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The Professions and Competition Policy

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Let me begin by broadly identifying my own position. First, I am broadly in favour of the proposed Competition Act, the philosophy it expounds, and the mechanisms it advances to implement that philosophy. Second, I am concerned - as are most professionals - to assure that professional services of a high calibre are delivered to the public at a price everyone can afford and through procedures which make them fully and easily accessible. Third, I am basically skeptical that the Bill does very much to secure the public interest in relation to professional services.

What are the present impediments to the just and equitable supply of professional services - and what does the Bill do to protect the public interest?

First, let me turn to the issue of price fixing. Through the medium of professional associations, tariffs of fees - minimum (and occasionally maximum) fees - are established which either guide or compel the practitioner in calculating the charges for his services. It is fair to say that these tariffs are seldom based on "objective" or "scientific" criteria. Usually they are designed to protect or enhance the income level of practitioners. They are seldom subject to external scrutiny either in the initial setting of the tariff, or in its application in any given situation. Of course, there are exceptions, as for example in the legal profession, where certain tariffs are established by legislation or by order of the court, and where some form of independent third party adjudication is available to review the appropriateness of the fee in any given case. However, even in these rather exceptional circumstances, the problem often is that the client does not know of his right to seek adjudication.

Compliance with the tariff is sometimes secured by punitive measures. More often, it depends upon voluntary adherence secured through publicity. Moreover, fee cutting in violation of tariff is sometimes tolerated provided that it is not flagrantly used as a method of attracting a clientele.

Given the fact that some form of price fixing is reasonably common in the market for professional services, it is important next to canvass the justifications advanced for this practice.

First of all, it is urged, the existence of a tariff protects the client from over-charging by giving him a guide with which he can predict the likely cost of the service he seeks, and against which he can measure the bill received for professional advice. The difficulty with this position is that since the tariff itself is not subjected
to external scrutiny, there is no guarantee that even a fee which conforms to the tariff is a fair fee. Moreover, as has been pointed out, the tariff usually prescribes only a minimum fee and a charge in excess of it would not be (for that reason) improper.

Next, tariffs are defended on the basis that the client is entitled to the benefit of the best professional advice available. If he is attracted by an illicit offer of a saving in the price of the professional service, rather than on the basis of superior quality, there is a distortion of his judgment. This defence of tariffs, however, is hard to sustain in view of the fact that few professions (especially those which cater to a "lay" public) have developed ways of identifying their members by criteria which would help a client select the "right" practitioner.

Finally, perhaps most persuasively, it is argued that tariffs are necessary to avoid a situation in which a professional becomes dependent upon thin profit margins and a high turnover of clients, a situation which might tempt him to shave the quality of the service in order to increase the turnover and thus to secure an "adequate" living. Yet this defence too poses a host of difficulties. What, for example, is an "adequate" living: $12,000? $18,000? $30,000? $75,000? Moreover, the problem of sub-standard service is an independent one; professional bodies should (and, to some extent, do) police the quality of service rendered by their members in any event. And, as common observation indicates, professionals even without the pressure of thin profit margins tend to be over-committed and over-extended - perhaps because many of them are work addicts or driven by professional pride and the enjoyment of their work, rather than by greed or need.

Whatever might be the justifications for price fixing, the practice is effectively struck down by section 16 of the new Bill. In the market for professional services, as in all other markets, the rule contemplated by the statute is the rule of competition.

However, the Bill does provide protection for professional fee tariffs established and implemented in accordance with section 92 of the Bill.

In order to qualify for such protection, tariffs or other forms of conduct which would violate the price fixing prohibitions must meet three conditions. First, the profession asserting the claim to immunity must have been "designated" by either the provincial legislature or by parliament. Second, no protection is to be afforded to persons who are engaged in the supply of goods or in the construction industry, limitations which would seem to deny protection respectively to pharmacists and civil engineers and architects. Third, the conduct called into question must be authorized by a federal or provincial statute, or a municipal by-law, and must be subject to the continuing
scrutiny of a body charged with the duty of protecting the public interest. This last point is rather obscure. Almost all professional associations are established by legislation, and exercise delegated legislative powers over their members. It has been thought that, even without explicit mention of the phrase "public interest", this is the sole purpose of conferring delegated powers upon a professional body. Thus, even at the present time, the governing bodies of professions are required to adhere to the public interest, although some occasionally fall short of that important standard. Does the new section 93(2)(e) require the incantation of the magic words "public interest" in the statute? If so, most statutes governing the professions would have to be amended, for what would appear to be purely formal reasons. On the other hand, if the new section means that a tribunal or court would look behind the statutory declaration that the Benchers of the Law Society or the Governing Council of the College of Physicians and Surgeons are acting in the public interest, to see if they are actually doing so, it does not say so with any degree of specificity.

This new approach to professional fee tariffs is probably of benefit to both the public and the profession, but likely of only marginal importance. So far as many lay people are concerned, they cannot afford any fee at all, no matter how it is fixed, no matter how reasonable it might be on any objective criterion. The cost of drugs, medical and legal care is beyond the reach of much of our population. Surely the way to deal with this problem is not to drive fee levels down through the competitive processes, but rather to make the services available through medicare or legal aid schemes.

Who would benefit from prohibitions against professional price fixing? In some areas, for example law and architecture, the client who needs and can afford service is usually not worried about cost; he will pass it on to the ultimate consumer. For example, lawyers, architects, engineers and realtors all charge fees which become part of the ultimate cost of building an apartment building and are reflected in the rent. No doubt a more modest "tariff" might somewhat reduce building costs. But it is problematical that any such reduction would lead to a reduction in rent; it is much more probable that it would increase the developer's profit margin. On the other hand, of course, there will be some savings for ultimate consumers. The reduction of realtors' fees for ordinary purchase and sale transactions, or of lawyers' fees for routine conveyancing, will no doubt be of some marginal utility for a sizeable segment of our population. But, as I will try to demonstrate, the real gains in bringing professional services within reach at a reasonable cost lie potentially in quite a different direction.

I next wish to discuss a group of miscellaneous restrictive practices such as prohibitions against advertising, refusals to deal and the like.
Traditionally, professions have frowned on advertising. In part this attitude reflects a sense of social distance from those who are merely engaged in business; in part, it represents an attempt to ensure that gullible clients are not attracted to the noisiest, rather than the best, members of the profession; and in part it represents a desire to preserve its established practices and patterns of relationships. Section 16(1), however, permits restrictions on advertising so long as they are unrelated to price. Accordingly, the traditional professional attitudes will remain undisturbed by the Bill.

Price discrimination, another practice which is prima facie outlawed by the new legislation, is not really a problem in many of the professions. However, it may sometimes happen that individual clients receive discriminatory advantages, either because they are poor or because they are the source of a good deal of work. But, although section 38(1) outlaws price discrimination as a general matter, certain exceptions are provided by section 38(2), including immunities for price discrimination if it is not granted "to any significant customer... in any market". It is difficult to see that in many professional situations a particular client would fall within the definition of "a significant customer".

Sections 39 and 40 dealing with professional allowances and other kinds of restrictive practices likewise would seem to have little or no significance for the professions. However, to the extent that such restrictive practices do fall within the proscription of these provisions, section 92 - which I have discussed in connection with price fixing - also provides immunities against these miscellaneous restrictive practices. Of course, the protection of section 92 is only available, again, to designated professions which are regulated by a public body charged with protecting the public interest.

I have deliberately omitted, so far, any mention of the area in which the impact of the statute is potentially the greatest: its prohibitions against monopolization. The professions typically enjoy monopoly power in relation to services within their respective jurisdictions. This monopoly is secured by legislation which forbids laymen to render the services provided by members of the profession.

Its justification is certainly sound in theory: professional services require a high degree of skill; those who already possess such skill are uniquely qualified to assess new aspirants; by certifying their competence, and admitting them to the ranks of the professional organization, they are identified to the public as qualified practitioners.

In practice, however, this rationale for professional monopoly is not always observed. By this I do not mean to say that all of the professions, or indeed any of the professions all of the time, abuse their monopoly. But,
there is some evidence to suggest that some professions may be thought to artificially limit their numbers so as to maximize the income of their members by creating a scarcity situation. Again, there is some evidence that some professions may refuse to admit members or may discipline and expel members, for reasons which do not relate to the protection of the public against dishonesty or incompetence; and further, some professions, from time to time may be lax in policing the competence and honesty of their members. Should we, then, seek to dismantle all professional monopolies or should we rather seek the development of safeguards which will ensure the protection of the public against the abuse of monopoly? As a general matter, the new Bill prohibits monopolization. Read literally, section 17(a)(ii) might be construed to apply to attempts to "prevent the entry of a person into a market" for professional services, even though the motive for such action is his lack of professional qualifications. Again, on a purely literal reading, members of a profession would violate section 17(b) if they "engage in behaviour" that is intended to place them "together with other persons" in a monopoly position. This prohibition precisely describes the role and function of the officers of a professional body. And note: section 92 provides no immunity for monopolistic conduct by the professions.

But the professions need not despair. It is virtually certain that the Bill is not intended to dismantle the whole structure of professional government. Read in context, section 17 does not appear to be directed towards bodies exercising delegated governmental authority, as do the professional bodies. The very fact that section 92 makes no attempt to immunize professional monopolies suggests that the draftsmen of the Bill thought that they were not covered in any event. Surely it would not have been necessary to protect professionals against the innocuous risks of prosecution for granting promotional allowances, if the whole structure of the professions was to be overturned.

Even more importantly, it is almost certain that the Federal Government has no constitutional power to destroy the system of professional governments created by Provincial legislation.

Nonetheless, even if we assume that professional monopoly needs to be left intact by the new Bill, we must still confront the question of how it is to be channelled into directions which involve the protection of the public interest. There are four broad approaches, which are not necessarily mutually exclusive. The first possibility would be to introduce elements of public control into the processes of professional government. This has been done in Ontario in many professions, following the recommendations of the McRuer Report. It is about to be done on a much more comprehensive basis in Quebec, following the recommendations of the Castonguay Report. While the public presence may in fact ultimately turn out to be symbolic, it could lead to more careful scrutiny by the
profession of its public responsibilities. This certainly is the desired objective of those advocating public representation on the governing boards of professional bodies.

Second, even if it be conceded that the profession must maintain a monopoly over work requiring a high level of skill and knowledge, are there not some tasks which can be delegated to, or performed entirely by, para-professionals and technicians? These persons may work either under the direction of a professional (as do dental hygienists or law clerks) or be constituted as a separate occupational group which operates autonomously (as do denturists or lay advocates) with direct relations between "clients" and themselves.

In either case there will be some benefit to the client in terms of cost savings, although probably the greatest benefits would be derived from access to autonomous para-professionals.

Before this solution can be implemented, however, careful analysis is required of the basis of the professions' asserted claims to the exclusive right to render service. There must be assurance that the para-professional or technician is in fact adequate to the task at hand. Moreover, in making such an assessment, there is the additional difficulty that the "de-professionalization" of tasks strikes at the honestly held convictions of professionals who tend to favour increased sophistication and complexity as evidence of increased competence - and as a value in itself.

Third, there is a possibility of creating countervailing forces and alternative and more efficient institutions for the delivery of professional services.

For example, in legal aid and medicare plans, the government, either directly or indirectly, bargains with the profession over the price of services. Not only does this bargaining process lead to some restraint in charges imposed upon the ultimate "client" but, as well, cost pressures are generated which may ultimately lead to substantive reforms. For example, undefended divorces consume a very large fraction of the total cost of the Ontario Legal Aid Plan. By moving these from the Supreme to the County Court, considerable cost savings are effected, which benefit not only the Plan, but persons who are paying the cost of their own domestic litigation. Or, to take another example, the high cost of prescriptions led to legislation in Ontario promoting the use of generic rather than brand name drugs.

Quite apart from governmental pressures, new experiments with both medical and legal clinics may lead to the development of systems for delivering professional services more cheaply and in a more congenial setting for persons who could not afford any fee, no matter how low.
Fourth, certain kinds of substantive reforms which are generated by professional knowledge and skill may contribute significantly to the reduction of the cost of professional services. Examples which come readily to mind are reforms in the system of land registry, the use of modular components in housing construction, and the fluoridation of the water supply. In each case, structural solutions were developed by members of the profession to ultimately enable consumers to receive the benefit of a professional service more cheaply or to avoid it altogether.

The point I want to make concerning all of these changes is that they relate basically to substantive, structural or institutional reforms. It is from such reforms, rather than the prospect of enhanced competition, that in my view the greatest potential benefit to the public is to be derived.

Whether we look at the professions from the point of view of economic benefits such as price, innovation, and efficiency, or from the point of view of social effects, such as the distribution of social and political power, the real gains are beyond the reach of any statute such as the Competition Act. Such acts operate basically to sanction offenders rather than to generate affirmative and fundamental institutional changes.

Perhaps it would be well to conclude with a historical analogy. In retrospect, it has often been suggested that the enactment of our first Combines Act in 1889 was a gesture of symbolic reassurance designed to register popular discontent with the growth of uncontrolled economic and political power within the business community. As a force which actually moulded the Canadian economy and its important industrial and commercial participants, the legislation probably had minimal impact. Perhaps the impact of the new Competition Act on the professions will likewise turn out to be mere symbolic reassurance designed to allay widespread public questioning of traditional professional prerogatives.