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# Licence to Capture: The Cost Consequences to Consumers of Occupational Regulation in Canada

*A growing profusion of occupations in Canada require members to be licensed or certified.  
In many cases the benefits for consumers of such regulation are outweighed  
by the added costs they pay for the services.*

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and Tingting Zhang

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## THE STUDY IN BRIEF

The power and knowledge imbalance between traditional professionals and consumers is often large enough to warrant standard setting by governments and self-regulatory organizations in order to protect the health, safety or financial integrity of consumers.

In many cases, however, the need to protect the public interest is not as clear cut. For example, with respect to services such as cosmetics, hairstyling and travel, it is more likely that consumers are experienced in, and capable of, judging quality without specialized knowledge or training. In these situations the case for regulating such occupations is weaker. The benefits for consumers of such regulation can be outweighed by the added costs they pay for the services.

Considering the trend in Canada towards more rather than less occupational regulation, the issue is how can we protect consumers in a largely service-based economy?

The authors find that the economic rationales for increasing occupational regulation in many cases can be outweighed by the potential harm such regulation has on new entrants as well as the consumers of the services. In particular, they find that restricting the ways professionals do business, broadly described as “market conduct restrictions,” are a greater threat to consumers than the simple fact of restriction itself, broadly known as “market entry restrictions.”

They recommend that, first, provincial governments should focus on eliminating market conduct regulations that have little or no connection to consumer protection and instead serve the interest of the regulated. These include restrictions on advertising, exclusivity rights to information or databases and other carved out domains of exclusivity. The ability to exercise an exclusive right by a professional needs to be evidence-based (i.e., that the professional is solely qualified to exercise such a power in the interest of consumer protection). For example, in many provinces professionals have domains of exclusivity that should be examined in more detail:

- Realtor use of intellectual property in MLS;
- Pharmacist exclusive right of dispensing;
- Physician or nurse practitioner exclusive right of prescribing;
- Solicitor exclusive right to effect transfer of land.

Second, federal competition laws need to be enhanced to override legal rules that give provinces broad immunity to create and sustain licensing or quota regimes that inhibit competition. Canadian courts have developed a doctrine that protects provincially enacted regulatory regimes against the application of federal competition laws in a variety of cases, including agricultural marketing schemes and retail alcohol. The Regulated Conduct Doctrine (“RCD”), which has given provinces a judicially created “get out of jail” free card, should be addressed and clarified in the federal *Competition Act*.

Policy Area: Education, Skills and Labour Market.

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## Occupational licensing in traditional professions such as law, medicine or engineering has existed for many years in Canada.

These licensing regimes have gained acceptance because consumers of these services often do not have the knowledge or experience to judge the quality of the offerings without independent checks and balances. Moreover, the power and knowledge imbalance between traditional professionals and consumers is often large enough to warrant standard setting by governments and self-regulatory organizations in order to protect the health, safety or financial integrity of consumers.

The occupations subject to regulation, however, have not been capped at traditional professions. Recent studies in the United States as well as the evidence in this *Commentary* find that the number of occupations broadly subjected to regulation has increased since 1950 and has generally seen an upward trend in most provinces, particularly Ontario and Quebec. The result is that in 2020 there are now more occupations that require either accreditation, registration or licensure than at any time before. The general trend is towards more occupational regulation rather than deregulation or liberalizing existing forms of regulation. Although the forms of occupational regulation vary based on provincial and federal laws, the fact is that it is more likely that members of an occupation are self-regulating as opposed to being regulated directly by the government.

There are many cases where the interest of the public favours occupational regulation for reasons of public safety. For example, medical professionals

having specialized knowledge on the advisability of certain procedures or use of particular drugs to treat complex conditions necessitates the delegation of certain powers and discretions to such professionals. In other cases, however, the need to protect the public interest is not as clear cut. For example, with respect to services such as cosmetics, hairstyling and travel, it is more likely that consumers are experienced in, and capable of, judging quality without specialized knowledge or training. In these situations the case for regulating such occupations is weaker. In other words, as the risk of harmful health or significant financial loss increases the case for regulation is strengthened. Therefore, conceptually we can understand regulation as existing on a spectrum where occupations with less serious outcomes (in terms of health or financial impacts) require more justification for regulatory barriers compared to occupations where possible outcomes could be more dire.

The principal concern regarding occupational regulation is the possibility that such regulation serves to further the interests of the members of the occupation at a cost that is greater than the benefits accruing to the public. In other words, occupational regulation may not be efficient if there are little or no tangible benefits to the public and such regulation adds costs to the consumers of the regulated services. In a 2007 study, the Competition Bureau singled out the professions as being one of the economy's least productive sectors (Competition

Bureau 2007).<sup>1</sup> While the cause of such lackluster productivity is unclear and comparisons of productivity among sectors of the labour market may be difficult it is nevertheless concerning given that professionals comprise at least 20 percent of the service economy in Canada. Moreover, services have steadily grown to become the mainstay of the Canadian economy. Therefore, it is important to consider the costs to consumers of regulation, which we find affects a significant proportion of service-based occupations.

In this *Commentary*, we will review the theories of occupational regulation, economic arguments that have been advanced for and against regulation, and provide data to support our prediction that an increase in occupational licensing will result in a net loss for consumers and new entrants to regulated sectors of the economy.

We find the number of occupations in Canada that are subject to occupational regulation has increased over time. The result is that more and more workers in Canada require some form of licence, accreditation or certification to be employed or offer services to the public. We find that the economic rationales for increasing occupational regulation in many cases can be outweighed by the potential harm such regulation has on new entrants as well as on the consumers of the services offered by regulated occupations. In particular, we find that restricting the ways professionals do business, broadly described as “market conduct restrictions,” are a greater threat to consumers than the simple fact of restriction itself, broadly known as “market entry restrictions.”

Our findings suggest that provincial governments in Canada should eliminate market conduct regulations that cannot demonstrably be

linked to consumer protection. Further, federal competition laws need to be revamped to override provincial governments’ ability to enact legislation that has anti-competitive effects.

## THE THEORY OF OCCUPATIONAL REGULATION

Any analysis of occupational regulation must begin with a definition of regulation. A regulated occupation is one that is governed by a provincial, territorial or federal authority.<sup>2</sup> It is an occupation that requires a “government issued licence [for workers] to do their job” (Kleiner and Krueger 2013). The regulation of occupations falls onto a spectrum, ranging from essentially no regulation, simple registration, to the most restrictive (practice-based licensure). Registration requires an individual offering a service to register themselves in a government or other third-party database in order to do business. For example, in many Canadian provinces a commissioner for taking oaths, or notary public, can carry on business verifying documents or signatures by simply registering while working under the supervision of a lawyer.

After simple registration there is accreditation and the related category of certification. Accreditation is an educational requirement, which is often followed by the certification of a governing body. For example, a professional engineer in Ontario requires educational accreditation but also certification (which consists of practical work experience and passing an examination) in order to practice the vocation. By contrast, an individual working or holding themselves out as an economist typically only needs to have accreditation in the form of graduate work in economics, as there is no

1 [https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Professions-study-final-E.pdf/\\$FILE/Professions-study-final-E.pdf](https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Professions-study-final-E.pdf/$FILE/Professions-study-final-E.pdf).

2 This is the definition used by the Government of Canada: <https://canadabusiness.ca/government/regulations/regulated-industries/regulated-professions-and-trades/>.

formal college or licensing authority for economists. Finally, on the most restrictive end of the spectrum is formal licensing of a practice. In the case of licensure, it is actually illegal to practice a vocation without a licence and this is usually the case with most traditional professions such as law, medicine, etc. The forms of occupational regulation are summarized in Table 1 below.

There are two notionally distinct yet practically non-exclusive theories of understanding occupational regulation: the public interest theory and capture theory (Cox and Foster 1990). Public interest theory contends that regulation is for the protection and benefit of the public at large and, more specifically, consumers of professional services. Public interest theory connects certain forms of market failure with forms of regulation designed to address such failures. For example, Table 2 summarizes market failures and policy concerns together with the regulatory prescription that is often used to address these issues.

In contrast to public interest perspectives, capture theory envisions regulation as a tool of the regulated. According to this theory, professionals, rather than consumers, demand regulation with the intent of limiting entry, decreasing supply and increasing their own wages. Regulation is lobbied for by the regulated or those seeking regulated status in order to carve out spheres of exclusivity in the supply of a professional service. Nobel prize winning economist, George Stigler (1971), in his seminal work, “The Theory of Regulation,” hypothesized that industries will always seek two things from government: money and control over entry by new rivals. Stigler’s capture theory assumes that occupational groups and industries purchase influence by lobbying politicians to obtain monopoly rights through legislation. According to Stigler, “with its power to prohibit or compel, to take or give money, the state can selectively help or hurt a vast number of industries.” Thus, regulation can have anticompetitive effects in multiple ways, for example by (i) creating barriers to entry into a

profession; (ii) increasing the likelihood of collusion among professionals; (iii) raising the costs of the members of a profession (Competition Bureau 2007). Importantly, the anti-competitive effects of regulation can stem from either preventing supply into the market (market entry restrictions) or interfering with the ability of the market to set competitive prices (market conduct restrictions).

One of the most common justifications for licensing occupations is that it is seen as a solution to the problem of market failure. Such failures are typically presumed to occur because consumers cannot discern the quality of a complex or technical service being offered by a professional (Cox and Foster 1990). In other cases, consumers need a central registry of information to make informed decisions. The problem of quality is compounded by the risk of self-dealing by professionals who can offer to provide services that are not necessary or even in the best interests of consumers where the consumer cannot verify necessity. For example, in health professions or in automotive repair there is an ever-present risk that the provider of the service will over-prescribe or over-diagnose problems when they are able to sell to an unknowing but risk-averse consumer.

Another type of market failure occurs when consumers and service providers do not consider the effect of their transaction on “third parties” not directly involved in their dealings. When a third party incurs a cost due to a transaction it is called an externality. In theory, externalities occur when consumers choose low-quality, unregulated professionals because the poor-quality service they receive can impact a third party at the same time or subsequent to the transaction. For example, if an unlicensed mechanic does substandard work on a vehicle and the car subsequently malfunctions and injures a third party, there is a case to be made that the mechanic needs to be regulated to protect against the potential for social harm arising out of shoddy workmanship.

**Table 1: The Forms of Occupational Regulation**

No Regulation	Registration	Accreditation	Certification	Licensure
No formal registration requirements, accreditation or certification.  (e.g., barista)	Simple filing requirement (name, address, etc.) before practicing occupation.  (e.g., commissioner of oaths)	Certification of Educational Achievement such as establishing that one has educational background in a field.  (e.g., economists)	Any person can perform the task, but an overseeing body administers an examination and certifies those that achieve a level of skill and knowledge for certification.  (e.g., building designer in some provinces, trademark agents)	It is illegal to practice the occupation without a license.  (e.g., law, medicine, engineering)

Source: Authors' compilation.

**Table 2: Market Failures and Regulation**

Market Failure / Policy Concern	Regulatory Prescription
<b>Information Asymmetry:</b> Consumers do not have or cannot obtain the information to assess the quality of services or to identify the provider adequately.	Can range from simple registration with an appropriate governmental body to more stringent requirements of licensure for professionals offering specialized services (doctors, dentists, lawyers, etc.).
<b>Negative Externalities:</b> The negative effect a transaction can have on third parties subsequent to the transaction where quality is not controlled by adequate certification or licensure.	Accreditation or certification (e.g., compulsory apprenticeship or education for mechanics).

Source: Authors' compilation.

Akerlof (1970) describes the asymmetric information imbalance between a buyer and a seller of a motor vehicle where the merchant has access to information which the consumer cannot verify. He argues that the market cannot operate correctly (or at all) when the consumer is unable to distinguish quality items from inferior goods. One of the justifications for licensing is that it sends the signal to the market that regulated professionals are

of greater value than non-regulated professionals and thus worth higher costs. Thus, accreditation, certification and even licensing are justified based on a combination of the educational and experiential value attributable to a professional offering a complex service.

The benefits of licensing, while theoretically appreciable, are not easily amenable to quantification. This is mainly because the

counterfactuals do not exist or may be difficult to establish with existing data.<sup>3</sup> For example, we cannot make a statement that a certain number of patients would have died in the absence of licensed physicians because such data are not available. Suffice it to say that experience dictates licensing has a value, but also a cost – and the focus of this *Commentary* is on the concerns raised by increased licensing where its costs transcend, or have the potential to transcend, its value. To be clear, we do not oppose all regulation as a response to evolving challenges in the labour market. For example, transitions in the workforce to a “gig” economy may precipitate useful, consumer-friendly regulations that help the market function better. Our objection is to regulations that have the primary effect of limiting competition or reducing market entry with no demonstrable benefit to consumers.

Although there are good reasons for regulating certain practices where market failures, including asymmetric information or externalities, create a significant health or financial risk to the public, our *Commentary* finds that the case for expanding occupational regulation is weak, particularly when Canadian consumers are better educated and have access to multiple sources of information to verify quality, and where less supply- or conduct-restrictive measures are available.

## DATA AND TRENDS IN OCCUPATIONAL REGULATION

In Canada, specific data on regulated occupations are sparse. Elsewhere, particularly in the United

States, various studies have tracked the number and types of regulated occupations and the effect of such regulations on consumer welfare (Kleiner and Kruger 2013). These studies have generally supported the economic theory that occupational regulation leads to net losses for consumers and new entrants in the form of higher prices and barriers to entry (Kleiner and Soltas 2019).

In terms of quantifying the scope of the issue, several US studies find that in 1950 around 5 percent of American workers were subject to some form of licensing (Council of State Governments 1952). In 1980, the estimate was around 18 percent of the US workforce (Kleiner and Krueger 2013). By 2008, nearly one-third of American workers required a state licence to perform their work legally. Occupational licensing in the United Kingdom has followed American trends. In 2015, it was estimated that 19 percent of all workers in the UK were subject to licensing, a growth of 2 percent in over 10 years (Kleiner 2017). Across the EU (depending on the country being examined), the overall estimate is that 22 percent of the 310-million-person labour force on the continent are subject to occupational licensing (Kleiner 2017). In Canada, most studies point to around 20 percent of the labour force working in regulated occupations with significant variations in the rates by province (Girard and Smith 2009).<sup>4</sup>

Although there are no historical statistics in Canada to assess the growth of regulated occupations over time, it is likely that the trend seen in the United States is mirrored to a certain extent here, as is confirmed by our empirical

3 In terms of licensed occupations, there are examples of occupations that are regulated in one province but not in others, e.g., naturopaths. Therefore, while it would be possible to compare a regulated naturopath in Ontario with an unregulated one in the Northwest Territories it would be difficult to state with certainty that the difference in wages is solely the result of occupational licensing. Other factors including personal characteristics and also regional differences could account for wage differences. An attempt to control for these personal variations is beyond the scope of this paper.

4 See, also, the Canadian Information Centre for International Credentials: [https://www.cicic.ca/928/find\\_out\\_if\\_your\\_occupation\\_is\\_regulated\\_or\\_not.canada](https://www.cicic.ca/928/find_out_if_your_occupation_is_regulated_or_not.canada).



results. Moreover, new legislation in areas that were previously unregulated, or only loosely regulated through trade associations, shows an increase in the licensing or certification requirements for various occupations by provincial governments.<sup>5</sup>

## CANADIAN DATA

For our empirical analysis of wages and regulation we used the 1999–2018 Labour Force Survey (LFS) at the Statistics Canada Research Data Centre. LFS is a monthly survey collected to provide official “estimates of employment and unemployment” in Canada (Smith 2015). The survey includes a sample of civilian, non-institutional Canadians aged 15 and over. The computer-assisted project surveyed selected households for six consecutive months. Hence, to avoid repeated measures, we picked the April and October monthly data to construct our annual nationally representative dataset. We restricted the sample to full-time workers aged 21–65 who reported positive employment earnings and an occupation. The final yearly sample size ranges from 78,000 to 93,000. We then excluded workers with occupations in engineering and skilled trades. We excluded these occupational groups because a large number of individuals with educational attainment in these fields do not likely hold or pursue a licence to work and we do not presently have ways to identify the distinction at the individual level.

Unlike the population survey in the US, the Canadian LFS does not ask directly whether workers are required to hold a licence in order to perform the job. Hence, the Canadian data are less detailed in this respect and a review of legislation and identification of self-regulatory colleges is necessary to determine which occupations are

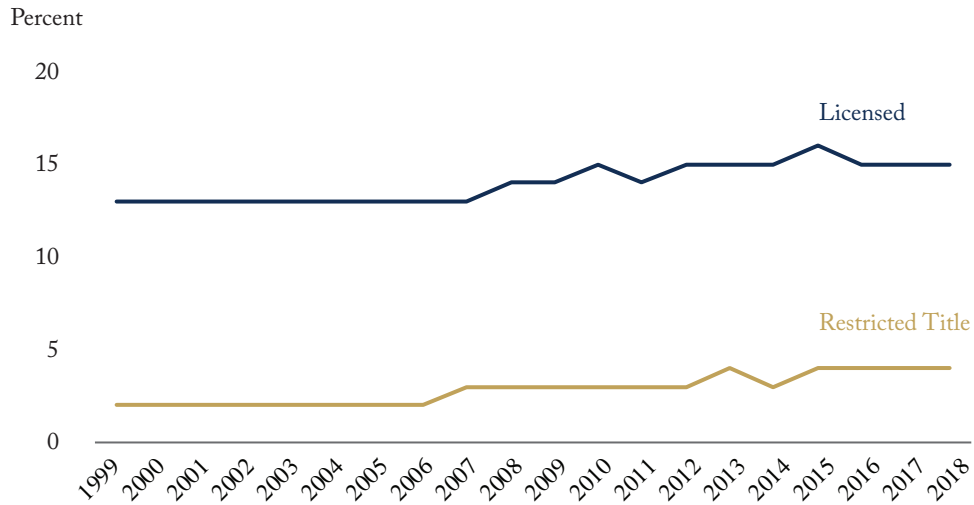
regulated. There is an inherent ambiguity in this process as the categories of “restricted title,” “licensure” and “registration” often overlap and intertwine such that it may be impossible to state unambiguously that certain occupations fit within a particular form of regulation. Accordingly, we manually reviewed provincial statutory regimes with a focus on identifying those occupations that have become the subject of legislation of some kind. We manually matched the four-digit National Occupational Classification (NOC) (see [Appendix A](#)) with information from the legislative record of occupational licensing status based on the province and the year of enactment (Girard and Smith 2013; Gittleman and Kleiner 2018; Zhang 2019). We did this by manually reviewing provincial statutes enacted in Ontario, British Columbia, Saskatchewan, Manitoba, Quebec, New Brunswick and Nova Scotia to identify regulations brought into force between 1996 and 2018 that create a licensing, registration and/or “right to title” regime for a given occupation.<sup>6</sup>

Figure 1 presents the share of licensed workers or workers in occupations with a restricted title between 1999 and 2018. Restricted title occupations include professions that carry specific titles but do not necessarily limit the ability to practice the trade itself by non-certified individuals. For example, certified professional planners or human resources professionals carry a right to title without preventing a non-certified person from undertaking similar tasks. The percentage of licensed workers increases slightly from approximately 13 to 15 percent, and the share of workers in occupations with a restricted title goes up from 2 percent to 4 percent in the past two decades. In Figure 2, the

5 Our review of provincial legislation in the seven most populous Canadian provinces found that at least 85 new occupational regulation regimes were enacted between 2000–2019.

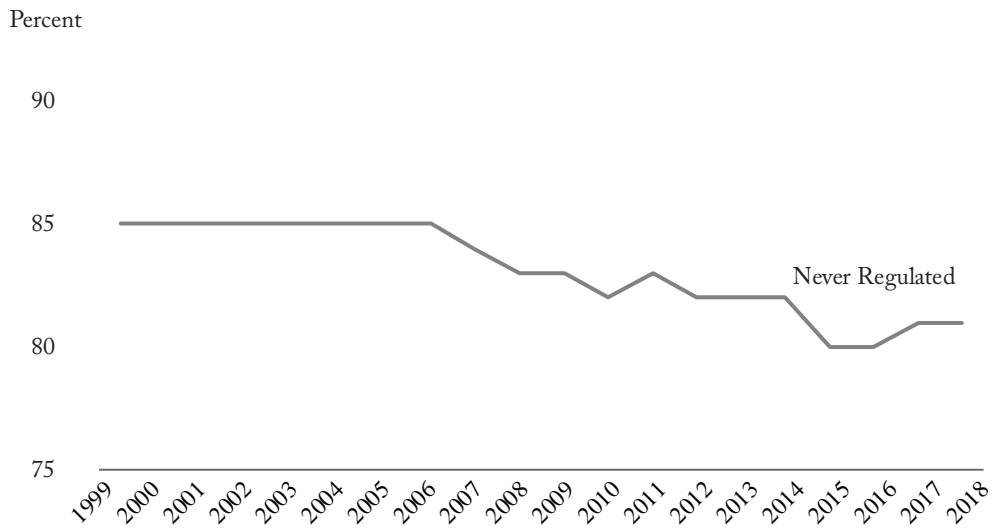
6 We are not able to distinguish whether a practitioner is a licence holder in the LFS. We, therefore, decide not to include this line of occupations.

Figure 1: Share of Workers in Regulated Occupations by Type



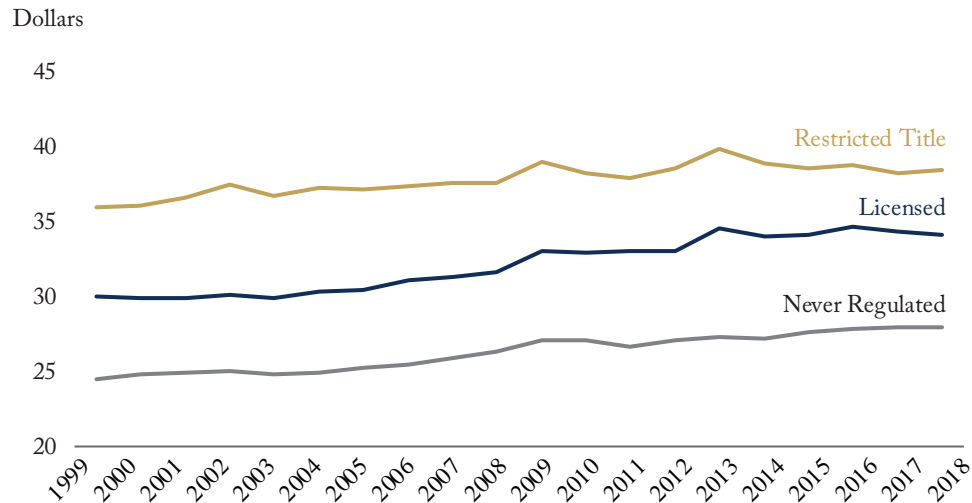
Source: Authors' calculations using Labour Force Survey.

Figure 2: Share of Workers in Occupations Never Regulated



Source: Authors' calculations using Labour Force Survey.

Figure 3: Average Hourly Wage



Source: Authors' calculations using Labour Force Survey.

percentage of workers in occupations that have never been regulated (i.e., licensed, restricted title, certification, or registration) by federal or provincial acts and regulations decreases from about 84 to 80 percent. When we excluded workers who report in engineering or skilled trades, we see a similar pattern – the percentage of licensed workers increases from 5 to 8 percent; the share of workers with restricted titles climbs from 1 percent to 3 percent; the share of workers in never-regulated occupations decreases from 92 to 87 percent.

We also illustrate the mean hourly wage of those groups of workers over time in Figure 3. In 1999, workers in licensed occupations made \$30.02 per hour (in 2018 constant dollars); the hourly wage

for the licensed workers goes up to \$34.11 per hour by 2018. The average hourly wage for workers with restricted titles increases from \$36.01 to \$38.51. In the meantime, workers in never-regulated occupations make, on average, from \$24.57 to \$27.99 per hour. After we excluded the engineering and skilled trades occupations, workers in never-regulated occupations make on average from \$24.73 to \$28.19 per hour, roughly the same as the full sample of the workforce. In contrast to that, the average hourly wage of licensed workers increases from \$33.46 in 1999 to \$36.91 in 2018, and the workers in occupations with a restricted title make from \$30.52 to \$35.34 per hour over this period.<sup>7</sup> These results mirror the findings in a 2018 study

7 Professional engineers are licensed occupations in all provinces. However, engineering licensing is a loose one since the occupational regulation acts allow practicing restricted activities “under the direct supervision of a licence holder.” This clause waters down the stringency of the licence.

which found a pay premium for workers with an occupational licence compared to those without one when controlling for standard factors that could impact wages such as unionization, industry, workplace size and education (Zhang 2019).<sup>8</sup>

## THE EFFECT OF REGULATION ON WAGES AND PRICING

Based on the available data, it is difficult to conclude that workers who are paid more earn a “regulatory premium” due solely to the fact of their occupation being regulated.<sup>9</sup> Nevertheless, the fact of an increase in regulated occupations coupled with a non-insignificant wage differential for workers who have a “restricted title” or licence raises questions about the extent to which such exclusivity rules impact consumers of professional services where a higher wage can, and by international comparisons, often does translate into a higher cost to consumers.

Although there is a different political and legal context, the studies from the United States do provide evidence on the costs of licensing in that country, which, like Canada, has seen an aggregate trend of increased licensing. There have been numerous studies in the US on the labour market outcomes for licensed occupations. Estimates of the cost to consumers range; however, Kleiner (2006) finds that assuming an average of 20 percent of the labour force requiring a licence there is a reallocation of income between consumers to licensed practitioners to the tune of \$116 billion

to \$139 billion. While these statistics do not show a clear “cost” in the sense that there is no comparator of what loss would exist in the absence of licensing, the numbers themselves warrant a closer examination of the issue. Using economy-wide or average estimates of the elasticity of labour demand Kleiner finds that the deadweight or efficiency losses to society as a result of licensing are between \$34.8 and \$41.7 billion annually (Kleiner 2006, Hammermesh 1993). More recently, Kleiner and Soltas (2019) did a welfare analysis of occupational licensing for workers and consumers, and estimate an average welfare loss of 15 percent of occupational surplus calculated by combining the changes in employment and quality-adjusted price levels. The welfare loss is shared approximately equally between consumers and workers.<sup>10</sup>

The cost to consumers is not simply due to the decrease in competition from unregulated sources; licensing rules and regulations may encourage practices that reduce competition among existing professionals, for example, fee-setting, limitations on advertising, scope of practice and mobility restrictions (Competition Bureau 2007). Studies that have reviewed restrictions on the advertising and other commercial practices of certain occupational groups, including dentists, lawyers, optometrists and pharmacists, have found that these conditions of licensing result in an increase in the price of services of between 4 percent and 33 percent (Cox and Foster 1990).

In Canada, there is a comparative dearth of studies on the effects of licensing on wages,

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- 8 The authors note that based on the available data they have no way to detect the causal effects of licensing. The only way to perform such an analysis would be a natural experiment where licensing changes occur at the provincial level where an occupation moves from licensed to unlicensed status. Because data are collected nationally and do not account for changes made at a provincial level we do not presently have a sample size large enough to perform such an analysis.
- 9 There are no published statistics in Canadian provinces as to the costs that licensing bodies charge their members in order to maintain their licensed standing.
- 10 See Kleiner, M. M., and Soltas, E. J. 2019. “A welfare analysis of occupational licensing in US states.” (No. w26383). National Bureau of Economic Research.

competition and price of services. One study by Muzundo and Pazderka (1980) found that, on average, individuals in professions that restrict advertising earn 32.8 percent more than individuals in professions that permit advertising, which points again to the practical effect of licensing rules – that competition is restricted not only by prevention of entry into the market but more importantly by market conduct restrictions. Muzundo and Pazderka further found that individuals in professions where fee competition is restricted earn 10.4 percent more than where there is unrestricted fee competition. This study is dated, however, and was only concerned with the wage effects of restrictions on pricing and advertising, which are not necessarily characteristic of all licensed occupations.

In non-OHIP covered dental care, the participation of employers in providing employment-based insurance coverage has declined in the last 10 years (Leake 2006). The reason is the continuous increase in the cost of dental care, which has contributed to the increasing costs of dental plans (Thompson 2012). A Canadian Health Measures survey found that over 16.5 percent of the Canadian population reported declining recommended dental care due to cost. Moreover, the number of middle-income Canadians reporting affordability issues with dental care jumped from 12.6 percent in 1996 to 34 percent in 2009.

Another important case is that of optometry and opticians. As noted by the Competition Bureau and found in a CBC *Marketplace* report, there is a significant differential in the price of prescription eyeglasses sold in-store through licensed optometrists and those purchased online.<sup>11</sup> The result has been the introduction of online sales in provinces such as British Columbia. An

FTC Bureau of Economics Working Paper found that prices for lenses delivered in-store by licensed individuals are 11 percent higher than prices online (Cooper 2006), which again suggests that direct sales from optometrists or opticians are at a greater cost to consumers.

## FEE SCHEDULES AND PRICING

The costs of regulated occupations are further inflated by an inherent demand for higher wages stemming from lengthy and expensive accreditation and certification programs by professionals. As the cost of accreditation increases through higher tuition fees, there is a pressure for these increased costs to ultimately be passed on to consumers. According to Statistics Canada, tuition for undergraduate programs for Canadian full-time students was, on average, \$6,571 in 2017/2018 and the costliest average tuition fees for Canadian undergraduate students were in dentistry (\$22,297) in 2017/2018, followed by medicine (\$14,444), law (\$13,642) and pharmacy (\$10,279), all of which are programs that culminate in mandatory licensed professionals (StatsCan: Tuition fees for degree programs, 2017/2018). The growing burden of student debt, already topping indebtedness in the United States, invariably leads to higher wages being demanded by members of regulated occupations who face greater financial sacrifice to gain market entry.

For example, a law school graduate in Ontario faces approximately \$4,710 in licensing costs in their first year (Application Fee of \$160, Barristers Examination of \$750, Solicitors Examination of \$750, Experiential Training of \$2,800, Call to the Bar Fee of \$250).<sup>12</sup> The Treasurer for the Law Society of Ontario estimates that the total average

11 See “Bringing Competition into Focus.” Competition Bureau 2018: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04377.html>.

12 <https://lso.ca/becoming-licensed/lawyer-licensing-process/fees-and-forms/fees-schedule>.

cost to become licensed is \$125,000 to \$145,000 when cost of living, tuition, and licensing are factored in.<sup>13</sup>

Many professional associations and self-regulators also put dampers on the reduction of fees by creating annual 'standard' fee schedules for the governed professionals. These fee schedules contribute to maintaining rather than reducing prices of professional services. For example, the Ontario Psychological Association sets recommended hourly rates for psychologists taking into consideration factors such as level of training, professional competence and "salary comparisons with other professions providing similar services." Other professions, including medicine, provide recommended fees for non-OHIP covered services (OMA Guide 2018). Fee schedules encourage baseline pricing and, in general, recommendation by associations or self-regulated bodies to follow pricing guidelines does not encourage a reduction in prices. These are effects that have been identified as problems associated with collusion among professionals that impact competitiveness (Competition Bureau 2007).

Overall, there are few, if any examples, of regulated occupations where prices have actually fallen as more professionals entered the practice, as would generally be predicted in a competitive market. Even in legal services, where there has been a mismatch between the number of graduating law students and the availability of articling positions in the last four years, the increasing number of licensed lawyers does not appear to have reduced the cost of legal services, nor has the licensing of paralegals in Ontario since 2007 (Wiseman, Dodek, Bouclin and Blair 2011).

## QUALITY CONTROL VERSUS MONOPOLY

While regulated workers earn more than unregulated ones and the evidence points to consumers bearing costs due to regulation, many of the empirical studies point to market conduct regulations having a greater impact on costs than the restriction of market entry itself. Intuitively, this makes sense as many individuals in the labour market choose to pursue educational or other accreditation even though it is not a legally mandated requirement for their jobs and such credentials alone can act as barriers to entry for those who do not have them. Education and credential seeking, however, can be an effective signal of higher quality and in this way employer demand for higher-skilled workers indirectly provides consumers with better service. Many of the empirical studies we reviewed have pointed to market conduct restrictions, including advertising, pricing and business structure having more of an impact on competitiveness and outcomes for consumers than market entry restrictions, provided that such market entry restrictions do not unduly prevent qualified people from entering a particular occupation.

The potential drag created by market conduct restrictions is brought into greater focus when demand for professional services is heightened, such as during the current COVID-19 pandemic and the resulting pressures on Canada's essential workers, particularly healthcare professionals. As noted in a recent op-ed by Gomez, Gunderson, and Zhang (2020), relaxing certain licensing-based restrictions in emergency situations helps alleviate the stress on demand for healthcare services.<sup>14</sup> To their credit, self-regulators in medicine and law have

13 [http://www.slaw.ca/2019/02/26/the-cost-of-becoming-a-lawyer/#\\_edn9](http://www.slaw.ca/2019/02/26/the-cost-of-becoming-a-lawyer/#_edn9).

14 <https://www.cirhr.utoronto.ca/news/relaxing-restrictions-occupational-licensing-response-covid-19>.

relaxed certain in-person meeting requirements pertaining to physicians and lawyers in response to the pandemic, allowing for virtual or telephonic meetings. Similar changes could apply to other conduct restrictions that affect other professions.

With the widespread use of information technology, smartphones and near instantaneous access to data and information, we note that consumers are also far more knowledgeable about the services of professionals than they were 25 to 30 years ago when information could not be cross-checked using the Internet.

The example of the ride-hailing app, Uber is demonstrative of the newfound power of consumers choice and self-protection available as a result of the Internet. Uber's innovation of matching drivers with willing customers through a simple phone app completely disrupted the taxi industry and created a \$70 billion industry in its wake. Interestingly, Uber's customers choose to use the non-licensed car service evidently because the benefits of licensure do not exceed the quality and convenience of Uber. This was for the most part a natural experiment in that Uber entered the market as a complete disruptor technology and the public migrated from traditional cab services to app-based hailing with such speed that many local governments were caught completely offguard. Even where cities have subsequently reacted by regulating Uber it is not clear that these regulations have enhanced consumers' ability to find ways to protect themselves by using phone-based ranking systems. For example, Uber drivers in New York City must incur approximately \$2,000 in licensing fees due to municipally imposed requirements such as mandatory defensive driving classes, drug testing and commercial vehicle insurance. In a recent study, Kleiner (2017) found that Uber drivers from neighbouring New Jersey are not required to incur New York City's onerous and expensive licensing requirements yet their drivers receive statistically equivalent quality ratings from Uber customers to that of New York City Uber drivers.

These results are reproduced to a certain extent in a 2020 National Bureau of Economic Research paper which studied the effects of occupational licensing on consumer choice and market outcomes in online platforms for residential home services. In this study, the authors found that platform-verified licensing status is unimportant for consumer decisions relative to review ratings and prices (Farronato, Fradkin, Larsen and Brynjolfsson 2020).

## DISCUSSIONS AND RECOMMENDATIONS

Our analysis of the studies and available data on occupational regulation finds potential burdens on Canadian consumers caused primarily by market conduct restrictions that are frequently the by-product of licensing.

At the same time, it is not debated that licensing professionals is important to protect consumers in many situations where technical expertise is involved and market failures exist. The objective for policymakers is to balance the interests of consumer protection with the virtues of a dynamic, competitive marketplace.

Considering the trend in the US and Canada towards more rather than less occupational regulation, the issue is how can we protect consumers in a largely service-based economy? We recommend that, first, provincial governments should focus on eliminating market conduct regulations that have little or no connection to consumer protection and instead serve the interest of the regulated. Second, federal competition laws need to be enhanced to override legal rules that give provinces broad immunity to create and sustain licensing or quota regimes that inhibit competition.

## BETTER DATA

In reviewing our data sample, we note that this is an area where publishing more detailed statistics would make it easier to estimate the costs of licensing

specific to Canada. For example, participants in the LFS should specifically be asked whether they need a licence. This would help identify with greater accuracy those occupations in the NOC classification that are notionally compulsorily licenced at the provincial level but which in fact have many non-regulated offshoots that tend to muddle the data sample.

## PROVINCIAL ACTION

Our first recommendation for curbing regulatory capture is for provincial governments to cut back on legislation that creates unjustifiable barriers to entry into the professions and to review existing market conduct restrictions. A case in point is optometry and the recent Court of Appeal decision in *College of Optometrists of Ontario v. Essilor Group Canada Inc.*<sup>15</sup> This case involved the Ontario Optometry College seeking an injunction against Essilor Group, which is a company that provides online sales of contact lenses to consumers who have a prescription. Essilor's principal place of business is British Columbia which, since 2010, has authorized the online sale of contact lenses (i.e., not requiring the direct participation of a licensed optician or optometrist in the sale of such lenses). Prior to 2010, British Columbia prohibited the selling or dispensing of contact lenses online; however the provincial legislature amended the Opticians Regulation to allow non-licensed persons to dispense eye glass lenses and contact lenses as long as certain conditions are met.<sup>16</sup> British Columbia's decision to allow for dispensing of lenses by non-licensees is one positive example where a province has reduced market conduct restrictions in a way that helps competition and reduces prices

for consumers who have a much wider choice of options to purchase the lenses. Ontario should follow suit, as should other provinces that create exclusivity in these areas.

In general, examining market conduct restrictions, including restrictions on advertising, providing exclusivity rights to information or databases and other carved out domains of exclusivity, should be the number one priority for provinces. The ability to exercise an exclusive right by a professional needs to be evidence-based (i.e., that the professional is solely qualified to exercise such a power in the interest of consumer protection). For example, in many provinces professionals have domains of exclusivity that should be examined in more detail:

- Realtor use of intellectual property in MLS;
- Pharmacist exclusive right of dispensing;
- Physician or nurse practitioner exclusive right of prescribing;
- Solicitor exclusive right to effect transfer of land.

Naturally, each case needs to be reviewed on its merits. The starting point, as is shown in the case of opticians in BC, is to examine the practice where the law demands exclusivity to see if alternatives are available that better promote consumer choice and competition. Optometrists in BC continue to have thriving practices – their professional skills are still required in the process of treating disorders of the eye. It is the commercial side of dispensing or effectively selling lenses that has been whittled down to give consumers more options on price.

In reviewing legislation, provinces should negotiate with self-regulated organizations. Furthermore, such negotiation should be promoted by enhancing and better defining the intersection

15 [2019] O.J. No. 1713.

16 The two conditions are that the person dispensing the lenses must have certain background information on the patient in the form of an "authorizing document" that has been verified as accurate and confirming that the assessment record does not indicate refractive errors or changes in refractive errors of a prescribed magnitude.



of federal competition laws and provincial rights to regulate health, safety and other matters within their jurisdiction as discussed below. Where, as in BC, realtors have not been able to protect the public interest effectively, the threat of removing self-regulation should remain a threat to those organizations who are not able to protect the public.

## STRENGTHENING COMPETITION LAWS

Our review of new licensing regimes in Canada found that nearly all new licensing or “right to title” regimes are enacted at the provincial level. From the legal standpoint, this is due to the division of powers under the *Constitution Act*, whereby provinces are delegated powers over local works, civil rights and property. For this reason, lobbying by groups or associations of professionals is primarily aimed at provincial legislatures.<sup>17</sup> Competition laws, however, are federal, meaning that there are competing objectives between provincial legislatures that grant self-regulatory powers to a vast array of professions and federal competition laws that in theory are supposed to protect against price fixing, price maintenance and other forms of anti-competitive conduct. The tension is palpable enough that Canadian courts have developed a doctrine that protects provincially enacted regulatory regimes against the application of federal competition laws in a variety of cases, including agricultural marketing schemes and retail alcohol (Mysicka and McKendry 2013).

The Regulated Conduct Doctrine (“RCD”), which has given provinces a judicially created “get out of jail” free card, should be addressed and clarified in the federal *Competition Act* which,

under normal constitutional conditions, would have federal paramountcy over provincial legislation.

To be clear, we do not recommend curtailing provincial jurisdiction in a manner that paralyzes provinces’ ability to legislate on matters of public interest, including health and safety. There is no question that the *Constitution Act* and more than 150 years of constitutional law in Canada have promoted a system of balanced and cooperative federalism. This was underscored in the recent Supreme Court decision in *R. v. Comeau* concerning New Brunswick’s restrictions on the importation of alcohol from out of province.<sup>18</sup> Our recommendation is that the current *Competition Act* be amended to better define the scope of what has become a muddled judicial history that in the authors’ view provides excessive immunity to provincially regulated activities. Presently the Act protects provincial bodies against criminal prosecution for anti-competitive offences based on an “escape clause” that references common law jurisprudence as follows:

The rules and principles of the common law that render a requirement or authorization by or under another *Act* of Parliament or the legislature of a province a defence to a prosecution under subsection 45(1) [conspiracies, agreements or arrangements between competitors] of this *Act*, as it read immediately before the coming into force of this section, continue in force and apply in respect of a prosecution under subsection (1). Many commentators, including Mysicka (2011) and others in the competition bar and in academic circles have criticized the RCD for being a vague, differentially applied and conceptually problematic doctrine. The fact that the current version of the

17 For example, the College of Early Childhood Educators acknowledges that for more than 20 years before the opening of the college in 2008 “organizations working in early learning and care lobbied the Ontario government to get legislative recognition for early childhood educators,” see <https://www.college-ecce.ca/en/About-Us/History->

18 [2018] 1 SCR 342.

*Competition Act* references the “common law” and therefore passes the buck back to the court system makes competition law weaker. It ensures that an existing patchwork of vague and inconsistently rendered decisions decides what regulations stand and what regulations are set aside. This should be changed. If competition policy is to be effective it must be capable of influencing how provinces legislate. If not, the only teeth it has is against private actors. And as this and other studies have found, competition is more at risk from the public and quasi-public sectors, not the private sector. This is particularly true since most professional bodies are born and persist at the provincial level by state-granted patent.

There should be circumstances in which provincial legislation can be reviewed and declared overbroad in connection with the granting of market entry or conduct restrictions. Alternatively, if the design of such legislation cannot be reconciled with judicial treatment of regulated conduct cases, provincial governments need to ensure they actively monitor the actions of self-regulators to ensure these non-state agencies remain accountable to the public. The only way to accomplish this is to revise federal competition laws.

## CONTINUOUS OVERSIGHT OF SELF-REGULATED ORGANIZATIONS

One of the problems is that provincial governments, which typically consult with, and make efforts to collaborate with, the federal government, have taken a hands-off approach in delegating regulatory powers to self-regulated organizations (SROs), most of which represent professionals (Mysicka 2014). The practical consequence is that certain non-state actors may engage in regulatory capture after the fact since they have often been granted a

broad mandate to police their own members under an existing umbrella of market conduct restrictions.

One solution to the problem of self-regulated organizations is for Canadian competition authorities to take the approach of the U.S. Supreme Court in its 2015 decision *North Carolina State Board of Dental Examiners v. Federal Trade Commission*. This case dealt with the question of whether a self-regulatory agency delegated authority by a state could maintain immunity from anti-trust prosecution in relation to actions by it which would otherwise be offences under the *Sherman Anti-Trust Act*. In 2003, non-dentists began offering teeth whitening services in competition to dentists who had offered such cosmetic services since the 1990s. Starting in 2006, the North Carolina Board of Dental Examiners began issuing cease and desist letters to non-dentists alleging they were illegally practicing dentistry. In 2010, the Federal Trade Commission became involved by filing a complaint against the Board alleging that the Board’s actions were anti-competitive and unlawful.

The US, like Canada, has developed a judicial doctrine granting immunity to state or provincial governments that enact laws which conflict with federal competition/antitrust statutes.<sup>19</sup> The issue in *Board of Dental Examiners v. FTC*, however, was whether such immunity would extend to agencies whose authority was delegated to them and not actively monitored or reviewed by a state government. In effect, the question was whether self-regulated agencies delegated power by a state government could take action that would, in the case of entirely private actors, be illegal under the *Sherman Act*.

The U.S. Supreme Court held that a non-governmental actor controlled by market participants such as the Board could not assert

19 See *Parker v. Brown* 317 U.S. 341 (1943) a seminal antitrust case.

immunity from anti-trust laws simply because the state had at some point delegated authority for it to regulate licensure of its members. Instead, a self-regulator such as the Board would have to establish that: (i) any policy it uses to restrain competition be one that is “clearly articulated and affirmatively expressed as state policy”; and (ii) that the policy be “actively supervised by the state.” The effect of this limitation is to narrow immunity where non-state actors are using delegated authority to impose anti-competitive rules or policies in the marketplace.

Canadian competition law could benefit from a modified approach that takes inspiration from the North Carolina Board decision. Bodies which acquire self-regulatory powers through provincial legislation should have their actions scrutinized by the Competition Bureau. If any of these non-sovereign bodies enacts rules that prevent or lessen competition and such rules are not actively supervised by provincial governments, those agencies should have greater exposure to liability under the *Competition Act*.

Finally, the burden of consumer protection should not be put solely to the Commissioner of Competition. Self-regulating organizations need to be transparent and accountable to the public as advocated in a previous *Commentary* (Mysicka 2014). Moreover, Ontario’s Fairness Commissioner provides publications on regulated professions and compulsory trades but does not address the overall status of consumer protection in the province. Other provinces do not have publications on fair access to regulated professions at all. Coordinated attention at all levels of government is needed to address the real possibility of anti-competitive effects arising from occupational licensing.

## CONCLUSION

Regulated professions have existed in Canada since before Confederation. Their influence in the economy has grown and is likely to increase with

the continuous expansion of the service sector. Although many professions offer valuable skills and services to consumers there are also risks that exclusive licensing limits entry, reduces supply and generally creates conditions for certain professionals to increase profits through higher prices for consumers. Various studies suggest that regulation causes an increase in the costs of services based on (i) a likely wage premium attributable to licensed professions, (ii) the costs of newly regulated services such as daycare outpacing inflation, and (iii) the rising costs of various professional services. While more detailed and better data are needed to fully assess the consequences of occupational licensing, Canadian governments should take measures to limit or control the possible negative effects of excessive occupational licensing on a case-by-case basis with a focus on examining areas where professionals have complete or near-complete exclusivity.

Because most regulation of occupations occurs at the provincial level there needs to be an adequate review by provinces to ensure that any newly proposed occupational regulation is truly necessary to protect the public and is not likely to result in harmful effects to consumers in the form of increased prices or the maintenance of unaffordable prices. Moreover, provinces should consider whether less supply-restrictive alternatives to exclusive licensing (such as registration or mandatory educational credentials) are available before granting a lobbying group powers of self-regulation on market entry and conduct. Finally, the federal competition laws should be reviewed to address the existing judicially created immunity granted to provinces and to provide self-regulators with greater exposure to liability under the *Competition Act*.

## APPENDIX A:

**Table A: The List of Occupations Identified as Regulated**

	<b>NOC Code</b>	<b>British Columbia</b>	<b>Manitoba</b>	<b>Saskatchewan</b>	<b>Ontario</b>	<b>Nova Scotia</b>
Accountant	1111	X	X	X	X	X
Agrologist	2123	X	X	X	X	X
Architect	2151	X	X	X	X	X
Biologist	2121	X				
Cosmetologist	6562		X			X
Dentist	3113	X	X	X	X	X
Dental Hygienist	3222	X	X	X	X	X
Dietitian	3132	X	X	X	X	X
Forester	2122	X		X	X	X
Funeral Director	6346	X	X	X	X	X
Interior Designer	5242		X	X	X	X
Human Resource Practitioner	1121				X	
Land Surveyor	2154	X	X	X	X	X
Lawyer	4112	X	X	X	X	X
Licensed Practical Nurse	3233	X	X	X	X	X
Mortgage Broker	114	X	X	X	X	X
Notary Public	4211	X			X	
Paramedics	3234	X	X	X	X	X
Pharmacist	3131	X	X	X	X	X
Physician	3111/3112	X	X	X	X	X
Private Investigator	6541	X	X	X	X	
Real Estate Broker	6232	X	X	X	X	X
Registered Nurses	3012	X	X	X	X	X
Social Worker	4152	X	X	X	X	X
Teacher	4031/4032	X	X	X	X	X
Veterinarian	3114	X	X	X	X	X

<https://www.jobbank.gc.ca/marketreport/requirements/.../ca> and authors' own search of provincial occupational acts and regulations.

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