

# THE COMPETITION ACT OF CANADA

The Treasurer of the Law Society of Upper Canada has kindly given permission to publish his letter to the members of the society and the letter from the Director of Investigation and Research.

The Law Society of Upper Canada  
Osgoode Hall  
Toronto  
Ont. M5H 2N6  
27 November, 1987

Dear Colleagues,

Re: The Competition Act of Canada

Convocation has been made aware of investigations being carried out by the Director of Investigation and Research under the Competition Act (formerly the Combines Investigation Act) with respect to the use of suggested tariffs of fees by some County and District Law Associations.

I must now advise the profession that Convocation regards the promulgation of tariffs of fees that:

- (a) are intended to bind members with respect to fees charged for legal services, or
- (b) are adhered to as a result of direct or indirect pressure brought to bear upon members by other members,

as conduct that is unauthorized by the Law Society and warrants the laying of a complaint and such disciplinary action as may be appropriate in the circumstances. The Law Society has received legal advice that the Law Society Act does not authorize the Law Society to fix tariffs of fees for the provision of legal services.

Recently the Waterloo Law Association and the Kent Law Association engaged in activities respecting tariffs of fees that have led to seizures and investigations by the Director of Investigation and Research. This conduct was engaged in subsequent to the then Treasurer's letter of May 1, 1985, published in the Communiqué Plus of May 23 and 24, 1985, which indicated that the laws of Canada prohibit agreement whether expressed or implied in restraint of trade, or conspiracies to lessen competition and fix prices for services and goods, includ-

ing legal services. These Associations are currently the subject of a discipline investigation by the Society.

I have been made aware that other associations may have engaged in or are contemplating engaging in similar activities that would be unauthorized conduct under this letter. As with any breach of the law, the Law Society views such activities as being incompatible with the public interest or the best interests of the profession. If activities of this kind result in a conviction, then they will be treated by Convocation in the same way as other serious criminal offences. Therefore, any members engaging in any conduct that contravenes the provisions of the Competition Act, including the continuation of present practices of that nature, will risk criminal prosecution regardless of whether disciplinary action is undertaken by the Law Society.

The Director of Investigation and Research has indicated to me that if any association is contemplating the adoption of a particular suggested fee schedule, that it may approach him for an opinion under the Director's Programme of Compliance.

Attached is a letter from the Director outlining his position on the adoption of suggested fee schedules.

W. Dan Chilcott  
Treasurer

Consumer and  
Corporate Affairs Canada  
Ottawa, Ont. K1A 0C9  
June 15, 1987

Dear Mr. Scace,

I am writing further to our recent discussions during which you requested that I outline my position on suggested fee schedules among members of the County and District Law Associations.

If the members of an association formulate and implement a suggested fee schedule, then, for the reasons discussed below, they and the association risk violating the conspiracy provisions found in section 32 of the **Competition Act**. This section of the Act, among other things, prohibits agreements to prevent or lessen, unduly, competition in the sale or supply of a product. "Product" is de-

finied by section 2 of the Act to include professional and other services. Those who violate section 32 are guilty of an indictable offence and are liable to imprisonment for five years or to a fine of ten million dollars, or both.

As you know, I have a statutory obligation to initiate an inquiry whenever I have reason to believe that an offence under the **Competition Act** has been or is about to be committed. The issuance of a fee schedule which is genuinely only a suggested one might not in itself cause me to initiate an inquiry pursuant to section 32. 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 practices. However, any agreement among a substantial number of members of a local law association to adhere to a suggested fee schedule would give me grounds to commence an inquiry. Furthermore, any attempt, directly or indirectly, to obtain adherence to a suggested fee schedule, whether or not adherence is voluntarily offered by the members, would raise an issue under the Act.

The association could foster intentions or expectations that the members follow a suggested fee schedule by any one of several mechanisms, not simply by obtaining direct agreement among its members. For example, it might solicit input from, or a consensus of, the members as to the appropriate level of the fees listed in the schedule. Alternatively, it might communicate to members how many of their colleagues have adopted, or are likely to adopt, the scheduled fees.

Regardless of manifest intentions or expectations, one would normally expect to observe a range of prices for any legal service given the nature of the market and the work product. I would therefore closely examine any situation in which a substantial number of lawyers in a given association priced their services at levels corresponding to those in the association's fee schedule. In such circumstances, it is likely I would have grounds to commence an inquiry under the Act.

As I am sure you will appreciate, it is for the courts to determine whether a

violation of section 32 of the **Competition Act** has occurred. In a case where no direct evidence of an agreement exists, the court may infer, pursuant to subsection 32.(1.2), the existence of an agreement from circumstantial evidence, with or without direct evidence of communication among the parties. The court could make such an inference, in my view, from evidence that upon any increase in the fee levels contained in a suggested fee schedule, a substantial number of lawyers were observed to adopt and to adhere to the new levels. Such an inference could also be drawn if fees were observed to move to the levels contained in a suggested fee schedule when, prior to its introduction, fees had varied among lawyers in the area in question.

It is obviously not possible to precisely define all the circumstances in which the issuance of a suggested fee schedule would contravene the Act. I would suggest that if members of the Law Society have any doubts or questions about the legality of adopting a particular suggested fee schedule, that they approach this office for an opinion under the Program of Compliance, either as a group, individually or through counsel. By means of this program, I endeavour to assist those who wish to avoid conflict with the **Competition Act** by examining matters submitted to me and by indicating whether or not the adoption of proposed plans would cause me to commence an inquiry.

If doubt as to the legality under the Act pertains to the use of an existing suggested fee schedule, the most prudent course of action would be to discontinue the practice. Discontinuance would not, however, necessarily immunize past behaviour from scrutiny under the Act.

Should you wish to discuss any of the foregoing further, please do not hesitate to contact me.

Yours very truly,  
Calvin S. Goldman

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*Our next issue will feature an article on the lawyers who have been charged under the Competitions Act.*