the impugned legislation must be part of a general regulatory scheme. Second, the scheme must be monitored by the continuing oversight of a regulatory agency. Third, the legislation must be concerned with trade as a whole rather than with a particular industry” at para 32. The new factors added were that “the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and (ii) the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country” at para 34).
315. Ibid at para 34.
316. Ibid.
317. See *ibid* at paras 56-57.
318. Ibid.
319. See *ibid* at para 32.
320. Peter W Hogg, 2009 Student Edition Constitutional Law of Canada (Toronto: Carswell, 2009) at 530.
321. City National Leasing, *supra* note 103 at para 34.
322. See Chapter 2, Effective Foreign Credential Recognition Legislation: Recommendations for Success.
323. See Chapter 5, Improving Foreign Credential Recognition through Reform in Immigration Law and Policy.
324. See e.g. *R v Hydro-Quebec*, [1997] 3 SCR 213 at para 127, [1997] SCJ No 76; One factor that might weigh in favour of the constitutionality and advisability of using the Competition Act to spur provincial action is that doing so may better place Canada in a position to fully adopt emerging international standards, for example, by ratifying the Lisbon Recognition Convention. Ratification would require Canada to either recognize foreign qualifications, such as university degrees, that are not significantly different from corresponding Canadian degrees, or to have in place fair processes for assessing foreign credentials. It may also place Canada in a better position in relation to adopting international norm that already exist, such as those under the General Agreement on Trade in Services (GATS). GATS is discussed in detail in Chapter 4, All Talk and No Action: Access to Canadian Markets under the General Agreement on Trade in Services; see Convention on the Recognition of Qualifications concerning Higher Education in the European Region, 11 April 1997, Lisbon, 11.IV.1997, online: Council of Europe <<http://conventions.coe.int>>.
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338. Bureau, Abuse of Dominance Guidelines, *supra* note 54 at iv.
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347. See *ibid* at viii-ix.
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349. Ibid at 155-156 (the report repeatedly says that entry requirements should be the “minimum necessary to properly and effectively practice law while protecting the public interest” at 156).
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557. "The Doha Round: Dead man talking", *supra* note 191.
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560. WTO, Legal Services Background Note, 2010, *supra* note 117 at 48.
561. *Ibid* at 49-51.
562. WTO, Council for Trade in Services, *Negotiations on Trade in Services (Special Session 2011)*, WTO Doc WT/TN/S/36 at 2 & 33 (2011), online: WTO <<http://docsonline.wto.org>> [WTO, *Negotiations on Trade in Services*].
563. Paton, *supra* note 32 at 415; Hill, *supra* note 66 at 373 (which explains that the Council of the Bars & Law Societies of the European Union (CCBE), which represents all the bars and law societies in the EU, is focused on the establishment of lawyers from non-EU Members as foreign legal practitioners).
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631. WTO, Article VI: 4: Chairman's Progress Report, (2011), *supra* note 228, s 13.
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633. CCBE Response, *supra* note 254.
634. WTO, Draft Disciplines, 2009, *supra* note 248 at 27; WTO, Article VI: 4: Chairman's Progress Report, (2011), *supra* note 228.
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640. The distinction between solicitors and barristers in the UK, each of which is governed by its own professional body (The Bar Council and the Law Society of England and Wales), is an example of limited practice areas which could be extended to foreign trained professionals.
641. WTO, Draft Disciplines, 2009, *supra* note 248, s 28.
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643. Hill, *supra* note 66 at 355.
644. IBA, A Handbook for IBA Member Bars, *supra* note 30 at 43.
645. FLSC, Meeting Canada's Current Obligations, *supra* note 243 at 4 & 11.
646. OECD, Managing Request-Offer Negotiations, *supra* note 126 at 25.
647. Hopkins, *supra* note 73 at 471.
648. Vastine, *supra* note 185 at 15.
649. Delmatsis, *supra* note 10 at 19.
650. Canada does have an MFN exemption as well as supplements and revisions to that list, which exempt aspects of service sectors such as film/video/television programming, fishing, agriculture, banking, air and marine transport, insurance and finance from MFN. See Trade in Services, Canada – Final List of Article II (MFN) Exemptions, WTO Doc WT/GATS/EL/16, 15/04/1994, 94-1102, online: WTO <<http://www.docsonline.wto.org>> for more information, as well as Trade in Services, Canada – List of Article II (MFN) Exemptions Supplement 1: Revision, GATS/EL/16 Suppl 1/Rev 1, (4 October 1995), 95-2882 and Trade in Services, Canada – List of Article II (MFN) Exemptions Supplement 2, GATS/EL/16/Suppl 2, 26 Feb 1998, 98-0690 for more information regarding insurance and financial services exemptions.
651. Foreign Affairs and International Trade Canada, Negotiations and Agreements, online: Canada.gc.ca <<http://www.international.gc.ca>>; see Free Trade Agreement Between Canada and the Hashemite Kingdom of Jordan, signed 28 June 2009; Free Trade Agreement Between the Government of Canada and the Government of the State of Israel, signed 1 Jan 1997; Canada – Chile Free Trade Agreement, signed 5 July 2007; Canada – Costa Rica Free Trade Agreement, signed 23 April 2001, in force 1 Nov 2001; Canada – Peru Free Trade Agreement, signed 29 May 2008; Free Trade Agreement Between Canada and the Republic of Panama, signed 14 May 2010; Free Trade Agreement Between Canada and the States of the European Free Trade Association, in effect 1 July 2009; NAFTA, *supra* note 40.

652. Foreign Affairs and International Trade Canada, Canada News Centre, Canada – Columbia Free Trade Agreement Comes into Force, No 230, 15 August 2011, online: Canada News Centre <<http://www.news.gc.ca>>; Free Trade Agreement Between Canada and the Republic of Columbia, signed 15 August 2011, online: Foreign Affairs and International Trade Canada <<http://www.international.gc.ca>>.
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656. Canada-EFTA FTA, *ibid*, III: 13(1)
657. NAFTA, *supra* note 40, c V: 12, V: 14 & V: 16.
658. *Ibid*, c V: 16, art 1603, art 1404 & Annex 1210.5.
659. *Ibid*, c V: 1603.1 & 1603.4.
660. Citizenship and Immigration Canada, “Appendix G: North American Free Trade Agreement (NAFTA)” in FW 1, Foreign Worker Manual: Temporary Foreign Worker Guidelines, (2011-01-20) at 143-144, online: <<http://www.cic.gc.ca>>.
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662. There are similarly no limits on the number of individuals permitted to enter Canada under these provisions or restrictions on the number of visa extensions individuals may seek under either the Columbia – Canada FTA or the Peru – Canada FTA.
663. Barbara McLaren, “Labour Mobility and Trade in the Americas: Current Frameworks and Socio-Economic Implications”, Focal Canadian Foundation for the Americas (June 2008) at 4, online: Focal <<http://www.focal.ca>>.
664. *Ibid* at 14 (provided to said author, unpublished).
665. John J Audley et al, NAFTA’s Promise and Reality: Lessons from Mexico for the Hemisphere (Carnegie Endowment for International Peace, 2004) at 40, online: Carnegie Endowment <<http://carnegieendowment.org/files/nafta1.pdf>> [Audley].
666. Lant Pritchett, Let Their People Come: Breaking the Gridlock on Global Labor Mobility, (Washington, DC: Centre for Global Development, 2006) at 30 (interestingly, Pritchett considers this “Everything but Labor Globalization” to be a catalyst for increased migration: the costs of moving, financially and psychically, are lessened and, with everything else liberalized, the question ‘why not labor too’ is bound to arise eventually).
667. ICRIER, Barriers to Movement of Natural Persons, *supra* note 206 at 36.
668. Federation of Law Societies of Canada, National Committee on Accreditation, Policies and Guidelines, in effect 15 August 2011, at 1.1 Assessment: Introduction, at 2, online: FLSC <<http://www.flsc.ca>>.
669. See e.g. Canada-EFTA FTA, *supra* note 294, art III:12(1)-(3) (the parties “recognize the increasing importance of trade in services” and that they “will work together with the aim of achieving further liberalization and additional mutual opening of markets for trade in services, taking into account on-going work under the auspices of the WTO.” The agreement also says parties will encourage professional bodies to develop and cooperate on mutual recognition of licensing and certification. Note, however, that nothing concrete is mentioned, nor are any steps provided and little is in principle added to the Members’ pre-existing GATS obligations).
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671. Mutual Recognition Agreements (MRA), Canadian Information Centre for International Credentials, 1990-2011, online: CICIC <<http://www.cicic.ca>>.
672. Zarrilli, *supra* note 49 at 8.
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675. *Ibid*.
676. WTO, Legal Services Background Note, 1998, *supra* note 97 at 73.
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678. Federation of Law Societies of Canada, How to Apply for an Assessment, online: Federation of Law Societies of Canada <<http://www.flsc.ca>>.
679. *Ibid*; Toal, *supra* note 313.
680. Federation of Law Societies of Canada, Task Force on the Canadian Common Law Degree: Consultation Paper (2008), Appendix 1, online: FLSC <[http://www.flsc.ca/en/pdf/2008Consultation\\_paper.pdf](http://www.flsc.ca/en/pdf/2008Consultation_paper.pdf)> [FLSC, Consultation Paper].
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689. Mattoo & Mishra, *supra* note 93 at 445.
690. Toal, *supra* note 313.
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703. The World Bank, "Roaring Tigers or Timid Pandas", *supra* note 39 at iv.
704. Stephenson, "Regional Liberalization of Services", *supra* note 337 at 196.
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734. EC, Council Directive 98/5/EC to facilitate the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, [1998] OJ L 77; EC, Directive 98/5/EC of the European Parliament and of the Council of 16 Feb 1998, OJ L 77, 14 March 1998.
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743. Global Economic Prospects, supra note 346 at 115.
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748. CICIC, Pan-Canadian Quality Standards in International Evaluation, supra note 54 at 4-5.
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750. Ibid.
751. For example, the NCA directly refers to Graduate Entry or Senior Status programs from the UK, as well as Graduate Diplomas in Law. The jurisdiction where an applicant was trained is significant: individuals who studied in mixed or hybrid legal systems containing at least some common law elements can expect to be asked to demonstrate competence in at least eight topics. Without relevant professional experience, the NCA also specifies that individuals trained in legal systems different from common law will be assessed on a case-by-case basis. Similarly, applicants with particularly low academic standing may not receive any recognition for their degree, no matter the jurisdiction.
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756. Ibid at 82.
757. Skills Research Initiative, International Mobility of Highly Skilled Workers: A Synthesis of Key Findings and Policy Implications (Ottawa: Micro-Economic Policy Analysis Branch, Industry Canada and Policy Research Directorate & Human Resources and Social Development Canada, 2008) at 8-9, online: Industry Canada <[http://www.ic.gc.ca/eic/site/eas-aes.nsf/vwapj/SRIsr04.pdf/\\$FILE/SRIsr04.pdf](http://www.ic.gc.ca/eic/site/eas-aes.nsf/vwapj/SRIsr04.pdf/$FILE/SRIsr04.pdf)>.
758. For a review of the potential positive and negative effects of the migration of skilled workers, including an extensive bibliography of the literature, see Frederic Docquier, "Brain Drain and Inequality Across Nations", Discussion Paper No 2440 – Institute for the Study of Labour (Bonn, Germany: IZA, 2006), online: IZA <<http://ftp.iza.org/dp2440.pdf>>.

759. See John Zhao, "Brain Drain and Gain: The Migration of Knowledge Workers from and to Canada" (2000) 6 Educational Quarterly Review 8 (in the 1990s, concerns were expressed that Canada was losing skilled workers to the United States, although those losses were less than the inflow of skilled workers to Canada from other countries).
760. Pritchett, *supra* note 305 at 276.
761. "Trade in Services: WTO GATS Negotiations – Highlights of Canada's Revised Conditional GATS Offer" (5 July 2011) online: Foreign Affairs and International Trade Canada <<http://www.international.gc.ca>>.
762. Stephenson & Hufbauer, "Labor Mobility", *supra* note 344 at 275.
763. *Ibid*.
764. Pritchett, *supra* note 305 at 3.
765. Hufbauer & Stephenson, "Services Trade", *supra* note 69 at 622.
766. A model worth emulating in this respect is the Québec-France Agreement, *supra* note 309.
767. See e.g. the mutual recognition agreements that the Canada Certified General Accountants Association has reached with its counterpart associations in the United States, Australia, Ireland and France; Canada Certified General Accountants Association, ACCA and CGA-Canada Mutual Recognition Agreement (MRA): Strategic Alliances, online: CGA-Canada <<http://www.cga-canada.org>>.
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769. *Ibid*.
770. Laurel S Terry, "The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as "Service Providers"" (2008) Prof Law 189 at 192.
771. Interview of Jason Kenney by Steve Paikin (20 November 2009) on The Agenda with Steve Paikin, TVO television broadcast, Toronto, online: TVO <<http://www.tvo.org>>.
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877. This is not to suggest that the Kazakhstani nurse in this example should not be allowed to immigrate to Canada, but rather that the points awarded should correspond appropriately to Canadian standards. This example also highlights the importance of bridging programs; if the Kazakhstani degree is properly recognized as equivalent to a partially completed Canadian Nursing degree, then the person could utilize an appropriate bridging program to obtain certification in a Canadian jurisdiction.
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1049. *Ibid*.
1050. Summative Evaluation, *supra* note 23 at 27.
1051. *Ibid*.
1052. Email from D. Kit, Ministerial Enquiries Division to Mark Melchers (10 June 2010). See Appendix A for more information on these internship programs.
1053. Recognizing Success, *supra* note 24 at 8.
1054. See Appendix A for more information.
1055. Ikura, *supra* note 2.
1056. *Ibid*; Constitution Act, 1867, *supra* note 1, s 92(13).
1057. See e.g. "Competition Bureau Study Report – Study of Findings", online: College of Opticians of Ontario <<http://coptont.org>>.
1058. Summative Evaluation, *supra* note 23 at 27.
1059. See Appendix B for information about Bridging Programs.
1060. Allan Woods, "Tories promise loans to help immigrants upgrade skills, get credentials", *Toronto Star* (6 April 2011).
1061. *Ibid*.
1062. See Appendix B for information about some occupation-specific facilitative mechanisms run by regulatory bodies.
1063. See Appendix B for examples of some occupation-specific clinical assessment programs.
1064. See e.g. Manitoba's International Medical Graduate programs in Appendix B.
1065. "Information on Prior Learning Assessment and Recognition in Canada", online: Canadian Information Centre for International Credentials <<http://www.cicic.ca>>.
1066. *Ibid*.
1067. *Ibid*.
1068. "Recognition for Learning", online: Canadian Association for Prior Learning Assessment <<http://recognitionforlearning.ca>> (CAPLA has conveyed an intention to develop such standards on their website).
1069. Summative Evaluation, *supra* note 23 at 25.
1070. *Ibid*.
1071. *Ibid* at 25-26.
1072. "Alliance of Credential Evaluation Services of Canada", online: Alliance of Credential Evaluation Services of Canada <<http://www.canalliance.org>> [Alliance].
1073. "Members of the Alliance", online: Alliance of Credential Evaluation Services of Canada <<http://www.canalliance.org>>.
1074. "Quality Assurance Framework", online: Alliance of Credential Evaluation Services of Canada <<http://www.canalliance.org>> [ACESC QAF].
1075. Alliance, *supra* note 63.
1076. *Ibid*.
1077. *Ibid*.
1078. See Appendix C for more information regarding the third-party credential assessment agencies.
1079. "Credential Evaluation, Assessment and Qualification Recognition Services", online: Canadian Information Centre for International Credentials <<http://www.cicic.ca>> [CICIC].
1080. *Ibid*.
1081. Council of Ministers of Education, Canada, Pan-Canadian Quality Standards in International Credential Evaluation (Toronto: Council of Ministers of Education, Canada, 2009) at 12 [Quality Standards].
1082. ACESC QAF, *supra* note 65.

1083. Ibid.
1084. Ibid.
1085. Ibid.
1086. Ibid.
1087. Ibid.
1088. CICIC, supra note 70.
1089. "General Guiding Principles for Good Practice in the Assessment of Foreign Credentials", online: Canadian Information Centre for International Credentials <<http://www.cicic.ca>>.
1090. Ibid.
1091. Ibid.
1092. Quality Standards, supra note 72 at 7.
1093. Ibid.
1094. Ibid.
1095. Summative Evaluation, supra note 23 at 26.
1096. Quality Standards, supra note 72 at 7. See Appendix D for more information.
1097. See *ibid* at 18 (this was suggested during the stakeholder forum in this report, but was not included in the final recommendations).
1098. "Overview", online: Pan-Canadian Quality Standards in Credential Evaluation <<http://evaluation.cicic.ca/en>>.
1099. Human Resources and Skills Development Canada, News Release, "Government of Canada investment improving foreign credential recognition across Canada: Canada's Economic Action Plan addresses key labour market challenges" (16 July 2010) online: Canada News Centre <<http://news.gc.ca>>.
1100. "Terminology Guides", online: Pan-Canadian Quality Standards in Credential Evaluation <<http://evaluation.cicic.ca>>.
1101. "Country Profiles", online: Pan-Canadian Quality Standards in Credential Evaluation <<http://evaluation.cicic.ca>>.
1102. Ibid.
1103. "Country Profiles", online: Pan-Canadian Quality Standards in Credential Evaluation Social Network <<http://discussion.cicic.ca>>.
1104. "Database for technological resources", online: Pan-Canadian Quality Standards in Credential Evaluation Social Network <<http://discussion.cicic.ca>>.
1105. "Database for shared technological resources", online: Pan-Canadian Quality Standards in Credential Evaluation, online: <<http://evaluation.cicic.ca>>.
1106. Ibid.
1107. "Quality Assurance Framework", online: Pan-Canadian Quality Standards in Credential Evaluation <<http://evaluation.cicic.ca>>.
1108. Diversis, Pan-Canadian Quality Assurance Framework for the Assessment of International Academic Credentials (Draft), (np: Diversis for The Council of Ministers of Education, Canada, 2011).
1109. Ibid at 4.
1110. Ibid at 11.
1111. Ibid.
1112. Ibid at 8.
1113. Ibid at 8.
1114. Ibid.
1115. Ibid at 9.
1116. Ibid.
1117. See Quality Standards, supra note 72 at 18 (this was suggested during the Stakeholders Forum portion of the report).
1118. See *ibid* (this was suggested during the Stakeholders Forum portion of the report).
1119. Constitution Act, 1867, supra note 1.
1120. Interview of Jason Kenney by Steve Paikin (20 November 2009) on The Agenda with Steve Paikin, TVO, Toronto, online: TVO <<http://www.tvo.org>>.

# APPENDIX A

## The Federal Government's Central Initiatives

Name of Program	Establishment and Funding	Objective of Program	Highlights
Foreign Credentials Referral Office	<ul style="list-style-type: none"> <li>- Launched 24 May 2007.<sup>1</sup></li> <li>- The 2007 federal budget set aside \$32.2-million for the first five years of the program.<sup>2</sup></li> </ul>	<ul style="list-style-type: none"> <li>- To "help people navigate through the complex system of foreign credential recognition in Canada."<sup>3</sup></li> </ul>	<ul style="list-style-type: none"> <li>- Services offered in Canada and abroad.<sup>4</sup></li> <li>- An array of online tools include the "Working in Canada" tool,<sup>5</sup> the "Going to Canada Portal,"<sup>6</sup> the "Employer's Roadmap to Hiring and Retaining Internationally Trained Workers,"<sup>7</sup> and "Planning to Work in Canada? An Essential Workbook for Newcomers."<sup>8</sup></li> </ul>
Foreign Credential Recognition Office	<ul style="list-style-type: none"> <li>- Introduced in 2003.<sup>9</sup></li> <li>- Received \$81.6-million over seven years (from 2003 to 2010).<sup>10</sup></li> <li>- As of 2009-2010 fiscal year the FCRP will receive \$8-million in on-going funding.<sup>11</sup></li> </ul>	<ul style="list-style-type: none"> <li>- To ensure foreign credential recognition processes are fair, accessible, coherent, transparent, and rigorous.<sup>12</sup></li> </ul>	<ul style="list-style-type: none"> <li>- [P]rovides grants and contributions to organizations involved in the process of facilitating foreign credential recognition.<sup>13</sup></li> <li>- Since 2003 has provided funding for 123 projects in 27 occupations.<sup>14</sup></li> <li>- An example of an effective program established through FCRP funding is BioTalent, Canada's BioSkills Recognition Program,<sup>15</sup> which created "an assessment model that will recognize the skills and competencies of internationally educated professionals in Canada's 'bio-economy'"<sup>16</sup></li> <li>- The FCRP also provided the funding for the "Pan-Canadian Quality Standards in International Credential Evaluation" report.<sup>17</sup></li> </ul>
Internationally Educated Health Professionals Initiative	<ul style="list-style-type: none"> <li>- Introduced in 2005.<sup>18</sup></li> <li>- \$18-million per year in ongoing funding is established.<sup>19</sup></li> </ul>	<ul style="list-style-type: none"> <li>- To increase the supply of health professionals into the Canadian workforce.<sup>20</sup></li> </ul>	<ul style="list-style-type: none"> <li>- Provides funding for projects</li> <li>- Aimed at "information dissemination, pathways to qualification assessment and recognition, skill building, and coordination that aims to increase the number of internationally educated health professionals qualified to practice in Canada."<sup>21</sup> ...</li> </ul>

Name of Program	Establishment and Funding	Objective of Program	Highlights
Internationally Educated Health Professionals <i>(Conti'd)</i>			<ul style="list-style-type: none"> <li>- Focus has been on particular professions (medicine, nursing, medical laboratory, science, medical radiation technology, pharmacy, phtsiotherapy, and occupational therapy.<sup>22</sup></li> <li>- Examples of ongoing and completed projects are present online and in <i>Pan-Canadian HHR Strategy Annual Reports</i>.<sup>23</sup></li> </ul>
Young Newcomers Internship Program	<ul style="list-style-type: none"> <li>- Launched in 2008 by Citizenship and Immigration Canada.<sup>24</sup></li> </ul>	<ul style="list-style-type: none"> <li>- To provide young immigrants with Canadian work experience with the federal government.<sup>25</sup></li> </ul>	<ul style="list-style-type: none"> <li>- In the first year, twelve young immigrants were given four month internships with CIC.<sup>26</sup></li> <li>- In April 2010, Citizenship and Immigration Canada announced that the program "will be expanded to other government departments and agencies so that more immigrants can benefit from it."<sup>27</sup></li> </ul>
Immigrant Internship Pilot Project	<ul style="list-style-type: none"> <li>- Launched in 2008 by Human Resources and Skills Development Canada.<sup>28</sup></li> </ul>	<ul style="list-style-type: none"> <li>- To provide mid-career internationally trained professionals Canadian work experience.<sup>29</sup></li> </ul>	<ul style="list-style-type: none"> <li>- Fifteen interns participated in the program in positions related to their fields; each intern is "paired with a mentor at the managerial level."<sup>30</sup></li> </ul>

APPENDIX A ENDNOTES

1. Foreign Credentials Referral Office, News Release, "Canada's new government launches first phase of Foreign Credentials Referral Office" (24 May 2007) online: <http://www.credentials.gc.ca>.
2. Ibid.
3. Ibid.
4. Ibid.
5. "Working in Canada Tool", online: Foreign Credentials Referral Office <http://www.workingincanada.gc.ca>.
6. "Going to Canada", online: Foreign Credentials Referral Office <http://www.goingtocanada.gc.ca>.
7. Canada, Citizenship and Immigration Canada, Employer's Roadmap to Hiring and Retaining Internationally Trained Workers (Ottawa: Foreign Credentials Referral Office, 2010), online: Foreign Credentials Referral Office <http://www.credentials.gc.ca/employers/roadmap/roadmap.pdf>.
8. Canada, Citizenship and Immigration Canada, Planning to work in Canada? An Essential Workbook for Newcomers (Ottawa: Minister of Public Works and Government Services Canada, 2009), online: Foreign Credentials Referral Office <http://www.credentials.gc.ca/immigrants/workbook/workbook.pdf>.
9. Canada, Foreign Credentials Referral Office, A Commitment to Foreign Credential Recognition (Government of Canada Progress Report) (Ottawa: Minister of Public Works and Government Services, 2010) at 11, online: <http://www.credentials.gc.ca/about/pdf/progress-report2009.pdf> [FCRO].
10. Ibid at 4.
11. ??
12. "Foreign Credential Recognition", online: Human Resources and Skills Development Canada <http://www.hrsdc.gc.ca>.
13. Jason Kenney, "Speaking Notes" (Pre-conference Session: Foreign Credential Recognition in Canada and Abroad, delivered at the 12th Metropolis Conference, Montreal, Quebec, 18 March 2010), online: Citizenship and Immigration Canada <http://www.cic.gc.ca>.
14. FCRO, supra note 9 at 11.
15. "About Us", online: BioTalent Canada <http://www.biotalent.ca>.
16. FCRO, supra note 9 at 12
17. Ibid at 11.
18. "Internationally Educated Health Care Professionals", online: Health Canada <http://www.hc-sc.gc.ca> [IEHPI].
19. FCRO, supra note 9 at 12.
20. IEHPI, supra note 18
21. Ibid.
22. Canada, Health Canada, Pan Canadian Health Human Resource Strategy 2007/08 Report, (Ottawa: Minister of Health, 2008) at 14, online: Health Canada <[http://www.hc-sc.gc.ca/hcs-sss/alt\\_formats/pdf/pubs/hhrhs/2008-ar-ra-eng.pdf](http://www.hc-sc.gc.ca/hcs-sss/alt_formats/pdf/pubs/hhrhs/2008-ar-ra-eng.pdf)>.
23. FCRO, supra note 9 at 13; "Reports and Publications – Health Human Resources", online, Health Canada <http://www.hc-sc.gc.ca>.
24. Citizenship and Immigration Canada, News Release, "Minister Kenney celebrates CIC's award winning Young Newcomers Internship Program" (8 June 2009), online: <http://www.cic.gc.ca> [YNIP].
25. Ibid.
26. Ibid.
27. Citizenship and Immigration Canada, News Release, "Young Newcomers Internship Program to be expanded" (27 April 2010), online: <http://www.cic.gc.ca>.
28. YNIP, supra note 24.
29. Email from D Kit, Ministerial Enquiries Division to Mark Melchers (10 June 2010).
30. Kelly McGahey, "Small and Medium Sized Enterprises Recruiting and Integrating Skilled Immigrants", Hire Immigrants Ottawa (February 2010) at 17, online: Conference Board of Canada <http://www.conferenceboard.ca>.

# APPENDIX B

## Provincial and Pan-Provincial Initiatives

Profession	Program
Lawyers <sup>1</sup>	<ul style="list-style-type: none"> <li>- The National Committee on Accreditation (NCA) was created by the Federation of Canadian Law Societies (made up of all Canadian Law Societies).<sup>2</sup></li> <li>- NCA awards a Certificate of Qualification, which “[m]ost law societies in Canada accept ... for entry to their bar admissions process.”<sup>3</sup></li> <li>- A Certificate of Qualification is awarded based on an assessment of one’s credentials performed by the NCA. Based on an assessment, either a Certificate of Qualification is awarded, or if not all requirements are met, the person will be “required to demonstrate competence in a number of subjects.” This can be done by passing examinations, doing coursework at a Canadian law school, or a combination of both.<sup>4</sup></li> <li>- From 1999-2009, 1708 Certificates of Qualification were issued to applicants from 46 countries,<sup>5</sup> and this was from 4515 applications from candidates representing 89 countries.<sup>6</sup></li> </ul>
Engineers <sup>7</sup>	<ul style="list-style-type: none"> <li>- Engineers Canada (made up of the 12 jurisdictional regulatory bodies for engineering) operates the Engineering International Education Assessment Program (EIEAP).<sup>8</sup></li> <li>- The EIEAP assesses the credentials of a foreign trained person, and determines the value of the credentials in Canadian terms. It is the only assessment body in Canada focusing specifically on engineering credentials.<sup>9</sup></li> <li>- Engineers Canada specifically states that “the EIEAP is not part of the registration process to become a professional engineer in Canada.” Each jurisdictional regulatory body is responsible for the assessment of credentials of a foreign trained person as it pertains to licensure.<sup>10</sup> The Association of Professional Engineers and Geoscientists of Manitoba suggest that the EIEAP is simply a tool to assist potential immigrants in making an informed decision about coming to Canada.<sup>11</sup></li> <li>- The regulatory body in a jurisdiction will assess the credential, and then may assign an examination program (maximum of 20 exams) to “ensure that academic requirements are met.”<sup>12</sup></li> <li>- Once the credential is recognized, and experience requirements are met, the final step to licensure is passing the “professional practice exam”.<sup>13</sup></li> </ul>
Physicians	<ul style="list-style-type: none"> <li>- Provincial International Medical Graduate (IMG) Programs<sup>14</sup></li> <li>- Seven Canadian jurisdictions have programs to facilitate the Canadian licensure of IMGs (British Columbia, Alberta, Manitoba, Ontario, Quebec, Newfoundland and Labrador, and Nova Scotia).<sup>15</sup></li> <li>- Manitoba’s IMG program is broken up into three parts. The Medical Licensure Program for International Medical Graduates (MLPIMG) is for IMG physicians who will still require some additional training, the International Medical Graduate Assessment for Conditional Licensure (IMGACL) is for practise ready physicians, and the Non-Registered Specialist Assessment Program (NRSAP) is for medical specialists.<sup>16</sup></li> <li>- The MLPIMG is a year-long training program for family physicians, intended to enhance current skills and knowledge held by IMGs. Participants will take part in 13 four-week training rotations, with assessments at the end of each. Successful completion of the program results in eligibility for conditional medical licensure in Manitoba. a salary during the program is provided by a sponsoring employer, and in exchange there is a contract to work for that employer upon successful program completion for a specified time.<sup>17</sup></li> </ul>

Profession	Program
Physicians <i>(Cont'd)</i>	<p>The IMGACL is a three month long assessment program for IMGs. There are three four-week rotations, with evaluations after each rotation. Successful completion of this program results in eligibility for conditional medical licensure in Manitoba.</p> <p>A salary during the program is provided by a sponsoring employer, and in exchange there is a contract to work for that employer upon successful program completion for a specified time.<sup>18</sup></p> <ul style="list-style-type: none"> <li>- NRSAP<sup>19</sup> is “an assessment program for specialists.” The assessments take place in a specialist department, for 3-12 months, depending on the specialty. Supervisors and colleagues submit interim and final reports, and the final decision is based on the final report. Conditional medical licensure in Manitoba must be obtained prior to acceptance into the NRSAP program.<sup>20</sup></li> </ul>
Bridge to licensure programs (various professions)	<ul style="list-style-type: none"> <li>- The purpose of bridging programs is to fill gaps between the skills, knowledge, education and training that one has and the requirements to work in a certain field in a given Canadian jurisdiction.</li> </ul> <p>Ontario</p> <ul style="list-style-type: none"> <li>- Ministry of Training, Colleges and Universities has established the Ontario Bridging Participant Assistance Program. This program provides bursaries valued at up to \$5,000 for internationally trained individuals to participate in eligible bridging programs.<sup>21</sup></li> <li>- Eligible bridging programs are listed for 34 specific occupations, and an “other” category.<sup>22</sup></li> </ul> <p>Manitoba</p> <ul style="list-style-type: none"> <li>- Government of Manitoba’s website lists 11 occupations for which bridging programs are available, as well as several “[l]anguage and communication programs”.<sup>23</sup></li> </ul> <p>Other Jurisdictions</p> <ul style="list-style-type: none"> <li>- While other provinces and territories also have bridging programs in place, many lack a central website which lists them all; information on each of these programs can be found independently, based on province and occupation. It may be advantageous for jurisdictions to have central bridge training programs which list all such programs in the province or territory, along with any financial aid/loan programs that are in place for the bridge-to-licensure programs.</li> </ul>

APPENDIX B ENDNOTES

1. Federation of Law Societies of Canada”, online: Federation of Law Societies of Canada <http://www.flsc.ca>.
2. “Joining Canada’s Legal Community”, online: Federation of Law Societies of Canada <http://www.flsc.ca>.
3. Ibid.
4. Ibid.
5. “Certificates of Qualification Issued 1999-2009”, online: Federation of Law Societies of Canada <http://www.flsc.ca/en/pdf/CQ99-09.pdf>.
6. “Comparative NCA Evaluations 1999-2009”, online: Federation of Law Societies of Canada <http://www.flsc.ca/en/pdf/NCAEV99-09.pdf>.
7. “Immigrating and Engineering”, online: Engineers Canada <http://www.engineerscanada.ca>
8. “Immigrating to Canada”, online: Engineers Canada <http://www.engineerscanada.ca>
9. “Engineering International-Educational Assessment Program”, online: Engineers Canada <http://www.engineerscanada.ca>.
10. Email from Gordon Griffith (Director, Education, Engineers Canada) to Mark Melchers (19 May 2010).
10. Email from Claudia Shymko (Assessment Officer, APEGM) to Mark Melchers (29 June 2010).
11. Immigrating to Canada, supra note 8.
12. Ibid.
13. “Organizations and programs for IMGs”, online: Medical Council of Canada <http://www.mcc.ca>.
14. Ibid.
15. “Brief Program Overview”, online: University of Manitoba Faculty of Medicine <http://umanitoba.ca>.
16. “Family Physician Training”, online: University of Manitoba Faculty of Medicine <http://umanitoba.ca>.
17. “Family Physician Assessment”, online: University of Manitoba Faculty of Medicine <http://umanitoba.ca>.
18. “Specialist Assessment”, online: University of Manitoba Faculty of Medicine <http://umanitoba.ca>.
19. Ibid.
20. “Ontario Bridge Training”, online: Ontario Ministry of Citizenship and Immigration <http://www.citizenship.gov.on.ca>.
21. Ibid.
22. “Bridging programs”, online: Government of Manitoba <http://www2.immigratemanitoba.com>.

# APPENDIX C

## Stand-alone Foreign Credential Assessment Services in Canada

Name of Agency	Location	Alliance of Credential Evaluation Services of Canada Membership	Government Recognized or Mandated	Highlights
Academic Credentials Assessment Service <sup>1</sup>	Manitoba	Yes	Yes	<ul style="list-style-type: none"> <li>- Must be mandatory part of application process for employment to get an assessment.</li> <li>- Must be a permanent resident of Manitoba.</li> <li>- Assessments are free.</li> <li>- Client does not receive a copy of the assessment.</li> </ul>
International Assessment Service <sup>2</sup>	Alberta	Yes	Yes	<ul style="list-style-type: none"> <li>- Anyone can pay for an assessment (cost is \$100-\$200 depending on type of assessment).</li> <li>- Agreements in place to perform assessments for Saskatchewan and Northwest Territories.<sup>3</sup></li> </ul>
International Credential Evaluation Service <sup>4</sup>	British Columbia	Yes	Yes	<ul style="list-style-type: none"> <li>- Anyone can pay for an assessment (cost is \$125-\$225 depending on the type of assessment sought).</li> </ul>
World Education Services Canada <sup>5</sup>	Ontario	Yes	Yes	<ul style="list-style-type: none"> <li>- Anyone can pay for an assessment (cost for full assessment is \$145-\$270 depending on type of assessment).</li> <li>- Performs pre-evaluations for \$25.</li> <li>- Course by course evaluations are available.</li> <li>- Database includes information for over 45,000 academic institutions, 214 countries, nearly 20,000 different credentials, and over 1,500 grading scales.</li> </ul>
Cente d'expertise sur les formations acquises hors du Quebec <sup>6</sup>	Quebec	Yes	Yes	<ul style="list-style-type: none"> <li>- Anyone can pay for an assessment (cost is \$106).</li> </ul>
Comparative Evaluation Service, School of continuing Studies, University of Toronto <sup>7</sup>	Ontario	No	No	<ul style="list-style-type: none"> <li>- Anyone can pay for an assessment (cost is \$226).</li> <li>- IF CES is used, a \$150 credit is offered toward tuition at the University of Toronto's School of Continuing Studies. ...</li> </ul>

Name of Agency	Location	Alliance of Credential Evaluation Services of Canada Membership	Government Recognized or Mandated	Highlights
International Credential Evaluation Service <sup>8</sup>	Ontario	No	No	<ul style="list-style-type: none"> <li>- Anyone can pay for an assessment (cost is \$90-\$200 depending on type of assessment).</li> <li>- Course by course evaluations are available.</li> </ul>

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1. "Work in Manitoba: Academic Credentials", online: Immigrate to Manitoba, Canada <http://www2.immigratemanitoba.com>.
2. "International Qualifications Assessment Service", online: Alberta Employment and Immigration <http://employment.alberta.ca>.
3. "Credential Evaluation, Assessment and Qualification Recognition Services", online: Canadian Information Centre for International Credentials <http://www.cicic.ca>.
4. "International Credential Evaluation Service", online: British Columbia Institute of Technology <http://www.bcit.ca/ices>.
5. "Welcome to World Education Services", online: World Education Services <http://www.wes.org/ca/>.
6. "Obtaining an Évaluation comparative des études effectuées hors du Québec", online: Québec-Immigration <http://www.immigration-quebec.gouv.qc.ca>.
7. "Comparative Education Service (CES)", online: School of Continuing Studies, University of Toronto <http://learn.utoronto.ca>.
8. "Current, accurate and dependable educational credential assessments and related advisory services", online: International Credential Assessment Service of Canada <http://www.icascanada.ca>.

# APPENDIX D

## Reports on Foreign Credential Recognition Issues

Name of Report	Author(s) of Report	Highlights and Recommendations from Report
Recognizing Success A Report on Improving Foreign Credential Recognition <sup>1</sup>	Parliamentary Standing Committee on Citizenship and Immigration	<ul style="list-style-type: none"> <li>- Foreign credential recognition is within provincial/ territorial jurisdiction, but the federal government must still provide leadership and play a facilitative role.<sup>2</sup></li> <li>- Recommendations include:               <ul style="list-style-type: none"> <li>- Expand the FCRO's Canadian Immigration Integration Project to allow more immigrants access to the program;<sup>3</sup></li> <li>- The federal government should implement a program providing incentives for employers to create "short-term work opportunities" for immigrants;<sup>4</sup></li> <li>- All federal government departments should create such "workplace experience programs," and the ones already in existence (at CIC and HRSDC) should be expanded;<sup>5</sup></li> <li>- A loan program should be created for immigrants to facilitate access to bridging programs.<sup>6</sup></li> </ul> </li> </ul>
A Pan-Canadian Framework for the Assessment and Recognition of Foreign Qualifications <sup>7</sup>	The Forum of Labour Market Ministers	<ul style="list-style-type: none"> <li>- Report is the result of the FCR issue being put on the First Ministers Meeting in January 2009. The First Ministers Tasked FLMM with "developing a pan-Canadian framework and implementation plan" for the "timely assessment and recognition of foreign credentials."<sup>8</sup></li> <li>- Canada's Economic Action Plan (the 2009 budget) includes \$50 million over two years to fund implementation of this plan, and the provinces will provide additional funding.<sup>9</sup></li> <li>- The framework is grounded in four "guiding principles": fairness, transparency, timeliness, and consistency.<sup>10</sup></li> <li>- Based on the results of the foreign credential assessment process, a person should be directed to one of three pathways: the "direct pathway to certification," the "pathway to skills upgrading," or the "alternative pathway to skills upgrading." The goal is to inform each person of which pathway he or she should be on within one year of the beginning of the process. Each pathway ends with entrance to the Canadian workforce.<sup>11</sup></li> <li>- Five "desired outcomes" are identified in the framework: "preparation and pre-arrival supports", "assessment", "recognition", "bridge to licensure", and "workforce participation".<sup>12</sup></li> <li>- Implementation plan: Implement the plan in stages based on occupation. By 31 December 2010, it is to be in place for eight identified occupations: Architects, Engineers, Financial Auditors and Accountants, Medical Laboratory technologists, Occupational Therapists, ...</li> </ul>

Name of Report	Author(s) of Report	Highlights and Recommendations from Report
A Pan-Canadian Framework for the Assessment and Recognition of Foreign Qualifications <i>(Cont'd)</i>	The Forum of Labour Market Ministers	<ul style="list-style-type: none"> <li>- ...Pharmacists, Physiotherapists, and Registered Nurses.<sup>13</sup> Implementation for an additional six occupations is planned to be completed by 30 December 2012. These occupations are Dentists, Engineering technicians, Licensed Practical Nurses, Medical Radiation Technologists, Physicians and Teachers.<sup>14</sup></li> </ul>
Pan-Canadian Quality Standards in International Credential Evaluation <sup>15</sup>	Funded by HRSDC, created by the Alliance of Credential Evaluation Services of Canada, the Canadian Information Centre for International Credentials, and the Council of Ministers of Education, Canada.	<ul style="list-style-type: none"> <li>- An attempt to “lay the groundwork for a set of pan-Canadian policy and practice standards to guide the work of all credential assessing bodies.”<sup>16</sup></li> <li>- Recommendations from the authors include:                             <ul style="list-style-type: none"> <li>- the creation of a common “glossary of terms”;</li> <li>- the “harmonization of document requirements and verification procedures”;</li> <li>- the development of “a pan-Canadian Quality Assurance Framework (QAF)”;</li> <li>- the establishment of shared information bases;</li> <li>- a feasibility study regarding “developing an internet portal for free overseas pre-assessments”;</li> <li>- the development of a “competency profile” for assessors; establishment of a university or college based program for assessors;</li> <li>- holding “regular workshops and networking opportunities for credential assessors”;</li> <li>- creating a strategic “set of jointly researched country profiles”;</li> <li>- annual meetings between assessors and other stakeholders; and,</li> <li>- increase public awareness regarding the role that third party assessment agencies play.<sup>17</sup></li> </ul> </li> <li>- Recommendations made by participants in the study, but not by the authors include:                             <ul style="list-style-type: none"> <li>- the establishment of a “governance model that would ensure/encourage adherence to QAF principles”;</li> <li>- altering membership requirements to ACESC to allow for a wider range of members.<sup>18</sup></li> </ul> </li> </ul>

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1. House of Commons, Standing Committee on Citizenship and Immigration, *Recognizing Success: A Report on Improving Foreign Credential Recognition*, (2009) (Chair: David Tilson).
2. *Ibid* at 1-2.
3. *Ibid* at 7.
4. *Ibid* at 8.
5. *Ibid* at 8-9.
6. *Ibid* at 9.
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**Further Reading**



May 2011

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