

Fee Schedules and the Competition Act of Canada

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RECENTLY, AS a result of an inquiry by the Director of Investigation and Research under the Competition Act (formerly the Combines Investigation Act), the line between acceptable and unacceptable conduct in the areas of fee schedules was clearly defined. Although no charges were laid nor was there any admission of guilt by either the Kent County Law Association or the Waterloo Law Association, and members of the executive committees from 1985-1987, Associate Chief Justice Frank Callaghan of the Ontario Supreme Court issued a prohibition order against both Associations from drafting any sort of fee schedule for a period of ten years.

The following is a review of the conduct acknowledged in a joint statement by the Combines Branch and the Waterloo Law Association. The Statement of Admissions and Orders of Prohibition respecting both Associations are available from FULL TEXT. Cite *R. v Waterloo Law Association et al*, 738-020, 14pp; *R. v Kent County Law Association et al*, 738-021, 16pp.

Statement of Admissions

1. The Respondents, The Waterloo Law Association and the individual members of the Executive for the years 1985, 1986 and 1987 thereof (hereinafter referred to as the Association) is restricted to lawyers engaged in the business of supplying legal services in the Regional Municipality of Waterloo in the Province of Ontario.
2. The Association was incorporated by declaration made on December 21, 1894 pursuant to An Act Respecting Benevolent, Provident and Other Societies (R.S.O. 1887, c. 162).
3. That, regulations 23 to 35 (R.S.O. 1980, Reg. 1573) promulgated under the Law Society Act (R.S.O. 1980, c. 233) establish that county and district law associations are formed and funded primarily for

the purposes of creating and maintaining county law libraries. Membership is purely voluntary.

4. That, from time to time the Association promulgated suggested fee schedules that could be charged for performance of named legal services by members of the Association.
5. That, in March 1985, as a result of widespread incidents of pricing below the most recent suggested fee schedule, the chairman of the Professional Standards Committee of the Associations informed the Executive of the Association that he would prepare a report concerning a new tariff and ways that it could be enforced, in order that members of the Association would be bound to charge fees consistent with the tariff.
6. That, in May 1985, the Professional Standards Committee reported to its members that it was considering methods of persuading non-conforming lawyers to adhere to a new tariff and requested suggestions from members concerning the tariff and its enforcement, and demanded that the names of lawyers quoting unusually low fees be reported.
7. That, at a meeting in July 1985, the Executives discussed enforcement of a proposed fee schedule and sanctions against Association members who did not cooperate.
8. That, in September 1985, the Association mailed a fee schedule effective November 1, 1985 to each member of the Association listing the fees to be charged for residential real estate legal services. Also enclosed was an acknowledgement form for the signature of the member stating that the member had received, reviewed and approved of the fee schedule.
9. That, in October 1985 the Professional Standards Committee mailed

guidelines respecting fees to members of the Association indicating that the tariff was to be implemented on November 1, 1985.

10. That, at that time the Executive of the Association suggested to the members of the Association that non-adherence to the fee schedule would be regarded as being in breach of accepted ethical and professional standards, and was a person who may be boycotted by the legal community in Waterloo.
11. That, a membership meeting was to be called December 10, 1985 to formally ratify the new fee schedule.
12. That, the Association gave written notice of a general meeting to be held on December 10, 1985 for the purposes of formally ratifying the fee schedule for residential real estate legal services and discussing any concerns of the membership with respect to its implementation.
13. That, at the general membership meeting held on December 10, 1985, the Association formally ratified the above-mentioned fee schedule by an unanimous vote. Approximately 95% of all lawyers in Waterloo who practiced real estate law were in attendance at the said meeting.
14. That, subsequent to November 1, 1985, a committee of the Executive undertook to monitor the fees being charged by the individual members for the provision of real estate legal services to ensure adherence to the fee schedule by non-complying members.
15. That, subsequent to November 1, 1985, and continuing until February 19, 1986, many members of the Association maintained a uniformity in fees, consistent with levels in the fee schedule promulgated by the Association during this period.

16. "That, the conduct of the Respondents as described in paragraphs 4. to 14. above, are acts or things constituting or directed towards an agreement reached between the Association, the Executive and among a large majority of members to restrain competition in the price for the provision of residential real estate legal services. Because of evident uniformity in fees there was a lessening or prevention of price competition between or amongst lawyers in Waterloo in the provision of residential real estate legal services, and the acts or things referred to herein were taken with the intent of securing such results."

17. That, the members of the Association who so agreed to adhere to the fee schedule promulgated by the Association subsequent to November 1, 1985 constituted a large majority of those provided such legal services in Waterloo during the relevant period.

The above represents to joint statement of admissions agreed to by the Waterloo Law Association and the Combines Branch. There was no admission of guilt and Gordon Kaiser representing the Association said his client could have made a good case in court.

After being satisfied that the Respondents had done acts or things directed towards the commission of an offence under Section 32 (1) (c) of the Competition Act, R.S.C. 1970, Chapter C-23 as amended, namely "that of conspiring, combining, agreeing or arranging together and with one another or with other persons, to prevent, or lessen unduly, competition in the supply of a PRODUCT, to wit: residential real estate legal services within the Regional Municipality of Waterloo," Mr. Justice Frank Callaghan issued a prohibition order.

The Prohibition Order

This order prohibits the Waterloo Law Association from "conspiring, combining, agreeing or arranging together or with one another or with any other person to fix, establish, enforce, administer or direct the fee at which they supply legal services, whether through the use of fee schedules suggested or otherwise." The order went on to prohibit "any measure to cause, or attempt to cause, any person to adhere to the fees so fixed, established, enforced, administered or directed."

The above portion of the prohibition order makes specially prominent Section 32 of the Competition Act. But Mr. Justice Callaghan did not stop there. He went on to prohibit for a period of 10 years: "(a) promulgating any schedule of fees for legal services, whether suggested or otherwise; (b) forming or maintaining any Committee in respect of legal fees, whether in whole or in part; and (c) communicating to one another by any method the legal fees that members have charged, are charging or plan to charge clients, save only for those communications appropriate to the day to day operation of a law practice unless approved by the Director of Investigation and Research under the Competition Act, R.S.C. 1970, Chapter C-23 as amended."

The Court also ordered that each new member of the Association for a period of five years receive a copy of the order and a written statement that it is the policy of that Association to require compliance with the Competition Act and with the Order, and that non-compliance with the Order may constitute an offence under Section 116 of the Criminal Code.

The statement of admission by the Kent County Law Association was similar to that of the Waterloo Law Association. A fee schedule was agreed to by approximately 80 percent of the membership and undertakings were signed "to charge fees only in accordance with the aforementioned fee schedule". An unprofessional conduct by-law was passed by the membership in attendance at a meeting held on October 22, 1984. "Failing to follow and apply any Fee Schedule of the Association . . ." was specifically included in the by-law. The by-law allowed for penalties, including the imposition of fines on members found guilty of unprofessional conduct.

The Combines Investigation Branch began an inquiry into the Kent County Law Association and their fee schedule. The Branch took the position that exact adherence to the Tariff with a possible penalty for failure to do so was in breach of the Competition Act. As a result of the inquiry, the Kent Association excluded the ". . . undertakes to charge only in accordance with the aforementioned fee schedule . . ." clause.

The subsequent prohibition order against the Kent County Law Association

was the same as that against the Waterloo Law Association.

The case represents the first of its type against a professional organization. Although no charges were laid against anyone, the case serves to warn professional organizations that lessening competition for any product, including professional services, will be severely dealt with by the courts. Mr. Ian Nielson-Jones, a Combines Branch Investigator, said in an interview with Mr. Kirk Makin that "there is nothing wrong with voluntary fee schedules". In a letter from Mr. Calvin Goldman, the Director of Investigations and Research, to the Law Society of Upper Canada, he stated that, "a genuine suggested fee schedule would be one that an Association issues without raising any intention or expectation that the association membership adopt the schedule in their practice".

This gives rise to the question, does the annual fee survey conducted by the Association of Ontario Land Surveyors intend to suggest that the figures published therein are the fees to be charged? Clearly the answer is no. Our "Product", that of opinions on boundaries, is defined by Section 2 of the Competition Act to include professional and other services. In the real estate transaction the consumer is purchasing a parcel of land, as such he is entitled to know the cost of the land and the range of associated professional fees. The annual fee survey published by our Association serves as a guide to the public, real estate agents and lawyers as to what the average costs for named survey services they can expect in their area. Given the nature of our product there will be a range of prices for any given service. The public should be informed as to what the complexities are in the performance of our task, why and the estimated costs.

"Ensure that the client is aware of the complexity of the type of survey recommended and the nature of the fee for the services" - Code of Ethics, Association of Ontario Land Surveyor.

The Waterloo Law Association case should make clear the line between fee schedules or fee surveys and price fixing or unduly lessening of competition. By applying the Act vigorously against lawyers, the government has made it clear that it will deal harshly with any professional organization that sets up a fee schedule and enforces it without statutory authorization. ●