Jabour v. *Law Society of British Columbia et al.*[1]: Application of the Combines Investigation Act[2] to a Provincially Created Professional Society.

CASE SUMMARY

The appellant Jabour advertised his legal clinic in British Columbia by means of newspapers and an illuminated sign on his office building. The respondent Benchers of the British Columbia Law Society moved to discipline Jabour for "conduct unbecoming a member" under provisions of its enabling statute, the *Legal Professions Act*.[3] The appellant moved that the Bencher's restrictions on advertising were in vilation of the *Combines Investigation Act* (the *Act*) and in particular of the 1975 amendments to section 32.[4] At the British Columbia Supreme Court, it was found that the *Act* did apply, on the ground that while the Benchers had the power to regulate advertising, they had no such power to prohibit. At the Court of Appeal level, this regulation-prohibition distinction was rejected. Seaton J.A. stated in his judgment that combines legislation does not apply to regulatory schemes validly established by provincial legislation. On appeal to the Supreme Court of Canada, Estey J. speaking for the Court again found that the *Act* did not apply to the activities of the Benchers, for the reason that the necessary requirements of section 32 were not present.

HISTORICAL BACKGROUND

A. Legislation:

In 1975, the *Combines Investigation Act* underwent considerable amendment. This was no less the case in the sections under the heading "Offences in Relation to Competition" and in particular, for the purposes of the *Jabour* case, subjection 32(1). Subsection 32(1) provides:

> Everyone who conspires, combines, agrees or arranges with another person . . .
>
> (c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of an *article* . . .
>
> (d) *to restrain or injure trade or commerce in relation to any article;*
>
> is guilty of an indictable offence . . . (author's emphasis).

---

[1](1982), 137 D.L.R. (3d), 1. (S.C.C.)

[2]R.S.C., 1970, c. C-23.

[3]R.S.B.C., 1960, c. 214 (now the *Barristers and Solicitors Act*, R.S.B.C., 1979, c. 26.)

[4]S.C., 1974-75-76, c. 76.

In 1970, the term "article" in subsection 1(1) was defined as "an article or commodity that may be the subject of trade or commerce". In short, subsection 32(1) did not apply to the supply of a service or in particular to combines that might arise within professional societies. In 1975 amendments made it clear that section 32 was to apply to services and professions. There were changes in the text of section 32 itself which reads as follows:

> (c) to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product . . . , or
>
> (d) *to otherwise restrain or injure competition induly,* (author's emphasis)
>
> is guilty of an indictable offence . . .

Directly bearing on subsection 32(1) were the substantial changes in the definition section. In particular, in subsection 32(1) "article" was replaced by the term "product"; "product" being defined in subsection 1(1) of the amendments as including an article and a service. In turn, "service" was defined as "a service of any description whether industrial, trade or professioanl or otherwise". Clearly, Parliament intended to include combines arising in the supply of services and the professions within the scope of the *Act.* The question to which the Supreme Court directs itself in the *Jabour* case is what are the scope of these provisions, particularly in relation to professional societies created by valid provincial enactment?

A final change in section 32 of the *Act* should be noted. Subsection 32(6) added a defence to provide specifically for professional "combines". Subsection 32(6) provides:

> 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* . . . (author's emphasis)

B. Case Law

As may be surmised from the facts, the primary issue arising in the *Jabour* case is whether the *Act* and it's amendments apply to a professional legal society created by, and acting under a valid provincial statute. Cases most closely on point are those which Estey J. in his judgment refers to as the "regulated-industries cases"[5] or, cases where regulatory schemes, set up under provincial legislation were questioned in terms oftheir violation of the federal *Act.* Clearly, such regulatory schemes and groups acting thereunder may have the effect of restricting competition in the supply of the products with which they deal. The very purpose for these schemes is the control of a product. However, the courts have consistently found that the *Act* does not apply in these cases.

---

[5]*Supra,* footnote 1, at 31.

One of the major cases considering the relationship of a provincial regulatory scheme to the *Act* is the *Reference Re the Farm Products Marketing Act.*[6] In that case, it was argued that Ontario was prevented from enacting certain provisions in the *Farm Products Marketing Act* because they violated the *Act.* The Supreme Court found that the *Act* did not apply. Rand J. put the matter quite clearly in his judgment when he stated that:

> The provisions of the Combines Investigation Act and the Criminal Code envisage voluntary combinations or agreements by individuals against the public interest that violate their prohibitions. The public interest in trade regulation is not within the purview of Parliament as an object against which its enactment are directed.[7]

Obviously, the "contrary to public interest" requirement of a combine is crucial in analyzing these cases involving provincial statutes since a provincial statute is presumably passed in the public interest. This point is again made in a case considered by Seaton J.A. in the Court of Appeal: *Cherry* v. *The King, ex. rel Wood:*[8]

> Moreover, it surely cannot be successfully argued that a board, in exercising the powers conferred upon it by the Legislature and which are designed to regulate and control the production, processing and distribution of a commodity in the Province "having regard primarily to the interests of the public and to the continuity and quality of supply" renders itself liable to a prosecution under s. 498 . . . (Criminal Code).[9]

In essence, these cases and others considering the same issue state that adherence to a provincial statute cannot "unduly" restrict competition in the supply of a product. Presumably, by analogy, it would appear that a professional society created in the public interest by provincial statute could not "unduly" restrict competition in the sense required by the *Combines Investigation Act.*

THE PRESENT CASE

As stated in the previous section, the case law with respect to the application of the *Act* to provincially created trade regulatory groups is quite straightforward; *i.e.,* the outcome being that in the case of a provincially created "combine", the *Act* does not apply. The significant issue in the *Jabour* case is; does the *Act* apply to professional societies created by provincial statute? The Supreme Court answers this question in the negative and thus avoids having to answer what would be a very difficult constitutional question: If the *Act* does apply, is it in that respect *intra vires* the Parliament of Canada?[10] Put simply, since the *Act* does not apply to the

---

[6](1957), S.C.R. 198.

[7]*Ibid.,* at 219-20.

[8][1938] 1 D.L.R. 156.

[9]*Ibid.,* at 162.

[10]*Supra,* footnote 1, at 5.

Law Society of British Columbia, there is no need to question the constitutionality of its application. In coming to this decision, Estey J. for the most part upholds the British Columbia Court of Appeal decision of Seaton J.A. Much of the case is devoted to an analysis of the *Act* and its amendments and the regulated-industries cases. Estey J. rejects the contention of the appellant that such cases be given a narrow reading. The appellants had put forward two arguments in this regard.[11] First, they argued that the regulated-industries cases be restricted to the marketing of natural products. The second contention (one having more merit) was that such cases should only apply where the statute promulgates a complete regulatory scheme; *i.e.* these cases should not apply in the *Jabour* case because there is no specific provision in the *Legal Professions Act* dealing with advertising. This argument had also been rejected by Seaton J.A. in the Court of Appeal. His response to this contention was as follows:

> One attempt was based on a study that revealed that in most or all of the cases the power was found to have been specifically granted. It is then said that the power to prohibit advertising is not specifically granted to the Benchers and therefore the cases do not apply. Whether the powers have been granted to the regulatory body in specific language as opposed to broad general language, does not offer a valid distinction. The essential thing is that the power be granted.[12]

Estey J. in examining the regulated-industries cases comes to the conclusion that there has been in such cases a requirement that in order to fall within the *Act*, there must be something "unduly", or contrary to the public interest for those sections to apply.[13] Estey J. then makes the following important statement, which clearly demonstrates the eventual outcome of the case:

> 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.[14]

From this statement, we see again the premise underlying all of these cases; *i.e.*, specifically, that a provincial statute is inherently made in the public interest. The argument runs as follows: Since the *Act* extends only to actions contrary to the public interest, and a provincial statute is made in the public interest, the *Act* does not apply to a provincial statute.

Not surprisingly then, Estey J., comes to the conclusion that the *Act* does not apply to the actions of the Benchers or the Law Society.[15] What

---

[11] *Ibid.*, at 36.

[12] *Jabour* v. *Law Society of British Columbia et al.* (1980), 115 D.L.R. (3d) 549 at 567.

[13] *Supra*, footnote 1, at 37.

[14] *Ibid.*

[15] *Ibid.*, at 40-41.

is somewhat surprising however, is that this is not in the end the point that Estey J. emphasizes. Rather, he turns to the opening words of subsection 32(1) where it states; "Every one who conspires, combines, agrees or arranges with another person", and finds that such agreement must be voluntary. He then points out that there can not be such a voluntary agreement in this case because the Benchers are acting according to their statutory mandate:

> In the words of Rand J. in *Farm Products Reference, supra*, at p. 278 D.L.R., at pp. 219-20 S.C.R., the provincial statute is "coercive" as applied to members of the provincially-regulated group, whereas the statute is directed towards voluntary combinations or agreements.[16]

A final argument put forward by the appellants concerned subsection 32(6).[17] Briefly, the argument was to the effect that subsection 32(6) by providing a defence where the agreement "relates only to a service and to standards of competence and integrity that are reasonably necessary for the protection of the public," Parliament intended to extend section 32 to include such professional groups as the Benchers. Both the Court of Appeal and the Supreme Court reject this contention. By applying clear and logical principles of statutory construction, Estey J. determined that the defence of subsection 32(6) would only arise if the respondents came within the intended scope of section 32 as given by subsection (1):

> in my view, ss. (6) does not operatae to make a fundamental change to the plain meaning of the main operating provision of the section, that is ss. (1) of s. 32. By its own terms, ss. (6) is a limited directive to a court hearing a charge under ss. (1). It is to ss. (1) that one must look to determine the breadth of the parliamentary grasp . . . A defence creating provision is hardly an appropriate place to find an expansion of the changing provision.[18]

THE ANALYSIS

The decision in the *Jabour* case appears to be an extension of the principles laid down in the regulated-industries cases as to the relationship between bodies created by provincial statute and the application of the *Combines Investigation Act*. Surely, the activities of such bodies may for some purposes fall within section 32 of the *Act*. At the same time however, it must be recognized that the necessaary "*mens rea*" to create a combine requires voluntary agreement, and this element is lacking when we are dealing with a body carrying out its statutory mandate. Perhaps more important is the "unduly" requirement; *i.e.*, that the combine be contrary to the public interest. Since a provincial statute is by its very nature in the

---

[16]*Ibid.*, at 37.

[17]*Ibid.*, at 38.

[18]*Ibid.*, at 39-40.

public interest, it is at once illogical to say that such bodies be considered as combines. Therefore, one is pushed to the conclusion that such groups are outside the scope of the *Act* as it presently stands.

"As it presently stands", is an important statement in terms of the constitutional question that was not dealt with in the *Jabour* case. It should be recognized that this case does not decide that the *Act* cannot apply to such provincially established bodies as the Law Society of British Columbia. This issue was never dealt with because it was found that the *Act* as it stands does not apply to such groups. This is not to say that Parliament cannot legislate to make such provincially created bodies a combine under the *Act*. To take this from the case would be to misread Mr. Justice Estey's decision.

The decision of the Supreme Court rests upon a fundamental principle of statutory construction that federal and provincial acts should be read together so that they may exist consistently and harmoniously with one another. Behind this method of construction, it must be recognized that there is a distinct judicial approach to questions dealing with possible conflicts between federal and provincial legislation; *i.e.*, they are to be read so as to give them the greatest possible independence within their spheres of jurisdiction. This judicial approach to interpretation seems to be a consistent one at least on the part of Estey J. In a recent case, *A.-G. Quebec & Keable* v. *A.-G. Can. et al.*[19] (which Seaton J.A. notes at the Court of Appeal level in the *Jabour* case),[20] Estey J. has this to say:

> Difficulty in ascertaining the precise boundary in specific circumstances is no reason to withdraw from the responsibility of enumerating a constitutional doctrine which recognizes the validity of the exclusive authorities in the subsections of ss. 91 and 92 respectively.[21]

As a final question, it may be asked which services and professional groups will come within the scope of the *Act*? It would appear that the *Act* would apply to such professional groups and societies that are not created or regulated by provincial statute. Although this was not the precise question before the Supreme Court, Estey J. *in obiter* had these words to say:

> There are of course in our community endless associations, professional and otherwise, voluntarily established and embracing persons carrying on activities social, commercial, professional and otherwise, which have no statutory mandate in the sense of a governing body of a profession. It may well be that it was the intent of Parliament to include in ss. (6) (or ss. (1)) such non-statutory bodies.[22]

---

[19][1979] 1 S.C.R. 218.

[20]*Supra*, footnote 12, at 564.

[21]*Supra*, footnote 19, at 259.

[22]*Supra*, footnote 1, at 40.

CONCLUSIONS

The effects of the Jabour decision are far-reaching in terms of subsequent interpretation of the *Combines Investigation Act* amendments and their application to professional societies. Firstly, and quite particularly, it appears that provincially created legal societies across Canada are now free from action in terms of violation of the *Act* as it presently exists. Secondly, the *Act's* provisions as to restriction of competition in a profession have arguably been strictly limited in that these sections likely will not be found to apply to any professional body created by valid provincial statute.

In one sense, this is a landmark case in that it determines what professional groups or services are to be excluded from the *Act*. From another perspective however, this case only extends the principles that have already been established and applied in the regulated-industries cases.

ANNE W. La FOREST*

*B.A. Candidate, (University of Ottawa) 1983, LL.B. Candidate, (U.N.B.), 1984