Submission to the Professional

Organizations Committee of Ontario

by

Robert [redacted] Bertrand

Assistant Deputy Minister
Bureau of Competition Policy

and

Director of Investigation and Research
Combines Investigation Act

Consumer and Corporate Affairs Canada

A. INTRODUCTION

1. Scope of Brief

As witnessed by the creation of the Professional Organizations Committee, the performance of the self-regulating professions has come under increasing public scrutiny in recent years. One of the conclusions of this reassessment to date is that competition can play a unique and vital role in ensuring that the performance of the professional sector truly conforms to the public interest.

Professions have traditionally been structured as state-sanctioned monopolies in the belief that only the members of a profession can assure the protection of the public in the supply of services. Inherent in this rationale is the assumption that while competition is beneficial when applied to other sectors of the economy, it may be ineffective and even detrimental if applied to the supply of professional services. Such reasoning has increasingly become subject to serious economic doubts since the business element of professional services cannot be ignored. The Commission of Inquiry on Health and Social Welfare in Quebec noted that the fact that professionalism

> ... often requires long preparation and the mastery of a science (or an art or a technique) which bestows social prestige, if not a position of real power, should not prevent us from considering the profession as an economic fact of the service type. This is essentially the nature

> of the profession and it is from this point of departure that professional law must be built as an instrument of control by society.[1]

In pursuit of the protection of the public interest in professional practice, Canadian society has granted several professions authority to control entry into the profession and permitted them to restrict competition in other forms including prices or fees or through advertising. It must not be overlooked that these tools available to a profession to protect the public interest are the tools of monopoly and the fact they exist creates the possibility that they may be abused. Artificial restraints on competition are detrimental to the public interest in that they distort the allocation of economic resources, they may limit access to professional services through higher prices and limited supply and they may discourage innovation and change.

Problems of accurately defining the term "profession" have increased as knowledge has become more specialized with the result that the traditional notion of professionalism

> ... has slowly lost its meaning or, in any case, no longer evokes a certain number of precise and exhaustive criteria which would make it possible

---

1 Quebec, Report of the Commission of Inquiry on Health and Social Welfare: The Professions and Society, Volume 7, Tome 1, Part 5, 1970, 16.

to distinguish it from other types of occupations of the alleged "non-professionals".[2]

Yet increased pressures for self-regulation and the increasing impact of professional services in the economy suggest the prospect that the associated social costs will multiply. It is therefore essential that alternative social control mechanisms be considered for the professions.

One method of providing a check on the potential abuse of monopoly power is direct public regulation. There are circumstances where government involvment is necessary to enable the public to distinguish between the qualified and unqualified and to assure public access to essential services. At the same time, doubts exist about the effectiveness and efficiency of all-encompassing regulation.[3] While meeting certain specific goals, it appears that neither self-regulation nor public regulation is as effective a regulator of markets as the forces of competition.

It is frequently argued that the public interest demands regulation of professional services. Recent studies and developments in Canada and elsewhere have shown,

---

2 Quebec, The Professions and Society, Vol. 7, 1970, 39.

3 For a more complete discussion of these issues see G.B. Reschenthaler, Regulatory Failure and Competition, Canadian Public Administration, Fall, 1976, 466-486; Jeffrey Pfeffer, Administrative Regulation and Licensing: Social Problem or Solution?, Social Problems, Vol. 21, April, 1974, 468-479; and Sylvia Ostry, Competition Policy and the Self-Regulating Professions, Address to the Conference on the Professions and Public Policy, University of Toronto, October 16, 1976, 9-10.

however, that the public interest in maintaining ethical and quality standards need not be sacrificed to prevent potential abuses of monopoly power. There is no essential incompatibility between the practice of a profession in the public interest and exposure to a competitive environment and the economic resources represented by the professions are much too important in scale to be left unexposed to the discipline of competition.

2. Purpose of Brief

As I am skeptical of the efficiency and effectiveness of the formal regulatory systems, it is my intention to illustrate the need for greater reliance on competition as a regulator of the professions.

With its extension in 1976 to encompass services, the professions are now subject to the Combines Investigation Act unless the activity in question is effectively regulated. Although exposure to the Act acts as a constraint against more serious abuses of monopoly power, a more permanent and practical solution lies in effecting structural changes in professional organizations to induce efficiency through competition. Since the organizational nature of several key professions in Ontario forms the basis of the Committee's terms of reference, its recommendations will have an important bearing on the degree and direction for the application of competition in the professions. As such, the Committee's study is of interest and importance to competition policy in Canada.

3. Outline and Summary

The following section briefly surveys the principal restraints on competition imposed on the public by the professions and the adverse impact of these restraints on resource allocation. It concludes that greater exposure to free market forces would help to alleviate such distortions without jeopardizing the public interest. The enactment of this principle into competition policy legislation has created a new environment for the professions generally, and obviously the Committee will want to give consideration to its implications. Therefore, the brief will outline the status of professions under the Combines Investigation Act. Because that status may be altered by provincial legislation, special attention is given to the application of competition policy to regulated conduct.

Developments likely to affect the competitive nature of the professions in Quebec, the U.S. and U.K. are also noted. The reorganization of laws governing the professions in Quebec, recent jurisprudence in the U.S., and recommendations contained in studies by the British Monopolies Commission point toward more dependence on free market forces to allocate professional services.

Finally, the last section contains various recommendations in relation to the Committee's terms of reference submitted by the Bureau of Competition Policy to advance competition and efficiency within the professions.

B. COMPETITION AND THE PROFESSIONS

In a free enterprise system, competition is recognized as the most efficient regulator of markets and thereby leads to public benefit in lower prices, greater choice, increased innovation, and a more efficient allocation of economic resources. It is only in those cases of natural monopoly or where specific policy goals would not be achieved through the interplay of market forces that public intervention through ownership or regulation is considered necessary in the public interest. Historically, the supply of professional services has been perceived as one category of economic activity which warranted some measure of public control. In some cases this has been granted to the professions through self-regulation on the basis that they are best qualified to exercise such authority. The only justification for self-regulation though, is as a means of protecting the public interest.[4]

While self-regulation has been beneficial in terms of upgrading the quality of professional services, it is important to ask at what cost this has been achieved and whether the need to upgrade skills has been the excuse rather than the reason for imposing increased entry costs. Obviously, it is essential that the manner of self-regulation be periodically reviewed and reassessed in order to probe that question and to ensure that self-regulation operates to maximize the net benefits - from a social welfare standpoint - flowing from the professional sector.

---

4 Ontario, Royal Commission Inquiry Into Civil Rights, Report Number One, Volume 3, 1968, 1162-1166.

One way of gaining insight into self-regulation is to put it in the context of decision-making systems as does the Ontario Committee on the Healing Arts.[5] Although the decisions of supplying professional services are similar to those of producing manufactured goods, differences in the nature of the products have resulted in variations in the methods by which those decisions are made. Since consumers are generally poor judges of professional quality they must rely on the advice of others and receive assurances that those offering counsel are qualified to do so. In an attempt to overcome this fundamental gap in consumer knowledge, decisions respecting quality, competence, and expertise have been entrusted to professional associations. Such authority creates the possibilities for a profession to interpret the power as a mandate to limit entry unreasonably and restrict those forms of competition commonly practised in the private market.

By avoiding reliance on the private market in the professional sector, the possibility arises that consumer welfare and efficient resource allocation may be adversely effected. In the process of centralizing decision- making power in the professions, the efficiency-inducing mechanisms of the private market may be obstructed; namely decentralized decision-making and competition, which are coordinated via the price system. As the committee on Healing Arts notes[6], in

---

[5] Ontario, Report of the Committee on the Healing Arts, Volume 1, Queen's Printer, 1970, 109-143.

[6] Ontario, Report of the Committee on the Healing Arts, Volume 1, Queen's Printer, 1970, 111-113.

a market economy decentralized decision-making encourages the mobility and optimum combination of scarce resources in response to the varying conditions of supply and demand, while competition ensures that these resources are employed in the most efficient manner through price and profit incentives.

The cost of diminishing the importance of the free market may be high. By constraining individual freedom of choice, professional self-control may generate informational deficiencies if consumers are less able to transmit their needs to professionals who are not only less able to respond to those demands, but prohibited from sufficiently informing consumers of the services they offer. Thus, although self-regulation may help alleviate one informational problem for consumers, it may create others. The Committee on Healing Arts also points out that markets that are not competitive can also fail to satisfactorily adjust to variations in demand, while monopoly producers may restrict output short of that which the free market would obtain.[7] Restrictions on competition may also impede innovation.[8]

A recent study[9] commissioned by my department, a copy of which is provided for the Committee's perusal, suggests that professional control of admission, fees, and

---

[7] Ontario, Report of the Committee on the Healing Arts, Volume 1, Queen's Printer, 1970, 111-113.

[8] D.S. Lees, Economic Consequences of the Professions, Institute of Economic Affairs, 1966, 24, 27-28.

[9] T.R. Muzondo, and B. Pazderka, Earning and Private Rates of Return Differentials, Professional Licensing and Competition Policy, Queen's University, November, 1977.

advertising may have adversely effected consumer welfare and economic efficiency. The authors of the study conclude that:

(1) if professions maximize their net aggregate earnings, a lower total level of professional service and higher fees result, although most professions would find such fee setting impractical due to the unavailability of the detailed information which is required;

(2) if minimum fees are employed by the profession, well established, highly skilled practitioners will prefer higher minimums to derive higher earnings, which will be partially gained at the expense of consumers and less established and experienced members of the profession. Aggregate earnings will be higher than without such fee arrangements, although various pressures, including internal opposition from its members, may constrain the profession from fully exploiting its monopoly power;

(3) the proposition that advertising in service markets would be wasteful may be unjustified given an examination of its costs and benefits in product markets;

(4) advertising could provide potentially significant benefits by increasing the supply of information regarding professional services with the effect that consumers' search costs would be reduced and intra-professional competition increased;

(5) rather than acting as a barrier to entry, advertising is likely to facilitate entry by reducing the period of professional under-utilization, and;

(6) lifting advertising bans could also benefit consumers if it forced, which is likely, the abandonment of fee-setting practices.

Many of the studies conducted in recent years in several Canadian provinces and the U.K., in search of alternative and more flexible organizational and administrative structures, have recognized and endorsed abandoning many of those practices which restrict competition.[10]

1. Control over Pricing

Perhaps the most blatant anti-competitive practice in the professions is price-fixing. Control over pricing is present in some professions, although with considerable variation in degree. Obviously, the greatest concern arises in cases of strictly enforced fee schedules, but it should be remembered that price competition may be non-existent even if suggested tariffs are employed and particularly when discouraged through a prohibition on advertising.

---

[10] See Ontario, Royal Commission Inquiry Into Civil Rights, Report Number One, Volume 3, 1968; Quebec, Report of the Commission of Inquiry on Health and Social Welfare: The Professions and Society, Volume 7, Tome 1, Part 5, 1970; L'Office des Professions du Québec, La règlemantation des honaires, professionels dans la pratique privée, June, 1977; Alberta Select Committee of the Legislative Assembly, Report II on Professions and Occupations, December, 1973; Economic Council of Canada, Interim Report on Competition Policy, Information Canada, 1969; Ontario, Report of the Committee on the Healing Arts, Queen's Printer, 1970; The Monopolies Commission, A report of the general effect on the public interest of certain restrictive practices so far as they prevail in relation to the supply of professional services, Part I; The Report, Her Majesty's Stationery Office, October, 1970.

It has been possible for professional control over fees to arise because of the broad self-regulatory powers assigned. This is clearly an issue where one must be cautious in differentiating professional self-interest from the public interest and where consideration must be given to the costs imposed on society. The professions' rationale for limiting price competition may vary, but generally includes the arguments that it is in the public interest by guaranteeing standards of quality of service, creating price certainty, and encouraging professionals to assume more complex, higher-cost assignments. Evidence to support these arguments is lacking and they ignore the detrimental effects of price-fixing.

The protection of the public interest in standards of competence and integrity is the function of controls on entry; quality is not guaranteed by a high and fixed price. Any member of a profession who would provide inferior quality in order to attract customers through lower prices would be just as likely to provide the same quality of service at a fixed price and reap additional profits. It is dubious that price certainty is a desirable goal and if there is any justification to the argument it only appears when competition is so stifled that consumers are unable to exercise freedom of choice. The notion that price-fixing encourages the undertaking of more complex work is also questionable since it can be argued that practitioners may concentrate on providing the simpler, lower-cost services.

When suppliers exercise complete control over the prices of the services they provide, they can increase fees whenever they choose to cover increasing costs. The result is that inefficiencies and waste may develop and grow. Higher prices reduce the demand for services with the result that there may be less work for members of the profession and access to services is restricted to those who can afford them. This problem is particularly serious in health and other personal services fields; it is very difficult to argue that an absence of price competition is in the public interest if some members of society are denied access to essential services because fees are too high.

Price-fixing has broader social costs because it distorts the allocation of resources in the economy. High rates of return encourage more persons to enter the profession and, in the professions where entry may be controlled by existing suppliers rather than the market, the likelihood of arbitrary and discriminatory barriers to entry is increased.

Price competition will also help to assure that practitioners receive fair returns, but when a profession exercises some influence over income by controlling fees, it creates suspicion in the minds of the public and may create demand for some measure of social control. While preferable to a professional association, it is my view that a public agency may be less likely to be an effective regulator of fees and incomes than a competitive market.

In a narrower sense, pricing restrictions have serious effects on individual consumers. It clearly means that prices may be higher than necessary and consumers may be over-charged. More significant, however, is the denial of consumer sovereignty. The buyer of professional services may have no right to choose the amount and quality of service he requires; he certainly cannot choose a lower quality service at a lower price if he would prefer to do so. This leads to economic waste as additional or higher quality services are provided than are necessary. It will also limit access to professional services where a consumer is not permitted to purchase the service he wants and can afford, but is unable to afford the service he would be required to purchase.

2. Restrictions on Advertising

In its code of ethics or other rules, a profession may establish restrictions on the advertising which may be engaged in by members. Part of the rationale for such restrictions may stem from the attitude that competing for and trying to attract business is unethical. Professions in the U.S. and U.K. have restricted advertising on the basis that controls are necessary to prevent advertising of a nature that would lower the prestige of and reduce public confidence in the profession. It is also maintained that

advertising would increase the cost of services provided.[11]

These arguments fail to make the necessary distinction between persuasive and informational advertising. It is true that some oligopolistic industries engage in wasteful promotional advertising, but restrictions on advertising of a purely persuasive nature do not have serious detrimental effects on competition. What is of concern are restrictions on the dissemination of information of fees, the availability of services, and areas of specialization. The lack of this type of information reduces incentives to price competition and may even create demand for price certainty since consumers are unable to seek out lower cost sources and may want assurance that they will not be over-charged. In addition, it reduces incentives for specialization and innovation in services and techniques and imposes a barrier to the entry and expansion of business of new members of the profession. Informational advertising can hardly reduce public confidence in a profession and its prohibition cannot be justified when consumer ignorance limits access to services and restricts freedom of choice.

---

[11] John R. Darling, Attitudes Toward Advertising By Accountants, The Journal of Accountancy, February, 1977, 48-49; D.S. Lees, Economic Consequences of the Professions, Institute of Economic Affairs, 1966, 18-19, 22-28.

The suggestion that advertising will simply lead to higher prices because of higher costs is contradicted by evidence which suggests the opposite to be true. For example, a recent study by J.F. Cady found that, on the average, prices for pharmaceutical drugs in his sample were consistently higher and more widely dispersed in states that restricted retail price advertising for drugs than those that did not. In addition to increasing consumers' search costs with a resultant loss in welfare, Cady estimated that such advertising restrictions cost American consumers approximately $400 million more in drug costs during 1975. This led Cady to conclude

> ... that advertising can act as a significant stimulus to market competition through the provision of salient, useful information. To ignore this effect and to view all advertising as abusive, deceptive, and contributing to imperfect market conditions is potentially detrimental to consumer welfare.[12]

---

[12] John F. Cady, Advertising Restrictions and Retail Prices, Journal of Advertising Research, 1976, 29-30. See also Lee and Alexander Benham, Regulating Through the Professions: A Perspective in Information Control, Journal of Law and Economics, Vol. 18, October, 1975, 421-47, and Virginia State Board of Pharmacy et. al. v. Virginia Citizens Consumer Council, Inc., et. al., 425 U.S. at 754, and n. 11, which notes that a survey performed by the American Medical Association in Chicago revealed a price differential of up to 1200% for the same amount of a specific drug.

3. Entry Restrictions

The rationale for assigning self-regulatory authority to the professions lies in the belief that only the members of a profession possess the expertise necessary to establish entry standards to protect the public interest. To a certain extent and in specific cases this may be true, but it is also important to consider the costs associated with restrictions on supply and the inherent dangers of leaving the control over supply to existing practitioners.

Artificial restrictions on entry and the supply of professional services create distortions in the economy. At the same time there is a need to protect the public and it is generally recognized that this need may outweigh the economic costs. The real danger arises when a profession alone has the right to exercise such control. Situations where members purposely restrict entry to lessen competition and to guarantee greater returns to existing members are, hopefully, rare, but it must be recognized that professions may confuse the public interest and professional self-interest. A belief that competition is harmful to the public may result in misguided conduct to lessen competition by restricting entry.

A desire to maintain the quality and the reputation of a profession may lead it to establish continually higher entry requirements to reflect the growing

sophistication of expertise in the field. However, these standards may actually be greater than what is needed to assure the minimum standards necessary to the public, with resulting distortions in resource allocation and additional limitations on consumer choice. Artificial restrictions on supply, particularly when accompanied by price-fixing and other practices, lead to higher prices and unjustified enrichment of professional incomes.

4. Other Restrictions

Restrictions which limit the form of organization of a professional practice, for example by prohibiting incorporation or restricting partnerships, may also adversely affect competition. They restrict the achievement of economies of scale where they may be possible and limit the scope for investment in the development of professional services. Some organizational restrictions may be justified to protect the public, but ones designed solely to protect the less efficient members of a profession or to maintain a profession's monopoly over the supply of a service may be detrimental.

As has been noted, many of the restrictive trade practices engaged in by the professions arise from a prevailing attitude that competition is unethical or unprofessional. That attitude leads to a variety of other practices which deny the benefits of competition to the

public. Some of these other practices include general prohibitions on competing for business, including bans on the submission of tenders.

It is argued that such bans are necessary because if a professional commits himself to a firm price for a contract and has offered a lower price to obtain the contract, then he may be unable to provide the quality of service required. This argument implies an absence of ethics on the part of the professional involved. It also suggests a lack of sophistication on the part of the buyers and that is not always a fair assumption. A client who wishes to call tenders for certain types of work is likely well-informed as to which suppliers provide services that are satisfactory to his needs and will only ask for prices from those suppliers. In addition, a call for tenders will likely arise for types of work which are standard and routine and which are performed satisfactorily by most suppliers.

A prohibition on competition generally denies the benefits discussed above. Most seriously, the belief that competition is harmful leads to the promulgation of rules and regulations affecting all aspects of a member's business and which serve to stifle competition in all possible forms. The range of restrictive practices engaged in lends support to the conclusion of the Ontario Committee on the Healing Arts that

> ...the history of the /self-/ regulatory bodies in Ontario abounds in decisions, policies and regulations of a truly or apparently restrictive practice nature. Our examination of the practices of the professions discloses an inclination on the part of the statutory governing body to see itself as the defender of the interests of its members...[13]

A similar conclusion was made by the Commission of Inquiry on Health and Social Welfare in Quebec which examined professional control over commercial activities:

> Privileges and restrictions of this type are explained by bygone historical situations. They are socially ineffective since they restrict access to services; they are professionally without significance because they do not guarantee quality of service. If they serve the interests of certain members of a profession, they do not protect the profession itself.[14]

In its Interim Report on Competition Policy, the Economic Council of Canada endorsed a recommendation of the Ontario Royal Commission Inquiry into Civil Rights that lay members be appointed to governing bodies to represent consumers and help ensure that power is exercised in the public interest rather than the professional interest. The Council considered three systems of checks and balances for the determination of professional renumeration. It accepted that where desired and sufficiently effective, collective

---

13 Ontario, Report of the Committere on the Healing Arts, Vol. 3, 1970, 43.

14 Quebec, The Professions and Society, Vol. 7, 1970, 32.

bargaining or public regulation could be adequate systems, but concluded that as a general rule, self-employed professionals should be subject to competition policy.

These studies and others which reached similar conclusions have led to changes in the direction of public policy regarding the professions not only in this country but in others as well, including the United States and the United Kingdom. In Canada, the most significant changes have been introduced at the federal level and in Quebec.

C. THE STATUS OF THE PROFESSIONS UNDER COMPETITION POLICY LAW IN CANADA

The concept of applying standards of economic performance to the professions resulted in legislation which brought the professions under the coverage of the Combines Investigation Act in 1976.

The enactment of Bill C-2 represented the recognition that the public interest is best served by competition in the supply of professional services and the superior economic performance which flows from competition. Consequently, the professions are now subject to broad national policy goals in addition to specific provincial legislation. The commercial activities of professionals are removed from the coverage of the Combines Investigation Act only when prescribed by legislation.

1. The Combines Investigation Act

Canada was one of the last countries to include service industries in its competition policy, although one of the first to legislate in the field. The first anti-combines legislation was passed in 1889, preceding by one year the Sherman Act in the United States. Since then, Canada's competition law has been amended on many occasions to broaden its scope and effectiveness. By the mid-1960's, however, it still proved to be inadequate in dealing with certain issues and the government requested the Economic Council of Canada to study competition policy with the intention of undertaking extensive revisions. The Council's report in 1969 recommended a complete overhaul of the law and was the first major step to revisions continuing to-day. To avoid protracting the passage of essential improvements because of failure to achieve agreement on all aspects of a new policy, the government has proceeded in stages through amendment of the existing Act. Stage I, Bill C-2, became law in 1976. Stage II was introduced in the House of Commons last March as Bill C-42 and re-introduced this November as Bill C-13.

Throughout most of its existence the Act did not generally apply to services, although the activities of at least one profession, pharmacy, were ruled to be subject to

the Act.[15] The reasons for this omission are largely lost in history, but the Economic Council found that "it no longer seems logical, if indeed it ever did," to exempt about 20% of Gross Domestic Product in 1967 from competition policy.[16] It is significant to point out that although the revisions to competition policy have proceeded amidst stormy debate, the extension of its application to services, including the professions, was one issue on which concensus was achieved early and it constituted one of the important changes adopted in Stage I.

The primary objective of the law is the protection of the public interest in free competition. But competition is not the goal in itself; rather competition is sought as the single most important means of achieving the larger goal of efficient economic performance. Traditionally, the Act has sought its purposes through criminal law and most of its provisions remain as criminal offences. In addition there

---

15 The Queen v. B.C. Professional Pharmacists' Society. It was held that the sale of the professional service was incidental to the sale of prescriptions and the Society was convicted on two counts under sections 32(1)(c) and (d). Other service industries previously covered by some provisions of the Act were those involving the storage, rental and transportation of an article and the price of insurance on persons or property.

16 Economic Council of Canada, Interim Report on Competiton Policy, Information Canada, 1969, 196, 140-143.

are now matters subject to civil review and Bill C-13 will significantly expand this approach by providing for civil review of such issues as mergers and monopolies by a new Competition Board. The Act is administered by the Director of Investigation and Research who is required to conduct an inquiry whenever he has reason to believe that there has been or is about to be an offence under Part V or that grounds exist for the making of an order under Part IV.1. He may also be required to conduct an inquiry on the direction of the Minister of Consumer and Corporate Affairs or upon the application of six residents of Canada. To obtain evidence the Director has the right to enter premises and seize documents and to obtain written and oral information on oath. At the conclusion of his inquiry, the Director may refer the evidence to the Attorney-General for prosecution, he may refer it to the Restrictive Trade Practices Commission or, if no further inquiry is justified, he may discontinue the inquiry.

Part IV.1 of the Act provides for the review of certain practices by the Restrictive Trade Practices Commission. On application by the Director, and after appropriate opportunity for argument, the Commission can issue remedial orders in specific cases of refusal to deal, consignment selling, tied selling, market restriction,

exclusive dealing and other practices which may have harmful effects on competition. Under the proposed legislation, the Commission's responsibilities will be transferred to the Competition Board which will also have the responsibility to issue orders in cases involving mergers, monopolization, and price differentiation. Because most reviewable matters involve a high level of market concentration and the exercise of market power, they may seldom apply to professional services generally. Nevertheless, self-employed professionals should be aware of these provisions and the Committee may decide to look further into them to review the adequacy of the protection of the public which they provide.

It is important to discuss certain of the criminal prohibitions in more detail as these have a dramatic effect on the activities of some professional groups. Again, all provisions in Part V apply to professional services, except section 34(1)(a) which deals with price discrimination in the sale of articles, but two sections have the greatest significance because they may touch upon a wide range of activities and a large number of practitioners.

Section 38 which deals with price maintenance became law on January 1, 1976. Because it replaced the previous ban on resale price maintenance, a practice which typically only arises in the distribution of articles, some

may be inclined to overlook its significance to the professions. The new section makes it an offence for anyone engaged in the business of producing or supplying a product, by agreement, threat, promise, or any like means, to attempt to influence upward or to discourage the reduction of the price at which any other person supplies or offers to supply a product. It would also be an offence for the first person to refuse to supply a product to the second person because of his low pricing policy.

I interpret these provisions to apply to the suppliers of professional services. For example, if a professional association provides services to its members, and if it requires its members to follow a fee schedule, say under threat of suspension, it may have committed an offence under this section. Similarly, if an accountant, for example, approached another accountant in a community to obtain his agreement to increase fees, he may be guilty of an offence. There has been little jurisprudence as yet on the full implications of this section, but I have made my interpretations known to various professional groups and would like the Committee to be aware of them.

The section of the Act which has the most profound effect on the commercial activities of professionals is section 32, the general prohibition on agreements or arrangements to lessen competition unduly. It was because

of its importance that application of this section to services generally became effective only on July 1, 1976 to provide a six-month period for service industries to make the necessary changes for compliance. The extension of the application of this section to services was effected by the change of the word "article" to "product". Elsewhere, "product" is defined as including an article and a service of any description whether industrial, trade, professional or otherwise. Consequently, one has the benefit of the substantial body of jurisprudence which has developed in regard to this section to assist in its interpretation. While cases have typically involved price-fixing, the section also covers agreements to allocate markets and to prevent new entry and the expansion of existing competitors.

On the basis of the jurisprudence, I believe that an agreement among a significant number of persons supplying professional services in an area to charge the same fees would be a violation of section 32. The prohibition would apply to individual practitioners in one market area acting in concert or to a provincial association and its members who agreed not to undercut a fee schedule. I have been asked on many occasions whether or not the issuance of a suggested fee schedule would be an offence and my answer has included a caution: While such an action may not be a violation in itself, it might be if it were issued by

agreement and with the intention or expectation that it would be substantially followed. If I received information that a significant number of members were charging the fees suggested in a guide established by arrangement, I would be required to conduct an inquiry.

An agreement to restrict advertising would ordinarily lessen competition, but the Act allows for certain types of restrictions. Subsection 32(2) permits agreements to restrict advertising (along with other specified agreements) provided that the agreement or arrangement would not restrict a person from entering into or expanding his business in a profession or would not lessen competition unduly with respect to prices or in the other ways enumerated in subsection 32(3). In other words, professional associations may continue to make some rules respecting advertising by their members, but they must be cautious. I believe that restrictions which go so far as to deny the dissemination of information essential in a free market such as fees, the availability of a service, and areas of specialization would raise serious questions while restrictions on purely persuasive advertising would not. In response to those who argue that a professional association must restrict advertising to protect the public from false and misleading advertising it should be sufficient to point out that the public is protected by the criminal prohibition in section 36 of the Act and by other consumer protection laws.

While it has been noted that it took a mere change in wording to extend the application of this section to services, it should not be assumed that the wide-ranging implications were not fully explored and considered. To make it clear that activities to assure the public of minimum standards of quality might not be prohibited outright, Parliament included a specific defence in subsection 36(6):

> In a prosecution under subsection (1), the court shall not convict the accused if it finds that the conspiracy, combination, agreement or arrangement relates only to a service and to standards of competence and integrity that are reasonably necessary for the protection of the public
> (a) in the practice of a trade or profession relating to such service; or
> (b) in the collection and dissemination of information relating to such service.

Ordinarily, such agreements would raise questions under the Act because they might impose barriers to entry and limit the range of products available in a market. It could be argued that such an exemption is unnecessary because if there is a need to protect the public in this way, it should and would be met by a specific statute and thereby exempted from the Act. Nevertheless, Parliament has assured that such activities may be engaged in by a professional group acting on its own initiative in the public interest. It must be noted, however, that this defence is not so broad as to permit a code of ethics that prohibits a member from undercutting a fee schedule nor does it allow setting

artificial admission requirements to limit entry into a profession as such actions do not relate to standards of competence and integrity reasonably necessary for the protection of the public.

The Act provides substantial penalties for violation of the criminal provisions in Part V and for conviction for contravention or failure to comply with an order of the Commission. An individual convicted under section 32 is subject to imprisonment for five years or a fine of $1 million or both. In addition to these penalties, a person may also be subject to civil action for recovery of damages by a person who has sufferred loss as a result of action contrary to Part V or failure to comply with an order of the Commission or a court. It is significant to point out that such action may be taken without any prior conviction. Bill C-13 would give consumers, for the first time, recourse to class actions for recovery of damages.

In addition to these penalties, professionals are subject to the deterrent effect created by social and peer pressures. Publicity of a criminal conviction may have a profound effect on the public reputation of and confidence in a profession or its members. Those who choose to stray over the bounds of legality could find their career jeopardized not only because of public censure but in those cases where a professional association provides for

expulsion of a member convicted of a criminal offence. These comments are not intended as threats, but rather to point out the degree of importance that society attaches to the goals achieved through competition. As a member of a profession, a lawyer or an engineer may be required to conform to standards of competence and integrity established in his profession, but he is also a businessman and in his commercial activities is subject to the same standards of conduct as others engaged in business.

There are few specific exemptions from the Act. Sections 4, 4.1 and 4.2 exempt certain activities related to collective bargaining, the underwriting of securities and amateur sport; most of the broad categories of conduct exempted have been discussed above. The most significant category of exemption arises in the case of activities regulated by a public agency pursuant to valid legislation. Because the mandate of this Committee is to study the legislative framework of certain professions, it is essential that it consider the status of regulated conduct under the existing and proposed competition policy law.

2. Regulated Conduct

Because the Combines Investigation Act is a statute of general application, occasions arise where it may conflict with a specific policy objective. Two judicial decisions have given guidance when such conflicts arise.

In 1957, the Supreme Court of Canada considered a scheme under Ontario farm products marketing legislation and concluded that it was not in conflict with the Combines Investigation Act. Kerwin, C.J.C. said:

> 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.[17]

The question of regulated activities arose in Regina v. Canadian Breweries Limited in the Supreme Court of Ontario. McRuer, C.J.H.C. stated:

> When a Provincial Legislature has conferred on a Commission or Board the power to regulate an industry and fix prices, and the power has been exercised, the court must assume that the power is exercised in the public interest. In such cases, in order to succeed in a prosecution laid under the Combines Act with respect to the operation of a combine, I think it must be shown that the combine has operated, or is likely to operate, so as to hinder or prevent the Provincial body from effectively exercising the powers given to it to protect the public interest.
>
> There may, however, be areas of competition in the market that are not affected by the exercise of the powers conferred on the Provincial body in which restraints on competition may render the operations of the combine illegal.[18]

---

17 Re The Farm Products Marketing Act, R.S.O. 1950, C. 131 as amended (1957) 7 D.L.R. (2d) 257 at page 265.

18 Regina v. Canadian Breweries Limited, 126 C.C.C. 133 at page 146.

These principles have had a profound effect on competition policy in Canada because they effectively exempt a significant portion of economic activity from the Act. My predecessors and I have been guided by the jurisprudence and there have been no cases since in which there has been judicial comment on the issue. Obviously, there remain many specific cases where it is difficult to say whether an exemption applies or not. This is particularly true in the self-regulating professions where legislation may grant broad powers and it is difficult to know if specific authorization and effective public regulation exist.

In an effort to assist the courts, other legislators, regulatory bodies and those subject to regulation, Parliament is considering clarifying the law on the exemption for regulated conduct in Bill C-13. As introduced, a new section 4.5 would exempt, from most substantive provisions of the Act, conduct which meets these conditions:

a) the conduct is regulated by a regulating agency which derives its power from a federal or provincial statute;

b) the regulating agency is:

(i) not appointed or elected by the persons subject to its regulation, or

(ii) in the case that it is an agricultural products marketing board, is subject to the supervision of a supervising agency

that is not appointed or elected by the persons whose conduct is subject to its supervision;

c) the regulating agency is expressly empowered by the legislation to regulate in the manner it is so doing;

d) the regulating agency has expressly directed its attention to the regulation of the conduct.

The new Bill also proposes to exempt the conduct of a regulating or supervising agency that derives its power to regulate conduct or supervise the regulation of conduct from a federal or provincial statute. These standards are similar to those which have been established by jurisprudence in the United States.[19]

I believe that these provisions will go a long way to clarify the existing law and prevent the unwary of unintentionally crossing the bounds of legality. The provisions also have considerable significance to the work of this Committee to help it avoid the danger of recommending legislation which may give a broader exemption from the Competition Act than what it may intend as being in the public interest.

---

19 Joe Sims, State Regulation and the Federal Anti-Trust Law, U.S. Department of Justice, 1974.

D. DEVELOPMENTS IN OTHER JURISDICTIONS

Discontent with the inefficiencies and inequities spawned by professional self-control is evident in recent developments in Quebec, the U.S., and U.K., which have emphazised and, to some extent, implemented greater reliance on the private market as a regulator of the professions. Despite evolving through different mechanisms, a realization has emerged that competition, combined with enhanced freedom of choice, serves to coordinate the market for professional services and ensure their operation in the public interest. This evolution of thought is most noticeable in the United States where it has been achieved through constant legal questioning, and in Quebec which is advocating more competition within the professions after recently reorganizing its professional laws on the basis of more direct government intervention.

1. Quebec

Following the proposals of the Commission of Inquiry on Health and Social Welfare, in 1973 the Quebec government implemented an extensive reorganization of the province's professions by enacting the Professional Code in addition to twenty-three acts pertaining to specific professions.[20] The legislation is designed to protect the

---

20 See L'Office des Professions du Québec, Reform of the Professions in Quebec, L'Editeur Officiel du Québec, October, 1976.

public interest through increased public regulation and a more precise definition of professional obligations. Two of the most important provisions are those allowing for public representation in the professional decision-making process through lay appointments to administrative and disciplinary bodies and the creation of L'Office des Professions du Québec which assumes a supervisory role.

The legislation attempts to limit the monopoly powers traditionally wielded by many professions by first considering whether they should be incorporated with exclusive right to practice, which yields a monopoly over practice and title, or with reserve of title, which permits use of the professional title only. The distinguishing criterion used by L'Office is the environment in which the profession functions. Where the nature of the service is strictly personal and provided on an independent basis with no third-party supervision of quality, exclusive right to practice is granted. In other cases, reserve of title incorporation is issued which is more conducive to competition. The monopoly power of professions with exclusive right to practice is partially dampened by requiring services under their jurisdiction which can be competently performed by other classes of professionals to be so delegated.

The following provisions, applicable to all professions, are intended to further curtail the exercise of restrictive behaviour:

(1) Admission is to be based on the holding of a degree recognized by the Lieutenant Governor in Council who is given regulatory powers to help determine the educational requirements necessary to acquire a licence. Any additional conditions imposed by the profession must be approved by the Lieutenant Governor in Council. Except for lawyers, notaries, and land surveyors, foreign professionals may be admitted as permanent members conditional upon a declaration of intent to pursue Canadian citizenship and the possession of a diploma recognized by the profession.

(2) Regulations governing practise which affect the public interest, such as codes of ethics and types of advertising permitted, are subject to approval by the Lieutenant Governor in Council on the advice of L'Office.

(3) Where L'Office is not satisfied with certain rules it may intervene to have them altered or removed; again subject to approval by the Lieutenant Governor in Council who has expanded regulatory powers under the legislation.

(4) Disciplinary procedures for violations of codes of ethics is rendered more uniform while mechanisms for inspecting professional competence are established.

(5) Public representatives are appointed by L'Office for representation on governing bodies.

(6) Fee schedules are derived from consultation of L'Office with the professions and must be endorsed by the Lieutenant Governor in Council.

Although the legislation leans toward more direct government regulation, it is interesting to note that L'Office des Professions has recently advocated greater reliance on the competitive system as a means of regulation. In 1976 , it expressed its intention to recommend to the government that, except in rare circumstances, new professions only be incorporated with reserve of title in order to avoid the rigidities of monopoly power associated with exclusive right to practice.[21]

More recently, in a study[22] examining the feasibility of regulating fees as specified in the Professional code, L'Office stressed the need to promote competition to best ensure the public interest and optimum use of resources which various fee arrangements among professionals distort. In fact, no fee schedules have been approved by the Lieutenant Governor in Council in Quebec since 1973. L'Office also suggested less professional control over entry to ensure an adequate supply of profes-

---

21 L'Office des Professions du Québec, The Evolution of Professionalism in Quebec, September, 1976, 63-65, 69.

22 L'Office des Professions du Québec, La règlementation des honoraires, professionels dans la pratique privée, June, 1977.

sionals in response to market demands and intends to recommend that the right to perform certain services under the jurisdiction of professions with exclusive right to practice be granted to other classes of professionals. L'Office also rejected restrictions designed to prevent the advertising of areas of specialization or fees.

2. United States

The application of competition policy to the professions in the United States, which has primarily concentrated on pricing and advertising restrictions, has come about through recent jurisprudence and stricter enforcement of antitrust laws rather than by legislation as in Canada. These pressures have compelled significant moderation of restraints on competition in the professions.

In 1975 a unanimous and precedent-setting decision by the U.S. Supreme Court in Goldfarb v. The Virginia State Bar[23] shattered the notion that the "learned professions" were exempt from the Sherman Antitrust Act by ruling that the suggested minimum fee schedules levied by the Virginia State Bar constituted illegal price fixing.

Significantly, the Court rejected the defense that price competition is inconsistent with the maintenance of professional standards and integrity. By extending their

---

23 Goldfarb v. The Virginia State Bar (1975) 95 S. Ct. 2064.

use beyond the "purely advisory" stage, the fee schedules, which were enforced through the possibility of disciplinary action by the State Bar, created a rigid floor price with pernicious affects on competition. The court rejected the defense of state regulation, as first recognized in Parker v. Brown[24], since the state had not authorized the schedule through any statute or its Supreme Court rules and despite references to advisory fee schedules in the Virginia Supreme Court's code of ethics, it neither required their distribution nor authorized their use in fixing prices. Furthermore, the State Bar's ethical opinions, which favoured the schedules, were not approved by the Virginia Supreme Court, the ultimate regulator of the legal profession in the state.

Earlier this year, the U.S. District Court of Appeals in Washington, D.C., held that the National Society of Professional Engineers' ban on competitive bidding amounted to a per se violation of the Sherman Act under Goldfarb.[25] Although prices were not directly fixed, the Court determined that the ban prohibited free price competition and was used in situations where the public interest was not endangered.

---

24 In Parker v. Brown (1943), 317 U.S. 341, the U.S. Supreme Court held that restrictions on competition imposed by the state acting as a sovereign were exempt from Sherman Act prosecution.

25. U.S. v. National Society of Professional Engineers, Trade Regulation Reports, (1977-1) Trade Cases 61, 317

Recently, challenges to the legality of advertising restrictions instituted and policed by the governing bodies of professional associations have focused attention on two crucial decisions by the U.S. Supreme Court. In Virginia State Board of Pharmacy, et al. v. Virginia Citizens Consumer Council, Inc., et al., the Court held that a Virginia statute which prohibited the advertising of prescription drug prices was an unconstitutional restraint on free speech. Observing that high professional standards were assured through close regulation, the Court recommended an alternative to the State's "highly paternalistic" approach of protecting its citizens by keeping them in ignorance:

> That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.[26]

Similarly, the Court affirmed the constitutional right of lawyers to advertise the price of their services in Bates v. The State Bar of Arizona. The dispute arose when two Arizona attorneys, in violation of an Arizona Supreme Court's disciplinary rule, placed a newspaper advertisement concerning the types and prices of services offered at their

---

26 Virgina State Board of Pharmacy, et al., v. Virginia Consumer Citizens Council, Inc., et al. (1976-1) Trade Cases 60,930.

"legal clinic". Although the Court agreed with the Arizona Supreme Court that the proscription was immune from anti-trust prosecution under Parker v. Brown, it found no reasonable justification for the ban. Since the nature of the advertisement dispelled any concern over claims of quality or personal solicitation, the Court firmly asserted that such advertising yields benefits by providing consumers with relevant and vital market information, which "performs an indispensable role in the allocation of resources in a free market system", reducing legal costs, and facilitating new entry.

It dismissed the argument that advertising would adversely affect professionalism and create serious enforcement problems by finding

> ...the postulated connection between advertising and the erosion of true professionalism to be severely strained.
> ...It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort.[27]

In addition to the above private suits, the Federal Trade Commission and Justice Department have levelled their antitrust weaponry against the professions. The FTC is primarily concerned with eliminating barriers to new entry, price fixing, advertising restrictions, and undue

---

27 Bates v. The State Bar of Arizona, Antitrust and Trade Regulation Report, No. 820, June 30, 1977.

limitations on the definition of services performed exclusively by the professions. In 1975 it charged that the advertising restrictions of the American Medical Association lessen competition, create fixed and stable prices, and deny consumers access to pertinent market information. It similarly attacked the advertising and pricing restrictions imposed by the American Dental Association and four state dental associations. It has also moved to have abolished the advertising restrictions imposed on pharmacists, ophthalmologists, optometrists, and opticians, and is conducting an investigation of the accountancy profession. Also, the Antitrust Division of the Justice Department has initiated suits against the American Bar Association and the American Pharmaceutical Association to compel them to allow their members to advertise.

There is some evidence that the cumulative impact of recent court decisions and FTC and Justice Department action has forced a partial easing of advertising restrictions by some professions. For instance, Goldfarb apparently induced the American Bar Association to amend its regulations to expand the nature of information lawyers could include in legal directories and the yellow pages.[28] In

---

28 The amendments allowed attorneys to include in legal directories and the yellow pages, subject to state approval, biographical information, office hours, credit arrangements, and fees for initial consultation.

January, 1977, the State of Michigan, in response to the antitrust suit initiated by the Department of Justice against the A.B.A.'s advertising restrictions, amended its Code of Professional Responsibility with the approval of the Michigan Supreme Court to become the first state to allow attorneys to advertise fees, areas of specialization, and pertinent biographical information in the yellow pages.

The Bates decision accelerated this trend, at least in the legal profession.[29] Less than two months after Bates was delivered on June 27, 1977, the A.B.A. relaxed its advertising restrictions still further by permitting attorneys to publish a variety of fee information including hourly rates, contingency fees, fee ranges, and charges for specific services. Procedures for expanding the types of information which may be published were also provided, but the use of personal solicitation and television is forbidden unless it can be demonstrated that they are absolutely necessary to disseminate adequate consumer information. Apparently, the Department of Justice does not believe these changes are sufficient and preferred as a minimum, a proposal which would have allowed attorneys to advertise, subject to the same media restraints, any information that was not fraudulent, deceptive, misleading, or false.

---

29. Apparently, Canada's legal profession is experiencing increasing pressure to ease its ban on advertising as a result of amendments to the Combines Investigation Act and developments in the U.S. See the Financial Post, Law Meets Politics, September 10, 1977.

The A.M.A., in January of this year, reacted to the FTC's charges by liberalizing its restrictions pertaining to advertising by physicians. However, the FTC was not satisfied that the anti-competitive practices were withdrawn and so refused to discard its complaint as the A.M.A. had requested.

3. United Kingdom

In 1970 the British Monopolies Commission released a report[30] of its investigation of the effects on the public interest of certain professional restrictive practices. Recognizing that these activities have escaped detailed scrutiny in the past, but often have a detrimental impact on competition, the Commission concluded that:

(1) Some restrictions on entry are necessitated by the various qualifications of professional practice which are in the public interest. However, the qualified should not be unduly prevented from practising by artificial barriers to entry nor should the unqualified be barred from practising except in situations where the public interest is severely endangered.

---

30 The Monopolies Commission, A report on the general effect on the public interest of certain restrictive practices so far as they prevail in relation to the supply of professional services, Part I; The Report, Her Majesty's Stationery Office, October, 1970.

(2) Where price competition is not presently permitted, its introduction would constitute the single most important stimulus to competition, efficiency, and innovation. Only in situations where its disadvantages are substantial should price competition be eliminated.[31]

(3) Only where the client's trust and confidence is jeopardized or where serious overconcentration of practice would occur, are restrictions on forms of professional organization justified. Otherwise, such restrictions yield slight or non-existant benefits and may be unproductive by impeding more efficient methods of distribution. Except where detrimental conflicts of interest would arise, inter-professional partnerships should not be deterred since they could produce economies of joint supply.

(4) Restrictions on informative advertising should be eliminated.[32]

---

31 Two recent reports from the Monopolies Commission recommended that architects' and surveyors' services be subject to price competition. The Commission concluded that, with limited exceptions, fee scales be abolished for property valuations and property management by surveyors. It also proposed that any fee scales for architects' commissions and other surveyors' services be established by an independent committee in order to safeguard the public interest. See the Financial Times (London, England), Thursday, November 10, 1977.

32 Monopolies Commission, Report, 1970, 68-86.

In 1976 the Commission made public its report on the study of the anti-competitive effects of advertising restrictions imposed by various professional groups.[33] Since the issues and recommendations enumerated by the Commission are similar for each report, those pertaining to solicitors are representative of their direction. As in many Canadian provinces, U.K. solicitors who advertise in unapproved sources are guilty of professional misconduct and are liable to sanctions of censure.

The Commission identified the following disadvantages associated with the advertising restrictions imposed on solicitor's services:

(1) They prevent consumers and potential entrants from receiving vital information about the nature of services offered by individual practitioners and firms of professionals.

(2) They adversely diminish the competitiveness, efficiency, and innovation of the profession while impeding entry.

---

33 In August, 1973, the Commission was assigned the task of reporting on advertising restrictions followed by accountants, veterinarians, surgeons, stockbrokers, solicitors, and barristers.

(3) They may cause the profession to resort to less desirable and challengeable methods of attracting clients resulting in harm to the public's confidence in the profession.[34]

Concluding that the costs of such restrictions outweigh any benefits, the Commission advocated the termination of general bans on advertising in favour of permitting solicitors to use any methods of publicity they deem suitable subject to the conditions that promotional and misleading advertising be avoided.

As of January this year, the full Monopolies and Mergers Commission was examining the reports which were submitted to Parliament. Negotiations with the professions had also commenced by the Commission whose recommendations were expected to be adopted.

---

34 The Monopolies and Mergers Commission, Services of Solicitors in England and Wales, Her Majesty's Stationery Office, July 1976, 39.

E. SUMMARY AND CONCLUSIONS

In addition to studies in other provinces and countries, two reports in Ontario have identified the major problem concerning professional organization. In 1968, the McRuer Commission reported:

> We have made it clear that the power to admit a licensee is not conferred to protect the economic welfare of the profession or occupation. Those professions or occupations which have been granted self-governing status are charged with a responsibility not only to see that persons licensed are qualified, but that all qualified applicants are licensed. The public has a genuine and very real interest in knowing that the members of the self-governing bodies are properly trained and have good ethical standards.
>
> ...
>
> But it must be recognized that each of the self-governing bodies has been given a statutory monopoly through its licensing powers. What has to be guarded against is the use of the power to license for purposes other than establishing and preserving standards of character, competence and skill.[35]

A similar conclusion was reached by the Ontario Committee on the Healing Arts:

> This Committee is fully cognizant of the importance of professional integrity both to practitioners and to the public, but we remember also that the delegation of responsibilities by the state of the professional licensing bodies confers on those bodies a monopolistic power. Like other monopolistic concentrations in a society, this power may not always be exercised in the

---

35 Ontario, Royal Commission Inquiry into Civil Rights, Report No. 1, Vol. 3, 1968, 1172.

> public interest. Such delegations of power by the state are intended, not just primarily but exclusively, to be used in a manner which will promote and maintain high qualitative standards of practice; the sole justification for such delegation of power is the protection of the public. Even when used with great care and discretion, monopolistic powers are always dangerous and require constant public scrutiny.[36]

The most significant national development towards a solution of this problem was the extension of the application of the Combines Investigation Act to professional services in 1976. The criminal law now exists as a check on the monopolistic practices of a profession which are contrary to the public interest. Activities which continue to be exempt are those specified by law or subject to effective public regulation. Further amendments to the law will go a long way to clarify the regulated conduct exemption.

The distinction between the public interest and professional self-interest was drawn clearly in the one case under the Combines Investigation Act involving a profession. That case concerned an agreement among the members of the B.C. Professional Pharmacists' Society to apply a surcharge of $1.00 on prescriptions supplied to persons receiving welfare benefits. Questions concerning the public interest and the effect of provincial legislation arose during the

---

36 Ontario, Report of the Committee on the Healing Arts, Vol. 1, 1970, 7.

trial. These comments by Mr. Justice Seaton of the Supreme Court of British Columbia should be kept in mind by all professionals:

> It can also be said that competition is limited in that the Pharmacy Act eliminates competition from non-pharmacists. That Act is for the protection of the buyers of prescriptions not the sellers. The powers necessarily given a profession to protect the public may not be used against the public interest. Where, as here, competition can only exist among a limited number the protection of that competition is of increased importance.[37]

The Society was found guilty on two counts under sections 32(1)(c) and (d) of the Act.

The new competition legislation extends to all professions an environment which provides protection to the public from the unwarranted and unreasonable exercise of monopoly power. Prior to the coming into force of the amendments to section 32, I conducted a Notification Programme, informing service industry associations of the new law. Where possible, I also pointed out specific practices which might be illegal after July 1, 1976 and invited any questions. Representatives of many professional bodies have met with me or my officials in recent years to discuss specific problems and they have generally displayed a desire to comply with the law.

---

37 The Queen vs. B.C. Professional Pharmacists Society et al. (1971), 1 W.W.R. 705; 17 D.L.R. (3d) 285; 64 C.P.R. 129.

Nevertheless, the attitude that competition is unprofessional or unethical is still a strong one. While there have been changes regarding enforced fee schedules, there is still a reluctance to engage in price competition. In some cases, restrictions on informative advertising and bans on competing for work still exist. A recent report concerning consulting engineers in Ontario illustrates the reluctance to change among members of a profession. It is reported that consulting engineers have failed to take advantage of a relaxation of advertising constraints even though it was determined by their association that lack of advertising was responsible for the loss of work in Canada to foreign consultants.[38]

While changes in this attitude cannot be legislated, they will be encouraged by an environment which reduces the scope of restrictions and regulation. There is no justification for legislative provisions which allow professional organizations complete discretion in activities such as control over fees, informative advertising, and other forms of competition. Similarly it should be possible through careful drafting to avoid assigning broad powers which might be interpreted as authority to impose artificial restraints on competition.

---

38 Globe and Mail, September 14, 1977.

It has been reported to the Bureau of Competition Policy on several occasions that some of the professions and other industries in the services sector would request new or additional provincial legislation to exempt their activities from the Combines Investigation Act. I do not know if the Committee has received such submissions, but if it has, they should be considered with caution. I am not aware of any case where the public interest is better served by restrictions on competition in the supply of professional services which would now be illegal under the Combines Investigation Act. As discussed above, the Act incorporates a defence for arrangements which relate only to standards of competence and integrity reasonably necessary for the protection of the public. A profession which wants to engage only in such arrangements has nothing to fear under the criminal law. The rationale for provincial legislation or regulation of such activities arises in those cases where the province believes that the specific arrangements it considers necessary would either not arise or could not be enforced without compulsion. A suggestion that a profession requires additional exemption is likely based on the continuing attitude that competition is unprofessional and should be looked at suspicioulsy.

Since the Committee's recommendations will significantly influence the future strength and persistence of such attitudes, due consideration of the role of

competition as an effective regulator is an essential ingredient in the Committee's evaluation of its terms of reference. Safeguarding against the abuses of monopoly power can be achieved by restricting the profession's control to those activities which are absolutely necessary to protect the public, by specifically and narrowly defining the sphere of those activities, and by providing a mechanism for effective regulation including the appointment of lay members to governing bodies.

Questions of the division of functions and jurisdiction of professional groups, the creation of new groups and sub-groups and the recognition of para-professionals should be considered solely in the context of assuring minimum standards of quality if such standards are necessary. Such decisions should not include consideration of protecting the existing members of a profession or preventing competition between two or more professional groups, but rather follow the criteria that every person qualified to provide a service be permitted to do so.

In regard to the latter point, only in rare circumstances should Canadian citizenship or British subject status be deemed a proper condition of entry. Commenting on its appropriateness in the dentisty profession, the Ontario Committee on the Healing Arts noted that "It would be difficult to conceive of an attribute that is less related to competence to care for the dental health of the public

than the Canadian citizenship of the practitioner."[39]

The public interest in dynamic and efficient markets for professional services need not conflict with legitimate needs for protection from the unqualified. As discussed, provincial legislation may remove the checks found in the Combines Investigation Act on the exercise of monopoly power by the professions. It is essential that such exemptions be limited to those activities where it is necessary and that alternative checks be provided through adequate public representation on governing bodies and effective public regulation. Such an approach will foster the much needed development of competition and efficiency in the professional sector of the economy and improve public confidence in the professions.

---

39 Ontario, Report of the Committee of the Healing Arts, Vol 3, 1970, 51.