The *Competition Act* and the Professions

Notes for an Address

by

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to

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Program on the Professions

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I. Introduction

I am pleased to have the opportunity to discuss with you today the application of the *Competition Act* to the professions. As we enter an era of trade liberalization, it is likely that Canada's service sector, including certain professional services, will be under increasing pressure in the upcoming years to become even more competitive – more efficient, more innovative – than ever before. I look forward to hearing your comments about how we at the Bureau of Competition Policy can best ensure that the competitive climate in which the professions operate is conducive to this type of performance.

Before I proceed any further, it may be helpful to clarify what I mean when I refer to the professions in this discussion. While the traditional category of the learned professions includes such groups as doctors, lawyers, dentists, architects and engineers, there are other service groups which do not fall into this traditional classification. However, a number of those service groups share some similar characteristics such as established entry requirements, a certification process or some measure of self-regulation, either on a statutory or a voluntary basis.

Examples of this latter group include paralegals, **real estate** agents and property appraisers. Given these structural similarities, many of the competition issues that I propose to discuss are common to traditional professionals and these other similar types of service groups. Rather than single out any of these particular categories, I have attempted to direct my general comments to this broader overall segment of the services sector.

As many of you may know, Canada's competition law, as it was originally framed, did not apply to the professions or indeed generally to service industries. However, as the service industry grew to assume an increasingly important role in the economy, this gap became more apparent. Indeed, in its 1969 Report on Competition Policy, the Economic Council of Canada pointed out that services were no less in need of competition policy

regulation than the sectors already covered, and recommended an extension of the Act's coverage. The continued rapid growth of the service sector through the 1970s provided further impetus for reform which was accomplished as part of the 1976 amendment process. An important segment of the services sector is the professions.

Today, the services sector continues to grow at a pace which far exceeds growth in other sectors such as manufacturing and resources. More than 60 percent of the Gross Domestic Product is now produced in the service sector. Given the increasing importance of service industries to the economy, we in the Bureau have given increasing priority to the application of the law in the area of services, including the professions.

Since 1976, certain of the professions, including the legal profession, have faced a number of important changes. There has been an unprecedented growth in the number of individuals entering the ranks of the professions. In addition, some of the established professions have encountered new paraprofessional groups entering the marketplace striving to carve out market niches for themselves. Consumers may now choose between groups offering specialized financial services, paralegal services, business services and health services, to name just a few. As a result, consumers are demanding more information regarding prices and levels of service to assist them in choosing between competing professionals, and overlapping professional and paraprofessional services. Also, some traditional professions have begun to express concern about the lack of formal regulation of the emerging paraprofessions. For example, my office recently agreed to participate, to9ether with representatives of the Law Society of Upper Canada, on a Task Force examining the role of paralegals in Ontario and the need for regulation in this area.

The effect of these various factors has been an increase in the competitive pressures exerted on a number of the professions. Faced with these pressures, it is imperative that members of the professions ensure that they do not, wittingly or unwittingly, respond by adopting practices that would illegally impair competition and run afoul of the *Competition Act*.

Since the passage of the 1976 amendments, the Bureau of Competition Policy has been actively involved in assisting members of the professions to structure their conduct in a manner that avoids conflict with the Act. In the competitive marketplace for professional services that we are confronted with today, the continuation of this compliance initiative is more important than ever. In my comments I will be echoing some of the themes that have been articulated by the Directors of Investigation and Research since 1976, and elaborating on recent developments in competition law affecting the professions.

I would like to commence by providing you with a summary of the rationale and general scope of the Act in relation to the professions. I will then elaborate on recent judicial decisions and my views relating to the application of what is known as the "regulated conduct" defence. I will also outline how we in the Bureau view the issue of suggested fee schedules and other price-related activities which may be of direct interest to you in light of the recent Kent and Waterloo law association cases.

Finally, I would like to comment on our compliance-oriented approach in relation to this particular area.

II. The Scope and Rationale of the *Competition Act*

As has been said many times, the *Competition Act* is a law of general application which governs the conduct of business activities in Canada. A limited range of activities undertaken in relation to amateur sport, collective bargaining activity and securities underwriting are specifically exempted from the Act. However, the activities of all other groups or associations, including professional associations, are subject to the law, except where there is in place effective regulation of the activity in question as discussed below. Both the criminal and non-criminal sections of the Act may be applicable to the professions.

Competition legislation proceeds on the premise that competition is the best means of ensuring that resources are used in such a way that efficiency and productivity are maximized, innovation is rewarded, and consumers are offered the broadest scope of services at the most competitive prices. We in the Bureau see merit in having the legal profession, and indeed the professions generally, being subject to the same competitive pressures as other sectors of the economy. Fair and vigorous competition is still the best means of promoting a healthy business climate in which the interests of the public are best served.

The amendments to the *Competition Act* in 1986 incorporated a new purpose clause in section 1.1 which states that the purpose of the Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy. The specific objectives also include the maintenance of competition to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy as well as to provide consumers with competitive prices and product choices.

While certain facets of the professions are currently regulated by statutory authority, we support the principle that less, not more, regulation will offer the professions the most scope to remain competitive in an increasingly dynamic economy. I suggest that we are not alone in this view.

In its 1986 report to the Quebec Government, a study group on deregulation headed by M.L.A. Reed Scowen concluded that excessive regulation in that province has indeed restricted its ability to remain competitive. Commenting specifically on the self-regulating professions, the Scowen Report noted that the public is increasingly questioning the need for monopolies over certain professional domains. It also specifically recommended the abolition of the authority to fix professional fee schedules, liberalization of the rules respecting advertising and promotion, and government scrutiny of entry regulations that professional associations impose.

A report prepared in 1986 by the members of the Professional Organizations Committee for the Attorney General of Ontario also took note of the important role of competition in the market for professional services. While recognizing that self-regulation was the most cost-effective method of safeguarding the public interest, the Committee expressed concern that over-regulation could inhibit initiative in organizing practices and deploying services and ultimately result in higher costs to clients. The Committee also concluded as did the Scowen Report that mandatory fee schedules – whether minimum, maximum or fixed – are undesirable.

III. The Regulated Conduct Defence

In view of the self-governing character of many of the professions in accordance with

provincial legislation, conduct generally prohibited by the *Competition Act* is sometimes specifically sanctioned by a regulatory body. Each profession has a different level of regulation and further, within a profession, there are different degrees of regulation between provinces. Even today, a few professions in certain provinces are allowed to fix fees of their practitioners with government approval. The extent to which such regulation pre-empts the application of federal competition laws has been addressed by the courts over the years through resort to what is known as "the regulated conduct" defence.

The regulated conduct defence, was developed in relation to the criminal law sections of the predecessor legislation, and was first raised in a number of early cases involving provincial regulatory authorities in the agricultural sector. In recent years, the judgment of the Ontario Supreme Court in *R. v. Canadian Breweries Ltd*. has been most frequently cited for its elaboration of the basic nature of the defence *Breweries* stands for the proposition that where provincial legislation has conferred on an independent body power to regulate an industry and fix prices, and that power has been exercised by the authorized body, the court should assume that the power has been exercised in the public interest, precluding application of the federal competition law.

The scope of this defence has been discussed in one of my earlier speeches which may be referred to for additional information. In that speech I pointed out that a question now arises in relation to the application of this defence, particularly in respect of the new non-criminal provisions of the Act such as those relating to the merger review process, in view of the fact that the jurisprudence on the regulated conduct defence is fundamentally based on the prosecution of criminal offences. This question is now even more timely in view of the Supreme Court of Canada's decisions released last week in the *City National Leasing* and *Rocois Construction* cases, which upheld the *Combines Investigation Act* as valid federal legislation under the general trade and commerce power. In so doing the Supreme Court confirmed that the federal competition law embodies a complex scheme of economic regulation designed to eliminate activities that reduce competition in the marketplace. In this regard, Chief Justice Dickson stated that the scheme of regulation is national in scope and that local regulation would be inadequate.

The application of the regulated conduct defence to the legal profession was first considered in the *Jabour* case, with which many of you are undoubtedly familiar. While the *Jabour* case was not a victory for the Crown, neither did it extend the scope of the regulated conduct defence, as some might suggest. I think it is fair to say that the outcome of the *Jabour* decision was determined by the particular and somewhat unique facts of that case, which were carefully canvassed by the Supreme Court of Canada.

The *Jabour* case arose as a result of an action taken by the Law Society of British Columbia in response to the commencement of an inquiry by the Director into the Society's enforcement of its regulations restricting advertising against Vancouver lawyer Donald Jabour. In a unanimous decision rendered on August 9, 1982, the Supreme Court of Canada held that the conspiracy provisions of the Act do not apply to the actions of the Benchers of the B.C. Law Society in restricting price advertising and in disciplining members who contravened such restrictions.

Mr. Justice Estey, writing for the Court, found that the Benchers of the Law Society were authorized under their statute to make rules with respect to informational or price advertising. He then went on to conclude that the conspiracy section, as then worded, did not apply to the actions of Benchers undertaken pursuant to this authority. Firstly, he

noted that the conspiracy section is directed to conduct which unduly lessens competition, and held that compliance with a provincial measure validly enacted in the public interest cannot be said to be "undue" and therefore illegal. The second reason for the conclusion reached was the Court's finding that the offence section contemplates voluntary agreements or combinations. In His Lordship's view, the Law Society could not be said to be voluntarily agreeing when acting to discharge responsibilities assigned to them by statute.

Subsequent cases have adopted a narrow application of the *Jabour* decision having regard to the unique facts of that case. For example, in *Waterloo Law Association v. Attorney General of Canada*, a case concerning fee-setting activities engaged in by a county law association, Mr. Justice Eberle of the Ontario Supreme Court identified two important distinctions between the case at hand and the *Jabour* matter. First, he noted that the Law Society of B.C. in *Jabour* was acting as a provincially authorized regulatory body and discharging its responsibilities to the community pursuant to its constitutive statute. However, in the *Waterloo* case, the association was acting as a voluntary body with no regulatory authority over the profession. In addition, Mr. Justice Eberle drew attention to the very different nature of the B.C. and Ontario statutes governing regulation of the legal profession. He also noted specifically that the Ontario *Law Society Act* contains no provision akin to that found in the B.C. statute, which empowers the Benchers of the B.C. Law Society to broadly define conduct unbecoming a member as conduct which it deems to be contrary to the best interest of the public or of the legal profession. *Waterloo* was cited favourably by the Ontario Court of Appeal in the case of *R. v Independent Order of Foresters,* a decision in which Mr. Justice Grange, speaking for the Court, clearly expressed the view that a direction or at least an authorization to perform the prohibited act was necessary to invoke the regulated conduct defence.

I think it is apparent from these cases that, notwithstanding the existence of some provincial regulation of a particular industry, it cannot be assumed that every activity in an industry or every dimension of competition is thus shielded from the application of the federal competition law. As Madame Justice Reed stated in the recent case of *Industrial Milk Producers Assn. V. British Columbia Milk Board*, it is not various industries as a whole which are exempt' by the regulated conduct defence, but merely those activities which are required or authorized by the federal or provincial legislation, as the case may be.

In my view, these decisions suggest that the courts are becoming increasingly willing to narrowly construe the scope of regulatory statutes, in order to give greater recognition to competition policy objectives. This view is reinforced by a decision issued just a few weeks ago by the British Columbia Supreme Court in the matter of *Mortimer v. Corporation of Land Surveyors of the Province of British Columbia*.

This case involved an appeal by a land surveyor who had been found guilty by the Board of Management of the Corporation of failing to observe the tariff of fees for professional services then in effect. While the *Land Surveyors Act* empowered the Corporation to pass bylaws, "not inconsistent with the Act, with regard to the tariff of fees for professional services," the bylaw in question required members to observe the standards set out in a booklet containing tariffs of fees for professional services. In allowing the appeal and quashing the conviction, the Court held that the *Land Surveyors Act* was insufficiently clear to allow the imposition of a mandatory minimum tariff of fees, which was the practical effect of the bylaw. As the Court commented:

There is much to be gained in giving professional bodies the power to regulate themselves. I do wonder, though, if the common good is served by providing to a professional body (monopolistic in nature) through legislative authority and without limitations, the power to engage in activities which would be illegal if carried out by anyone else. Surely in these circumstances, a strict construction of the legislation is a reasonable approach.

IV. Professionals and the *Competition Act*

Since 1971, the Bureau has pursued a policy of vigorous enforcement of the Act where warranted against members of various professions, and twelve such cases have been undertaken, all involving price-fixing issues. The cases predating the 1976 amendments, dealt, of course, with the supply of articles by members of professional groups.

For example, in 1971 the British Columbia Professional Pharmacists Society was convicted of conspiring to fix the professional fee to be charged on the sale of prescription drugs. Other inquiries were undertaken involving veterinarians, dentists and notaries. I should also point out that charges of price-fixing have been laid against the Pharmacy Association of Nova Scotia. Many of you will also be aware of the recent disposition of inquiries involving members of the Kent and Waterloo Law Associations. In addition, most recently an Order of Prohibition was granted on consent against members of nine local **real estate** boards across Canada and against the Canadian **Real Estate** Association. Inquiries are currently underway regarding certain other activities of some professions.

Following the resolution of the Kent and Waterloo law association inquiries, a number of complaints were received by my office to the effect that the legal profession had been singled out for enforcement action. As the above list indicates, that is simply not the case.

In dealing with professional associations, our primary focus is usually on the conspiracy provision. To review the application of the relevant sections briefly, section 45 of the *Competition Act* prohibits, among other things, agreements or arrangements to lessen competition unduly in the sale or supply of a product. The definition sections of the Act include services in the meaning of "product," and the term "service" includes services of any description, whether industrial, trade, professional or otherwise.

Associations are not subject to conspiracy provisions insofar as members agree only to define product standards or if the agreement falls within certain other exempt categories. The exemptions do not apply, however, if the agreement (as to product standards, for example) lessens competition unduly in respect of prices, quantity or quality of production, markets or customers, or channels or methods of distribution, or if the agreement restricts entry into the profession. Section 45 also does not apply to providers of a service if the agreement relates only to standards of competence and integrity reasonably necessary to protect the public. I will refer again to this subsection in discussing the relation of fees to quality of professional work.

There are two other features of the Act which I should mention at this juncture. The 1986 amendments to the Act clarified that the conspiracy offence only requires proof of a single as opposed to a double intent. In other words, the Crown need only establish that the accused intended to enter into the conspiracy or agreement in question. There is no

requirement that the Crown prove in addition the intent to lessen competition unduly or otherwise affect competition as set out in subsection (1) of the section.

In relation to the conspiracy provision, it has been brought to my attention that practicing professionals, particularly in smaller communities, may be concerned that my office could launch an inquiry because their prices are similar to those of their competitors, even though pricing decisions have been made by each practitioner independently. Indeed, consumers quite often complain to us that prices are similar, not only for professional services but also for commodities like groceries or gasoline. Similar pricing can result from a process which economists refer to as "conscious parallelism," where firms basically follow the pricing of a market leader. Let me give you an idea of how we address this kind of complaint.

The fundamental requirement of the conspiracy provision is that an agreement must be proved to exist which, if carried into effect, would prevent or lessen competition to the extent required. While a recent amendment, section 45 (2.1), restates the common-law position that existence of the agreement may be inferred from circumstantial evidence, the fact of the agreement must nevertheless be proved beyond a reasonable doubt. Accordingly, we would not necessarily launch an inquiry based solely on information that fees quoted in a given locality are similar. More information may be required because the existence of similar fees, may, in some circumstances, be as consistent with the theory that professionals are conspiring as it is with the theory that they. are competing so vigorously, quite independently of each other, as to match their competitors' prices.

Similar prices could be suspicious, however, when other factors are present. For example, if a wide range of prices has existed previously, and a fee schedule was issued with the result that a vast majority of the fees suddenly moved to this fee schedule level, that would likely form the basis for an inquiry under the Act.

It is not surprising that the principal concerns which arise under the *Competition Act*, when considering the activities of professional associations, relate to the conspiracy provisions. This may be explained in part by the ease with which activities that are originally conceived as unobjectionable cross the line which separates lawful from unlawful conduct. We have found that in periods of intensified competition, there is a strong temptation for some associations, for example, to include in codes of ethics anti-competitive rules designed to alleviate the rigors of competition or maintain the revenues or incomes of their members.

V. Specific Areas of Concern

As I mentioned earlier, the primary concern that arises with respect to the activities of the professions in relation to competition law is with the application of the conspiracy provisions. While conspiracies most frequently take the form of price-fixing agreements, our concerns are not confined to the area of price-setting alone. There are other dimensions of competition that have been or are subject to some restrictions in the professions. I have in mind prohibitions on advertising, restrictions on entry, limitations on access to necessary facilities or services, and prohibitions on innovative methods of delivery.

I propose to discuss with you, therefore, a few of these areas of concern following my discussion of the question of fees and suggested fee schedules.

a) Suggested Fee Schedules

The use of suggested fee schedules was recently brought to the public's attention by press reports of the disposition of two inquiries into price-fixing activities engaged in by local law associations.

On January 12, 1988, orders of prohibition were issued by the Supreme Court of Ontario against the Kent County Law Association and the Waterloo Law Association and their respective members and executives. The orders were issued after each association consented to the terms of the order and the accompanying admissions. These admissions describe the various steps that each of the associations took in attempts to achieve and enforce agreements on the legal fees members would charge the public for residential **real estate** legal services.

In the case of the Waterloo Law Association, it was admitted that the Executive of the Association had met to discuss a proposed fee schedule and the sanctions that could be used against members to enforce it. Following the promulgation of the fee schedule, the Executive suggested to members that non-adherence to the fee schedule would be regarded as a breach of accepted ethical and professional standards. At a subsequent Association meeting attended by the great majority of lawyers practising **real estate** law in the area, the fee schedule was ratified by a unanimous vote.

In the case of the Kent County Law Association, it was admitted that, at a meeting attended by eighty percent of the Association's members, a motion of agreement was unanimously passed to adhere to a suggested fee schedule regarding residential **real estate** matters. Each member was subsequently asked by letter to sign an acknowledgment of agreement with the fee schedule and to agree and undertake to charge fees only in accordance with the schedule. The Association also approved an unprofessional conduct bylaw which included, as grounds for unprofessional conduct, a failure to agree to adhere to the fee schedule.

In both of these cases, the law associations admitted on the record of the proceedings that the implementation of their tariffs was designed to prevent widespread discounting by certain members which was hampering the ability of other members to charge the suggested fees. The implementation of the schedules had, on the face of the record, apparently nothing to do with standards of competence and integrity subject to exemption pursuant to section 45(7) of the *Competition Act*. The record indicates that the two associations not only promulgated fee schedules but also encouraged adherence to these schedules by indicating that members would be subject to disciplinary sanctions for charging fees lower than those stipulated.

In light of the results in these two cases, certain local law associations have asked for opinions from my office about the use of suggested fee schedules which are not accompanied by explicit disciplinary measures for non-adherence. In response to such concerns, I have taken the position that the development and issuance of a fee schedule which is genuinely only a suggested one would not, in itself, provide me with grounds to initiate an inquiry. A genuine suggested fee schedule is one which is issued merely for professional information purposes, without raising any intention or expectation whatsoever that the membership will adopt the schedule in their practices. Members must feel that they are free to deviate from the schedule without fear of recrimination or sanction, and that should be borne out by the subsequent facts.

Strictly speaking, it is possible to implement a suggested fee schedule which raises no issue under the Act. However, my officers and I have consistently cautioned professional groups that even without the implementation of disciplinary measures to enforce a fee schedule, it is not easy to formulate and implement a fee schedule without risking violation of the conspiracy provisions. This risk arises because of the ease with which such a schedule may be used to establish or facilitate an agreement on prices or promote adherence to a specified level of fees.

An association may foster intentions or expectations that members will follow a suggested fee schedule, without obtaining the direct agreement of the members and without reference to the imposition of sanctions. The language of the fee schedule itself may have this effect if it conveys the impression that adherence is expected and deviations would be inappropriate. If such a fee schedule were promulgated and information was brought to our attention that a significant number of lawyers were adhering to the fee schedule, I would likely be obliged to commence an inquiry.

Our position on this issue is consistent with that which has been articulated in the United States, where consent orders have been issued to address price-fixing engaged in by a number of professions including lawyers, engineers, and chiropractors. One important example is the decision of the U.S. Supreme Court in *Goldfarb v. Virginia State Bar.* The *Goldfarb* case was concerned with the use of a fee schedule consisting of a list of minimum recommended prices published by a voluntary county bar association. Although the schedule was framed as being voluntary only, the State Bar, the relevant regulatory authority, had published reports condoning fee schedules, and had issued ethical opinions indicating fee schedules could not be ignored. The U.S. Supreme Court subsequently ruled that the fee schedule constituted a price-fixing agreement in violation of the *Sherman Act*.

At various points in time, the use of fee surveys have been raised as an alternative to rigid fee schedules. For example, the Report of the Professional Organizations Committee, to which I referred earlier, recommended the promulgation of fee surveys as a means of providing both consumers and professionals with a descriptive, and I would add objective source of information concerning prevailing prices in professional services markets. The fact that a fee survey does not require or specifically promote adherence to a particular fee level, is in my view, an important distinguishing feature. However, I should caution that fee surveys, like fee schedules, may be used by a professional organization or individual members thereof, to facilitate an agreement on prices to be charged in the future. For this reason, my office has indicated in advisory opinions regarding fee surveys that we would examine closely any situation in which, following the dissemination of a fee survey, a substantial number of members of a professional group in a particular market were observed to move to the highest price recorded, where previously price variations had been present.

b) Maintenance of Professional Standards

One argument that is frequently raised in the context of fees attempts to draw a link between low levels of fees and standards of practice. It has been argued that price competition among members of a profession is inconsistent with the maintenance of professional standards and integrity and that the removal of fixed minimum prices for services would result in violation of these standards. Furthermore, it has been suggested that under conditions of price competition, practitioners would seek to reduce costs by lowering the quality of services provided.

Certainly, the unique characteristics of the legal profession dictate that certain restrictions on the practice of law are necessary to ensure a minimum quality of service to the public, and no one in the Bureau is advocating that the profession should be impeded in the fulfillment of that role. However, it is my view that there is no necessary correlation between price competition and lower standards of quality and integrity. In any event, standards of integrity and competence may be adequately addressed by the law societies under their provincial mandate.

High standards of integrity may exist in circumstances where healthy price competition exists. Conversely, higher prices do not necessarily impede those who are so included from cutting corners to benefit from a higher level of profit. In other words, higher fees do not necessarily ensure the highest standard of service, nor do below average fees necessarily provide proof of shoddy work.

This very question of the relevance of quality concerns was considered by the U.S. Supreme Court in the matter of *National Society of professional Engineers v. United States*,and was also addressed in the 1970 report of the U.K. Monopolies Commission.

In the latter-mentioned report, the Monopolies Commission concluded, after an extensive and thorough study of restrictive practices in relation to the supply of 40 to 50 professional occupations including legal services, that a recommended scale of charges does not in itself remove temptations to reduce costs and increase profits by cutting the quality of services. The Commission further observed that price competition is likely to be the single most effective stimulant to greater efficiency and innovation, variety of service and price that can be applied to a profession. While admitting that price competition might create dangers in relation to services of a particularly personal nature or whose quality the public are incapable of judging, the Committee concluded that such cases would be "exceptional."

The *Professional Engineers* case which I mentioned involved the use by an engineers' association of an ethical rule which prevented competitive bidding. The Supreme Court of the United States, in finding that the rule was an unreasonable restraint of trade, rejected the association's submission that the prohibition on competitive bidding was necessary to protect the public from poorly constructed buildings because price competition would result in poor quality engineering and workmanship While the Supreme Court acknowledged that competition may not be entirely conducive to ethical behaviour, it remarked that this was not a reason cognizable under the Sherman Act for doing away with competition. The Court categorically stated that "the Rule of Reason does not support a defence based on the assumption that competition itself is unreasonable" and described the engineers attempt to justify the bidding rule as nothing less than a frontal assault on the country's competition legislation.

We have no such categorical statements to rely upon in the Canadian jurisprudence. However, it has long been established by the Canadian courts that the public interest in free competition takes paramountcy over other business considerations. For example, in *Howard Smith Paper Mills et al. v. The Queen,* the Supreme Court of Canada considered the application of the law to an agreement that the accused argued was necessary to stabilize the industry in view of its poor financial state and heavy losses. This argument was not held to constitute a defence. Mr. Justice Kellock commented in his decision that "the statute proceeds upon the footing that the preventing or lessening of competition is in itself an injury to the public. It is not concerned with public injury or

public benefit from any other standpoint."

I would also refer you to the words of Mignault, J. also of the Supreme Court of Canada, in the case of *StinsonReeb Builders Supply Co. et al. v. The King. Stinson-Reeb* was concerned with an agreement among members of a plasterers association. The Court noted that injury to the public by the hindering or suppressing of free competition, notwithstanding any advantage which may accrue to the business interests of the members of the combine, is what brings an agreement or combination under the ban of the legislation.

I should point out that the quality of service argument was not raised on the record in the Kent and Waterloo law association cases. Indeed, the admissions indicated that the associations' actions were related to a concern that the discounting of fees was adversely impacting on the ability of other members to charge the full fee. However, when we have been confronted with the suggestion that a minimum fee is necessary to achieve a proper standard of quality, we have offered the following comments.

In the professions, as in many other service industries, one would normally expect to observe a range of fees or prices, given the nature of the work product and the market itself. Indeed, as the B.C. Supreme Court commented in the *Mortimer* case with respect to land surveyors, the concept of a single tariff "is simply not reasonable" given that the work is so varied not only as to its complexity, but also as to the time required to complete it. Attempts to establish a relationship between work standards and a rigid minimum price fail to take account of the wide variety of circumstances which may explain an individual lawyer's decision to charge less than his or her competitors. For example, a firm may decide to economize on overhead costs, such as office accommodation, in order to increase accessibility to legal services. A new entrant to the profession may decide to offer a lower hourly rate and good quality service to generate volume and build a client base. Such actions are not in themselves indicative of substandard service.

While there may be a point below which the amount of time and resources devoted cannot possibly allow an adequate level of service to be rendered, there should be room for a considerable variation in professional fees within which a reasonable service may be provided. It is this range which is precluded by the application of a universal price standard, and which denies consumers the right to choose whether they wish the "cadillac" or the "no-frills" service.

I am certainly appreciative of the concerns of members of the profession that poor quality work reflects badly on the profession as a whole and undermines public confidence. However, such concerns can be addressed more appropriately through resort to established lawful disciplinary channels in individual cases rather than through broad restraints on price competition, which may only address the problem indirectly if at all. Consequently, my office would examine closely any situation involving an attempt by an association or its members to eliminate price competition under the guise of regulating standards of service, or to discipline a member of a profession for low fees.

c) Restrictions on the Emergence of New Professions

The established professions are confronted today with a growing number of paraprofessional groups who offer to provide particular services at lower cost and frequently are able to do so by concentrating skills and training on a particular and

limited area of service. In those professions where such submarket entry has been attained or is being attempted, paraprofessionals are often dependent upon the co-operation of members of the established professions for referrals, training, consulting or direct supervision. This dependency creates a potential for abuse if the established professions for reasons of self-interest act to retard the growth of these competitors.

Any sort of group boycott of this nature may run afoul of competition policy by denying the public the lower prices and other benefits that might be derived from the competition generated by new entry. The case of *Wilk et al. v. American Medical Association et al.*dealt with this very issue only a few years ago.

Dr. Wilk and a few other chiropractors charged twelve medical organizations, including the American Medical Association, with violations of the *Sherman Act* based on a conspiracy to contain and eliminate chiropractors. It was revealed that the AMA had established a special committee which branded chiropractic as unscientific and adopted ethical rules which prohibited professional association between doctors and chiropractors. The District Court of Illinois held that the AMA had instituted a boycott of chiropractors for the purpose of containing and eliminating the profession. The AMA's "patient care" defence was rejected by the Court because it concluded that the boycott had continued long after any objectively reasonable concern over the scientific method being utilized by chiropractors could be raised.

Here in Canada, as in the United States, a number of professional groups including midwives and paralegals, are currently working to gain recognition and acceptance by members of the public and members of the professional communities with which they must interact. From a competition policy standpoint the Bureau will continue to urge provincial authorities to facilitate the entry of these new groups, with appropriate regulatory safeguards where necessary. As members of the legal profession, you should be aware of the potential application of the *Competition Act* to agreements or arrangements to boycott or otherwise impede the entry of new paraprofessional groups with the object of preventing competition in the particular service concerned. Such exclusory activity may be subject either to the criminal conspiracy provisions or to the non-criminal abuse-of-dominance provisions.

d) Advertising in the Professions

Over the years, the Bureau has repeatedly expressed concern about prohibitions on advertising, which are prevalent in various forms among many professions. The competitive benefits to be derived from advertising are numerous. Advertising reduces barriers to entry by removing reliance on word-of-mouth referrals, which tend to favour established firms, thereby enabling new firms to make their presence and unique features of their practice widely known. Advertising also increases consumer awareness of prevailing prices, leading to more careful comparison shopping on their part, and ultimately imposing downward pressure on fees. Price competition, in turn, encourages greater efficiency and promotes innovations in service delivery. For example, the conduct at the heart of the *Jabour* case was a restriction imposed on advertising by lawyers which, it was argued, precluded the successful operation of lower-cost, high-volume legal clinics which were reliant upon advertising to attract customers.

Certain professions, such as the legal profession have recently moved towards greater liberalization of their policies on advertising, a move which we are pleased to see. I suggest to you that a recent decision of the Ontario Court of Appeal,which found that a

prohibition on advertising by dentists violated the *Charter of Rights and Freedoms* guarantee of freedom of expression, may further promote the removal of advertising barriers. In the interim, advertising restrictions continue to give us cause for concern, and may, depending on the facts of the particular case, provide grounds to commence an inquiry under the Act.

VI. Approach to Enforcement

Since the passage of the *Competition Act* in 1986, the Bureau of Competition Policy has substantially increased its efforts to advise the public of its position on the application of the law. We have encouraged businessmen and others to consult with us before undertaking actions which run a risk of contravening the Act, and to make greater use of our program of advisory opinions.

While this compliance-oriented approach has become a more important focus of our enforcement efforts recently, it is part of an initiative that has been underway for a number of years. In the case of the professions, I might point out that a series of educational seminars were undertaken across the country following the proclamation of the 1976 amendments to inform professional groups of the new rules of the game and to offer assistance to them, if necessary, to ensure that their conduct was in conformity with the law.

Since that time, advisory opinions have been provided to a number of professional and other associations seeking advice on a variety of issues. The recent publicity surrounding the Kent and Waterloo law association cases and the **real estate** board matters have served to further heighten awareness of the application of the *Competition Act* to professional activities. We have received a good number of requests for advisory opinions or meetings to discuss the Act's application.

Another important cornerstone of our current enforcement approach is the use of consent prohibition orders, without conviction and sentence, as an alternative means, in certain appropriate instances, to full prosecution of cases. The professions have been involved in some of our most recent cases in which this approach was used.

I should point out that the determination as to what method of resolution will be used in a particular case is done on a case-by-case basis, and no sweeping generalization can be made as to the future use of consent prohibition orders involving members of the professions. A number of factors are ultimately considered by the Attorney General's office in deciding whether to resolve a case through this vehicle.

In the Kent and Waterloo law association cases, this resolution was ultimately settled upon in view of the fact that the complexity of the case substantially raised the prospect of lengthy and costly litigation. The prohibition order resolution was deemed to be the most effective and efficient means of stopping the conduct in question and deterring its subsequent occurrence. The order contained a number of strong provisions, and the Law Society of Upper Canada's actions have supported the effectiveness of the order.

In the cases involving inquiries into the activities of several **real estate** boards across Canada, the particular and effective terms of the order negotiated and the immediacy of the resolution were also significant determining factors. However, considerable weight was also attached to the potential application of the terms of the order to all 114 member boards of the Canadian **Real Estate** Association. The acceptance of this resolution by

the Association enabled us to extend the anticipated benefits associated with freer competition to consumers across Canada. And we were able to accomplish this without lengthy and costly litigation in various jurisdictions across Canada.

It may be useful to elaborate on some of the terms of the order of prohibition in this latter case. The order prohibits the respondents from fixing or controlling commission rates and fees for the Multiple Listing Service, and it prohibits restrictions on the advertisement of rates and fees in any publication. In addition, boards are prohibited from placing unreasonable financial or educational restrictions on access to membership in a board or services provided by a board. Furthermore, boards are prohibited from restricting the offering of incentives to homeowners to list their properties. (I might mention that already one national **real estate** company has introduced a special offer, whereby individuals who list with the company are provided with a coupon booklet entitling them to discounts off purchases from a major department store.) In addition, the order imposes obligations on boards to educate their members regarding the terms of the order and to provide certain other information to assist us to monitor compliance with the order. While time does not permit me to summarize all the terms of the order, I think it is fair to say that this is the most comprehensive order of prohibition that has ever been issued by the Canadian courts in a competition law case. For those who are interested, copies of the complete order are available from the Services Branch of the Bureau.

As you can see from the resolution in this case, there are circumstances where a strong order of prohibition may be as effective or possibly more effective than prosecution in the ordinary course. In view of this fact, it should be evident that our compliance-oriented approach should not be taken as an indication of a less vigorous stance regarding the enforcement of the competition laws. Greater awareness of the law's application has been brought about by recent publicity and by our long history of consultation with the professions. As a result, if and when we encounter similar cases in the future, lack of knowledge or uncertainty about the application of the *Competition Act* will be an increasingly difficult stance for any profession to maintain in support of a resolution by means of a prohibition order under subsection 34(2).

However, I do recognize that many of the issues we have discussed today are not simple ones, and frequently an in-depth examination of the particular facts of a situation is' necessary before a proper determination can be made. One of the positive results of the Kent and Waterloo inquiries is that a number of different professional organizations across Canada have contacted the Bureau to discuss proposals regarding their conduct. We welcome such approaches and are willing to co-operate with the provincial law societies in addressing these proposals. We therefore suggest you consider approaching us with any proposals you may have relating to fee schedules or other matters that may raise questions under the Act.

As I stated at the very outset of this paper, the professions are assuming growing importance in the Canadian economy, and consumers are relying upon professional services to a greater extent than ever before. As a result, we want to ensure that the public interest in free competition is maintained by the professions. This objective can be facilitated by ensuring that the professions are well-informed as to their obligations under the federal competition law and provided with timely assistance to enable them to confront the practical issues that they face. I hope that today's discussion has assisted that objective.

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