Hunter, Lawson

Competition policy and regulation : the Jabour case

Paper presented at the Law and Economics Workshop, Faculty of Law, University of Toronto, December 1, 1982.

Canada

CCA-170 (4-82)

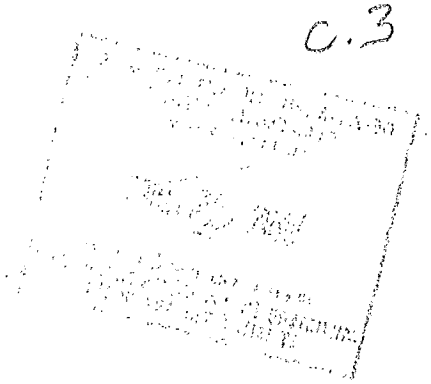
Paper presented by Lawson Hunter at the

Law and Economics Workshop

Faculty of Law

University of Toronto

December 1, 1982



Dec 1st/82

LAW AND ECONOMICS WORKSHOP

Competition Policy and Regulation: The Jabour Case

Section II: The Jabour Case

A. The Extension of the Combines Investigation Act to Professional Services.

The Stage I amendments to the Combines Investigation Act in 1976 were effected in recognition of the existing jurisprudence concerning regulated activities and the assumption that this jurisprudence would apply in the case of those industries to be caught by the Act for the first time.

The extension of Canadian antitrust law to services was perhaps the most significant single change brought about by Stage I. Services were defined to include professional services.* Department officials saw no serious conflict between the Act and the provincial statutes authorizing self-regulating professions to set reasonable entry and quality standards. The Department's explanatory notes specifically pointed out that a number of services including the professions "would continue to be immune from the legislation to the extent that their activities were regulated or expressly authorized by law," and later:

> "Many of the professions enjoy extensive powers of self regulation under Provincial statutes, particularly in matters affecting professional standards such as entry requirements. The proposed amendments would not affect those arrangements. However, 'commercial' activities

* The word "article" was changed in most sections of the Act to "product" and product was defined as including an article and service; " 'service' means a service of any description whether industrial, trade, professional or otherwise;" (s.2)

> such as the fixing of fees are frequently not covered by the Provincial laws, and in such cases they would henceforth have to be in accordance with the provisions of the Combines Investigation Act, unless covered by valid provincial legislation." *

It is interesting to note that this concept was widely understood and other groups in the services sector were concerned that they lacked such protection. During debate on the Bill, the Canadian Real Estate Association sought assurance that its entry requirements would not create problems under the prohibition in s. 32(1) on agreements to lessen competition unduly. Although it could be argued that a court would not likely find such restrictions illegal, any doubt was removed by adding this defence as ss. 32(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 rleating to such service."

The language of this section was carefully chosen. The word "ethics" does not appear because of concern that it would effectively provide a blanket exemption for all Codes of Ethics. It was known that many already included provisions against competitive activity and others could easily be amended to do so.

The 1976 amendments and the Director's Notification Program led to a series of meetings with professional associations.

* Consumer and Corporate Affairs, Proposals for a New Competition

The notion that the "regulated conduct" exemption was limited to activities specifically authorized by law or effectively regulated by a public body pursuant to valid statute constituted a continuing thread of such discussions. Whether or not the Director of the day agreed that a purely self-regulating body should set minimum fees or otherwise restrict competition, without public supervision, he did not undertake inquiries if such activity was taken pursuant to specific statutory authority. In fact, a review of the Bureau's record illustrates that rather than actively seeking out cases to challenge, it responded cautiously to complaints brought to its attention.

The most immediate and significant effect of the 1976 amendments came not from vigorous enforcement of the new laws, but from voluntary compliance. In real estate, law, architecture, and others, associations either withdrew their set fees or made it clear that they would not be enforced. Where tariffs stayed on the books, they either became dated or were described as being "guides" only and it was well known that they were not widely followed. Even in Québec, where laws require minimum tariffs and provide for effective regulation by the Office des Profession and Lieutenant-Governor in Council, no new tariffs have been approved since 1973.

While such voluntary compliance diminished the likelihood of a Combines challenge on fees, it presaged enforcement on other fronts. Although the Bureau had always expressed its concern about issues such as prohibitions on advertising and unreasonable restrictions on entry,* the self-regulating bodies appeared more reluctant to alter their practices in these areas. It is not clear if this was because they saw the battle for fixed fees lost but were not prepared to concede other issues, or rather if they saw a distinction in their statutory powers: While few had specific powers to regulate advertising and other commercial practices, such activities may be more easily justified under general powers to maintain ethics and quality than price-fixing would be.

The application of the Combines Investigation Act to agreements to restrict advertising illustrates that in spite of its weaknesses, it does envisage the wide variety of activities that may be subject to collusion and allows for each to be examined on its own merits.

Economists have long debated the affects of advertising on competition. In oligopolistic markets involving relatively homogeneous products, it can be argued that extensive promotion is directed at product differention and creating or altering consumer taste. Brand loyalty and high advertising costs impose

---

* See, for example, Bureau of Competition Policy, Stage I Competition Policy Background Papers, April, 1976.

barriers to new entry and firms are able to extract higher prices. An opposing view is that advertising promotes competition by adding to the consumers' stock of knowledge. The perfect competition model assumes, inter alia, perfect knowledge on the part of buyers and sellers in the market. To the extent that advertising moves the level of knowledge closer to the ideal, it is beneficial.

These differing viewpoints are not necessarily mutually exclusive, and it is the latter which is relevant when considering markets for professional services. There is no question but that consumer ignorance of professional services is high.* In fact it is because consumers are not expected to possess adequate information that the professions have been granted powers of self-regulation - to protect the public by assuring that only those who are qualified and honest can practice.

In the absence of advertising, professionals compete for business on the basis of reputation and in fact, people tend to select a lawyer on the recommendation of acquaintances.** Some of those opposed to advertising argue that it will increase concentration by allowing the large to expand at the expense of the small. On the contrary, it is reliance on word-of-mouth which likely favours the large and imposes a significant barrier to entry.

---

* ABA study

** "Public Attitudes to Lawyers and Lawyer Advertising" A Public Opinion Study Conducted for the Canadian Bar Association by the Canadian Gallup Poll Limited, April, 1978.

The basic information which has typically not been publicly available in the professions includes fees, specialization or preferred areas of practice, qualifications, location, office hours, languages spoken and methods of payment available. Access to such information gives consumers a wider basis on which to select the person who best meets their needs. This does not mean that reputation or other criteria are replaced, only supplemented.

In this model, suppliers must become more sensitive to consumer demands. If consumers demonstrate a preference for seeing a lawyer on Saturdays, it will be necessary to decide whether to open then or not. If the fee for a routine service is significant in the choice of one practitioner over another, then more careful consideration to costs and fees will have to be made.

The benefits of advertising in markets characterized by a large number of suppliers and a high level of consumer ignorance may be great.* Price competition not only leads to lower fees, but also encourages greater efficiency to lower costs. Innovation in methods of providing services (e.g. legal clinics) as well as techniques is more likely to flourish when market forces are at work. Advertising will reduce barriers to entry by allowing the new firm to make its presence and any unique features known.

---

* Muzondo-Pazderka concluded that the advertising ban contributed 10.8% to professional incomes in 1970.

It is perhaps in its affect on innovation that advertising may be most important. It is significant to note that the two public inquiries under the Combines Investigation Act concerning advertising prohibitions involved new and low-cost delivery systems.

Although the concept is not directly articulated in the Act, the Director found a distinction between "informative" and "persuasive" advertising. As a matter of policy, competition officials were more concerned with restrictions on the advertising of qualifications, location and hours of business, specialization and above all, fees. It is the dissemination of such information which facilitates the functioning of market forces. Restrictions on advertising aimed only at persuading consumers to choose one firm over another for other reasons would be less likely to run afoul of section 32. This position goes some way to meeting the concerns expressed in some circles that governing bodies still be able to regulate publicity to assure certain standards of taste and respect for the profession. What ever one's personal views of this attitude, it is difficult to find a competition policy argument against a rule that a professional's advertising be "dignified" as long as it does not prevent the dissemination of basic information.

Section 32(1)(c) of the Act prohibits agreements or arrangements to lessen competition unduly in the production, sale or supply of a product, including a professional service. Subsection 2 provides a defence for those arrangements which relate only to certain matters enumerated, including the restriction of advertising or promotion. That defence is lost if the agreement or arrangement has lessened or is likely to lessen competition unduly in respect of:

a) prices,
b) quantity or quality of production,
c) markets or customers, or
d) channels or methods of distribution,

of it the arrangement has restricted or is likely to restrict any person from entering into or expanding a business in a profession.

Consequently, in any prosecution of a profession's prohibition of advertising it would be necessary for a court to find one or more of these effects and then determine whether or not the arrangement would lessen competition unduly. The Jabour case provided examples of such effects.

B. Jabour and The Law Society of British Columbia

The case arose as a result of advertisements published in local Vancouver newspapers by Donald E. Jabour in 1978 at the time of the opening of his Neighbourhood Legal Clinic. Mr. Jabour had been a member of the Bar for nearly 20 years and from 1975 to 1977 was Chairman of the Legal Services Commission of British Columbia. In that capacity, he had studied the legal needs of the public and became familiar with the United States experience. He concluded that the legal services system satisfactorily met the needs of the wealthy and the poor (through legal aid) but not middle income people.

To meet this demand, Mr. Jabour decided to establish a Neighbourhood Legal Clinic modeled along the lines of legal clinics which had been developed in the United States in recent years. His examination of those clinics had confirmed in his mind the need to advertise as a means of assuring sufficient volume of business to develop the specialized techniques and maintain the low prices which characterized this form of delivery system for legal services.

Despite his attempts to discuss the issue with the Law Society beforehand, the conflict between his advertising and the Society's virtual prohibition of advertising was obvious: The Society immediately commenced disciplinary action. After 3 months and a substantial volume of evidence, Mr. Jabour was found guilty of conduct unbecoming a member of the Society and a 6-month suspension was recommended.

For its part, the Society had been aware of the Director's opinion that agreements to restrict advertising could give him grounds to conduct an inquiry. It had created a committee to study advertising but had not moved to change its rules. In addition, the Treasurer of the Society had made clear her views that the questions involved were internal to the Society and not the responsibility of federal officials.

The Director monitored the developments closely and provided a witness at the disciplinary hearing. It was only when Mr. Jabour was found guilty that the Director commenced a formal inquiry and caused the Secretary of the Society to be subpoenaed. The Society responded by taking an action in the Supreme Court of B.C. to block the inquiry.

In an earlier effort to stop the Society's discipline hearings, Mr. Jabour had commenced an action under section 31.1 of the Combines Investigation Act alleging that he had suffered damages as a result of conduct contrary to section 32. (In this action, he succeeded in obtaining an injunction to prevent the Benchers from acting upon the Discipline Committee's recommendation of a 6-month suspension.) Because both cases involved the issue of the authority of the Benchers in relation to the provisions of the Combines Investigation Act, it was agreed that the trial of those aspects of both cases would be conducted at the same

time in the Supreme Court of B.C.*

Although the Court was not asked to rule on the question of whether or not the Society's prohibition of advertising constituted an offence under section 32 of the Combines Investigation Act, some of the evidence that was brought forward at the trial goes toward the case that would have been made if that point had been argued. Evidence was introduced not only of the effects of the advertising restrictions in British Columbia and elsewhere in Canada, but also in the United States where the decision of the Supreme Court in Bates and O'Steen vs. the State Bar of Arizona** in 1977 had a profound impact on advertising rules in the legal profession.

In summary, the evidence presented supported the theoretical arguments that advertising restrictions lessened competition in a number of ways to the detriment of the public. The three B.C. lawyers who had sought the right to advertise in the previous year were able to testify that their practices had suffered or failed because of their inability to advertise.

---

* The Attorney General also challenged the jurisdiction of the B.C. Supreme Court in the Law Society's action by virtue of ss. 17 and 18 of the Federal Court Act. The question was also argued at the Court of Appeal and the Supreme Court of Canada and in all cases, the jurisdiction of the Supreme Court of B.C. was upheld.

** citation

The evidence showed that the Jacoby and Myers Legal Clinics in California, which had barely maintained four offices during three years expanded to 18 offices within months of the Bates decision. Legal clinics had often failed elsewhere.

A study of U.S. legal clinics found that the concept could not operate successfully without advertising.* At the same time, and contrary to the notion widely held by opponents of advertising, the study found that the quality of services offered by clinics was no lower than traditional firms (and may even be higher). Through specialization and high-volume, legal clinics were able to offer fees lower than most traditional firms; their affect then was to reduce the general levels of fees for services provided by clinics.

The three B.C. lawyers were able to provide interesting examples of innovations in means of supplying services, each of which relied on informing the public of their presence. The first, of course, was Mr. Jabour's legal clinic, the first in Canada. Although business fell when he could not advertise, the practice was successful, perhaps because of the publicity of his legal battles with the Law Society. Another new service was a self-help service; it was successful while it was in the public eye, but failed when the Law Society refused to allow it to advertise. The third involved a dockside legal service to the Gulf Islands of B.C. where there were no practicing lawyers. Because the Society refused to allow the advertising of times when the lawyer would be in a town or the fact that he would travel to an island on appointment, the service was finally stopped.

As interesting as this evidence was to economists and students of competition policy, it had little if any affect in the courts because it involved issues that were not before them. Rather, the courts were being asked to rule on the more narrow question of whether or not the Combines Investigation Act applies to the Law Society of B.C. and if so, whether or not the Act is constitutional to that extent. In the Jabour action, the question of Mr. Jabour's right to freedom of speech was also an issue.

The main thrust of the Director's argument in the case rested onthe principles concerning the status of regulated conduct under the Combines Investigation Act spelled out above. In essence, it was the Director's contention that a review of the jurisprudence established that activities were only exempt from the Act where they were specifically authorized by federal or provincial legislation or where they were effectively regulated by a public body acting pursuant to valid law. Nowhere did the Legal Professions Act authorize the Benchers to regulate advertising by lawyers. The Act did provide for regulations governing the profession which were subject to approval by the Lieutenant Governor in Council. These regulations, however, contained no provisions governing advertising. Also, the Act provided for the Benchers to make rules, and although these rules were not subject to public approval, they similarly were silent on the question of advertising. It was only in the Professional Conduct Handbook published by the Benchers and containing certain rulings that one found the very specific

and extensive restrictions or prohibitions on advertising. The Courts had previously found that these rulings, published "for the guidance of members" did not constitute rules and regulations under the Act and had no legal authority.*

In support of its position, the Law Society found its authority in the provisions of the Legal Professions Act which entrusted the Society with responsibility for disciplining members for professional misconduct and conduct unbecoming a member of the Society. Section 1 of the Act in fact defines conduct unbecoming a member as including:

> "any matter, conduct, or thing that is deemed in the judgment of the Benchers to be contrary to the best interest of the public or of the legal profession, or that tends to harm the standing of the legal profession."

The Act also provides for the regulation and governing of the practice of law in a variety of other ways.

In accepting the Director's position, the Trial Court found that the Society did not have the statutory authority to impose its blanket restraint on advertising. It did not deny its right, and indeed its duty, to ensure that any advertising conform to standards set by the Benchers in matters of competence, honesty, integrity and quality. But it found that the Farm Products Marketing Reference provides only a limited exemption:

> "The case is authority for the proposition that a provincial Act dealing with the regulation of a matter within the competence of the Province and which is purely local in nature, and which gives specific powers to the governing body to engage in marketing activities which are prima facie prohibited by the Combines Act, is not in conflict with the Combines Act.

* Re Pan - Citation

> Although the Supreme Court of Canada held that it is within the competence of the Province to pass such legislation, it does not follow that simply because a regulated industry is authorized by the provincial Act to engage in certain specified marketing activities which are prima facie prohibited by the Combines Act, that such a regulated industry is thereby at liberty to engage in marketing activities not so specified and which may be contrary to the Combines Act. Thus if the governing body of a profession is specifically authorized by the provincial Act under which it governs the affairs of that profession, to fix prices, then in such case any provision in the Combines Act which makes it an offence to fix prices would not apply to that governing body because in the words of Locke, J. 'to perform an act which the Legislature is empowered to and has authorized cannot be an offence against the state'. However, should that governing body engage in a marketing activity which is prima facie contrary to the Combines Act and which activity has not been specifically authorized by the provincial Act, then in such case, as regards that marketing activity, the Combines Act would apply."

The Court of Appeal of B.C. did not agree. Specifically, it did not accept the notion that the authority to engage in an activity otherwise prohibited by the Combines Investigation Act had to be specific in order to support an exemption. All that matters is whether or not the authority was granted and not the specifity of the language used by the legislature. The Benchers had been delegated the power to regulate the profession in the public interest, including the power to discipline lawyers for unbecoming conduct. Under the jurisprudence, persons acting pursuant to powers granted by a legislature could not be found to be in breach of the Combines Investigation Act.

C. The Supreme Court Decision

The appeal of this case to the Supreme Court of Canada provided an opportunity for the Federal Government to seek clarification of the long-standing uncertainty surrounding the status of regulated activity under the Combines Investigation Act. The Court was asked to clarify the law in a narrow way so to adopt principles similar to the U.S. "state action" doctrine.

In his argument, the Attorney-General submitted that the B.C. Court of Appeal had decided the case by concluding that regulatory schemes validly established by provincial legislation fall outside the prohibitions of the Combines Investigation Act. Those cases concerned the constitutional validity of provincial marketing legislation. While the existence of the Combines Act did not prevent a Province from establishing its own regulatory schemes, it was argued that in the Law Society case, the authority could not be taken as being so broad as to shield any activity by the Society.

It was submitted that the elements of the regulated industry defence as developed by the jurisprudence required the following to be established:

1) a clearly articulated scheme,
2) adopted by the Legislature or Executive,
3) and imposed by "affirmative command" of the Province on the persons claiming the defence.

An attempt was made to draw a distinction between the self-regulatory authority of the Benchers of the Law Society in this case and the regulatory authority of Provincial appointees in the others. The "scheme" (in this case, the prohibition on advertising) had not been adopted by the Legislature or Executive of the Province, but rather by persons elected by their peers and with a self-interest in the rules governing their commercial activities. There was no authorization beforehand nor approval after of the Society's scheme either by the Legislature or the Executive.

It was submitted that the powers given to the Law Society did not make it dissimilar to other corporations granted powers by the Legislature. The power could be put to proper or improver use and its exercise would be subject to Federal and Provincial laws. The power to discipline cannot be used by the Society to engage in an activity which would be prohibited by other legislation. The U.S. Courts have developed the notion that anti-competitive activities cannot simply be permitted or prompted, but rather must be compelled by the State in order to gain protection from the anti-trust laws. In the Jabour case, the Supreme Court was asked to decide that an exemption from the Combines Act requires the specific authorization of a self-regulatory body's activities in order to gain exemption: In this way, there would be an assurance that Federal laws governing competition policy will not be set aside even in cases where a Province had no intention of doing so.

In its unanimous decision handed down on August 9, 1982, the Supreme Court of Canada rejected the government's submissions and found that the Combines Investigation Act did not apply to the Law Society of British Columbia in the case. The reasons were delivered by Estey, J.

After reviewing the various powers granted under the Provincial statute to the Law Society, and the various details of the regulatory scheme, Estey, J. concluded that there was no question but that the province had the right to establish legislation regulating the legal profession:

> "The general publis is not in a position to appraise unassisted the need for legal services or the effectiveness of the services provided in the client's cause by the practitioner, and therefore stands in need of protection. It is the establishment of this protection that is the primary purpose of the Legal Professions Act." *

As to the regulatory mechanism adopted, considerable emphasis was placed on the importance of maintaining the independence of the Bar from the state. Whatever the arguments for or against self-regulation as opposed to some other type of regulation to achieve these goals, the significant point was that the Court found that such decision was for the Province to make and that there is no relevant distinction in law between the two:

> "I see nothing in law pathological about the selection by the provincial Legislature here of an administrative agency drawn from the sector of the community to be regulated."**

---

* Citation p. 20

** Citation p. 20

In other words, whether the scheme is directly regulated and supervised by the Legislature or Executive or whether it is left to operate without any supervision whatsoever had no relevance in determining its status under the Combines Investigation Act.

The Court therefore rejected the Crown's submission in favour of the state action doctrine. It found that the statute directs the Law Society to determine, in the public interest, those things that constitute conduct unbecoming a member of the Society and that the decision of the Discipline Committee in this case presumably reflects the announced policy of the Society. Estey, J. concluded:

> "The Statute does not limit the Benchers in the regulation of advertising nor does it confine them to matters of standards of 'competence and integrity' in the words of s. 32(6) of the CIA. The statute authorizes disciplinary action for 'conduct unbecoming a member of the Society' and the mandate was broadly styled by the Legislature when it saw fit to define 'conduct unbecoming' as including 'any matter, conduct or thing that is deemed in the judgment of the Benchers to be contrary to the best interest of the public or of the legal profession'."
>
> ...
>
> "The immediate issue therefore is the statutory authority granted by the province to the Benchers for its actions and I find this authority to be present." *

---

* page 26

Having reached this conclusion, Estey, J. then canvassed the jurisprudence concerning regulated conduct and the Combines Investigation Act and found that the Law Society was not subject to the Act when carrying out its authority under the provincial legislation:

> "The operative words at the beginning of s. 32 are: 'Every one sho conspires, combines, agrees or arranges with another person'. These words are broad enough to include all the Benchers acting as a group or individually or the Law Society as a corporate entity and any one or more of the Benchers or of its statutory officers, or indeed any one with whom the Law Society may have acted jointly. Consequently, if any two of these persons, natural or legal, voluntary entered into an agreement condemned by the CIA, the offence would be constituted, and on suspicion of such a situation an inquiry under s. 48 might well be ordered. What happened here, however, is something different in character both in fact and in law." *

He noted a distinction between a provincial statute which is coercive in nature as opposed to the voluntary combinations or agreements against which the Combines Act is directed. In adopting policies and disciplining members for misconduct or incompetence, the Society was carrying out its duty under the Provincial Act:

> "The words adopted by Parliament in s. 32 and restated above are not ordinarily found in language directed to the actions of persons holding office under a provincially authorized regulatory body and discharging their responsibilities to the community pursuant to their constitutive statute. This is particularly so

---

* page 37-38

> where the group said to be acting 'conspiratorially' was in fact proceeding at the time in question as a deliberative body whose existence was mandated by a provincial statute. 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.
>
> I do not find the words adopted by Parliament in s. 32(1) taken by itself properly construed and applied to relate to the action taken by the Law Society acting in accordance with their legislative authority, as I have concluded, under a valid provincial statute." *

The court considered a case in the U.K., Dickson vs. Pharmaceutical Society of Great Britain, and agreed with the statement of Lord Denning M.R.:

> "If the council of a professional body should make a rule which is in restraint of trade it is as much subject to the law of the land as anyone else." **

But this case was distinguished from the B.C. Law Society case in a number of ways. The British case did not involve a statutory governing body but rather a voluntary association. In the absence of a federal separation of sovereignty and statutory authority granted to the professional body, the British case did not require an interpretation of opposing statutes.

---

* page 38-39

** page 41

The Court considered the American jurisprudence including Goldfarb vs. Virginia State Bar (1975), 421 U.S. 773 and Bates vs. State Bar of Arizona (1979), 433 U.S. 350, but concluded that the American cases were of little help.

Estey, J.'s consideration of the "regulated industries" cases led to comments concerning the test of public interest which raises interesting questions about the future status of regulated activities under federal law.

> " The courts in these cases have said in various ways that compliance with the edicts of a validly enacted provincial measure can hardly amount to something contrary to the public interest. Since all the cases examined above approach the CIA on the basis of a criminal charge, actually or potentially arising under it, the element of public interest was always present. In Canadian Breweries, supra, (p. 605) the Court proceeded on the basis that the word 'unduly' in s. 32 connotes substantially the same meaning as the more general words in the same statute 'operated or is likely to operate to the detriment or against the interest of the public'. Even the 1975 amendments to s. 32 (supra), by the addition of sub. 1.1, did not remove 'unduly' from the operative provision, subs. (1) of s. 32. So long as the CIA, or at least Part V, is styled as a criminal prohibition, proceedings in its implementation and enforcement will require a demonstration of some conduct contrary to the public interest. It is this element of the federal legislation that these cases all conclude can be negated by the authority extended by a valid provincial regulatory statute." * (emphasis added)

The question that arises of course is whether or not the Court is suggesting that the right of the provinces to define the public interest within their spheres constitutes a limitation on the federal criminal law power. The conclusion

---

* page 37

that provincial regulatory schemes operating pursuant to statutory authority are outside the Combines Investigation Act is not new. It is now clear that that exemption can be extended to self-regulatory bodies acting pursuant to general rather than specific authority and with no public supervision. One is left to speculate as to the result of the decision as to how far such a self-regulating body may go without running afoul of competition law and perhaps even more seriously, as to whether or not the Federal Parliament has the constitutional authority to establish limits by means of criminal sanctions.