SELF-REGULATION AND COMPETITION IN ONTARIO'S LEGAL SERVICES SECTOR: AN EVALUATION OF THE COMPETITION BUREAU'S REPORT ON COMPETITION AND SELF-REGULATION IN CANADIAN PROFESSIONS

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INTRODUCTION

A recent report from the Canadian Competition Bureau, "Self-Regulated Professions: Balancing Competition and Regulation" (2007) expresses concern that self-regulation of Canadian professions may undermine competition in these sectors. The Bureau makes an empirical claim that productivity in the professions is low in Canada relative to the U.S., which motivates its investigation of competition and self-regulation. The Bureau reviews a number of specific regulations imposed in the legal and other professions and in some cases makes suggestions for improving competition, and hence productivity in these sectors.

In this report, we critically assess the Bureau's report. Section I considers the empirical basis for the claim that productivity is low in Canadian professions, and also considers the connection between such a claim and competition and self-regulation in the legal sectors. Aside from pointing out the lack of specificity about law in the empirical evidence, Section I shows that concern about competitiveness because of comparative productivity data in the U.S. and Canada is unwarranted: output measures in the professional sectors are market-based; and market conditions, such as competitiveness, necessarily affect market-based measures. The relative productivity figures therefore do not say much about competition. Indeed, as we discuss, the relatively low productivity numbers could reflect *greater* competition in Canada.

Section II departs from an implicit analysis of competition from examining productivity data and moves to an explicit analysis of competition in Ontario's legal

services market. Section II outlines the usual methodology employed by the Competition Bureau to assess the competitiveness of markets and applies it to a sample of Ontario legal services markets. Not only are legal services markets unconcentrated, but analysis of barriers to entry further supports a conclusion that Ontario's legal services markets are competitive in structure.

Section II reveals a competitive market structure, but this does not necessarily imply robust competition. It is possible that there could be concerns about self-regulation limiting competition despite an otherwise competitive market structure. For example, mandatory minimum fee schedules would impair competition even if there were hundreds of competitors. Section III reviews some aspects of self-regulation that the Bureau touches on in its report, although does not explore them in great detail. While the Bureau identifies some areas of potential concern, other matters are of much less importance. Section IV concludes by outlining some general principles that ought to govern self-regulation of the legal profession.

SECTION I: THE COMPETITION BUREAU'S EMPIRICAL FOUNDATION

A. The Bureau's Empirical Concerns

The Competition Bureau's study of self-regulation of Canadian professions is motivated, at least in part, by some rather sobering statistics about labour productivity in Canadian professions. To demonstrate the influence of these empirical conclusions on the

Bureau's thinking, the Bureau's report begins with a Foreword by the Competition Commissioner, which itself begins by citing productivity evidence:

> The professions comprise up to one fifth of Canada's service economy and seven percent of the total hours worked in Canada's business sector. It is cause for concern, therefore, that labour productivity in this important sector of the Canadian economy is approximately half that of the professions in the United States and is in the bottom quintile for labour productivity among Canadian industries.[1]

The Executive Summary begins similarly:

> Despite comprising a significant part of the service economy in Canada, perhaps as much as one fifth, the professions comprise one of the overall economy's least productive sectors. According to the Conference Board of Canada, professional services rate in the bottom quintile for productivity per hours worked. In addition, labour productivity in the professions in Canada is approximately half that of the professions in the United States. At the same time, the professions are one of the most regulated sectors of the Canadian economy, and the regulation in place in the professions is more restrictive in Canada than in many member nations of the Organization for Economic Co-operation and Development.[2]

The apparently dismal performance of the professions motivates the Bureau's study. Following on the first passage from the Executive Summary, the Bureau states:

> Given a considerable body of evidence that shows that reducing regulation improves competition and, as a result, productivity, it is reasonable to ask whether and how professional services could be less regulated in Canada. The Competition Bureau is ideally placed to answer this question, since one of its primary responsibilities is advocating for competition in Canada. On several occasions, the Bureau has advised Canadian regulatory bodies on how to improve their approach to regulation to realize the benefits of competition. The Bureau also has considerable experience investigating anti-competitive behaviour in the professional services sector.[3]

Thus, lest there be any uncertainty in drawing the potential connection between sub-par performance and competition, the Bureau makes the linkage explicit: it is worth studying

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[1] Competition Bureau, "Self-Regulated Professions: Balancing Competition and Regulation" (2007) at v.
[2] *Id.* At vii.
[3] *Id.* at vii.

competition in the professions since competition spurs productivity and the professions exhibit low productivity.

In this section, we critique the Bureau's approach to the empirical evidence. In our view, the evidence that the Bureau cites as motivating its study is not only insufficiently targeted for the Bureau to draw meaningful inferences, but the findings could, in fact, be evidence of *greater* competition in Canada than in the US. We examine each point in turn.

B. The Scope of the Evidence

The main study upon which the Bureau relies for its productivity data is a report of the Conference Board of Canada, *Mission Possible: Stellar Canadian Performance in the Global Economy*.[4] The study provides the empirical conclusion that labour productivity in Canadian professional services is not even half that in the U.S., and that it is in the bottom quintile of industries relative to the U.S.[5] The Conference Board itself relies on an Industry Canada study on U.S.-Canada relative labour productivity.[6] Rao, Tang and Wang study Canadian productivity in a variety of industries relative to the U.S. They find that productivity is lower in Canadian professional services than in the U.S.,

[4] Glen Hodgson and Anne Park Shannon, *Mission Possible: Stellar Canadian Performance in the Canadian Economy* (2007).
[5] At p. 46.
[6] In fact, it is not entirely clear how the Conference Board derived its results. At p. 46, it notes that it co-sponsored research in 2004 on labour productivity that it updated for the purposes of the 2007 report. It cites Brenda Lafleur and Andrew Sharpe, "The Canada-U.S. Productivity Gap: Deepening our Understanding", in *Performance and Potential 2004-05: How Can Canada Prosper in Tomorrow's World?* Ottawa: The Conference Board of Canada, 2004, which presumably is the basis of the 2004 study to which the 2007 report refers, but the central results on relative productivity in the 2007 report are attributed to Someshwar Rao, Jianmin Tang and Weimin Wang, "What Explains the Canada-U.S. TFP Gap?" Working Paper 2006-08. It is thus not clear how the upgraded 2004 results affect the Rao et al. 2006 results.

and that relative productivity in professional services is poor compared to other Canadian industries.

We begin our response to the empirical evidence cited by the Bureau by noting its lack of precision. The Rao et al. study upon which the Conference Board and, in turn, the Bureau, rely does not purport to offer a profession-by-profession analysis of relative labour productivity. Rather it groups the professions into a single class of "professional services." Specifically, in the Rao et al. study "professional services" is defined pursuant to the North American Industry Classification System code 54. This code includes a wide range of professional services. Specifically, NAICS 54 is defined as follows:

> NAICS Sector: 54 Professional, Scientific, and Technical Services. The Professional, Scientific, and Technical Services sector comprises establishments that specialize in performing professional, scientific, and technical activities for others. These activities require a high degree of expertise and training. The establishments in this sector specialize according to expertise and provide these services to clients in a variety of industries and, in some cases, to households. Activities performed include: legal advice and representation; accounting, bookkeeping, and payroll services; architectural, engineering, and specialized design services; computer services; consulting services; research services; advertising services; photographic services; translation and interpretation services; veterinary services; and other professional, scientific, and technical services.
>
> This sector excludes establishments primarily engaged in providing a range of day-to-day office administrative services, such as financial planning, billing and recordkeeping, personnel, and physical distribution and logistics. These establishments are classified in Sector 56, Administrative and Support and Waste Management and Remediation Services.[7]

The wide definition of professional services casts serious doubt about the utility of productivity data in evaluating, or even motivating the evaluation, of regulation in any

[7] See http://www.census.gov/epcd/ec97/industry/E54.HTM.

given profession. Regulation of veterinarian services has nothing to do with regulation of the legal profession. Thus, even if it were true that professional services as a whole were significantly underproductive compared to the U.S. or some other benchmark, it is not at all obvious that this would have any relevance at all to productivity in any particular profession. Productivity in "professional services" represents an average overview of productivity in a range of unrelated sectors, and the average, of course, may or may not reflect productivity in any particular profession. It is entirely possible, for example, that productivity in the legal profession is very high, while it is not in the accounting profession, and the average is relatively low productivity overall. In such a setting, reform to the legal profession could do more harm than good despite overall low productivity in the professions. To be sure, a focus on the professional services sector is more informative about productivity in the Canadian legal profession than, say, examining economy-wide average productivity: legal services is a more significant element of professional services than it is of the economy as a whole. But there is still considerable uncertainty about the connection between professional productivity as defined in the report the Bureau relies upon and productivity in the legal profession. This is thus one reason to doubt the empirical basis that the Bureau cites to launch its investigation of regulation in the legal (or indeed any) profession.

Another concern about the scope of the evidence cited by the Bureau in motivating its study relates to the connection between self-regulation and productivity in the legal profession. A conclusion that the legal profession in fact has lower productivity than in the U.S. does not indict regulation in the sector. The Bureau seems to move in a

linear fashion from concerns about productivity to concerns about self-regulation. There are, of course, a host of factors that may impact productivity in the legal profession other than self-regulation.

One important disconnection between labour productivity data and the effects of self-regulation concerns the role of capital and other inputs. If a particular industry in Canada is undercapitalized relative to the U.S., then labour productivity in that industry is likely lower than in the U.S., since capital contributes to the per-labourer output of an industry. If the legal profession in Canada relies less on capital than its American counterpart, then there is a significant potential explanation of a labour productivity gap that has nothing to do with self-regulation, unless one can tell a story of how Canadian self-regulatory rules restrict capital structure more than American rules. It may be that self-regulation concerning the partnership ownership structure of law firms affects the cost of capital, but it is not obvious how Canadian rules diverge in important ways from the U.S. on this score.

In fact, there is evidence that the Canadian professional services sector relies less on capital than does the American sector. Rao et al. report that machinery and equipment capital intensity in 2004 in Canadian professional services was only 34% of that in U.S. professional services. This is undoubtedly a major source of varying productivity across the two sectors.

Another reason to doubt the connection between self-regulation and productivity arises because lawyers are constrained to produce within the confines of a legal system over which they have little control. Suppose that there were a court system that required a large number of low-value interlocutory hearings before a decision could be rendered in a contract dispute. Or suppose that backlogs in courts deter cases from being heard in a timely fashion. Lawyers, rather than spending their time on relatively high-valued matters like the outcome of litigation, would have their productivity shackled by the litigation system, which is outside the purview of self-regulation. Thus, even if low productivity in the Canadian legal profession could be demonstrated, the causes of this productivity require careful study before one could conclude that self-regulation is the, or even a, cause.

C. Inferences about Competition from Labour Productivity Data in Professional Services

The Bureau's central concern with self-regulation is that it potentially limits competition in undesirable ways. Lack of competition in turn may be a contributing cause of the sobering productivity results that the Bureau cites to motivate its study. As this section explains, however, inferences about the state of competition in professional services cannot be drawn with any confidence from labour productivity results.

To explain our concerns, it is necessary to review how labour productivity figures are calculated. In the Rao et al. study comparing U.S. and Canadian labour productivity, a preliminary matter concerns currency translation. The authors attempt to render

production statistics comparable across the countries by establishing an industry-by-industry exchange rate that reflects purchasing power parity: i.e., if calculated accurately, a business in the industry in question in Canada spending a purchasing-power-parity [PPP], industry-specific converted dollar in Canada purchases exactly what a dollar in the U.S. would purchase in the same industry.

Once the appropriate exchange rate is calculated, the dollar value of production in each industry in each country is calculated. For the result that the Bureau cites, Rao would calculate the value of production of "professional services" in each country in dollar terms. Notice that production is not defined according to some unit of output (e.g., number of widgets produced), but rather according to dollar value – this is crucial to our analysis here, as we explain below.

Once the dollar value of production in the professional services market is calculated, labour productivity is found simply by dividing the value of production by the units of labour that were required to create this output. These ratios in the U.S. and Canada are compared to determine relative productivity in the professional sectors in each country.

Rao et al. find that Canadian productivity is low relative to the U.S. The Bureau relies on this to support an investigation into whether competitive restrictions in the professions are in part responsible for this poor performance. The problem with the Bureau's analysis is that anti-competitive practices in professional services could in fact

increase the productivity statistics that Rao et al. produce. To return to a point just emphasized, productivity statistics that Rao et al. provide rely on the dollar value of production divided by the number of workers in the sector. The dollar value of production does not capture quantity of output only, but also the price at which it was sold. Thus, on this methodology, the productivity of an acre of planted corn would be measured not by the number of cobs grown, but by the market value of the corn sold. This methodology, perhaps particularly in the service sector, makes sense: it would be impossible to measure the "quantity" of legal services provided. But by examining revenue rather than quantity, the productivity figures depend on market conditions, not just on the production technologies of the suppliers in question.

Suppose that markets are perfectly competitive.[8] In this case, professional service providers are compelled to charge their marginal costs. The revenue in the industry will reflect the total costs of production. If, however, there is market power in an industry, because of anti-competitive self-regulation or some other reason, then revenue will be greater than total costs. This may affect productivity data. Consider two alternative scenarios. In the first scenario, each lawyer in a competitive market is very productive, perhaps because of greater investment in capital. In the second scenario, there is only one, very unproductive lawyer who is the only provider of legal services in a particular market. Each lawyer in the two scenarios may be able to charge $500 per hour: lawyers in the competitive market charge $500 per hour because of competition and their high degree of productivity; the lawyer in the second market is unproductive, but can charge a

[8] See, e.g., Aklilu Zegeye and Larry Rosenblum, "Measuring Productivity in an Imperfect World" (2000) 32 Applied Economics 91.

monopoly rate of $500 per hour. High productivity and market power are indistinguishable when examining the value of services sold per hour of a lawyer's time. The only way to distinguish productivity is to measure the "quantity" (not hours) of legal services provided per labourer, but legal services cannot be reduced to quantity.

In some industries it may be feasible to account for market power by adjusting the PPP exchange rate. An analyst might be able to gauge the mark-up on a product sold by comparing the costs of inputs and the prices of output and attempt to back this out of the productivity analysis. Similarly, if there were an objective method of measuring the quantity of legal output, the market power factor would not cloud productivity statistics. One need not know the market price of corn to calculate how many cobs an acre produces; thus, productivity per acre can be calculated without reference to market conditions/power. If one could count the "cobs" produced by a lawyer, then one could compare labour productivity in competitive and non-competitive markets unproblematically. But it is not possible to measure a given "quantity" of legal services directly, which makes a direct analysis of quantity-produced-per-lawyer impossible. Moreover, without an ability to ascertain quantity, one cannot measure the mark-up on the price charged for a given quantity of legal services in an attempt to back out market power from the productivity estimates. Competitive conditions will inevitably affect the measurement of productivity in the professional sector.

Market power may exaggerate labour productivity statistics. Thus, if market power in legal services arises because of anti-competitive self-regulation that leads to a

smaller number of lawyers than competitive markets would support, all things equal, revenue per hour of professional services will be *higher* than in competitive markets. This in turn would tend to *increase* productivity as calculated by revenue over labour inputs. Market power in this instance would exaggerate productivity.[9]

It is therefore problematic for the Bureau to conclude that there may be competitive problems driving low productivity statistics in Canadian professional services relative to the U.S. Canadian and U.S. productivity measures would be comparable if the degree of competition in each market is the same, but not if they are different. Indeed, one could coherently argue that the reason why revenue over labour in Canadian professional services is lower than it is in the U.S. is because Canadian markets are *more* competitive than those in the U.S., and hence prices are lower all things equal.

None of this is to say that it is unwise for the Bureau to conduct a study of competition and self-regulation in the Canadian legal profession. But it is clear that the apparent empirical basis upon which the Bureau relies does not support the exercise. Not only is an examination of average productivity in professional services too broad to indict any particular profession, but the result that Canadian professional services are less productive as measured by revenue over labour inputs may in fact reflect greater competition in Canadian markets. Until there is a non-market based measure of productivity, akin to counting corn cobs, any productivity study of the legal profession will be contingent on competitive conditions, and thus not particularly useful in drawing inferences about competitive conditions.

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[9] *Id.*

SECTION II: COMPETITIVE CONDITIONS IN THE ONTARIO LEGAL SERVICES MARKET

Productivity statistics do not suggest that the Canadian, or Ontarian, legal services market is uncompetitive. But this does not mean that the markets are competitive. In this section we analyze more directly competitive conditions in Ontario's legal services market. While our analysis is hardly dispositive on the matter, our exploration suggests that the legal services market in Ontario appears to be robustly competitive.

A. Defining the Market

The first step in investigating the competitive conditions in a market is to define more precisely what the market is.[10] There are two dimensions to the market: the product market and geographic market. Consider an attempt to determine whether Canada Dry brand ginger ale participates in a competitive or weakly competitive product market. Before answering the question, one has to ask what the product market is. Is the Canada Dry brand sufficiently strong that it competes in its own market? Does it compete with other branded ginger ale sellers? Does it compete with all ginger ale sellers? Carbonated drink sellers? Non-alcoholic drink sellers? Drink sellers? The broader the market, the more competition Canada Dry faces in its market.

On the geographic market dimension, consider an attempt to determine the competition facing a grocery retailer (assuming "grocery retailing" to be a product market). A grocery store is located at Yonge and Bloor. Does it compete with a grocery

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[10] See, e.g., Competition Bureau, Merger Enforcement Guidelines (2004).

store three blocks away? Four blocks away? A kilometer away? Ten kilometers away? The obvious impact of the answers to these questions illustrates that geographic market definition is also crucial in evaluating competition in a market.

Defining the market is a fundamental first step in evaluating the competitiveness of the legal services market, but markets cannot simply be discovered as objective facts. Rather, they are constructs. The key question in establishing an algorithm for determining markets is whether a product exerts competitive discipline on another product such that neither seller of each product can ignore the other in setting prices and quality. In what has become the standard approach in countries with sophisticated competition policy enforcement, the Competition Bureau's Merger Enforcement Guidelines (2004) [MEGs] offer the following procedure for defining the product market (often referred to as the "hypothetical monopolist" test).[11] First, start with an initial product (Canada Dry). If there were a single seller of that product, could that seller raise prices from competitive levels by 5% and sustain the higher price for a year profitably? If not, then the inquiry should include in the market the next-closest substitute for the initial product (ginger ale). The question is then repeated: could a single-seller of the group of products raise prices by 5% profitably. If not, then the next closest substitute is brought in (carbonated drinks). And so on. The market is defined by the smallest group of products which a single seller could profitably sell at a 5% premium to competitive levels.

[11] See also, Michael Trebilcock, Ralph Winter, Paul Collins and Edward Iacobucci, *The Law and Economics of Canadian Competition Policy* (U of T Press, 2002), chap. 2 and 4.

An analogous process applies to defining the geographic market: start with an initial location (Yonge and Bloor). If a single seller at this location could profitably raise prices from competitive levels by 5%, then this location is a geographic market; if not, then add the next closest location to the market (three blocks away). If a single seller could raise prices by 5% profitably in this larger area, then the market is defined; if not add the next closest location, and so on.

Put more intuitively, relevant product (service) and geographic markets are defined by the willingness of consumers to substitute away from goods (or services) or switch to alternative (perhaps more distant) suppliers when faced with a small but significant and non-transitory price increase. The greater their willingness to switch, the broader the relevant market.

To undertake a thorough examination of competitive conditions in the legal services market in Ontario would require an examination of legal clients' price sensitivities. In some areas of practice, one would expect these sensitivities to be relatively large. In tax advisory work, for example, the line between legal practice and accounting advisory work may not be precisely drawn, which in turn suggests that an attempt to raise prices for legal advice on tax matters beyond competitive levels may induce clients to hire accountants instead. In other areas of practice, these sensitivities are likely smaller. If the price of criminal defence work rose by 5%, it is not obvious that clients would have more attractive alternatives.

Given that we do not undertake an empirical examination of legal clients' price sensitivities (or "demand elasticity", to use the conventional economic jargon), we cannot define product markets for legal services precisely. However, as we discuss, the data in our view resoundingly suggest robustly competitive market structures even on relatively narrow definitions.

Similarly, we do not have data on clients' willingness to shop around for legal services from providers outside their immediate geographic region. Again, except for very small communities, however, even narrow market definitions do not suggest a lack of competition in Ontario's legal services markets. For very small communities, we do look to some implicit evidence of broader geographic competition, as we discuss.

In what follows, we will consider various product market definitions. One is the most general: legal services. Others are more specific product markets, such as corporate/commercial law; wills, estates and trust law; family law; and real estate law. We also treat geographic markets as being municipal in scope, rather than larger regional markets which may well be appropriate in some cases.

B. Market Concentration

Once markets are defined, the next step in determining competitive conditions concerns an evaluation of market concentration in the market. The Merger Enforcement Guidelines [MEGs] take an approach in which a merger would be unproblematic if market shares of the merging parties are below certain thresholds, while if they are above

the thresholds, further analysis would be required. There are, in general, two forms of anticompetitive behaviour that the MEGs and competition policy address. First, there may be a concern that an individual seller in a market may be able to act sufficiently insulated from competition that it can charge supra-competitive prices (or provide sub-optimal quality). Second, there may be concern that a group of sellers collectively may be able to act in an explicitly, or implicitly, coordinated fashion such that prices are higher than competitive levels, or quality is lower. The MEGs set out different market share safe harbours depending on the nature of the competitive concern. If the concern is unilateral conduct, the Bureau suggests that it will not challenge a merger if the merging parties have a joint market share of under 35%. If the concern is multilateral conduct, the Bureau will not challenge a merger unless the four largest firms have a market share of at least 65%, and the merged entity would have at least a 10% market share.

These safe harbours are useful in analyzing competition in Ontario's legal services market. Using data from lawyers' annual information forms that lawyers must file with the Law Society of Upper Canada as a condition of licensure, we examine the number of lawyers in a variety of municipalities, as well as number of firms on the assumption that lawyers within a firm coordinate their production, providing legal services generally and in practice areas. We do not include a firm as practicing in a particular area unless at least one lawyer at the firm reports spending at least 10% of her time in this area. Note that the numbers we provide on specific product lines understate competition because of this restriction. As the MEGs note, a producer not selling at all in a particular product (or geographic) market at competitive prices may nevertheless be included in the market if

the producer would begin selling in that market in response to a price increase. In our data, we exclude *de minimus* participation in a line of legal services, but sellers providing less than 10% of their efforts in a certain line of business are very likely to be able to increase their participation above 10% in the event of anti-competitive price increases in that line of business. Indeed, since lawyers are licensed to practice in any area, lawyers not providing legal advice at all in a particular area may be induced by market power profits to begin doing so in the face of less than competitive market conditions.

The results from a sampling of legal services markets in different sizes of Ontario municipalities are as follows:

Type of Legal Practice		Toronto	London	Timmins	Orillia	Flesherton
	Population[12]	2.5 million	353,000	43,000	30,000	700
Overall	# of lawyers	13315	887	51	55	1
	# of firms	4239	853	41	52	1
Corporate/commercial	# of lawyers	3475	130	4	9	0
	# of firms	1282	65	4	8	0
Wills, estates, trust	# of lawyers	816	105	4	13	1
	# of firms	586	103	4	1	1
Family/matrimonial	# of lawyers	815	94	13	14	0
	# of firms	597	77	11	12	0
Real estate	# of lawyers	1658	141	12	17	1
	# of firms	1021	133	7	12	1

[12] Population data from http://www.citypopulation.de/Canada-Ontario.html, except for Flesherton's, which was found at wikipedia.org.

The number of firms practicing in a practice and geographic area does not indicate relevant market shares, so the safe harbour numbers of the MEGs are not directly applicable here. But for the larger municipal centres, it strikes us as highly implausible that any single firm would have a market share over 35%, or that any four firms would collectively have a market share of 65% or more. The average market share of London firms that provide family law services is just over 1%. Even if some firms are ten times the average size, this is a market that the Competition Bureau would view as robustly competitive. These figures are even more suggestive of competition if the total number of law firms is the focus, and it is plausible to assume (as we do) that lawyers would begin to move into other lines of practice if these were particularly lucrative given a lack of competition.

On the other hand, market shares in the smaller centres appear much greater and may on their face suggest competitive concerns. But we doubt that these markets present competitive problems. The geographic definition we rely on in the table concerns location within the municipality itself. Given the relatively large cost of legal services for any given customer, we suspect that many would travel to other nearby centres rather than pay supra-competitive prices for local providers. It is implausible that buyers would spend much time traveling to realize a 5% lower price of a single grocery item, but it is not implausible that buyers would travel to realize a 5% savings on the cost of legal services, just as they would when shopping for household appliances or automobiles or doing the weekly family food shop. But one need not rely only on principled speculation; there is market evidence that geographic markets are broader than the municipalities. We

examined yellowpages.ca for advertisements for lawyers serving Flesherton, Ontario, a town of 700 in southwestern Ontario. It turns out that there are over ninety law firms serving Flesherton, located in nearby towns like Hanover, Dundalk, Markdale and Shelburne, as well as relatively close larger centres, like Meaford, Owen Sound and Collingwood. Market share data suggest that legal services markets in Ontario are quite competitive.

C. Barriers to Entry

Even accepting narrow geographic and product market definitions, our sample of Ontario cities appears to have very competitive markets for legal services. But even if markets were concentrated, this would not end the assessment of competition. Another key consideration, as the MEGs stress, is barriers to entry. Concentrated markets do not pose competitive concerns if entry barriers are low. If new firms can enter in response to the exercise of market power, supracompetitive pricing would attract new entry and would only be transient. At the limit, even a firm with 100% market share cannot raise prices above competitive levels if entry of new competitors were costless and instantaneous. More generally, the MEGs suggest that the Bureau will not have competitive concerns about a merger, even if it creates concentrated markets, if entry would occur within two years that would constrain any significant price increase.

Even if there were some residual concern about competition in smaller centres, it is highly implausible that market power could be sustained in any given centre for long. The barriers to entry into the legal market concern investments in human capital: it takes

time and effort to earn a law degree and earn one's professional accreditation. Once a lawyer is accredited within Ontario, however, there are almost non-existent barriers to entering different geographic markets. Indeed, given inter-provincial mobility agreements, entry into Ontario by lawyers from elsewhere in Canada is also very easy. Thus, if some geographic markets were robustly competitive, like London's, while others permitted lawyers to earn supra-competitive returns, one would expect there to be entry into the less competitive market as the result of lawyers migrating from the more competitive market. Even very concentrated market shares, then, would not necessarily indicate market power. In reality, it is likely that there are few law firms in smaller centres because there is lower demand, and perhaps higher costs (for example, lower economies of scale).

Before concluding our discussion of actual competitive conditions in Ontario's legal services market, we note in passing another strong indication of the robust nature of competition, or at least an indication that self-regulation is not a potent force in restricting competition. While a minority of lawyers earn very high hourly fees, in the several hundred dollar range, most others earn much lower fees. Legal Aid Ontario, for example, pays hourly rates below $100. Hadfield[13], in a critique of self-regulation of the legal profession, acknowledges that in the individual legal services sector in the U.S. incomes and fees have either remained stable or decreased slightly with a perceived glut of lawyers and un- or under-employment – a view in part corroborated in Ontario in a recent

[13] Gillian Hadfield, "The Price of Law: How the Market for Lawyers Distorts the Justice System," (2000) 98 *Michigan Law Review* 953; Gillian Hadfield, "Legal Barriers to Innovation: The Growing Economic Cost of Professional Control Over Corporate Legal Markets," (2008) *Stanford Law Review* 101.

study by a Law Society of Upper Canada Committee of the challenges facing sole practitioners and small law firms in maintaining financially viable practices.[14]

There are no regulatory restrictions preventing low-earners from earning $800 an hour. Thus, the significant variation in returns to lawyers do not result from regulation. While the higher-earning lawyers are a minority, they are responsible for a disproportionate share of the value of the legal services market. Given that there would be a group of lower-paid lawyers willing to compete with them, the high returns that this cadre earns are not the result of less competition. Indeed, many of the higher-earning lawyers are involved in international business transactions, in which case they face stiff competition not only from other Canadian lawyers, but from international law firms.[15] Low productivity in this disproportionately valuable segment of the legal services sector, if it existed, could not be blamed on a lack of competition.

SECTION III: REGULATORY RESTRICTIONS ON COMPETITION

A. The Bureau's Assessment of Regulatory Restrictions on Competition in the Legal Professions: A Critique

In the Competition Bureau's 2007 study of the professions in Canada: *Self-Regulated Professions: Balancing Competition and Regulation*, the Bureau claims "that much of the productivity problem that plagues Canada's professions may be due to regulators not considering competition issues, or considering them inadequately, when

[14] Final Report of the Sole Practitioner and Small Firm Task Force, Law Society of Upper Canada, March 24, 2005.

[15] This observation suggests that the Toronto legal market is even less concentrated than the above data suggest.

they were creating their regulatory schemes, in the context of a very different Canadian economy than exists today." Section I shows that the productivity statistics on which the Bureau relies do not provide a basis for casting doubt on competition in the Canadian or Ontarian legal services industry. Section II directly investigates competition in Ontario's legal services market and, using the Competition Bureau's approach to evaluating the competitiveness of markets, concludes that markets are very competitive in structure. This Section addresses any residual doubts about competition in Ontario's legal services market. Even in the presence of competitive market structures it is possible for self-regulation to restrict conduct such that competitive outcomes are not achieved. For example, if self-regulation established a mandatory minimum fee schedule, there would be serious concern about competition even in very unconcentrated markets. While a searching examination of the Bureau's line-by-line recommendations for regulatory reform is beyond the scope of this report, we begin the section by reviewing some of the Bureau's recommendations, then provide some thoughts about the importance of the recommendations. We conclude that the Bureau fails to provide compelling evidence of serious concern about a lack of competition in the legal profession; though this conclusion does not necessarily negate the case for pro-competitive regulatory changes at the margins.

B. The Bureau's Recommendations

The Bureau's study focuses on various categories of regulatory constraints on competition in the professions:

1) restrictions on entering the profession

2) restrictions on mobility

3) restrictions on overlapping services and scope of practice

4) restrictions on advertising

5) restrictions on pricing and compensation

6) restrictions on business structure

In the chapter of the study on the legal profession, the study examines a number of classes of regulatory restrictions on competition and makes recommendations thereon. Amongst the more important of these are the following:

1. Market Entry Restrictions

The study notes that there are significant variations across provinces in the length of the professional legal training course and articling period, which suggests that the entry requirements may have been set, in some instances, at a higher than necessary level, thereby increasing the requirements that prospective lawyers have to meet to enter into the profession.

The study notes that while in the past there have been significant barriers to inter-provincial mobility of lawyers within Canada, most provinces have now fully implemented the National Mobility Agreement (NMA). It sets out principles that govern temporary and permanent mobility among signatory provinces and largely eliminates any inter-provincial restrictions on mobility.

With respect to international mobility, the study notes that the Council of Canadian Law Deans and the Federation of Law Societies of Canada have created the National Committee on Accreditation (NCA) to evaluate internationally-trained lawyers' requirements. The study questions the necessity of residency requirements that are still maintained by many provinces.

With respect to overlapping services and scope of practice, the study is critical of the scheme recently adopted in Ontario for regulating paralegals and administered by the Law Society of Upper Canada. The study recommends that to the extent that paralegals need to be regulated the proper avenue for this is not through law societies, given the conflict of interest that arises from one competitor regulating another. The study also recommends that law societies should neither prohibit related legal service providers, such as paralegals and title insurers, from performing legal tasks nor limit their ability to do so unless there is compelling evidence of demonstrable harm to the public.

2. Market Conduct Restrictions

The study is critical of restrictions that continue to be maintained in some provinces on the content and format of lawyers advertising, and argues the case for some form of specialist certification or designation to reduce information asymmetries between service providers and consumers. The study also recommends that restrictions on comparative advertising should be relaxed or removed.

The study notes that most provinces have removed any mandatory or suggested minimum fee schedules.

With respect to regulations relating to business structure, the study recommends that law societies should consider less intrusive mechanisms than prohibiting multidisciplinary practices to circumvent possible conflicts of interest. Examples to follow are those from the Law Society of Upper Canada and the Barreau du Quebec, both of which allow lawyers to form partnerships with non-lawyers under certain conditions and appropriate regulations. In order to allow for multidisciplinary practices, law societies will have to remove restrictions that currently prohibit or discourage lawyers from working in multidisciplinary arrangements with other professionals.

C. Analysis

While a detailed analysis of the merits of these regulatory restrictions is beyond the scope of this paper, we believe that the following caveats on the Bureau's views are in order.

With respect to market entry restrictions, in particular the length of professional training courses and articling periods from one province to the other, these differences seem relatively trivial, and in the light of the National Mobility Agreement (NMA), which now provides for relatively unrestricted temporary and permanent mobility of lawyers amongst signatory provinces, these differences become even more trivial.

In any event, it is of course the case that licensing requirements restrict entry; that is precisely their point. The concern is to ensure that relatively poorly informed clients are well-served by their lawyers, and human capital investment by lawyers is necessary to

achieve this aim. And it is worth noting that costly qualification periods, if constant over time, cannot even conceptually confer market power rents on lawyers. It is true that unnecessarily costly restrictions will limit competition and provide some ex post rents to lawyers, but this does not necessarily benefit lawyers on balance since they must incur the ex ante costs of entering the profession themselves. It would be of net benefit to lawyers, for example, to allocate scarce licences to practice law arbitrarily to a handful of lawyers, since those fortunate enough to receive the licence get something for nothing. But forcing lawyers to incur costs to become lawyers implies that lawyers will enter the profession only to the extent that expected future returns cover their costs of investing in the licence. Such restrictions reduce competition and increase fees, but any benefit ex post is consumed by the cost of obtaining the licence in the first place. There is no net benefit to lawyers.

We would be more suspicious of regulatory barriers to entry if they were altered over time. Currently qualified lawyers may conclude that they can realize something for nothing by increasing the costs of qualification, and thus reducing competition, while not having to undertake such extra costs themselves. The Bureau, however, does not consider trends over time, which renders its analysis of regulatory entry barriers problematic.

As Gillian Hadfield acknowledges in two recent critical reviews of the regulation of the legal profession in the U.S.,[16] while artificial barriers to entry are the commonly recognized sources of monopoly power in the market for lawyers, empirically there has to

[16] Gillian Hadfield, "The Price of Law: How the Market for Lawyers Distorts the Justice System," (2000) 98 *Michigan Law Review* 953; Gillian Hadfield, "Legal Barriers to Innovation: The Growing Economic Cost of Professional Control Over Corporate Legal Markets," (2008) *Stanford Law Review* 101.

be some doubt that they are an important source. She notes that over the last few decades in the U.S. there has been a tremendous increase in the number of lawyers entering the profession. While increases in the number of lawyers entering the profession in Canada has probably been less dramatic, modest expansion in the intake of students at Ontario law schools over the last several decades, the prospect of accreditation of new law schools in the future, and the ability of law graduates from other provinces to move into the Ontario market with very few, if any, restrictions on their mobility all suggest that market entry restrictions are not a significant constraint on competition.

With respect to the market conduct restrictions that the Bureau study focuses on, we do not doubt that self-regulation that establishes fee schedules, or severely restricts advertising, could impact competition in undesirable ways. But, as the Bureau's study notes, most provinces have removed any mandatory or suggested fee schedules in recent years. Moreover, regulators, especially in the case of Ontario, have removed most restrictions on lawyers' advertising. Without commenting on the overall net benefits of such further deregulation, the Bureau's recommendations that remaining restrictions on comparative advertising should be relaxed or removed concern a relatively minor feature of most advertising.

The Bureau study is also critical of the scheme recently adopted in Ontario for regulating paralegals and administered by the Law Society of Upper Canada, on the grounds that there is an obvious conflict of interest in one competitor regulating another. This conflict is a legitimate source of concern: lawyers as a whole may resist entry by

new competitors that drive their earnings down.[17] However, the Bureau fails to touch on the complexity of the regulatory issues[18], or to note that the regulatory regime that has been adopted in Ontario for the regulation of paralegals, after many years of study and debate, involves a carefully balanced governance structure, whereby the by-laws governing the qualifications, roles, and responsibilities of paralegals are to be developed by a committee comprising five lawyer benchers, five elected paralegals, and three lay benchers. Whether this governance regime sufficiently addresses actual or perceived conflicts of interest remains to be seen, but its design is clearly sensitive to this concern.

The Bureau's recommendations with respect to regulations relating to business structure, in particular those prohibiting multidisciplinary practices, raise more controversial issues,[19] although notably the Bureau recommends that the regulations adopted by the Law Society of Upper Canada in this respect are an example for other provinces to follow.

We are concerned that the Bureau's report treads too lightly over some of the nuances surrounding the general question of the legal profession's regulation of the boundaries of the profession. These boundary questions, such as those involving paralegals, are complex and involve many trade-offs. In our view, the only satisfactory approach to a policy critique or defence of self-regulation in this regard is an issue-by-

[17] As noted above, lawyers may have an incentive to increase barriers to entry over time, while a regulatory change authorizing paralegals to perform some work previously done by lawyers effectively has the opposite effect.
[18] For example, s. 4.1 of Ontario's Law Society Act requires the Law Society to regulate "all persons who practise law in Ontario or provide legal services in Ontario." The statutory reference to "providing legal services" requires the Law Society to regulate paralegals.
[19] Michael Trebilcock and Lila Csorgo, "Multidisciplinary Professional Practices: A Consumer Welfare Perspective," (2001) 25 *Dalhousie Law Journal* 1.

issue analysis of the particular regulation in question. We have noted, for example, the nuances associated with regulation of paralegals; similar complexities arise with other matters. For example, issues surrounding the sale and distribution of title insurance are far from straightforward. In the U.S., there was substantial deregulation of the title insurance market that permitted sellers to provide a bundle of services, some of which (e.g., real estate conveyancing) traditionally lay within the purview of the legal profession. There have been a number of complaints about business practices in the title insurance industry, and corresponding investigations by state and federal authorities. Indeed, the U.S. Government Accountability Office released a report in April, 2006 suggesting further study of the industry's cost structures, business practices and regulation. This experience reinforces the notion, noted by the Bureau, that the benefits, as well as the costs, of regulation must be weighed carefully before conclusions about these regulatory boundary issues can be reached.

As to the Bureau's proposal for some form of specialist certification or designation to reduce information asymmetries between service providers and consumers, this is a controversial issue. One of us has, in earlier writing,[20] expressed scepticism as to the wisdom of devoting scarce regulatory resources (both public and private) to ambitious specialty certification programs, for the following reasons. First, there will be pressures for the proliferation of specialty classes as members of the profession strive to differentiate their services from others' and thus attempt to reap whatever competitive advantage is associated with real or imagined service differentiation. Second, there will be disputes within the profession over the appropriate specification and boundaries of

[20] Michael Trebilcock, "Regulating Legal Competence," (2001) 34 *Canadian Business law Journal* 444.

each specialty, over the appropriate criteria by which one is judged to be a specialist and over the even-handedness and competence with which the plans are being administered, particularly if their administration primarily resides in the hands of those already certified as specialists. A substantial amount of the scarce regulatory resources of the profession is likely to be invested in supporting the plans under the weight of these pressures. Fourth, plans that start off only as specialty certification programs are likely over time to become, at least in part, *de facto* specialty licensing programs, as those successful in having themselves certified as specialists then succeed in establishing exclusive claims to specialized competence (*e.g.*, by persuading large institutional employers or various demand-side regulatory agencies, legal aid administrators, etc., to stipulate specialty certification as a necessary qualification for undertaking particular professional functions or categories of work). These developments are likely to lead, on the one hand, to a very extreme form of segmentation of professional service markets with a concomitant loss of mobility of human resources within those markets and, on the other hand, to a major new demand on the scarce regulatory resources of the governing bodies of the profession.

SECTION IV: CONCLUSION: PRINCIPLES TO GOVERN SELF-REGULATION OF THE LEGAL PROFESSION

To summarize, there may be some residual competitive concerns about self-regulation of the legal profession, but they are much more limited than the list raised by the Bureau. We do not resolve these matters in this sub-section, but offer some general principles for addressing the issues.

It is a truism that much economic and social regulation in the professions and in countless other contexts has an impact on competition in the sector in question, if competition is simply defined as maximizing the number of competitors. In Canada, as in most other countries, a plethora of legislation and regulations (national and subnational) regulate aspects of private market conduct and hence competitive conditions in such markets. Fraud and misleading advertising are not legitimate forms of competition, nor is coercion of customers. In some contexts economic regulation addresses the insufficiency of competitive forces as an effective discipline, *e.g.*, natural or protected monopolies. In other contexts, regulation addresses the distributional impacts of competition, including, for example, the many laws regulating conditions of employment in labour markets, agricultural marketing boards or supply-management schemes. In other contexts, service quality or ethical concerns are reflected in licensing or conduct requirements as conditions of (and barriers to) entry into a given class of economic activity. In yet other contexts, regulation addresses externalities from economic activities, such as pollution, often by setting standards that act as entry barriers to potential competitors. In other contexts, regulation is designed to protect industries from foreign competition, *e.g.*, trade barriers or foreign ownership restrictions or to protect domestic cultural values, *e.g.*, Canadian content requirements in broadcasting. In others, state ownership or public provision is seen as a surrogate for competition (*e.g.*, health care).

Thus, it is obvious that national competition laws cannot possibly be interpreted as over-riding or displacing all these forms of regulation but must take all or most of them as givens – as equally legitimate expressions of the democratic will as the

enactment of the *Competition Act* itself.[21] This is the motivation for the robust "regulated industries defence" that has evolved in Canada. This defence substantially shields regulated conduct from competition law scrutiny.[22] It is thus insufficient for a critic to point to a particular piece of self-regulation as restricting competition and rest its case; the countervailing purpose of the regulation must be considered.

We acknowledge, on the other hand, that scepticism about *self-regulation* may be particularly acute, given the direct benefits to the regulators from adopting anti-competitive regulations. Perhaps because of this concern, delegated self-regulation is relatively exceptional and is accorded to a relatively small number of occupational groups or professions. For example, the big five Canadian banks (or other highly concentrated industries) have not been accorded substantial self-regulatory powers over their industries, presumably because this would entail significant risks of antisocial forms of collusion or cartelization. Equally, used car dealers, door-to-door salespeople, and telemarketers have not been accorded self-regulatory authority. The delegation of regulatory authority by government to self-governing professional body hence requires a demonstration that self-regulation is more effective and/or less costly than direct regulation or perhaps regulation by a quasi-independent regulatory agency (analogous to *e.g.*, the Ontario Energy Board or the Canadian Radio-Television and

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[21] R.S.C. 1985, c. C-34.

[22] See Michael Trebilcock, Ralph Winter, Paul Collins and Edward Iacobucci, *The Law and Economics of Canadian Competition Policy* (Toronto, University of Toronto Press, 2002), ch. 11; Michael Trebilcock, Regulated Conduct and the Competition Act," (2005) 41 *Canadian Business L.J.* 492; Competition Bureau of Canada, Technical Bulletin on "Regulated Conduct," June 2006.

Telecommunications Commission). Thus, a case needs to be established rather than assumed for professional self-regulation.[23]

Once a need for some form of regulation has been established, the case for professional self-regulation turns on four kinds of considerations: the cost of information, the cost of error, the cost of enforcement, and the establishment of trust.[24] Although there is great diversity in the activities of the different professions, there are common elements as well. In each case, we find the application of a body of knowledge that is systematic and sometimes arcane. This is a knowledge base which, by its nature, can be acquired only by long and arduous training. Second, the activities of the professions touch on some of the most fundamental of human affairs. Third, professional practitioners are numerous and their clients are even more numerous. Professional services intrinsically involve the application of general knowledge to particular cases; they are, therefore, essentially individual in scope. Finally, the essence of the professional relationship involves the assumption of an agency role by the practitioner, acting on behalf of all relevant interests involved in the decision-making, the client's interests and those of third parties, and suppressing altogether his own interests. This agency function cannot be established and cannot be maintained in the absence of trust. Professionals must be trusted to act for their clients rather than for themselves, and they must be trusted to be sensitive to the interests of affected third parties. Without trust, professional relationships would flounder.

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[23] See Michael Trebilcock, "Regulating the Market for Legal Services," (2008) 45 *Alberta L. Rev.* 215.
[24] See Michael Trebilcock, Carolyn Tuohy and Alan Wolfson, *Professional Regulation: A Staff Study of Accountancy, Architecture, Engineering and Law in Ontario, prepared for the Professional Organizations Committee* (Toronto, Ministry of the Attorney General, 1979).

The choice between direct and self-regulation of quality in these professional markets is affected by these four characteristics. The determination that a service is of high quality or that a practitioner is adequately qualified can be made only by the application of the systematic knowledge base of the profession. If the state chooses to regulate the quality of professional services directly, it may, of course, hire "experts" (presumably from the profession in question) to assist it in its task. Clearly, however, the acquisition of this information is costly, even if it is facilitated by retaining expert advisors. The delegation of regulatory powers to the profession itself would place the responsibility for quality assurance in the hands of people who have sufficient knowledge to do the job.

The costs of error are also high. Since the activities of professionals are important, the performance of poor quality services or, more generally, the certification or licensure of unqualified practitioners, constitutes a serious challenge to the public interest. In extreme cases, public health and safety may be imperiled. Even in less dramatic circumstances, the state cannot easily countenance "errors" made in quality assurance in these markets. Such errors will, of course, be more numerous when the regulator lacks the information necessary to assess quality correctly. The combination of the high costs of acquiring such information and the high costs of doing without it appear to argue in favour of delegating the regulatory function to the profession itself.

There are further arguments supporting such a delegation. The fact that professional practitioners are so numerous, and that their services are so myriad, implies

that enforcement of quality standards constitutes a formidable undertaking. The strong allegiances to the profession and its norms, developed and internalized by members as part of their education and training, serve to enhance voluntary compliance with quality standards. In this way the enforcement costs associated with monitoring and policing legions of practitioners can be substantially reduced by delegating this responsibility to the profession as a whole.

Finally, trust relationships are extremely fragile, especially when they touch on matters of importance. But trust is fundamental to the professional's role; the professional "agent" cannot perform his function without this trust. Individual clients and the public at large are much more likely to have confidence in the activities of practitioners when the state has indicated its confidence in the profession as a whole. The delegation of regulatory authority to a self-governing body of the profession signals such a trust and thereby reinforces the establishment and maintenance of similar trust relationships at the individual level.

However, despite these virtues of self-regulation in some professional markets, we accept that the delegation of regulatory authority is not itself without costs. There are risks that a self-regulating profession will not adequately discharge its responsibilities, particularly in the face of conflicts of interest that may arise. These are likely to be particularly pronounced in areas where the profession's economic interests are at stake, such as in the protection of a professional monopoly over rights to practice and in the discouragement of competitive practices among its members or the protection of obsolete

or inefficient production functions and associated investments in human capital even though these may yield normal competitive rates of return to existing service providers (professional protectionism rather than consumer protection).[25]

This tension in turn raises complex issues in striking an appropriate balance between independence and accountability, which we do not pursue in detail here.[26] These may raise special concerns in the case of the legal profession relative to other professions because lawyers often assume a professional responsibility for representing clients with interests adverse to government (or the State) and are thus vulnerable to recriminations or retribution through regulatory bodies over which government exercises any significant influence (a problem all too evident in many developing countries and authoritarian regimes).[27]

In evaluating existing professional rules, particularly those that may impact on competitive conditions in the provision of legal services, and in evaluating proposed rules that may have such an impact, we believe that it would be appropriate for the Law Society of Upper Canada in initiating such processes, and for the Attorney General of Ontario in his or her oversight capacity, to apply a "least restrictive means" or

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[25] See Hadfield, op cit.
[26] See The Report of the Professional Organizations Committee (Ontario: Ministry of the Attorney General, 1980) ch. 2; Trebilcock, Tuohy, and Wolfson, *op.cit.*ch. 7; Michael Trebilcock, "Regulating the Market for Legal Services," *Alberta Law Review* , *op.cit.*
[27] See Michael Trebilcock and Ron Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Edward Elgar, 2008), chapter 9, "Professional Regulation."

"proportionality" test. This test is well developed in various other legal contexts. Writing in the context of international trade rules, Alan Sykes, in a recent paper,[28] points out:

> Least restrictive means requirements and related principles which require regulators to pursue regulatory objectives in the manner that is "least restrictive" of other societal values, pervade national and international legal systems. In American constitutional law, they appear in First Amendment cases, in equal protection cases, and in dormant commerce clause cases, among others. They perform similar functions in European law, such as in the jurisprudence of Articles 30 and 36 of the Treaty of Rome. They may be found in a number of articles of the North American Free Trade Agreement (NAFTA), and they play an essential role in the law of the World Trade Organization (WTO)."

It should be added that a similar test is applied under Section I of the Canadian Charter of Rights and Freedoms in justifying derogations from constitutionally protected rights and freedoms – the so-called proportionality test initially developed by the Supreme Court in *Oakes* (1986).[29] In an international trade law context, Sykes addresses various WTO obligations on member states not to adopt rules or regulations in purported furtherance of various social policy objectives that are more restrictive of international trade than necessary to achieve those objectives. In analyzing an increasingly rich body of WTO dispute settlement case-law on this question, Sykes concludes that it largely reflects simply a crude cost-benefit analysis, constrained by an awareness of error costs and uncertainty. Regulations that seem likely to be wasteful are more likely to be condemned under the least trade restrictive means test when the cost of erroneously condemning them are small, and when the costs of any reduction in compliance with the

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[28] Alan O. Sykes, "The Least Restrictive Means," (2003) 70 *University of Chicago Law Review* 403; see also Jan Neumann and Elisabeth Turk, "Necessity Revisited: Proportionality in World Trade Organization Law After Korea-Beef, EC-Asbestos, and EC-Sardines," (2003) 37 *Journal of World Trade* 199.

[29] See, more generally, David M. Beatty, *The Ultimate Rule of Law* (Oxford University Press, 2004), especially chapter 5.

stated regulatory objectives are small. In this sense, least restrictive means analysis in the WTO may be viewed as sensible cost-benefit analysis under uncertainty. By "crude" Sykes means that the WTO dispute settlement body does not actually quantify the costs and benefits of alternative regulatory policies in dollars or some other metric. Rather, the decision maker proceeds more impressionistically and qualitatively to assess the effect of alternative policies on trade (in our case, competition), the administrative difficulties and resource costs associated with alternative policies, and the regulatory efficacy of those policies, then weighs these considerations in making a decision.

Sykes argues that the attention to error costs and uncertainty is evident in the hesitancy of decision-makers (especially the WTO Appellate Body) to hold that an alternative is less restrictive of trade (or that the challenged policy is not "necessary") if the alternative policy *may* be less efficacious and if the value of regulatory efficacy is great. Thus, for example, if the regulatory objective relates to some highly valued interests such as the protection of human life, then the challenged regulation will be upheld if there is any doubt as to the ability of the proposed alternative to achieve the same level of efficacy. This practice may be understood as a recognition of the fact that the costs of an erroneous decision – the loss of life – would be extremely high, and that even a small probability of an erroneous decision counsels against condemning the measure under scrutiny. By contrast, where the regulatory objective relates to some less important interest, and the proposed alternative is considerably less restrictive of trade, decision makers may condemn a challenged regulation even when the efficacy of the proposed alternative regulation may be less than the efficacy of the challenged regulation.

Likewise, where an alternative regulation is clearly less restrictive of trade and there is no doubt as to its efficacy in achieving regulatory goals, the mere fact that it is somewhat more costly for regulators to implement will not prevent the decision maker from condemning the challenged regulation.

In our context, the test that law societies and Attorneys General to whom they account should apply to existing or proposed professional rules or regulations that may have an impact on competitive conditions in markets for legal services is whether the rules or regulations in question, in pursuing legitimate non-competition-related objectives (e.g., promoting professional ethical values, avoiding conflicts of interest, protecting vulnerable or ill-informed consumers), restrict competition no more than necessary (relative to reasonably available regulatory alternatives) in achieving those objectives.