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# SPEAKING NOTES

**for**

**Sheridan Scott**
**Commissioner of Competition**

**COMPETITION BUREAU**

**Commissioner's Panel:**

**Antitrust in the self-regulated professions: an international perspective**

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Canada

Thank you. I am delighted at the opportunity to act as moderator for our distinguished panel. Before beginning our panel discussion, I want to say a few words about the professions and some of the work we are doing at the Competition Bureau.

In a new book, "Licensing Occupations: Ensuring Quality or Restricting Competition?" (Upjohn Institute, 2006), Prof. Morris Kleiner of the University of Minnesota has estimated that in the United States 20 percent of workers in the year 2000 were in occupations which were covered by some form of state licensing requirement, up from 5 percent in the 1950s. Taking into account local and federal government requirements, perhaps three of every ten workers nationwide are required to obtain a license to do their jobs. Looked at another way, there are now more than twice as many workers subject to occupational licensing than there are workers covered by labour union contracts. Parallel data are more difficult to obtain in Canada, but it is a reasonable assumption that ours would track fairly closely. Certain of the occupations included by Prof. Kleiner would not be considered "self-regulating professions" in the conventional sense, so the numbers would perhaps not look as dramatic. Nevertheless, there is no denying that this sector accounts for a significant and increasing share of GDP[1].

Until relatively recently, the Bureau operated under the assumption that the regulated conduct defence (RCD) would apply in most situations involving the regulated professions, and that our role would therefore be limited. Some of you may recall that we posted a Technical Bulletin on the RCD on our Web site some time ago and invited public comment as part of a broad policy review on the matter. This exercise resulted in an internal policy change, such that we are now open to taking civil cases involving regulated entities to the Competition Tribunal. It remains to be seen how the Tribunal will respond, but we are eager to clarify our role in regulated industries, for our own

[1] http://www.hc-sc.gc.ca/hcs-sss/pubs/care-soins/2005-hcs-sss/expen-depen_e.html

guidance as well as that of the private sector.

It is part of our normal, day-to-day operations to monitor the activities of the competition authorities in other jurisdictions. We are thus aware that many of our foreign counterparts have undertaken comprehensive studies and other initiatives concerning the self-regulating professions within their jurisdictions. Examples would include the Americans, the British, the Australians, the Irish and the Europeans, and we have representatives of three of these jurisdictions here today. These were worthwhile exercises which, among other things, have provided us with a basis for international comparisons.

These three considerations - the increasing significance of the self-regulating professions to the economy, our revised approach concerning the RCD, and the example of other jurisdictions - provided much of the impetus for me to assign a high priority to this sector in terms of our advocacy and enforcement efforts. Let me say a few words about some of our work in the area.

Late in 2005, we learned that three provinces - Alberta, Nova Scotia, and New Brunswick - were in the process of modifying their regulations to establish self-regulation for dental hygienists. On March 7, 2006, we published on our Web site letters I had sent to all three governments laying out the Bureau's perspective on professional self regulation and the legal structure under which it functions. In them, I set down eight general guiding principles which governments should recognize when creating self-regulating organizations (SROs). I won't list them out here, but in general they address such issues as market access, transparency, impartiality and periodic re-assessment.[2]

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[2] http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2033&lg=e; http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2034&lg=e; http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2035&lg=e

Several months later, I announced in a speech entitled "Competition and Innovation in a Flat World" [3] at an Insight Conference in Toronto on May 15, 2006, that I had asked my staff to undertake a comparative study into a number of SROs to determine to what extent, if at all, any of them use anti-competitive restrictions to limit access to their profession or to control the competitive conduct of their members. Such restrictions would include any bearing on entry, fees, reserved rights, business structure, and advertising. The study will cover the legislation, regulations and codes of practice governing a range of professional services offered in all ten provinces and the three territories. The Bureau will also attempt to assess the economic effects on competition of the various types of restrictions.

To this end, we have sent questionnaires to professional associations, colleges, and boards for accountants, lawyers, optometrists, opticians, pharmacists, and real estate agents in the ten provinces and three territories. Our study will rely heavily on the information we receive in response. We are in the final stages of a Request for Proposal process to locate and hire an expert economist to help us in our economic analysis concerning the effects on consumer welfare of government and non-government restrictions imposed on members of these SROs. Depending on the quality of responses, we would publish a draft paper for public consultation in the next year or so discussing the use of these practices. Following the consultation process, we would then publish a final report that would inform the public and policy makers of our findings and, if applicable, the costs to consumers and the economy in terms of reduced competition. The study will be similar to those recently carried out by competition policy agencies in other jurisdictions such as the European Commission[4] and the Irish Competition Authority[5]. As has occurred in other jurisdictions, we hope

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[3] http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2092&lg=e

[4] The Commission's study may be found at http://ec.europa.eu/comm/competition/liberalization/conference/libprofconference.html

[5] The Irish Competition Authority Website is http://www.tca.ie/. The studies of the professions are listed under "Professions Study"

that the professions will subsequently take steps to modify practices which are found to be anti-competitive. Here is how the EU proceeded.

In January 2003, the Competition DG published a Report on Competition in the Professions. The Report looked at six professions - lawyers, notaries, engineers, architects, pharmacists, and accountants (including tax advisors). In its Executive Summary on the Economic Impact of Regulation in the Field of Liberal Professions in Different Member States, the Report states:

> "...the available empirical evidence points in the direction of regulatory induced suboptimal outcomes from the point of view of the whole economy (and from the point of view of consumers in particular) being present in varying degrees in legal, accounting, technical and pharmacy fields in many member states of the European Union, particularly in those countries with restrictively regulated professional services. We are led by this study to the overall conclusion that the lower regulation strategies which work in one Member State might be made to work in another, without decreasing the quality of professional services, and for the ultimate benefit of the consumer."

The Commission invited regulatory authorities in the member states and professional bodies to review existing rules taking into consideration whether those rules are necessary for the public interest, whether they are proportionate, and whether they are justified. We intend to do the same.

In 2005, the Commission published a working document entitled "Progress by Member States in reviewing and eliminating restrictions to Competition in the area of Professional Services" which provides a detailed outline of progress made by Member States.

Of the professions just listed as being a part of our study, three - optometrists, opticians, and pharmacists - operate in the health care sector, and it is there that I wish now to turn, for it is one of our priority sectors at the Bureau and will also be a main focus of today's discussion.

When one thinks of regulated professional industries in Canada, for most, the first and most obvious is the health care sector. In 2004, total health care spending reached an estimated $130 billion.[6] In 1975, total Canadian health care costs accounted for seven percent of GDP and grew to an estimated 10.4 percent in 2005, or $4,411 per capita. In 2005, on average, public health expenditures were estimated to account for seven of every 10 dollars spent on health care, with the remaining three dollars coming from private sources and covering the costs of supplementary services such as drugs, dental care and vision care.[7]

A substantial proportion of industry practitioners - such as the optometrists, opticians, and pharmacists - operate more or less in a market environment under a regime of self-regulation similar to those which govern the activities of the professions selected for our study. Should we come to the same conclusions as our counterparts did, we feel that we can make a contribution to the discussion on how best to improve the regulation of these professions.

Predictably, many of us who work in the field of competition law, while we may not have at this time many specific policy prescriptions to improve the situation, are of the view that at least part of the solution rests in introducing market forces where possible, or, at a minimum, devising measures that address policy goals in the least

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[6] Canadian Institute for Health Regulation website at; http://www.cihi.ca/cihiweb/dispPage.jsp?cw_page=media_08dec2004_e

[7] Canadian Institute for Health Information; "National Health Expenditure Trends, 1975-2005; Ottawa: the Institute, 2005, pp. iii, 4-5, 7, 99 as quoted on Health Canada's website at http://www.hc-sc.gc.ca/hcs-sss/pubs/care-soins/2005-hcs-sss/expen-depen_e.html

intrusive manner. I hope that our discussion today will shed some light on how this has been done in other countries.

Our panel discussion will proceed in the following manner. First, we will hear a presentation by Ted Marmor, Professor of Public Policy and Management at the Yale School of Management. Prof. Marmor will speak to us about the role of antitrust in health care. Educated at Harvard and Oxford, Prof. Marmor teaches at Yale's law school, political science department, and school of management. He has written several books on Medicare Reform and is one of the foremost experts in this field.

Prof. Marmor's presentation will be followed by a Question & Answer session, which will also include our other distinguished guests, who are representing antitrust agencies from the U.K., the U.S., and Australia. They have all been active with respect to the regulated professions and in some cases specifically with those in the health care sector. They are:

Mr. Philip Collins, Chairman of the U.K. Office of Fair Trading since October 1st, 2005. Mr. Collins has practised in the competition law field for almost 30 years. He established competition law as a specialist practice at Lovells. For the last 12 years of his career he has been based in Brussels. He has advised clients in many industry sectors on a diverse range of cases before the OFT, the Competition Commission, the European Commission and the European Courts.

William Blumenthal is General Counsel of the Federal Trade Commission. He holds an A.B. and M.A. in economics from Brown University and a J.D. from Harvard University. Before entering government service in March 2005, he practiced law as a partner in the Washington, DC office of King & Spalding LLP, and he was active in the work of the International Competition Network, the ABA Antitrust Section, the Competition Committee of the OECD Business and Industry Advisory Committee, and many other antitrust groups.

John Martin was appointed as Commissioner of the Australian Competition and Consumer Commission (ACCC) in June 1999 and was reappointed for a second five year term as Commissioner on 7 June 2004. His special responsibilities include small business related matters and health-related issues.

Mr Martin was Executive Director of the Australian Chamber of Commerce and Industry from 1989 until his appointment to the ACCC. Earlier in his career, Mr. Martin was a policy adviser and program manager with the Australian Treasury and the Department of Industry and a regional industrial consultant with the United Nations in Bangkok.