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Beer, Butter, and Barristers: How Canadian Governments Put Cartels before Consumers

The regulated conduct doctrine, which shields anti-competitive behavior in Canada's regulated sectors, should be reformed through targeted amendments to the Competition Act *that clarify the Act's application to regulated conduct, limit the scope of immunity of regulated sectors, and ensure minimal impairment to competition.*

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The Study In Brief

In Canada, various sectors of the economy are subject to government regulations, many of which are designed to correct market failures. However, such regulations are generally inconsistent with federal competition law, which aims to promote economic efficiency by maintaining the integrity of competitive markets.

The courts have resolved this tension by developing the Regulated Conduct Defence (RCD) – an interpretive judicial doctrine that immunizes various regulatory regimes from the application of competition law. In this *Commentary* we challenge the wisdom of the RCD from an economic and legal standpoint. In particular, we criticize the view, established by the courts, that regulations conflicting with competition law should be deemed to operate in the public interest.

We argue that certain regulatory regimes advance private interests at an unreasonable cost to consumers. Our analysis includes three examples of regulatory regimes that interfere with competitive forces but nevertheless benefit from immunity to competition law: agricultural supply management, private alcohol retail, and legal services.

We propose: (i) clarifying the *Competition Act*'s application to regulated conduct; (ii) where practicable, limiting the scope of immunity for regulated sectors such that if regulation is deemed necessary, it is narrowly tailored to be minimally impairing to competition; and (iii) requiring the federal government to assess the competitive effects of all legislation prior to enactment.

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"Laws are spider webs through which the big flies pass and the little ones get caught."

— Honoré de Balzac

In Canadian competition law, a conspiracy is a criminal arrangement between competitors to control the supply or price of a product.[1] Such arrangements distort markets and concentrate wealth, undermining the capacity of free enterprise to enhance social welfare. Canada's *Competition Act* deters such arrangements and other forms of anti-competitive conduct through substantial fines and imprisonment.

Yet in a number of regulated sectors, Canadian governments have sanctioned restrictions on competition in the pursuit of alternative policy goals. This market intervention involves a trade-off because anti-competitive regulations can drive up prices, limit product choices and restrict economic growth and opportunity. Regulated industries account for over 20 percent of Canada's GDP, and lackluster competition in these sectors inhibits productivity and the overall performance of the Canadian economy.[2] Some of the key sectors in which regulation reduces competition to support other policy objectives include:

- poultry, dairy and eggs (agricultural supply management);
- alcoholic beverages (retail sales);
- financial services;
- taxis;
- telecommunications;
- broadcasting; and,
- professional services (e.g., legal services).

When Canada's competition laws first came into force, their applicability to conflicting regulatory regimes was unclear. However, in a series of decisions,[3] Canadian courts developed a common law doctrine known as the Regulated Conduct Defence (RCD) to avoid conflicts between competition laws and regulatory regimes that reduce or interfere with competition.[4] As a judicial doctrine, the RCD represents the deferential approach Canadian courts have taken to legislation creating or authorizing anti-competitive conduct. In this *Commentary*, we challenge the wisdom of the RCD in its current form and, in particular, the view

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1 See S. 45 of the *Competition Act* (R.S.C. 1985, c. C-34).

2 See Bishop (2013, 3), Maher and Shafer (2005, 4).

3 Some of the more frequently cited RCD cases include *R. v. Chung Chuck*, [1929] 1 D.L.R. 756, *R. v. Cherry*, [1938] 1 D.L.R. 156 (Sask. C.A.), *R. v. Simoneau*, [1957] S.C.R. 198, *Reference re: Farm Products Marketing Act (Ontario)*, [1957] 7 D.L.R. 257, *R. v. Canadian Breweries*, [1960] O.R. 601 and *Jabour v. Law Society of B.C.*, [1982] 2 S.C.R. 307.

4 For a general description of the RCD, and the Competition Bureau's position in respect of this legal doctrine, see Competition Bureau (2010). A more detailed legal analysis of the RCD can be found in Trebilcock et al. (2002, ch. 11).

that regulatory regimes conflicting or interfering with competition laws should be deemed to operate in the public interest.[5]

From an economic perspective, we argue that many legalized restraints on trade advance private interests at a cost to the public interest. We allow that when profits from higher prices accrue to the public purse, governments may justify such market interventions as supporting public programs like education and healthcare. We also allow that in cases of natural monopolies or market failure, government-mandated restraints on competition may be necessary. However, where profits from monopoly prices accrue to private actors, the legalization of anti-competitive conduct amounts to a private tax imposed on consumers for the benefit of special interest groups. Such private taxation is regressive and imposes aggregate economic costs.

Legally, we argue that the RCD represents a departure from entrenched principles of Canadian constitutional law. This departure perpetuates uncertainty regarding the division of federal and provincial powers. Further, the RCD casts a judicial veneer of soundness over policies that restrain competition and may be detrimental to consumers. While these deficiencies are predominantly legal in nature, we acknowledge that a judicial solution to the ongoing tension between regulation and competition is undesirable, as courts lack the expertise and authority to make determinations of economic policy.

We therefore argue that tackling the RCD necessitates reform at the political level. In particular, we think that legislatures need to reform regulatory regimes that shield or promote anti-competitive practices. While consensus across all levels of government may be difficult to achieve, the federal government can, at a minimum, encourage reform at the provincial level through targeted amendments to the *Competition Act*. Such amendments should (i) clarify the *Competition Act*'s application to regulated conduct; (ii) where practicable, limit the scope of immunity for regulated sectors such that if regulation is deemed necessary, it is narrowly tailored so as to be minimally impairing to competition; and (iii) require the federal government to assess the competitive effects of all legislation.

Our argument proceeds in five parts. First, we describe the purpose of competition law, define key concepts, and explain the legal doctrine that is the RCD. Second, we examine the justifications for regulation and describe its primary forms, providing examples of regulatory regimes at the federal, provincial and municipal levels. Third, we explain how regulatory capture can steer regulation to the service of private rather than public ends. Fourth, we provide three examples of regulated sectors in which competition is restricted in ways that further private interests: poultry, dairy and egg production; private alcohol retail services; and legal services. Fifth, we provide specific policy recommendations.

Competition and the Public Interest

The Purpose of Competition Law

Competition and antitrust laws are enforcement mechanisms used to prevent commercial

5 Kerwin C.J. best described the attitude of judicial deference to regulatory regimes in the face of conflicting competition laws in the Supreme Court's reference regarding the *Farm Products Marketing Act*: "With respect to that Act and also to the sections of the Criminal Code referred to, it cannot be said that any scheme otherwise within the authority of the Legislature is against the public interest when the Legislature is seized of the power and, indeed, the obligation to take care of that interest in the Province." See: *Reference re: Farm Products Marketing Act* [1957] S.C.R. 198.

practices that distort competition and interfere with the operations of free markets. In Canada, the *Competition Act* contains a purpose clause highlighting the various ends towards which the legislation is directed:

> The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.[6]

In light of these objectives, enforcement by the Competition Bureau is directed against activities that interfere with competition. Such activities include, among other things, bid-rigging, deceptive marketing, pyramid schemes, and conspiracy to fix or maintain the price or supply of a product. The *Competition Act* also prohibits various practices that constitute abuses by firms that hold a dominant position, and includes a review process for mergers that have the potential to substantially prevent or lessen competition. In short, the Act seeks to maintain competition in order to promote efficiency and fair business practices.

Definitions of 'Public Interest' and Private Taxation

The *Competition Act* is a federal statute of general application. In this respect, Canadian consumers have a legitimate interest in seeing its objectives enforced nationally across all industries in which competition serves the public interest. But what is meant by 'public interest'? In the regulatory context, the term is used to support a variety of ends, not all of which are reconcilable. McGill economist Christopher Green noted this problem in his work on agricultural boards:

> The traditional assumption on which government regulation is based is that it is undertaken with the 'public interest' in mind. Unfortunately this is a very vague concept. Among other things it begs the question of who is included in the public interest. Everyone? Consumers? Taxpayers? Producers? Economists have traditionally defined the 'public interest' in terms of consumer interest, since under certain assumptions a maximization of consumer surplus is consistent with a maximization of total (social) welfare. (1983, 427.)

In this *Commentary*, we link the public interest to consumer interest.[7] We do so because the public interest is reasonably co-extensive with the consumer interest – that is, all or almost all members of the public are consumers of privately sold goods and services, as well as public goods and services funded by tax revenue from producers.

6 *Competition Act* R.S.C. 1985, c. C-34, s. 1.1.

7 Many economists focus on aggregate economic efficiency (i.e., the sum of consumer and producer surplus) to evaluate market outcomes. However, we note that equating aggregate economic efficiency with aggregate welfare can be problematic in a society with inadequate redistributive mechanisms. In addition, competition authorities tend to focus on preventing the welfare losses suffered by consumers arising out of the monopolization or the abuse of monopoly power by a dominant firm. In this respect, economic theory posits that, relative to a perfectly competitive market, a monopoly results in producer surplus being larger than consumer surplus and the sum of consumer and producer surplus being smaller (i.e., a net welfare – or deadweight – loss). Given that monopolies transfer wealth from consumers to producers resulting in a net gain to the latter, we think it appropriate to focus the discussion in this *Commentary* on consumer welfare (and therefore the consumer interest) with the caveat that consumers, as a class, encompass a diversity of stakeholders.

In addition, 'consumers' as a class is not *per se* limited to consumers of end-manufactured goods because a number of firms in the supply chain use regulated goods as inputs – making them de facto consumers with an interest in lower prices and increased product choices. In this respect, consumers – from average Canadians to producers using regulated inputs – reap the benefits of competition while also shouldering the burdens of monopoly prices. While competition laws serve a variety of purposes, consumer interests, broadly conceived, are frequently cited as the primary driver of competition law enforcement.[8]

When we employ the term 'private taxation' we use it as a catch-all for state-sanctioned anti-competitive conduct that transfers value from consumers and potential market entrants to incumbent private interests. While traditionally described as 'rent-seeking' in economic terms, private taxation more accurately captures the nature of these wealth and opportunity transfers which represent de facto "payment[s] exacted by legislative authority."[9]

Regulated Conduct Defence

In Canada, the federal government has jurisdiction over competition law by virtue of its trade and commerce as well as its criminal law powers. The provinces have jurisdiction over local industries and businesses through their property and civil rights powers.[10] This constitutional division of powers gives rise to conflicts where provincial economic regulations favouring restraints on trade conflict with federal competition laws designed to prohibit such restraints. To resolve these conflicts, Canadian courts developed the RCD as a method of statutory interpretation that 'reads down' competition laws in circumstances where they conflict with regulatory legislation (Kennish and Bolton 2003, 7). In most cases, the courts use the RCD to resolve conflicts between federal and provincial legislation. In *Attorney General of Canada v. Law Society of British Columbia*, the Supreme Court offered the following rationale for the RCD:

> When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.[11]

Notwithstanding the Supreme Court's pronouncement, 'reading down' federal law is not the standard rule governing conflicts between federal and provincial statutes. Rather, the RCD represents an exception to the rule of federal paramountcy, whereby valid federal law of general application ordinarily trumps conflicting provincial legislation.[12] In this respect, the RCD is an ad-hoc judicial response to conflicting statutory and, indeed, constitutional imperatives.

8 The purpose clause in the *Competition Act*, while stating a number of different objectives, expressly recognizes two primary stakeholders that the legislation aims to protect: consumers and small and medium-sized enterprises – see s. 1.1 of the *Competition Act* (R.S.C. 1985, c. C-34). In the United States, the Supreme Court has described antitrust laws as a "consumer welfare prescription", see: *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979). In Canada, the then-Commissioner of Competition emphasized the consumer interest in the Bureau's investigation leading up to a $12.5 million fine for a polyurethane foam price fixing cartel: "this investigation highlights the Bureau's reinvigorated mandate to stop consumer harm caused by price-fixing".

9 See definition of 'tax' in *Black's Law Dictionary* (6th Ed.).

10 See s. 91 and s. 92 of *The Constitution Act,* 1867 (UK) (30 & 31 Victoria, c 3).

11 *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at 356.

12 See Hogg (2012, ch. 16).

Where a federal as opposed to provincial regime conflicts with competition law, the courts generally take an interpretive approach analogous to the RCD that gives precedence to regulatory restraints on trade over more general competition law provisions.[13] In such cases, courts have found that statutes with a specific purpose override legislation with a more general application, such as the *Competition Act*.[14]

While the RCD has traditionally applied to the criminal provisions of the *Competition Act*, considerable ambiguity remains as to whether (or to what extent) it applies to the civil reviewable provisions of the Act.[15] Although a discussion of the legal issues in this debate is beyond the scope of this *Commentary*, we note that the Competition Bureau has stated, in respect of regulated conduct, that it will not necessarily take the same approach to civil reviewable matters as it does to criminal matters.[16] Given the potential for inconsistency in the Competition Bureau's approach under the framework of the *Competition Act*, we reiterate throughout this *Commentary* the need for legislative reform in this area of the law.

Why Regulate? The Social Welfare Trade-offs of Regulation

Market Failure

In many cases, free markets are able to achieve economically efficient, welfare enhancing outcomes without state intervention. In circumstances where this holds true, the role of regulators such as the Competition Bureau is arguably one of facilitation rather than intervention. Like a referee in a sports match, the Bureau does not engineer outcomes: rather, it liberates market forces by enforcing the rules of fair play and preventing competitively distortive practices.

As a regulator, therefore, the Bureau's role is unique in that it encourages rather than restrains competitive forces. However, the Bureau's work is not necessarily incompatible with state intervention in the marketplace. From the management of natural monopolies to setting product or employment standards, there are countless examples of social or economic situations where regulatory responses are preferable to free market solutions. These situations constitute market failures – sub-optimal outcomes where resources could be reallocated so that one individual can be made better off without making anyone else worse off. In another sense, market failures are social concerns because the concept of being better off relies on evaluative assumptions. Accordingly, identifying market failures is arguably subjective. However, it is objective insofar as one accepts that democratic consensus, international legal norms, and the test of time establish a degree of evaluative objectivity.

While market failures occur for a variety of reasons, the imposition of negative externalities on society is a common cause. For example, the

13 For an example of the application of the RCD in the federal context, see: *Society of Composers, Authors and Music Publishers of Canada v. Landmark Cinemas* (1992), 45 C.P.R. (3d) 346 (F.C.T.D.) (exempting the Copyright Board's activities regulated under the federal *Copyright Act* from competition law); and *R v. Charles*, [1999] S.J. No. 763 (Sask. Prov. Ct.) (the RCD applies to the federal *Canadian Wheat Board Act*).

14 The legal maxim supporting this approach is the canon of interpretation known as *generalia specialibus non derogant maxim* – "general things do not derogate from specific things" – see *Black's Law Dictionary* (5th Ed.).

15 Decisions discussing the application of the RCD to civil reviewable conduct include: *Industrial Milk Producers' Association v. British Columbia (Milk Board)* (1988), 47 D.L.R. (4th) 710 and *Law Society of Upper Canada v. Canada Attorney General* [1996] O.J. No. 995.

16 See Competition Bureau (2010, 2).

production and consumption of fossil fuels may lead to environmental effects such as climate change – a social cost that is not factored into the price of petroleum or other fuels. Market failures can also arise in situations where competitive forces are unable to incentivize the creation of public goods that are non-excludable and non-rivalrous (that is, additional users cannot be excluded from the goods and do not diminish the goods by using them) such as street lighting or national defence.

In most cases, regulatory responses to market failures restrict competition.[17] This is because it is the alleged failure of competitive forces that is the target of government intervention in the first place. In this respect, regulation "ensure[s] socially desirable outcomes when competition cannot be relied upon to achieve them… replac[ing] the invisible hand of competition with direct intervention – with a visible hand, so to speak" (Train 1991, 2). This formulation of regulatory responses implies a trade-off between regulation and competition. In cases where competition is the best method for achieving socially optimal outcomes, regulatory responses should be limited to 'refereeing' competitive forces – a role played by the Bureau and other facilitative regulators.[18] However, where the public interest favours intervention, competition may take a secondary role to correcting market failures.

For Canadian consumers, active and vigorous enforcement of competition laws is a welcome development. Competition is facilitated in an economy in which market power is diffused and laws effectively suppress collusion between competitors. Indeed, there is a well-established empirical connection between the intensity of competition in product markets and improved productivity in the economy as a whole (Maher and Shaffer 2005, 4). The preservation of competitive forces benefits consumers, entrepreneurs and small businesses alike via lower prices, greater product choices and the removal of barriers to entry.[19] For example, Joskow (2012) has found that the removal of price regulation in natural gas markets in the US was a key driver of consumers benefiting from the reduction in natural gas prices caused by the US shale gas boom. Industries that became deregulated in the last few decades have also seen faster productivity growth than otherwise similar industries (Gu and Lafrance 2008). As with correcting market failures, improving productivity and fostering competition is a social concern since economic growth drives improvements in living standards.

Inter-Provincial Externalities

Regulatory responses to market failures can lead to two distinct problems. First, the form or extent of regulation may be overbroad in that it goes beyond what is reasonably necessary to address the underlying social problem. In this way, poorly designed, untargeted regulations curtail competition more than is required to satisfy a public interest objective or objectives. This may be due to the law of unintended consequences, whereby legislation originally conceived and drafted to serve the public interest may ultimately serve private interests instead. One possible reason for this is discussed in the section below on 'regulatory capture.'

17 While legislation is often justified as necessary to correct market imperfections, as noted by Frank Easterbrook, "in most cases it is designed to defeat the market altogether." See Easterbrook (1983).

18 Central banks, for example, are arguably institutions that play more of a facilitative rather than an interventionist role in financial markets.

19 See S. 1.1 of the *Competition Act* (R.S.C. 1985, c. C-34).

Second, in the Canadian federalist context, provincial regulations that restrict competition in service of private interests may have an anti-competitive effect that extends beyond merely local or regional matters to which they pertain. The Supreme Court discussed the national, ubiquitous scope of federal competition law in the 2011 *Reference re Securities Act*:

> Competition, as Dickson C.J. observed in General Motors, "is not an issue of purely local concern but one of crucial importance for the national economy." It is a "genre of legislation that could not practically or constitutionally be enacted by a provincial government." Competition law is not confined to a set group of participants in an organized trade, nor is it limited to a specific location in Canada. Rather, it is a diffuse matter that permeates the economy as a whole, as "[t]he deleterious effects of anti-competitive practices transcend provincial boundaries." Anti-competitive behaviour subjected to weak standards in one province could distort the fairness of the entire Canadian market. This national dimension, as the Court observed, must be regulated federally, or not at all. Failure by one province to legislate or the absence of a uniform set of rules applicable throughout the country would render the market vulnerable.[20]

As a national enforcement agency, the Competition Bureau may be in the best position to monitor and address the extent to which provincial or local regulatory legislation inhibits competitive markets inter-provincially or nationally. Unfortunately, as it stands, the RCD largely prevents the Bureau from correcting inter-provincial externalities.

Forms of Economic Regulation

Before embarking on a discussion of how regulation can deviate from the service of public interest objectives, it is useful to review some of the primary forms of regulation used by governments (and bodies authorized by them, such as marketing boards and professional associations):[21]

- **(i) Subsidization:** direct or indirect subsidization can take the form of government payments, grants, guarantees, tax exemptions, vouchers and other remittances designed to benefit an industry as a whole or specific participants within an industry;
- **(ii) Protective tariffs and related barriers to trade:** tariffs, like subsidies, can be direct or indirect and usually have the converse effect of a subsidy – they render the trade in a particular good or service more expensive through per-unit or value-based taxation;
- **(iii) Control over entry:** control over entry can take the form of state authorized or mandated pricing policies, vertical integration, licensing requirements, production quotas, crown monopolies, foreign ownership restrictions, advertising restrictions etc.; and,
- **(iv) Direct price fixing:** in some cases governments directly fix prices, impose price floors, price ceilings or otherwise manipulate the prices of goods or services.

A number of these mechanisms are used in sectors of the Canadian economy where competitive forces have, in whole or in part, been supplanted by diverse forms of regulation. Table 1 includes examples of regulatory regimes at different levels of government.

Section 45 of the *Competition Act* prohibits "conspiracies, agreements or arrangements between competitors." Many, though not all, regulatory regimes in Table 1 mandate or authorize at least one form of conduct that would, absent the RCD, potentially contravene section 45. For example, agricultural supply management involves agreements to limit supply and fix prices. Given that such agreements would be criminal in the absence of regulation, legal sanction of such

20 *Reference re Securities Act*, 2011 SCC 66. Case law references within the text have been removed here.

21 A description of these forms of economic regulation is provided in Stigler (1971, 4-6).

Table 1: Sample of Regulatory Regimes in Canada

Sector	Jurisdiction	Legislation[a]	Form(s) of Regulation	Summary of Statutory Purpose[b]
Dairy	Provincial and Federal	*Milk Act* (ON); *Canadian Dairy Commission Act* (CA)	Quotas and direct price fixing; tariffs	To stimulate, increase and improve the producing of milk within Ontario; ensure a fair return for farmers and an adequate supply of dairy products
Eggs	Provincial and Federal	*Farm Products Marketing Act* (ON); *Agricultural Products Marketing Act* (CA); *Farm Products Agencies Act* (CA)	Quotas and direct price fixing; tariffs	The control and regulation in any or all aspects of the producing and marketing within Ontario of farm products
Poultry (hatching eggs, chicks, chickens, turkeys)	Provincial and Federal	*Farm Products Marketing Act* (ON); *Agricultural Products Marketing Act* (CA); *Farm Products Agencies Act* (CA)	Quotas and direct price fixing; tariffs	The control and regulation in any or all aspects of the producing and marketing within Ontario of farm products
Banks	Federal	*Bank Act*	Complex rules governing ownership and business conduct; limits on foreign entry	Establish national standards for financial products and services; promote stability and public confidence in the financial system; protect economy
Telecommunications	Federal	*Telecommunications Act*	Service requirements and government review of rates; limits on foreign ownership and control	Maintain Canada's identity and sovereignty; ensure affordable access (including rural service); enhance efficiency and competitiveness; protect privacy
Broadcasting	Federal	*Broadcasting Act*	Control over entry through licensing; limits on foreign ownership and control; government-mandated public broadcaster	Safeguard and promote Canadian culture and values, including bilingual programming; employ Canadian creative resources; facilitate access to content
Taxi Services	Municipal and Provincial	*Public Vehicles Act* (ON); *Toronto Municipal Code*, Chapter 545 – Licensing (Toronto)	Direct price fixing; control over entry through licensing	Serve public necessity and convenience
Alcoholic Beverages (retail sales)	Provincial	*Liquor Control Act* (ON)	Government-mandated private monopoly for beer; public monopoly for wine, liquor	Control the sale of beer, wine, and liquor
Legal Services (an example of professional services)	Provincial	*Law Society Act* (ON)	Self-regulating; control over entry through licensing; advertising restrictions	Maintain standards of professional competence and conduct while serving the public interest, including facilitating access to justice

Notes:

a: For provincial examples, we use Ontario. For municipal examples, we use Toronto.
b: Authors' summary of federal, Ontario and City of Toronto statutory language relating to purpose.

schemes should, in our view, be subject to greater public scrutiny.

Regulatory Capture

Diverse forms of market failure give rise to different policy responses. Nevertheless, public regulation designed to correct such failures may give rise to 'regulatory capture' – an idea most often associated with George Stigler.[22] Regulatory capture occurs when an agent or agency of the government pursues its own interest rather than the public interest, or is 'captured' by a cohesive private interest group, including the regulated industry itself. In this way, regulation can be subverted by competitors who use it to deter entry or maintain cartels (Shleifer 2005, 446). As such, regulatory capture is the mechanism by which private interests co-opt regulation to serve their own ends.

Regulatory capture may be a consequence of the dynamics of group action in democracies (Olson 1965). Large groups with a common interest (typically consumers) encounter greater obstacles to joint action than smaller groups with a common interest because individuals in large groups have little to gain relative to the group as a whole (Wiley 1986, 724). The result, commonly called the free rider problem, is that there is "a systematic tendency for exploitation of the great by the small" (Olson 1965, 29) and, consequently, an incentive structure supporting regulatory capture.

As a practical matter, the free rider problem makes legislative reform of anti-competitive regulations politically difficult in the face of highly motivated, well-organized special interest lobbying efforts and public relations campaigns.

Exposing Legalized Restraints on Trade

Agreements in Restraint of Trade

In our view, two categories of anti-competitive regulatory regimes are unjustified: (i) regulations with an invalid purpose; and (ii) regulations with a valid purpose that restrain competition more than is necessary to achieve that purpose.

(i) Invalid Purpose

The first category comprises regulatory regimes that have invalid purposes. By comparison, 'valid purposes,' are those that seek to correct genuine market failures. Of course, as noted earlier, identifying market failures has a subjective aspect, since the objectivity of market failures depends on democratic consensus and associated normative assumptions. This subjectivity makes identifying market failures a socially and politically contentious exercise. The controversial nature of market failures explains why the courts – at least with respect to the RCD – defer to democratically elected legislatures in determining the validity of objectives associated with regulatory regimes.[23] Accordingly, we will put aside the issue of validity of purpose and focus on the second type of unjustified regulatory regime.

(ii) Valid Purpose but Not Minimally Impairing to Competition

This category comprises regulatory regimes with valid purposes that restrain competition more than is necessary to achieve their purposes. In effect, such regimes impose unnecessary forms of private taxation through monopolization

22 See Stigler (1971); see also Posner (1974) and Peltzman (1976).

23 See, for example, *R. v. Canadian Breweries Ltd.*, [1960] O.R. 601.

or related restraints on trade. Analyzing the necessity of including private taxation in these regimes is relatively objective, since the efficient accomplishment of a given purpose is predominantly an economic exercise. In other words, though economic theory cannot speak to the validity of regulatory ends, it can test the efficiency of regulatory means.

Below, we ask the reader to consider three regulatory regimes on the assumption that their purposes are valid: (a) agricultural supply management; (b) private alcohol retail; and (c) legal services. We point out the harms of private taxation in such regimes and suggest that their purposes can be achieved through alternate, less competitively restrictive means.

(a) Agricultural Supply Management

In Canada, dairy, poultry, and egg farmers operate under systems of supply management in which marketing boards set provincial quotas and fix prices. Tariffs prevent competition from international markets. Supply management systems arose across Canada to remedy price volatility and farmers' historically weak selling power (especially of perishable products).[24] Yet the benefits of supply management come at a heavy cost to consumers. Table 2 shows the consequences of supply management on staple consumer products in Canada compared to the United States where alternative, less competitively distortive price stability regimes are in place.[25]

The Canadian system of supply management imposes monopoly-like prices on consumers, while limiting the entry of new farmers and foreign products. This private taxation is regressive, meaning that low-income Canadians are disproportionately affected when purchasing staples such as milk or eggs. Canadian consumers pay an additional $72 each per year for supply-managed dairy products, according to one estimate (Goldfarb 2009, 72). Add to this amount the cost of supply-managed eggs, chicken, and turkey, and a family of four annually pays hundreds of dollars more than they would under a liberalized regime. The system also makes imported cheese expensive, imposing additional costs on consumers who prefer foreign products (Hart 2005).

Supply management involves additional forms of private taxation. For small businesses and entrepreneurs, government-mandated cartels impose a capital investment burden on new farmers looking to enter the trade. In 2009, the average dairy farm required $2 million worth of quota (besides the cost of cows and a farm) for a viable operation (Goldfarb 2009, ii). Meanwhile, incumbent dairy farmers enjoy the second-highest profit margins of all farmers – over 25 percent in 2011 – and poultry and egg farmers also do well, with a margin of about 15 percent. By comparison, the average Canadian business has a profit margin of about 8 percent.[26]

Supply management has international consequences for Canada, slowing the negotiation of trade agreements such as the Trans-Pacific

24 See Hall Findlay (2012, 3–5) and Busby and Robson (2010, 1–2) and Busby and Schwanen (2013).

25 See *The Economist's* summary of agricultural subsidies by country: http://www.economist.com/node/21563323 (Date of Access: 29 January, 2013).

26 Statistics Canada CANSIM table 002-0056: http://www5.statcan.gc.ca/cansim/pick-choisir?lang=eng&p2=33&id=0020056 (Date of Access: 27 December, 2012); and CANSIM table 187-0002: http://www5.statcan.gc.ca/cansim/pick-choisir?lang=eng&p2=33&id=1870002 (Date of Access: 27 December, 2010).

Table 2: Average Price of Milk, Eggs, and Chicken, November 2010, 2011, 2012

	Canadian Average Price *($CDN)*	US City Average Price *($US)*
Whole Milk (4L in Canada; 3.8L in US)	6.29	3.47
Eggs (1 dozen)	2.99	1.82
Chicken (1 kg)	6.73	3.00

Notes: The value of $1US in $CDN in November 2010, 2011, and 2012 was, respectively, $1.01, $1.03, and $1.00 – making the currencies effectively on par. According to the Canadian Dairy Information Centre (http://www.dairyinfo.gc.ca), the price of 4 liters of milk is, on average, 2.7 times the price of 1 liter, so we have multiplied the Statistics Canada values by 2.7. Martha Hall Findlay uses the same approach: see Hall Findlay (2012, 9).

Sources: Authors' calculations based on Bank of Canada, Statistics Canada CANSIM table 326-0012 and US Bureau of Labor Statistics, Consumer Price Index – Average Price Data.

Partnership.[27] It also reduces economic opportunities for farmers in developing countries (Boyer and Charlebois 2007, 1–2). According to the World Economic Forum's 2012-2013 Global Competitiveness Report,[28] Canada ranked 41st globally in the cost of its agricultural policy, below countries such as New Zealand and Australia, both of which have abolished their agricultural supply management regimes (Hall Findlay 2012, 15–20).

Can agricultural market failures be resolved without private taxation or with less private taxation? The answer is yes. (See Busby and Schwanen 2013 for a specific recommendation of how to make the dairy sector more competitive while still retaining the supply management system.) Prices can be stabilized using less competitively distortive mechanisms like insurance, futures, and collective negotiating boards (of the sort used by pork producers and vegetable growers, for instance).[29] In addition, the quota system can be equitably phased out with a temporary levy, as Australia did with great success in its dairy sector (Hall Findlay 2012, 15–18). These solutions, however, necessitate coordinated political reform. On the judicial side, the RCD endorses the legal proposition that "[t]he public interest in trade regulation is not within the purview of Parliament as an object against which its enactments are directed."[30] In simpler terms, the courts will not on their own find that regulations legislatively

27 See Barrie McKenna. 2012. "Time to end supply management – but it won't go quietly." *The Globe and Mail*, June 24. Accessed at http://www.theglobeandmail.com/report-on-business/international-business/asian-pacific-business/time-to-end-supply-management-but-it-wont-go-quietly/article4366885/.

28 http://reports.weforum.org/global-competitiveness-report-2012-2013/#= (Date of Access: 10 April, 2013).

29 See the website of Ontario's Ministry of Agriculture, Food and Rural Affairs for a list of Ontario's various agricultural marketing boards: http://www.omafra.gov.on.ca/english/farmproducts/factsheets/ag_market.htm. (Date of Access: 29 January, 2013).

30 *Re The Farm Products Marketing Act*, [1957] SCR 198.

framed to be in the public interest are contrary to the public interest.

(b) Private Alcohol Retail

In Ontario, a privately held corporation has held a statutory near-monopoly on retail beer sales to restaurants and consumers since the end of prohibition. Brewers Retail Inc. (operating under the trade name, "The Beer Store") sells approximately 78 percent of all beer by volume in the province.[31] Its competitors are retail outlets at breweries and the Liquor Control Board of Ontario (LCBO) – which is a Crown monopoly that sells beer as singles and six-packs.

Brewers Retail is a private company owned by three foreign multinationals: Anheuser-Busch InBev, Molson Coors, and Sapporo.[32] These multinationals supply nine of The Beer Store's 10 leading brands (the exception being Heineken). The Beer Store lists these 10 brands online[33] and prominently displays their labeling at retail locations.[34] These beers are also sometimes displayed in a refrigerator termed the "Ice Cold Express."[35] This set-up may confer a competitive advantage on The Beer Store's three international owners. Moreover, the lack of customer-accessible shelf space at many Beer Store locations assists the owners because their famous brands and large advertising budgets make their sales strategy less reliant on customers' ability to browse.

To sell products at The Beer Store, breweries must pay to Brewers Retail one-time listing fees (one per brand and package size), per-store fees, and ongoing volume-based handling fees (MacIntyre 2012, 25). Brewers Retail states that these fees amount to cost-recovery.[36] However Brewers Retail does not disclose its detailed revenue intake or detailed operating costs (as a privately held corporation, it is under no obligation to do so).

Brewers Retail's near-monopoly also imposes other forms of private taxation. Consumers are inconvenienced, and grocery and convenience stores are deprived of the opportunity to compete for retail beer sales. Absent state-organized monopoly, these businesses would profit directly from beer sales and indirectly from incidental purchases made by beer consumers.

If these costs are intended to correct excessive alcohol consumption and related social harms, the financial benefits of regulation should accrue to public and not private interests (as is the case with the LCBO, for example).

31 A similar regime also exists for non-Liquor Control Board of Ontario (LCBO) wine retailing, which we do not discuss in detail in this *Commentary*, but which has a relatively small market share of wine sales. See the LCBO's 2010/11 Annual Report for details on market shares: http://www.lcbo.com/aboutlcbo/annual/2010_2011.pdf.

32 See Martin Regg Cohn. 2012. "More reasons to end the Beer Store cartel." *Toronto Star* December 20. Accessed at http://www.thestar.com/news/canada/politics/article/1304864--cohn-more-reasons-to-end-the-beer-store-cartel.

33 See "The 'Big 10' Brands" page on The Beer Store's website: http://www.thebeerstore.ca/beers/big-10-brands (Date of Access: January 16, 2013).

34 See The Beer Store Operations Report 2010, at 18: http://www.thebeerstore.ca/about-us/operational-report (Date of Access: January 17, 2013).

35 See Martin Regg Cohn. 2012. "Never mind the LCBO – The Beer Store is an embarrassment." *Toronto Star* December 11. Accessed at http://www.thestar.com/news/canada/politics/article/1300387--cohn-never-mind-the-lcbo-the-beer-store-is-an-embarrassment.

36 See Martin Regg Cohn. 2012. "More reasons to end the Beer Store cartel." *Toronto Star* December 20. Accessed at http://www.thestar.com/news/canada/politics/article/1304864--cohn-more-reasons-to-end-the-beer-store-cartel.

(c) Legal Services

Licensing regimes limit the supply of professional services by restricting market entry. To an extent, such regulations are necessary to ensure competence and to protect the public from misrepresentation. However, excessive restrictions drive up prices at a cost to the public. A recent Organisation for Economic Co-operation and Development (OECD) working paper highlighted these problems in the Canadian context:

> Professional services are usually subject to pervasive regulation, including the exclusive exercise of certain functions, entry and access requirements, recommended or fixed prices, and restrictions on advertising and business structure or residency requirements…. In practice such restrictions have been correlated with higher prices and less innovation, without improving quality…. These results support the view that restrictive regulatory frameworks and self-regulation by professional bodies are often used by the professions to obtain and safeguard economic rents, rather than supporting the needs and interests of consumers. (Maher and Shaffer 2005, 20–21.)

In Canada, legal fees average $338 per hour, according to one report.[37] Such rates may limit Canadians' access to legal representation. The problem of access to justice is reflected in recent litigation trends. Litigants in Ontario Family Court tend to self-represent, with 46 percent of self-represented litigants stating that their primary reason for not having a lawyer was that they could not afford one and were ineligible for legal aid (Bala and Birnbaum 2012, 3-6). Perhaps 80 percent of family court litigants and 60 percent of civil court litigants are self-represented.[38] Access to justice is essential in a society under the rule of law. Beverley McLachlin, Chief Justice of the Supreme Court of Canada, has been outspoken on the issue:

> If you're the only one who can provide a fundamental social need from which you benefit, I think it follows that you have to provide it…. And I don't think it's enough to say we are providing it for the rich and the corporations. You have to find a way to provide it for everybody.[39]

In 2007, the Competition Bureau published a review of the practices of self-regulating professions, including accountants, lawyers, optometrists, pharmacists and real estate agents. In its analysis of the legal profession, the Bureau made a number of recommendations for law societies (the provincial bodies regulating the legal profession) that, in its view, would increase competition and therefore lead to better service:

37 In fairness, the average hourly rate may be less indicative of typical rates depending on location and the legal matter at issue. The source of our stated average rate is Kirk Makin's *Globe and Mail* article "Access to justice becoming a privilege of the rich, judge warns" (February 10, 2011): http://www.theglobeandmail.com/news/national/access-to-justice-becoming-a-privilege-of-the-rich-judge-warns/article565873/ (Date of Access: January 22, 2013).

38 In a *Canadian Lawyer* magazine article, Geoff Ellwand cites data from a forthcoming study by University of Windsor law professor Julie Macfarlane. See Geoff Ellwand's *Canadian Lawyer* article "Betrayed, beguiled, and abandoned?" (February 2013): http://www.canadianlawyermag.com/4501/betrayed-beguiled-and-abandoned.html?utm_source=responsys&utm_medium=email&utm_campaign=20130204_CLNewswire (Date of Access: April 4, 2013).

39 See Kirk Makin. 2011. "Access to justice becoming a privilege of the rich, judge warns." *The Globe and Mail* February 10. Accessed at http://www.theglobeandmail.com/news/national/access-to-justice-becoming-a-privilege-of-the-rich-judge-warns/article565873/.

- Justify the duration of legal training as the minimum necessary to properly and effectively practice law while protecting the public interest;
- Facilitate the movement of lawyers between jurisdictions;
- Eliminate residency and citizenship requirements for practice;
- Do not regulate paralegals due to their economic conflict of interest with lawyers (that is, lawyers and paralegals compete insofar as law societies allow paralegals to offer some of the same legal services as lawyers);
- Do not prohibit related service providers from performing legal tasks absent evidence of public harm;
- Lift unnecessary restrictions on advertising including restrictions on comparative advertising of verifiable factors;
- Consider lifting restrictions on contingency fees and allow market forces to govern percentages; and,
- Do not prohibit multidisciplinary practices or fee sharing. (Competition Bureau 2007, 61–79.)

An example of the legal profession falling short on these recommendations relates to the duration of required legal training. In Ontario, where lawyers self-regulate through the Law Society of Upper Canada, a lawyer typically requires seven years of post-secondary education as well as a year of articling to become a licensed practitioner. Many other developed countries impose far lower licensing requirements for entry into the profession. Australia, for example, generally only requires four years of post-secondary education and between six months and one year of practical training;[40] England and Wales generally require three years of post-secondary education and two years of practical training and pupilage to become a barrister[41] (and becoming a solicitor takes six years total);[42] and Israel generally requires three and a half years of post-secondary education and one year of clerking.[43] A consequence of Ontario's barriers to entry is that newly licensed lawyers typically carry large amounts of debt, increasing their incentive to enter into high-billing corporate law positions rather than pursuing careers that improve access to justice. In addition, foreign-educated graduates in common law face high barriers to entry into the Canadian legal market – in some cases having to write as many as seven additional exams to become licensed.[44]

While competition-based reforms to the legal profession have the potential to bring prices down and improve access to justice, there is no legal basis to compel law societies (or, for that matter, the governing bodies of other regulated professions) to implement pro-competitive reforms. In this respect, the RCD allows self-regulating professions generally to conflate self-interest with the public interest, since imposing high barriers to entry can increase a profession's profitability and prestige. Judicial interpretations of the RCD may have compounded this problem, with the Supreme Court finding that conduct generally authorized by statute (as opposed to conduct specifically required

40 See "Practicing Law in Australia," Council of Australian Law Deans: http://www.cald.asn.au/slia/Practising.htm#Admission (Date of Access: April 4, 2013).

41 See "Becoming a barrister," The Bar Council: http://www.barcouncil.org.uk/becoming-a-barrister/ (Date of Access: April 4, 2013).

42 See "Becoming a solicitor," The Law Society of England and Wales: http://www.lawsociety.org.uk/careers/becoming-a-solicitor/ (Date of Access: April 4, 2013).

43 See "L.L.B," Tel Aviv University: http://www.law.tau.ac.il/Eng/?CategoryID=183 (Date of Access: April 4, 2013).

44 See Vern Krishna. 2013. article "End barriers to foreign lawyers." *Financial Post* April 3. Accessed at http://business.financialpost.com/2013/04/03/end-barriers-to-foreign-lawyers/.

by statute) can be immune from the application of competition law.[45] Practically speaking, this means that law societies (and, potentially, the governing bodies of other self-regulated professions) enjoy a broad discretion to regulate without regard to principles of competition law that are in the public interest.

RECOMMENDATIONS

Towards Minimally Impairing Regulation

Our sample of competitively distortive regulatory regimes is just that – a sample. The RCD's influence pervades other areas of the Canadian economy where anti-competitive practices benefit from legislative and judicial sanction. The question is whether regulated cartels will continue flying through the gaps of Canada's competition regime or if concerted policy reform can catch them. We believe that policy reforms can bring more competition to regulated sectors.

In our view, the best response to private taxation is regulatory reform at both the provincial and federal levels. Politicians should avoid supporting anti-competitive regulations while paying lip service to the idea that competition benefits the economy. Action on this front is long overdue: since the 1970s, competition policy experts have called for reforms to regulated industries[46] while voluminous studies and reports critical of anti-competitive regulation continue to be published. A political solution to address these longstanding concerns requires a twofold response.

First, governments at all levels should seek to tailor their regulatory responses to market failures, intervening only when it is publicly justifiable; and, where practicable, in a way that is minimally impairing to competition. In the lead-up to the 2009 reforms to the *Competition Act*, the Commissioner of Competition noted in a submission to the Competition Policy Review Panel that a number of jurisdictions, including the United States, the UK, Australia and the EU, have implemented reforms designed to ensure that government policy or regulation will limit competition only if warranted. These countries have adopted "processes that require law and policy makers to rely on market forces whenever possible and when intervention is necessary, to choose options that are least harmful to competition."[47] Below, we propose a means through which provinces and the federal government can more rigorously assess the competition effects of future legislation.

Second, reform on the political front should involve joint action by the federal and provincial governments, thus preventing jurisdictional disputes and encouraging a national commitment to the protection of consumer interests. The abolition of the Canadian Wheat Board's monopoly buying power and the federal government's recent decision to auction off additional spectrums in the telecommunications sector illustrate that progress is politically possible.[48] Canada's potential entry into

45 *Jabour v. Law Society of B.C.*, [1982] 2 S.C.R. 307.

46 Among other studies, Skeoch and Macdonald submitted "Proposals for the Further Revision of Canadian Competition Policy by an Independent Committee Appointed by the Minister of Consumer and Corporate Affairs." See Skeoch and Macdonald (1976).

47 See Submission to the Competition Policy Review Panel by the Commissioner of Competition: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02555.html (Date of Access: April 1, 2013).

48 See Government of Canada press release (March 7, 2013): http://news.gc.ca/web/article-eng.do?nid=724349 (Date of Access: April 1, 2013).

the Trans-Pacific Partnership could also mean that agricultural supply management is not destined to be a permanent feature of the Canadian economy. In terms of coordinating resolve between the federal and provincial levels of government, the Council of Australian Governments (COAG) is an example of an inter-governmental forum that has made progress towards improving living standards and which may serve as a useful precedent for federal-provincial cooperation in Canada on the issue of competition.[49]

Statutory Remedies

(i) Legislated Rules of Interpretation

If reforms at the provincial level are not forthcoming, federal amendments to the *Competition Act* – particularly as it relates to the RCD – could potentially spur reform at the provincial level. Specifically, amendments to the *Competition Act* could reinvigorate its application to regulated sectors by (i) introducing rules of interpretation in relation to regulatory measures; (ii) developing a balancing test to determine the validity of a given regulatory measure that conflicts with the *Competition Act*; and (iii) allowing provinces to seek confidential advisory opinions from the Commissioner of Competition.

Developing rules of interpretation in the *Competition Act* would force the courts to weigh and examine a regulatory measure instead of automatically deferring to legislatures on the basis of the RCD. Rather than assuming that a measure is in the public interest, courts could examine impugned regulation using a modified version of the proportionality aspect of the Oakes test (that is, the judicial test used to determine the validity of measures that limit *Charter* rights).[50]

In the economic realm, a modified Oakes test would involve three steps: (a) determining whether the regulatory measure at issue is fair and not arbitrary, and that it is carefully designed to achieve the objective in question and rationally connected to that objective; (b) determining whether the measure impairs the provisions of the *Competition Act* in question as little as possible (i.e., there are no reasonable alternative means available that are less impairing to competition); and (c) determining whether there is proportionality between the effects of the limiting measure on the provisions of the *Competition Act* and the objective (i.e., the more severe the deleterious effects of a measure, the more important the objective must be). If provincial legislators were aware that the law requires courts to assess regulatory regimes using an Oakes-style analysis, they would likely produce less restrictive regulatory legislation.

A modified Oakes test is not an entirely new idea. A similar proposal was made in the 1976 *Skeoch/Macdonald Report* which recommended that regulated industries be generally subject to competition law and only exempted where:

> (1) the restrictive conduct is specifically imposed by the legislation;
>
> (2) the restrictive conduct is actively supervised by independent officials and not by representatives of the participants; and
>
> (3) the restraint is necessary to the effective accomplishment of the legislative goal and is the least restrictive means available to achieve the legislative goal. (Skeoch and Macdonald 1976, 152; Bolton and Kennish 2003, 15.)

One positive effect of the *Competition Act* requiring 'minimum restraint' regulation is that various regulatory regimes would have to put into place

49 See Council of Australian Governments: http://www.coag.gov.au/ (Date of Access: March 1, 2013).
50 See *R. v. Oakes* [1986] 1 S.C.R. 103.

quality controls designed to ensure minimal distortion to competition.[51]

(ii) The Role of the Competition Bureau

The Competition Bureau has the ability to pursue strategic regulatory interventions in sectors where it can advocate for pro-competitive reforms. Recent remarks by the Interim Commissioner of Competition highlight the powers available under sections 125 and 126 of the *Competition Act*.[52] These sections allow the Commissioner to appear and make representations before federal and provincial regulatory boards, commissions or tribunals to provide advice to government on matters related to competition or to make recommendations regarding the impact of proposed policies and regulations on competition. The Interim Commissioner noted, and we agree, that "experience has shown that advocating for regulatory change has been an effective tool in promoting economic efficiency and productivity."

Advocacy by the Competition Bureau can also be extended through legislative reform. The federal government could amend sections 125 and 126 of the *Competition Act* by adding a provision allowing provinces to seek advisory opinions or assessments from the Commissioner on the validity of regulatory regimes. Any such opinions could be confidential and excluded from disclosure under the provisions of the *Access to Information Act*.[53] This would allow provincial governments to better conform to pro-competitive principles in drafting and enacting regulatory legislation.

(iii) The Government's Role

As we have maintained throughout this *Commentary*, when it comes to the intersection of regulation and competition law, federal and provincial governments should be at the vanguard of reform. In this vein, one concrete measure that the federal government could implement would be the institution of a mandatory internal process that would allow for statutes and regulations to be examined by the Competition Bureau in respect of their coherence with the *Competition Act*. Where proposed federal legislation or regulation will have anti-competitive consequences, the Commissioner should describe these effects in a report to be reviewed by the appropriate cabinet committee (e.g., Legislation and House Planning or Governor in Council) so that final decisionmakers are aware of these impacts prior to approving the legislation or regulation.

Australia requires that departments provide an assessment of how all legislation will affect competition policy and, if there is a negative effect on competition, that they show that the restriction is warranted by the public interest and is the least restrictive means available. Further, if the reviewers find that the benefits of the regulation do not justify

51 For a recent ruling along these lines, see *Fournier Leasing Company Ltd. v. Mercedes-Benz Canada Inc.*, where the ruling states "In order for the regulated conduct exception or defence to apply, the actions in question must have been directed or authorized by the statute or regulation."

52 See "Remarks by John Pecman, Interim Commissioner of Competition (February 7, 2013): http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03529.html (Date of Access: March 1, 2013).

53 The *Access to Information Act* contains various exemptions to requests for information, one of which is the right of a head of a government institution to refuse to disclose any record requested under the Act that contains information obtained in confidence from a government of a province. See *Access to Information Act R.S.C.*, 1985, c. A-1, s. 13(1).

the restriction in competition, Australia requires an explicit approval and signature of the Prime Minister or the Treasurer (Minister of Finance) for the legislation to pass (see Competition Bureau 2008). A similar system could benefit Canadians.

Conclusion

A number of legal issues and political realities may complicate pro-competitive regulatory reforms in the short term.[54] Nevertheless we are optimistic that the various forms of private taxation will eventually decline. Our optimism flows from the non-ideological nature of our argument, which we think can attract broad, if dispassionate, political consensus among consumers. However, a major challenge to reform is the fact that competition law and economic regulation are not voting issues (nor very exciting ones, for that matter), so it is difficult to bring political pressure to bear against entrenched special interests. As a practical concern, advocates of reform should concentrate on making the subject of pro-competitive reforms to regulation interesting for voters. We think that focusing on everyday product markets where regulations impose costs on Canadians – including staple foods, alcohol and legal services – is a promising step towards a more competitive Canada.

54 For example, legislators will have to draft any amendments to the *Competition Act* such that they comply with the Supreme Court's ruling in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 SCR 641.

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