

Indexed as:

Canada (Attorney General) v. Law Society of British Columbia

The Attorney General of Canada, the Restrictive Trade Practices Commission, L.A. Couture, in his capacity as Acting Chairman of the Restrictive Trade Practices Commission, and Robert J. Bertrand in his capacity as Director of Investigation and Research, Combines Investigation Act, appellants;

and

The Law Society of British Columbia and Victor McCallum, respondents;

and

The Attorney General of Ontario, the Attorney General of Quebec, the Attorney General of New Brunswick, the Attorney General of British Columbia, the Attorney General of Saskatchewan, the Attorney General of Alberta, the Law Society of Upper Canada, Federation of Law Societies of Canada/Fédération des professions juridiques du Canada, Prepaid Legal Services Program of Canada, interveners.

And between

Donald Jabour, appellant;

and

The Law Society of British Columbia and Harry Rankin representing the Benchers of the Law Society of British Columbia, respondents;

and

The Attorney General of Canada, the Attorney General of Ontario, the Attorney General of Quebec, the Attorney General of New Brunswick, the Attorney General of British Columbia, the Attorney General of Saskatchewan, the Attorney General of Alberta, Prepaid Legal Services Program of Canada, interveners.

[1982] 2 S.C.R. 307

File Nos.: 16298 and 16299.

Supreme Court of Canada

1981: May 25, 26 and 27 / 1982: August 9.

**Present: Laskin C.J. and Martland, Ritchie, Dickson, Beetz,
Estey, McIntyre, Chouinard and Lamer JJ.**

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Courts -- Jurisdiction -- Provincial superior courts -- Power to declare federal statute ultra vires -- Nature of exclusive powers of Federal Court (Trial Division) to grant injunctive and declaratory relief -- Constitutional Act, 1867, ss. 91(2), 91(27), 92(15), 96, 100, 101 -- Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, ss. 2, 17, 18.

Combines -- Provincial law society -- Advertising restrictions -- Whether or not Combines Investigation Act applicable to restrictions -- Combines Investigation Act, R.S.C. 1970, c. C-23, ss. 2, 8, 17(1), 32.

Civil rights -- Freedom of speech -- Law society restrictions as to advertising -- Whether restrictions imposed under valid provincial law -- Whether restrictions on member's right to advertise a violation of right to freedom of speech -- Combines Investigation Act, R.S.C. 1970, c. C-23, ss. 2, 8, 17(1), 32 -- Legal Professions Act, R.S.B.C. 1960, c. 214 (now Barristers and Solicitors Act, R.S.B.C. 1979, c. 26), ss. 1, 2(3), 36, 36A, 37, 43, 48(b), 62.

The Law Society of British Columbia initiated steps to discipline Jabour, a member who had advertised his practice contrary to the Society's rules, for "conduct unbecoming a member". In the B.C. Supreme Court, Jabour sought: 1) a declaration that the Law Society's rulings and orders were null and void because they offended the Combines Investigation Act and infringed upon Jabour's freedom of speech; and 2) an interlocutory injunction restraining the Law Society from proceeding pending the Court's determination of the issues raised. The request for the interlocutory injunction was rejected. The Law Society's Discipline Committee found Jabour guilty and recommended suspension of his licence to practice. Jabour, however, successfully sought an order enjoining the Law Society from considering the Committee's report pending disposition of the Court action. The order was sustained on appeal.

The Law Society started an action in the British Columbia Supreme Court after it received a notice of investigation under the Combines Investigation Act. The action sought: 1) an injunction preventing the Director from continuing with the inquiry relating to the Law Society and 2) declarations that the Combines Investigation Act did not apply to the Law Society, and if it did, that that Act was ultra vires Parliament to that extent.

Held: The appeals should be dismissed.

The British Columbia courts have jurisdiction to entertain the claims for declarations relating to the applicability of the Combines Investigation Act to the Society and its members. Although Parliament might establish a court for the better administration of the laws of

Canada, it lacks the constitutional authority to strip the provincial superior courts of the power to declare a federal statute beyond Parliament's competence. These courts occupy a position of prime importance in the constitutional pattern of this country and their power to consider the constitutionality of federal statutes is fundamental to the federal system established by the Constitution. Section 101 cannot justify such an exclusion of authority. Moreover, the British Columbia courts have jurisdiction to entertain a plea for injunction on these proceedings instituted under the Combines Investigation Act because it is a remedy ancillary to the court's principal determination and a part of the court's inherent general jurisdiction.

Section 32 of the Combines Investigation Act did not apply to the Law Society in the circumstances of this appeal. The Benchers' disciplining Jabour for advertising was authorized by the Legal Professions Act. That Act caused the discipline committee to be established, authorized disciplinary action for "conduct unbecoming a member of the society", and broadly defined that conduct to include "any matter, conduct or thing ... deemed in the judgment of the Benchers to be contrary to the best interests of the public or of the legal profession." The Benchers, in agreeing that Jabour was guilty of professional misconduct, did not conspire contrary to s. 32(1) of the Combines Investigation Act. Rather, they were discharging their duties under a valid provincial act. Where a federal statute can be properly interpreted so as not to interfere with a provincial statute, that interpretation is to be applied in preference to other constructions that would bring about a conflict between the two statutes. The defence, created by s. 32(6), dealing with conspiracy in relation to service or standards of competence reasonably necessary to protect the public in the practice of a profession, did not expand the charging section or otherwise fundamentally change the plain meaning of the section's main operating provision. It was not necessary to consider whether the Combines Investigation Act was *intra vires* Parliament.

Appellant's right to freedom of speech was not violated by the Benchers' ruling. This freedom, absent constitutional entrenchment placing it beyond the reach of Parliament or the Legislature, can be curtailed by valid statute law. The ethical, moral and financial aspects of a trade or profession can be regulated by a province within its boundaries. The Benchers' ruling here was exercised under valid provincial law and the fact that it reduced a member's right to freedom of economic speech (advertising) did not invalidate this otherwise validly delegated power.

Cases Cited

R. v. Thomas Fuller Construction Co. (1958) Ltd. et al., [1980] 1 S.C.R. 695; Ontario Boys' Wear Ltd. et al. v. The Advisory Committee et al., [1944] S.C.R. 349; Reference re The Farm Products Marketing Act, [1957] S.C.R. 198; Attorney General (Can.) and Dupond v. Montreal, [1978] 2 S.C.R. 770, applied; Merchant v. Benchers of the Law Society of Saskatchewan, [1973] 2 W.W.R. 109; Pharmaceutical Society of Great Britain v. Dickson, [1967] 2 All E.R. 558 (C.A.), affirmed [1968] 2 All E.R. 686 (H.L.); R. v. Chung Chuck, [1929] 1 D.L.R. 756; R. v. Can. Breweries Ltd., [1960] O.R. 601, considered; Dyson v. Attorney-General, [1911] 1 K.B. 410; Thorson v. Attorney General of Canada, [1975] 1 S.C.R. 138; R. v. Bradley, [1914] S.C.R. 270; Valin v. Langlois (1879), 3 S.C.R. 1; Attorney General of Canada et al. v. Canard, [1976] 1 S.C.R. 170; Denison Mines Limited v. Attorney General of Canada (1972), 32 D.L.R. (3d) 419; City of Hamilton v. Hamilton Harbour

Commissioners, [1972] 3 O.R. 61; British Columbia Power Corporation, Ltd. v. British Columbia Electric Company, et al., [1962] S.C.R. 642; Re Bridgman and City of Toronto, [1951] O.R. 489; R. v. Shamrock Fuel Co., [1924] 3 W.W.R. 454; R. v. Simoneau (1935), 65 C.C.C. 19; Cherry v. The King ex rel. Wood (1937), 69 C.C.C. 219; Goldfarb v. Virginia State Bar (1975), 421 U.S. 773; Bates v. State Bar of Arizona (1977), 433 U.S. 350; Parker v. Brown (1943), 317 U.S. 341; Reference re Alberta Statutes, [1930] S.C.R. 100, referred to.

APPEAL from a judgment of the British Columbia Court of Appeal (Law Society of British Columbia et al. v. Attorney-General of Canada et al.) (1980), 108 D.L.R. (3d) 753, 18 B.C.L.R. 181, [1980] 4 W.W.R. 6, dismissing an appeal from a judgment of Mackoff J. dismissing an application to strike out the writ of summons and to dismiss the action for want of jurisdiction. Appeal dismissed.

APPEAL from a judgment of the British Columbia Court of Appeal (Jabour v. Law Society of British Columbia et al.) (1980), 115 D.L.R. (3d) 549, 24 B.C.L.R. 1, [1981] 2 W.W.R. 159, allowing an appeal from a judgment of Mackoff J. relating to the Law Society's power to regulate advertising and the applicability of the Combines Investigation Act. Appeal dismissed.

Counsel at hearings: Attorney General of Canada et al. v. Law Society of British Columbia and Victor McCallum.

W.I.C. Binnie, Q.C., L.A.W. Hunter, and Morris Rosenberg, for the appellants.

D.M.M. Goldie, Q.C., D.G.S. Rae and W.S. Martin, for the respondents.

Lorraine E. Weinrit and John Cavarzan, Q.C., for the intervener the Attorney General of Ontario.

Henri Brun, for the intervener the Attorney General of Quebec.

Bruce Judah, for the intervener the Attorney General of New Brunswick.

E.R.A. Edwards, for the intervener the Attorney General of British Columbia.

John D. Whyte, for the intervener the Attorney General of Saskatchewan.

William Henkel, Q.C., for the intervener the Attorney General of Alberta.

Brendan O'Brien, Q.C., for the intervener the Law Society of Upper Canada.

Marcel Cinq-Mars, Q.C., and E. Neil McKelvey, Q.C., for the Federation of Law Societies of Canada.

Ian G. Scott, Q.C., for the intervener Prepaid Legal Services Program of Canada.

Counsel at hearings: Donald Jabour v. The Law Society of British Columbia et al.

Bryan Williams, Emilio S. Binavince, and Michael Mangan, for the appellants.

W.I.C. Binnie, Q.C., and L.A.W. Hunter, for the respondents.

J.A. Macaulay and A.D. Treleaven, for the interveners the Law Society of British Columbia et al.

Morris Rosenberg, for the intervener the Attorney General of Canada.

Lorraine E. Weinrit, for the intervener the Attorney General of Ontario.

Henri Brun, for the intervener the Attorney General of Quebec.

Bruce Judah, for the intervener the Attorney General of New Brunswick.

E.R.A. Edwards, for the intervener the Attorney General of British Columbia.

John D. Whyte, for the intervener the Attorney General of Saskatchewan.

William Henkel, Q.C., for the intervener the Attorney General of Alberta.

Solicitor for the appellants, the Attorney General of Canada, the Restrictive Trade Practices Commission, L.A. Couture, in his capacity as Acting Chairman of the Restrictive Trade Practices Commission, and Robert J. Bertrand, in his capacity as Director of Investigation and Research, Combines Investigation Act: Roger Tassé, Ottawa.

Solicitors for the respondents the Law Society of British Columbia and Victor McCallum: Russell & DuMoulin, Vancouver.

Solicitor for the intervener the Attorney General of British Columbia: Ministry of the Attorney General of British Columbia, Victoria.

Solicitors for the appellant Donald Jabour: Swinton & Co., Vancouver.

Solicitors for the respondents the Law Society of British Columbia and Harry Rankin representing the Benchers of the Law Society of British Columbia: Macaulay, McColl, MacKenzie, Vancouver.

The judgment of the Court was delivered by

ESTEY J.:- These two appeals are concerned with the answer to a series of questions settled by orders of this Court, some raising constitutional issues. These questions are as follows:

- A. The action instituted by the Law Society of British Columbia:
 1. Does the Combines Investigation Act, R.S.C. 1970, c. C-23 as amended, apply to the Law Society of British Columbia, its governing body or its members?
 2. If the Combines Investigation Act does apply, is it in that respect intra vires the Parliament of Canada?

These questions were not in terms put before the learned trial judge but were answered in substance as below indicated.

3. Does the Federal Court, Trial Division, have exclusive jurisdiction to grant declaratory or injunctive relief against the Attorney General of Canada, The Restrictive Trade Practices Commission, the Chairman of the said commission, and the Director of Investigation and Research, in connection with:
 - i) the interpretation or
 - ii) constitutional applicability of the Combines Investigation Act to the Law Society of British Columbia, its governing body or its members?

This question was the object of interlocutory procedures and was answered in the negative in both courts below.

B. The proceedings instituted by Donald Jabour:

(No. 1--same as in Law Society action)

1. Does the Combines Investigation Act, R.S.C. 1970, c. C-23 as amended, apply to the Law Society of British Columbia, its governing body or its members?

(No. 2--essentially same as in Law Society action)

2. If the Combines Investigation Act does apply, is it in that respect valid Federal legislation under the Criminal law and/or the Trade and Commerce Powers contained in Section 91(27) and 91(2) respectively of the British North America Act, (U.K.) 30 and 31 Victoria c. 3 and amendments thereto?
3. Does the ruling of the Benchers of the Law Society of British Columbia prohibiting the Appellant from informing the public about the type and cost of legal services provided, violate the Appellant's right to freedom of speech in Canada?

Question one, which is common to both actions, the learned trial judge answered as follows:

There being no specific implicit authorization in the Legal Professions Act for the defendants to impose what this Court has found to be a blanket restraint, tantamount to a complete prohibition of advertising by members of the Law Society to the public at large, the Combines Investigation Act does apply to the defendants.

The Court of Appeal of British Columbia answered the question in the negative, finding that the Combines Investigation Act, *supra*, does not apply to the conduct of the Society relating to the advertising by the appellant Jabour.

The second question, which in substance is also common to the two actions, is answered:

- (a) by the trial judge in the negative, that is to say the Combines Investigation Act is not ultra vires as it purports to apply to the Law Society; and
- (b) by the Court of Appeal, having found that the Combines Investigation Act does not apply to the Law Society, concluded that it was unnecessary to answer this question.

On the third question in the Law Society action both courts found jurisdiction in the British Columbia Supreme Court to entertain the action for a declaration and that ss. 17 and 18 of

the Federal Court Act did not oust such jurisdiction. The constitutionality of these sections was not found to be an issue for determination in either court.

The third question in the *Jabour* action relates to the alleged infringement by the Law Society of the appellant *Jabour's* right of freedom of speech. The trial judge, having found that the Law Society action taken with respect to the advertising activities by *Jabour* was unauthorized by the provincial statute, considered it was unnecessary to answer this question. The Court of Appeal decided that the Benchers had the right in law "to ban" the activity in question by *Jabour* and thus the issue of freedom of speech did not arise.

The Law Society is an institution established under the Legal Professions Act, R.S.B.C. 1960, c. 214 (now the Barristers and Solicitors Act, R.S.B.C. 1979, c. 26). (For convenience I will follow the practice of the Court of Appeal and continue to refer to the section numbers of the old Act.) Its membership comprises all those persons called to the Bar in British Columbia who have remained in good standing under the Act and applicable regulations, together with retired members. The Society is governed by the Benchers, being twenty-three members elected by the membership together with the Attorney General of the province as an ex officio member, and persons who have been elected and re-elected for a period of time prescribed by the statute who remain Benchers so long as they continue to be members of the Society. By subs. 2(3) "Every member of the Society admitted as a solicitor of the Supreme Court is an officer of all the Courts of the Province". By s. 36 of the Act the Benchers are directed to "govern and administer the affairs of the Society" and, in particular, to provide for the printing of legal decisions in the courts; to take "such action ... as they may consider necessary for the promotion, protection, interest, or welfare of the Society"; and to "establish and maintain a system of legal education" By s. 36A the Benchers are directed by the statute to continue in force the insurance fund required for the payment of group insurance contract premiums and to make rules respecting the levy upon members of the Society of annual assessments for the maintenance of such insurance fund and the payment of premiums in respect of group insurance contracts relating thereto, all to the end no doubt of protecting the public from loss and/or damage due to errors and omissions on the part of members of the profession acting in the course of the practice of law.

The Legislature by s. 37 empowered the Benchers to make rules concerning the maintenance of the Society's standards and honour and for the protection and well-being of those engaged in the practice of law in the province; for enrolling articulated students and calling persons to the Bar of the province and admitting persons as a solicitor of the Supreme Court of British Columbia; for providing for precautions to be taken by members for the care of clients' funds or other trust funds or property; and for the implementation of the insurance fund program, and the general discharge by the Society of its duties under the statute. By s. 43 et seq. the Benchers are directed to establish a discipline committee for the investigation into the conduct or competence of members and for determining:

... whether a member or former member has been guilty of

(i) misappropriation or wrongful conversion by him of money or other property entrusted to or received by him in his capacity as a member of the Society; or

(ii) other professional misconduct; or

(iii) other conduct unbecoming a member of the Society; or

(iv) a breach of any provision of this Act or the Rules made hereunder.

[s. 48(b)]

By s. 1 "conduct unbecoming a member of the Society" includes:

any matter, conduct, or thing that is deemed in the judgment of the Benchers to be contrary to the best interest of the public or of the legal profession, or that tends to harm the standing of the legal profession.

From action taken by the Benchers and their Discipline Committee, an appeal lies to the Court of Appeal of the province. Reference should be made to s. 71 of the Act which requires the Benchers to continue the "Special Fund" established for the reimbursement of:

pecuniary losses sustained by any person by reason of the misappropriation or wrongful conversion by a member of the Society ... of money or other property entrusted to or received by him in his capacity as such ...

In related sections of the Act provision is made for the protection of the public by the seizure of moneys and properties in the possession of a member of the Society when disbarred, suspended, or where the member appears to have absconded.

Related to the activities of the Benchers under the Act is the establishment of the "Law Foundation" by s. 71E et seq. for the purpose of establishing and maintaining:

... a fund to be used for the purpose of legal education, legal research, legal aid, law reform, and the establishment, operation, and maintenance of law libraries.

[s. 71G(1)]

The Board of Governors of the Foundation comprises eighteen members of which twelve are members of the Law Society appointed by the Benchers and the remainder are appointed either by the Attorney General or the Canadian Bar Association. Into this Foundation is paid by reason of other provisions in the statute, interest accumulations on trust accounts maintained by lawyers for the holding of clients' moneys. The ordinary solicitor-client relationship and responsibilities are set aside in this context by the statute and the moneys are made, by operation of law, the property of the Foundation to be applied to the discharge of the above objects.

I will return to other provisions of the statute relating to the taxation of solicitors bills later in these reasons.

In the discharge of their functions the statute accords to the Benchers and its committees powers under the Public Inquiries Act, R.S.B.C. 1960, c. 315. The statute expressly protects members of the Benchers from action for anything done in their capacity as Benchers so long as it is done in good faith.

Law societies in other provinces^{below} are similarly established by statute and have the same general self-governing authority and characteristics as the Law Society here. Sometimes the rule-making function is subject to confirmation by the Lieutenant Governor in Council (vide The Law Society Act, R.S.O. 1970, c. 238, s. 55); sometimes the Attorney General as a member of the Benchers is directed to "serve as guardian of the public interest in all matters within the scope of this Act or having to do with the legal profession in any way ..." (ibid., s. 13(1)). There are other variations and differences which have no relevance to these appeals.

Note: The Law Society Act, 1977, (Nfld.), c. 77; The Law Society and Legal Profession Act, R.S.P.E.I. 1974, c. L-9; Barristers and Solicitors Act, R.S.N.S., 1967, c. 18; Barristers' Society Act, 1973 (N.B.), c. 80; Professional Code, R.S.Q. 1977, c. C-26; An Act Respecting the Barreau du Québec, R.S.Q. 1977, c. B-1; Notarial Act, R.S.Q. 1977, c. N-2; The Law Society Act, S.M. c. L100; The Legal Profession Act, R.S.S., 1978, c. L-10; The Legal Profession Act, R.S.A. 1970, c. 203.

The appellant Jabour, a member of the Law Society of British Columbia had some correspondence with the Benchers in connection with his practice of law. The advertising consisted of four advertisements in local newspapers in and around Vancouver and the installation of an illuminated sign measuring three feet in height by sixteen feet in length on the exterior of the office building in which his office is located. The newspaper article took the following form:

DONALD E. JABOUR
Barrister & Solicitor wishes to
announce the opening of a new
concept of law office

LEGAL SERVICES AT PRICES
MIDDLE INCOME FAMILIES
can afford

Buying or selling a home. Writing a will.
Motor vehicle accidents or offences.

Landlords tenant problems. Family matters.
Incorporations. Estates. Court appearances.

These are the kinds of situations where middle income families need legal assistance. Now it is available at moderate cost, with pre-set fees for many services.

Some sample fees (excluding out-of-pocket expenses):

Simple will \$ 35 Uncontested Divorce from \$195 Advice on Interim Agreements \$25 Purchase of Home (any value) \$175 Incorporations from \$165 Advice on Consumer Contracts \$15 Review your present will Free

INITIAL CONSULTATION FREE

Opening February 1st, 1978

The North Shore	142A W. 15th St.,
NEIGHBOURHOOD	North Vancouver.
LEGAL CLINIC	936-4225

HOURS: 9 a.m. to 5 p.m. As a convenience to clients we will also be open Wed. Eve. 7 to 9 p.m. Sat. from 10.30 a.m. to 1 p.m.

Call or write for free brochure.

The sign on the building displayed the words "The North Shore Neighbourhood Legal Clinic, Donald E. Jabour, Barrister and Solicitor".

History of Proceedings

These proceedings find their source in the initial steps taken by the Benchers to discipline the appellant Jabour for "conduct unbecoming a member" contrary to s. 48(b)(iii) of the Act by reason of the advertising activities mentioned. The appellant then issued a writ in the Supreme Court of British Columbia seeking a declaration that the rulings and orders of the Law Society were null and void by reason of the provisions of the Combines Investigation Act (hereafter for brevity referred to as the CIA) and in violation of the appellant's right to freedom of speech; and an interlocutory injunction to restrain the Law Society from proceeding pending the determination in court of the issues raised by the appellant. This request for an interlocutory order was rejected by Anderson J. of the Trial Division.

The Law Society continued the discipline proceedings before its Discipline Committee. The Committee found the appellant guilty and recommended suspension of licence to practice for a period of six months. The appellant successfully sought an order in the Supreme Court enjoining the Law Society and the Benchers from proceeding with considera-

tion of the Committee's report pending the disposition of the court action. The interlocutory order was sustained on appeal.

Following a sporadic exchange of communications over a two-year period and after the Discipline Committee's report had been issued, the appellant, the Director of the Investigation and Research, commenced an inquiry under the CIA into "the Production, Purchase, Sale and Supply of Legal Services and Related Products in the Province of British Columbia". In the notice to the Law Society the Director stated, "The conduct of the Society will be enquired into" Earlier letters from the Director of the Law Society had implied that regulation of advertising by the Benchers may have amounted to criminal offences under Part V of the CIA. Specifically the letters raised the issue of Law Society compliance with the amended s. 32.

Shortly after the receipt of the Director's Notice of Investigation the Law Society started an action in the Supreme Court of British Columbia in which the Society sought declarations that the CIA was not applicable to it or, if it purported to be applicable, the CIA was to that extent ultra vires the Parliament of Canada; together with an injunction preventing the Director from continuing with the enquiry. The two actions in the Supreme Court were heard consecutively and the evidence in the first was by agreement applicable in the second. Both courts below disposed of both actions in single judgments.

It should be noted that in addition to the two actions in the Supreme Court of British Columbia, the enquiry under the CIA, and the discipline proceedings under the Legal Professions Act, it is said in the judgment of the Court of Appeal that there is a right of appeal by the appellant Jabour under s. 62 of the Act. This is an appeal from the acceptance by the Benchers of the recommendations of the Discipline Committee, should that come to pass. Since the injunction issued by Anderson J. against implementation of the Discipline Committee report pending the outcome of these proceedings, no further action has been taken in implementation of the recommended suspension and hence no appeal is outstanding.

Finally the Attorney General of Canada and the Attorney General of British Columbia joined the Jabour and Law Society actions respectively as interveners when notices were given under the Constitutional Questions Determination Act, R.S.B.C. 1960, c. 72. The provinces of Ontario, Quebec, New Brunswick, British Columbia, Saskatchewan and Alberta as well as the Prepaid Legal Services Program of Canada, The Law Society of Upper Canada and the Federation of Law Societies of Canada/Fédération des professions juridiques du Canada also appeared as interveners before this Court.

Jurisdiction of the Supreme Court of British Columbia

I will turn at the outset to the threshold question of the jurisdiction of the British Columbia Supreme Court to entertain the action by the Law Society. This action was commenced after the Jabour action (so referred to for easy reference) in response to notification by the Director of Investigation and Research, Combines Investigation Act, of his intention to hold an enquiry under s. 8 of that Act into the rulings, policies and activities of the Law Society in relation to those regulations or policies concerning advertising by members of the Law Society.

The respondents, in their writ of summons, seek three declarations:

- (a) that the CIA, in whole or in part, does not apply to the Law Society or to its members;
- (b) alternatively, that if the CIA does apply to the Law Society or its members, then to such extent the CIA or part thereof is ultra vires the Parliament of Canada;
- (c) that the respondent McCallum is under no obligation to comply with the direction given by the appellants to attend and to be examined upon oath in the investigation under the CIA.

The respondents further seek in the writ of summons herein injunctions against the appellants restraining the conduct of the aforementioned enquiry under the CIA in so far as it relates to the respondents. This submission relates principally to the provisions of the Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, ss. 2, 17 and 18, the applicable parts of which are as follows:

2. ...

[m] "relief" includes every species of relief whether by way of damages, payment of money, injunction, declaration, restitution of an incorporeal right, return of land or chattels or otherwise;

17. (1) The Trial Division has original jurisdiction in all cases where relief is claimed against the Crown and, except where otherwise provided, the Trial Division has exclusive original jurisdiction in all such cases.

18. The Trial Division has exclusive original jurisdiction

- (a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and
- (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

These provisions of the Federal Court Act, assuming for the moment they are constitutionally valid, are applicable only if the remedies sought by the respondents fall within the definition of "relief" and if they are in essence claims "against the Crown". The fundamental remedies sought by the respondents are the declarations relating to the federal statute, the CIA; the injunctions claimed are ancillary and predicated only on the success of the first remedy.

The appellants in the Law Society action challenged the jurisdiction of the Supreme Court of British Columbia to grant the declaratory and injunctive relief sought herein against the Attorney General for Canada, the Restrictive Trade Practices Commission and its Chairman and Director on the ground that the Trial Division of the Federal Court of Canada has the exclusive jurisdiction so to do.

The declaratory action has long been known to the courts here and in the United Kingdom. In its modern form it is epitomized in the case of *Dyson v. Attorney-General*, [1911] 1 K.B. 410 (C.A.), where the courts found the plaintiff entitled to proceed against the Crown for a declaration without proceeding by way of petition of right. *Cozens-Hardy M.R.*, at p. 416, recognized the court's jurisdiction to receive such a case "... although the immediate and sole object of the suit is to affect the rights of the Crown in favour of the plaintiffs". This form of action takes on much greater significance in a federal system where it has been found to be efficient as a means of challenging the constitutionality of legislation. *Vide Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, per Laskin J. (as he then was) at p. 162; and *Wade, Administrative Law*, 4th ed., p. 500.

The definition of "relief" in s. 2 includes "a declaration" specifically. It was said in the courts below that the reference to "declaration" in s. 2(m) is to a remedy, collateral or ancillary to other remedies, but is not to be read as including a declaration as an independent remedy. The trial judge put it this way:

The addition of "declaration" in the definition of "relief" in the Federal Court Act, which was not present in the definition of the Petition of Right Act, refers, in my opinion, to declarations associated with and incidental to the actions formally requiring a fiat and proceeding by petition of right in the Exchequer Court. In other words, it only adds a form of relief associated with and incidental to the actions formally requiring a fiat and proceedings by a petition of right in the Exchequer Court and it does not add an additional cause of action. The inclusion of "declaration" in the definition of "relief" does not extend the jurisdiction of the Federal Court beyond that possessed by the Exchequer Court.

Both courts below were of the view that the declaration in question did not come within the expression "claims against the Crown" as the term is employed in s. 17 of the Federal Court Act. The trial judge stated:

Such proceedings to determine whether it is within the legislative competence of Parliament to enact a certain Federal Act involves not the Crown but rather Parliament. What is sought here is merely a determination of whether Parliament has exceeded the limits of its authority and this can in no sense be characterized as a case where "relief is claimed against the Crown".

This view was upheld in the Court of Appeal where Hinkson J.A. (Nemetz C.J.B.C. and Macdonald J.A. concurring) drew a distinction between relief for which a petition of right had been necessary and the 'Dyson' type declaration, concluding that the provisions of the Federal Court Act referred only to the former. Hinkson J.A. stated:

An examination of the definition of relief as contained in the Federal Court Act and of the provisions of ss. 17 and 18 of that Statute appears to indicate that the exclusive jurisdiction of the Federal Court involves claims by a subject against the Crown in which the subject is seeking to have something done in order to give effect to his legal rights against the Crown or seeking a decision that he is entitled to property or some interest therein or to possession thereof as against the Crown. It is in that sense that the definition of "relief" is found in the Federal Court Act.

Applying the distinction between the ancient procedure by petition of right for a claim against the interests of the Crown on the one hand, and the 'Dyson' type declaration on the other, Hinkson, J. A. concluded:

... it is clear that the respondents are not seeking a judgment which would declare or decide that the respondents are entitled to have something done in order to give effect to their legal rights as against the Crown or that they are entitled to property or some interest therein or to the possession thereof. Rather, they are seeking declarations of the same nature as those sought in *Dyson v. Attorney-General*.

Such was the case in *R. v. Bradley*, [1941] S.C.R. 270, where a holder of a patent sought compensation from the Crown in the right of Canada for unauthorized use of his invention. The plea for a declaration that the Crown had made use of the plaintiff's patents was accompanied by a claim that the Crown "be condemned to pay to your suppliant the amount of compensation so found to be reasonable ..." The Court contrasted this form of declaratory relief with the simple declaration in *Dyson* concerning the validity of a notice issued under a taxation statute:

This, of course, is a vastly different thing from a judgment such as that in *Dyson v. Attorney-General* (*supra*), which does not declare or decide that the subject is entitled to have something done in order to give effect to his legal rights as against the Crown, or that he is entitled to property or some interest therein, or to the possession thereof. The proceeding by petition of right is not applicable to such a claim as that in question in *Dyson v. Attorney-General*. Such a proceeding is only competent where a petition of right does not lie. (*Esquimalt and Nanaimo Rly. Co. v. Wilson*, [[1920] A.C. 358, at 364, 365, 367 and 368]). [per Duff C.J., at p. 276.]

This same idea was reflected in *Thorson*, *supra*, per Laskin J., as he then was, at pp. 151-52 where it was stated:

The question of the constitutionality of legislation has in this country always been a justiciable question. Any attempt by Parliament or a Legislature to fix conditions precedent, as by way of requiring consent of some

public officer or authority, to the determination of an issue of constitutionality of legislation cannot foreclose the Courts merely because the conditions remain unsatisfied: *Electrical Development Co. of Ontario v. Attorney General of Ontario*, [[1919] A.C. 687,] *B.C. Power Corp. Ltd. v. B.C. Electric Co. Ltd.*, [[1962] S.C.R. 642.]

The claims for declaration made here are unaccompanied by any claim for recovery of property or rights from the defendants in the action but are indeed the core of the action, the only goal sought by the plaintiffs (respondents).

The statutory interpretation approach may prove or demonstrate more than this Court in this action is required to determine. This is so because if s. 2(m) is read down as proposed in the courts below to exclude the so-called 'Dyson' declaration, not only does this protect the Supreme Court of British Columbia from the claim of exclusivity made in ss. 17 and 18 but also throws into question the jurisdiction of the Federal Court to entertain a claim for such a declaration even on the basis of a concurrent jurisdiction. This question need not and should not be determined in this action. I therefore, with respect, conclude that the issue raised on this third question cannot be resolved on the basis proposed below, namely by the interpretation of these provisions in the Federal Court Act.

There is, however, another and more fundamental aspect to this issue. The provincial superior courts have always occupied a position of prime importance in the constitutional pattern of this country. They are the descendants of the Royal Courts of Justice as courts of general jurisdiction. They cross the dividing line, as it were, in the federal-provincial scheme of division of jurisdiction, being organized by the provinces under s. 92(14) of the Constitution Act and are presided over by judges appointed and paid by the federal government (sections 96 and 100 of the Constitution Act). As was said by Pigeon J. in *R. v. Thomas Fuller Construction Co. (1958) Ltd. et al.*, [1980] 1 S.C.R. 695, at p. 713:

It must be considered that the basic principle governing the Canadian system of judicature is the jurisdiction of the superior courts of the provinces in all matters federal and provincial. The federal Parliament is empowered to derogate from this principle by establishing additional courts only for the better administration of the laws of Canada.

Earlier in his judgment Pigeon J. quoted from Chief Justice Ritchie in *Valin v. Langlois* (1879), 3 S.C.R. 1, at pp. 19-20:

... These courts [provincially organized superior courts] are surely bound to execute all laws in force in the Dominion, whether they are enacted by the Parliament of the Dominion or by the Local Legislatures, respectively. They are not mere local courts for the administration of the local laws passed by the Local Legislatures of the Provinces in which they are organized. They are the courts which were the established courts of the respective Provinces before Confederation, ... They are the Queen's Courts, bound to take cognizance of and execute all laws, whether enacted by the Dominion Parliament or the Local Legislatures, ...

The jurisdiction of superior courts, and indeed other courts in the provinces, to review the constitutionality of federal statutes was the subject of comment in this Court in *Attorney General of Canada et al. v. Canard*, [1976] 1 S.C.R. 170, where Beetz J. at p. 216 stated:

Once it is conceded that the Minister has jurisdiction to appoint an administrator, the exercise of this jurisdiction can only be reviewed in accordance with the Indian Act and the Federal Court Act and not by the Courts of Manitoba. It is true that the latter's jurisdiction had not been questioned by the appellants, presumably because the action taken by the respondent challenged the constitutional validity and the operation of the Indian Act and the Manitoba Courts had jurisdiction to adjudicate upon this issue as well as upon appellants' counterclaim. The Courts of Manitoba could not on the other hand hear an appeal from the Minister's decision or otherwise review it.

The Federal Court, as the successor to the Exchequer Court of Canada which was first established by Parliament in 1875, was established pursuant to the authority of s. 101 of the Constitution Act which provides "for the Establishment of any additional Courts for the better Administration of the Laws of Canada". The expression "laws of Canada" has been settled as meaning the laws enacted by the Parliament of Canada, at least for the purposes of this appeal: *Thomas Fuller*, supra, per Pigeon J. at p. 707. It is difficult to see how an argument can be advanced that a statute adopted by Parliament for the establishment of a court for the better administration of the laws of Canada can at the same time include a provision that the provincial superior courts may no longer declare a statute enacted by Parliament to be beyond the constitutional authority of Parliament. Sections 17 and 18 of the Federal Court Act must, in the view of the appellants, be so construed. In my view Parliament lacks the constitutional authority to so provide. To do so would strip the basic constitutional concepts of judicature of this country, namely the superior courts of the provinces, of a judicial power fundamental to a federal system as described in the Constitution Act. At the same time it would leave the provincially-organized superior courts with the invidious task of execution of federal and provincial laws, to paraphrase the *Valin* case, supra, while being unable to discriminate between valid and invalid federal statutes so as to refuse to "execute" the invalid statutes. For this second and more fundamental reason I conclude that the British Columbia courts have the requisite jurisdiction to entertain the claims for declarations herein made. Moreover, it would amount to an attempt by Parliament to grant exclusive jurisdiction to the Federal Court to administer the "laws of Canada" while the validity of those laws remained unknown. Any jurisdiction in Parliament for the grant of exclusive jurisdiction to the Federal Court must be founded on exclusive federal powers under s. 91 of the Constitution Act. In so far as there is an alleged excess of that jurisdiction by Parliament, s. 101 of the Constitution Act cannot be read as the constitutional justification for the exclusion from the superior courts of the jurisdiction to pronounce upon it.

Before moving on to the claim made by the respondents for injunctions a word should be said about two cases advanced in argument before us: *Denison Mines Limited v. Attorney-General of Canada* (1972), 32 D.L.R. (3d) 419, and *City of Hamilton v. Hamilton Harbour Commissioners*, [1972] 3 O.R. 61. In neither case was the Court apparently

addressed as to the distinction between a 'Dyson' declaration and the declaratory relief sought for example in *Bradley*, supra. In the *Hamilton* case Chief Justice Gale observed at p. 62:

Perhaps the only other thing that I should add is that the constitutionality of the Federal Court Act, or any of its sections, was not raised before us on the hearing of this appeal.

The judgment of the learned trial judge in the *Denison Mines* case makes no reference to any argument on the constitutional limits of ss. 17 and 18 of the Federal Court Act.

The respondents also claimed, as already indicated, an injunction restraining the appellants, the Restrictive Trade Practices Commission and the individual appellants from conducting the inquiry under the CIA so far as it related to the conduct of the Law Society. Again the word "injunction" is included in the definition of "relief" in s. 2(m) of the Federal Court Act. In this instance the remedy sought would run against a federal board as defined by s. 2(g) of that Act and therefore is expressly included in s. 18 as being within the exclusive jurisdiction of the Trial Division of the Federal Court of Canada. Both courts below determined in essence that the injunction was sought out of an abundance of caution and as a matter of convenience was combined in the declaratory action now rather than risk possible recourse to later supplementary litigation should circumstances then require it.

Courts having a competence to make an order in the first instance have long been found competent to make such additional orders or to impose terms or conditions in order to make the primary order effective. Similarly courts with jurisdiction to undertake a particular *lis* have had the authority to maintain the status quo in the interim pending disposition of all claims arising even though the preservation order, viewed independently, may be beyond the jurisdiction of the court. An example of the latter type of judicial action is found in *British Columbia Power Corporation, Limited v. British Columbia Electric Company, et al.*, [1962] S.C.R. 642. Kerwin C.J., speaking for the majority of the Court, said at pp. 644-45:

In a federal system, where legislative authority is divided, as are also the prerogatives of the Crown, as between the Dominion and the Provinces, it is my view that it is not open to the Crown, either in right of Canada or of a Province, to claim a Crown immunity based upon an interest in certain property, where its very interest in that property depends completely and solely on the validity of the legislation which it has itself passed, if there is a reasonable doubt as to whether such legislation is constitutionally valid. To permit it to do so would be to enable it, by the assertion of rights claimed under legislation which is beyond its powers, to achieve the same results as if the legislation were valid. In a federal system it appears to me that, in such circumstances, the Court has the same jurisdiction to preserve assets whose title is dependent on the validity of the legislation as it has to determine the validity of the legislation itself.

In this case it is no doubt academic that the appellants or any officer of the Crown would conduct an inquiry under the CIA in the face of a judicial determination in favour of the respondents. I answer the technical point as to the jurisdiction of the British Columbia

courts to entertain a plea for injunction on these proceedings on the technical basis that such a remedy could be granted as ancillary to the court's principal determination and in support thereof as a matter of inherent jurisdiction of a superior court of general jurisdiction to ensure the effectiveness of its dispositions.

First Question

The first question put in the order of the Chief Justice is as follows:

1. Does the Combines Investigation Act, R.S.C. 1970, c. C-23 as amended, apply to the Law Society of British Columbia, its governing body or its members?

In the courts below, this question (which was number 2) read as follows:

ISSUE No. 2

Does the Combines Investigation Act, R.S.C. 1970, Chap. C-23 and amendments thereto, apply to the Defendants in connection with the Defendants' prohibition (position of the Plaintiff) or regulation (position of the defendant] of advertising.

The answer given by the learned trial judge I repeat here for convenience:

There being no specific nor implicit authorization in the Legal Professions Act for the defendants to impose what this Court has found to be a blanket restraint, tantamount to a complete prohibition of advertising by members of the Law Society to the public at large, the Combines Investigation Act does apply to the defendants. I express no opinion as to whether the defendants have in this case contravened the provisions of the Combines Act. That matter was not argued.

The trial judge found that the Benchers had the authority under the Legal Professions Act to regulate advertising but that the Benchers did not have the authority to prohibit it.

The Court of Appeal, speaking through Seaton J.A., concluded:

I can see nothing in the Legal Professions Act that would justify the conclusion that the Benchers are authorized to regulate advertising but not to prohibit advertising.

and later,

They [the Benchers] may prohibit any conduct that is contrary to the best interest of the public or the profession. Conduct need not be specifically prohibited before it may be the subject of disciplinary proceedings. Whether advertising as done by Mr. Jabour constitutes conduct amenable to disciplinary proceedings is a matter for the Benchers.

and finally,

I conclude that the Benchers have the power to prohibit the type of advertising that is found here and to discipline with respect to that type of advertising. Whether they ought to exercise the power is not for us to decide in these appeals.

Seaton J.A. then concluded that before 1975 the CIA "did not encompass regulation of trade by a provincial authority;" and was "not persuaded that Parliament intended by the 1975 amendments to take within the Act governing bodies of professions." He also excluded the professions from the trade and commerce authority of Parliament thus limiting the impact of the CIA on the professions to criminal law. In the end the learned appeal justice found that the performance of an act authorized by the legislature of the province had not by the CIA been made a crime, without deciding whether Parliament could constitutionally do so.

I conclude that the combines legislation simply does not apply to regulatory schemes validly established by provincial legislation. Such schemes are not prohibited by the Act. The conduct of those who make the regulations is not made an offence. Compliance with such rules is not made a crime.

The provisions of the Legal Professions Act have already been reviewed in a general way. Further reference to this Act should be made as it relates to this first question. By s. 5 of the Act the Attorney General of the province is an ex officio Benchers. The Benchers, by s. 41, may call to the Bar of the province any Canadian citizen they are satisfied is "... fit to become a barrister and solicitor of the Supreme Court." Once admitted to the Bar a member falls within the disciplinary process of the Benchers as outlined in a group of sections from 43 to 51. It is under these provisions that the Discipline Committee sat with respect to the appellant Jabour. The Discipline Committee made its determination under s. 48 but no action has been taken, pending these proceedings, by the Benchers under s. 49 for the implementation of that determination and the recommended suspension, because of the interlocutory injunction already mentioned.

From any action of the Benchers in the discipline of a member, an appeal lies by s. 62 to the Court of Appeal of the province, which may make "such order as to it seems just". The Act contains many special duties and rights such as the institution of proceedings by the Benchers for injunction or prosecution for breach of the statute.

There remains to be pointed out one more aspect of the practice of law by members of the Society, that of rendering accounts to the public for services rendered. The statute provides a summary procedure whereby a person receiving a bill for services from a member of the Bar may apply to an officer of the Court referred to as a Taxing Officer to have the account taxed. This power in the Taxing Officer is subject to review by a judge of the Supreme Court but otherwise the amount taxed becomes recoverable as though it were awarded under a judgment of the Court. The Court official is not bound in assessing the bill by any statutory or other tariffs, nor is he otherwise limited. Indeed where a contract has

been made between the solicitor and a client for remuneration to be paid for services to be rendered, the Court may set the agreement aside and the account may be taxed as though no such contract had been made. All such procedures would, of course, cut across any arrangements proffered by advertising or otherwise by the solicitor and accepted expressly or by implication by the client. This procedure is one of long standing under statutory provisions in the provinces and in the United Kingdom. The procedure raises many questions collateral to the issues which will arise in the event of price advertising by members of the profession. Would the unilateral contract which arises upon the acceptance of the services be, for example, one deemed to have been reached between solicitor and client in advance of the rendering of services so as to require an order of the Court to set it aside should the member of the public receiving those services ultimately resort to his right to taxation of the account as and when rendered? If that be so then is there a need, notwithstanding the public advertisement, for the intervention of independent legal advice before the acceptance of the arrangement when it is subject by statute, which may or may not be mentioned in the advertisement in question, to being set aside by a court at the instance of the client. These questions lie in the path of other courts but fortunately not this one on this appeal.

These taxing provisions, the sections dealing with insurance, client compensation funds, the trust account provisions and the disciplinary measures, to name a few, may find their origin in the unusual nature of legal services, the fiduciary position of the solicitor, the status of the member of the Bar as an officer of the courts of the Province, or perhaps these provisions are the simple recognition in the community of the fact that by the nature of things the worth of legal services cannot be assessed by the general public on receiving them. The matter reaches even further. The general public is not in a position to appraise unassisted the need for legal services or the effectiveness of the services provided in the client's cause by the practitioner, and therefore stands in need of protection. It is the establishment of this protection that is the primary purpose of the Legal Professions Act. Different views may be held as to the effectiveness of the mode selected by the Legislature, but none of the parties here challenged the right of the province to enact the legislation. It is up to the Legislature to determine the administrative technique to be employed in the execution of the policy of its statutes. I see nothing in law pathological about the selection by the provincial Legislature here of an administrative agency drawn from the sector of the community to be regulated. Such a system offers some immediate advantages such as familiarity of the regulator with the field, expertise in the subject of the services in question, low cost to the taxpayer as the administrative agency must, by the statute, recover its own expenses without access to the tax revenues of the Province. On the other hand, to set out something of the other side of the coin, there is the problem of conflict of interest, an orientation favourable to the regulated, and the closed shop atmosphere. In some provinces some lay Benchers are appointed by the provincial governments; in other provinces the Attorney General is seized with the duty as an ex officio Bencher of safeguarding the public interest; a right of appeal from decision affecting members is given to the Court; and the confirmation by the Provincial Executive, the Lieutenant Governor in Council, of all regulations adopted by the Society as a prerequisite to their validity. It is for the Legislature to weigh and determine all these matters and I see no constitutional consequences necessarily flowing from the regulatory mode adopted by the province in legislation validly enacted within its sovereign sphere as is the case here.

There are many reasons why a province might well turn its legislative action towards the regulation of members of the law profession. These members are officers of the provincially-organized courts; they are the object of public trust daily; the nature of the services they bring to the public makes the valuation of those services by the unskilled public difficult; the quality of service is the most sensitive area of service regulation and the quality of legal services is a matter difficult of judgment. The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally. The uniqueness of position of the barrister and solicitor in the community may well have led the province to select self-administration as the mode for administrative control over the supply of legal services throughout the community. Having said all that, it must be remembered that the assignment of administrative control to the field of self-administration by the profession is subject to such important protective restraints as the taxation officer, the appeal to the courts from action by the Benchers, the presence of the Attorney General as an ex officio member of the Benchers and the legislative need of some or all of the authority granted to the Law Society. In any case this decision is for the province to make.

What then has the Law Society, through the Benchers, done with reference to the regulation of advertising by its members? The courts, it should be said at once, are not concerned with the arguments for and against the advertising of legal services or with the method of regulation adopted by the Benchers in connection therewith; but only with the result in law of those actions and then only to the extent of issues raised in the several questions specified in the order of the Chief Justice as set out above.

In advancing towards a determination that the CIA applied to the Law Society, the learned trial judge concluded the Benchers were not authorized by the Act (a) to establish the "policies and Rulings of the Law Society of British Columbia ... with respect to advertising by members;" and (b) to impose "what I have found to be a blanket restraint, tantamount to a complete prohibition of advertising by members ... to the public at large." Reference is then made to a handbook prepared by the Benchers which set forth some rulings on professional conduct "for the guidance of members of the Law Society." The foreword to these rules describes their origin and function:

This Handbook has been published and distributed by the Benchers of The Law Society of British Columbia to guide and assist the Members in meeting and maintaining proper standards of professional conduct. Members of the profession I am sure will appreciate this intention.

Members should also appreciate that breaches of these rules will have to be considered as unprofessional conduct.

On the other hand, the Professional Conduct Committee invites your comments and criticism in connection with these Rules and your suggestions as to further aspects of professional ethics which may require clarification or specific direction. Undoubtedly as a result, further rulings will be made by the Benchers as occasion requires and these, together with amendments as may be necessary, will be published and distributed from time to time.

Ruling 1 deals with "Canons of Legal Ethics" and outlines the various capacities in which a lawyer functions in the community and his duties in these roles to the state, the court, the client, his fellow practitioner and to himself. In the last-mentioned category reference is made to self-advertisement:

5. (3) The publication or circulation of ordinary simple business cards in recognized legal publications is not per se improper but solicitation of business by circulars or advertisements or by personal communications or interviews not warranted by personal relations, is unprofessional. It is equally unprofessional to seek retainers through agents of any kind. Indirect advertisements for business by furnishing or inspiring newspaper comment concerning causes in which the lawyer has been or is connected, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's position, and like self-laudations which defy the traditions and lower the tone of the lawyer's high calling, should not be tolerated. The best advertisement for a lawyer is the establishment of a well-merited reputation for personal capacity and fidelity to trust.

Part C of the Handbook is headed "Advertising" and includes the following:

Ruling 1 General

It is improper for a member to advertise, except as permitted in this Part, in any publication or on radio or television or in any other media of communication, provided however, that a lawyer may place a card in a directory, law report, legal magazine or review or text intended primarily for circulation amongst lawyers.

Ruling 2 states that it is improper to indicate to the press or public that the lawyer is a specialist in some aspect or field of law. Ruling 3 deals with use of letterhead in fund raising campaigns. Ruling 4 is concerned with the manner of listing of a lawyer's name in telephone directories. This ruling includes an interesting anti-discriminatory provision directed towards the prevention of listings by members in a local directory in which the names of all practitioners may not be listed. Ruling 6 relates to "Announcements" and provides in part:

Announcements may be

- (a) published once or twice in a local newspaper and

(b) may be sent by mail

when a lawyer or a firm commences practice, changes his or its telephone number, address, or name or when a lawyer retires or joins as an employee or partner, or a firm is dissolved; but such announcements as are sent by mail may be sent only to other lawyers or to clients of the firm; no other announcements shall be published or sent without the consent of the Law Society or as otherwise permitted by this Part.

An announcement that a member is restricting his practice may be sent only to members of the profession.

When making an announcement in a legal publication, it is proper to indicate date and place of birth, membership in any law or bar society or other professional society, and dates of call to the Bar or admission as a solicitor, but it is improper to include:

- (a) Any alleged specialist qualification;
- (b) Any office held in any society other than a society devoted to the legal profession;
- (c) Membership in any fraternity, club or organization;
- (d) Official positions such as Municipal Solicitor, Member of Law Faculty or Public Trustee, unless the lawyer is not engaged in the public practice of law.

Ruling 9 refers to dealings with the press and broadcasters and limits what is popularly referred to as 'trial outside the courtroom'. Ruling 10 is entitled "Signs" and as it deals expressly with what is before the Court in these appeals it should be set out in full:

It is permissible to have a sign at the place of business of a lawyer stating the name or names of the firm and its members with the additional words "Barrister and Solicitor" but the sign may not be of an advertising or commercial nature. Any such signs may be lettered on windows or affixed to buildings but shall not extend over public property nor be larger than dignity and good taste would permit.

There is no need to particularize these rulings further. None of the parties have asserted that they have any statutory base in the sense of promulgated regulations. The issue here arises not because of this informal compilation of accumulated determinations by the Benchers in their committees functioning under s. 48(b) and s.1 of the Act, but because of the action specifically taken here by the Law Society under these provisions of the statute.

Having reviewed the statute in detail, the Court of Appeal concluded that the "Legal Professions Act authorizes the Law Society of British Columbia to do what it has done". The appellants in the Law Society action do not challenge this on the basis of any inadequacy of provision in the statute itself but rather on the grounds that the Benchers, not being a publicly appointed body have not acted and cannot act with the "authorization" of the

province in the sense of the so-called regulated industry cases. The appellant in the *Jabour* action likewise does not challenge this conclusion of the Court of Appeal. The appellant *Jabour* takes the view that whatever the effect be of action by the Benchers under the provincial statute or whatever it be specifically authorized to do by that Act, the provincial statute does not have the effect in law of removing the action of the Benchers from the reach of the CIA. This position appears to be differently expressed from that of the other appellants and imports the added notion that the provincial statute must go further than simply authorizing the action of the Benchers in regulating advertising, but must in doing so set up "a regulatory scheme as a substitute for competition," or "a substitute mechanism for competition to achieve the public interest". I will return to this submission in a moment. The appellant *Jabour* does, however, challenge the notion that statutory authorization to regulate includes the authority to prohibit. The federal appellants phrase this viewpoint by submitting that a prohibition against "informational advertising" is a blanket prohibition of advertising and when adopted by a self-governing body cannot be a scheme adopted, approved and authorized by the province so as to qualify as a regulated industry immune from prosecution under the CIA. In short the "prohibited" actions must be organized and specified by the Province and not by the Benchers. At this point the position of all the appellants converges.

May it be emphasized that courts are not here to scrutinize the policy on advertising as such. However it does not advance the answer to the issue to quantify or classify the regulatory effect of the decision of the Discipline Committee according to supposed classifications of advertising. The propriety in law, and its ultimate position under the CIA, of the action in question will not vary according to whether the advertising be informational or otherwise, if there be in fact or in law such a distinction. Whether it be a "blanket prohibition" or some other type of prohibition will not dictate the outcome here either. The policy of the Benchers as revealed by the Professional Conduct Handbook does allow some specific advertisements which do include 'information' about the member practitioners. That said, the issue remains, firstly, does the statute authorize the Benchers' action in disciplining the appellant *Jabour* for his advertising activities, and secondly, in any case does the CIA apply to the action by the Benchers first as a matter of statutory interpretation and then as a matter of constitutional law. It is at this point in the journey through these various issues that I respectfully come to the same conclusion as the Court of Appeal, namely that the action taken by the Benchers is authorized by the statute.

It is true, as argued here and below by all appellants, that a statutory "power" to regulate does not always include the "power" to prohibit (vide *Re Bridgman and City of Toronto*, [1951] O.R. 489 (H. Ct.); *R. v. Shamrock Fuel Co.*, [1924] 3 W.W.R. 454 (Sask. K.B.)) but that is not the issue here. The statute directs the Law Society acting through the Benchers to determine in the public interest what "matter, conduct or thing" is "conduct unbecoming a member of the Society," to refer back to s. 1 of the Act. The decision of the Discipline Committee presumably reflects the announced policy of the Law Society on the matter of advertising. None of the parties has said otherwise. The statute does not limit the Benchers in the regulation of advertising nor does it confine them to matters of standards of "competence and integrity" in the words of s. 32(6) of the CIA. The statute authorizes disciplinary action for "conduct unbecoming a member of the Society" and the mandate was broadly styled by the Legislature when it saw fit to define "conduct unbecoming" as

including "any matter, conduct or thing that is deemed in the judgment of the Benchers to be contrary to the best interest of the public or of the legal profession".

That is a far cry from a legislative mandate predicated on a single power "to regulate" where there is no elaboration of the conduct to be regulated. Authorities such as the decision of the Saskatchewan Court of Appeal in *Merchant v. Benchers of the Law Society of Saskatchewan*, [1973] 2 W.W.R. 109, are of no assistance in this proceeding because the statute there contained no definition of "conduct unbecoming" or of "professional misconduct" leaving to the court the duty to establish such a definition. Here the Legislature has expressly directed the Benchers to formulate such a definition. The appellant of course was under no misapprehension in advance of his advertising activities as to the policy of the Benchers in that regard. In the end, therefore, the proceedings find their origin in the simple challenge arising between the member Jabour and the Law Society as to the right of the Benchers to define and prohibit the type of advertising in which Jabour, as a member, engaged. The immediate issue therefore is the statutory authority granted by the province to the Benchers for its actions and I find this authority to be present.

This brings me then to an examination of the federal statute, the CIA, to determine if, on a proper interpretation, its terms and provisions reach the respondent in these proceedings.

Combines Investigations Act

This statute has had a long history commencing as component provisions in the Criminal Code. The present statute, its amendments and related statutes have been the subject of litigation in the courts since the late nineteenth century. By amendments made in 1975 it is said that the scope of the Act has been affected in a way material to these proceedings. The principal offence with reference to restraint on competition is found in s. 32:

32. (1) Every one who conspires, combines, agrees or arranges with another person

- (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,
- (b) to prevent, limit or lessen, unduly, the manufacture or production of a product, or to enhance unreasonably the price thereof,
- (c) to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance upon persons or property, or
- (d) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and is liable to imprisonment for five years or a fine of one million dollars or to both.

Section 2 defines certain terms including:

"product" includes an article and a service;

"service" means a service of any description whether industrial, trade, professional or otherwise;

"supply" means,

. . .

- (b) in relation to a service, sell, rent or otherwise provide a service or offer so to provide a service;

"trade, industry or profession" includes any class, division or branch of a trade, industry or profession.

Provisions specifically dealing with restraint on advertising are found in s. 32(2) and (3) the latter providing however that defences in subs. (2) are not applicable if the:

... conspiracy, combination, agreement or arrangement has lessened or is likely to lessen competition unduly in respect of one of the following:

- (a) prices,
- (b) quantity or quality of production,
- (c) markets or customers, or
- (d) channels or methods of distribution,

or if the conspiracy, combination, agreement or arrangement has restricted or is likely to restrict any person from entering into or expanding a business in a trade, industry or profession.

Subsection (6), which was added in 1975, raises a specific defence where the agreement relates to a profession:

(6) 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

- (a) in the practice of a trade or profession relating to such service; or
- (b) in the collection and dissemination of information relating to such service.

The foregoing sets out the statute as it stood at the commencement of the proceedings in 1978.

In 1975 Parliament enacted c. 76 of the Statutes of Canada, 1974-75-76, as a comprehensive series of amendments to the CIA. Several of the 1975 amendments are said to deal with the extension of the Act to embrace the regulation of competition in the professions theretofore left to the provinces' administrative control. In s. 2, for example, the definition of "product" was extended to include "service". A definition of "service" was inserted, *supra*; a definition of "supply" was added, *supra*; and the word "profession" was added to the definition of "trade or industry", *supra*. In Part V entitled "Offences in Relation to Competition" the word "article" in the operative s. 32, which is set out above, was replaced by the word "product" which of course has been defined in the 1975 amendments to include the word "service". Subparagraph (d) which is set out in full earlier replaces a narrower provision which read:

- (d) to restrain or injure trade or commerce in relation to any article.

Subsections (2) and (3), relating to a defence and a limitation of that defence respectively, were revised by referring to a "profession" in addition to "trade and industry" in the pre-existing statute.

No reference has here been made to s. 32(4) and (5) as they relate to exports and do not concern us nor do they throw any light on the meaning of the balance of s. 32; nor to subs. (7) which is also unrelated to the issues at hand.

The authority of the Director to make the inquiry here launched is found in s. 8, the relevant portion of which reads as follows:

8. The Director shall

. . .

- (b) whenever he has reason to believe that

. . .

- (iii) an offence under Part V [which includes s. 32, *supra*] or section 46.1 has been or is about to be committed,

. . .

cause an inquiry to be made into all such matters as he considers necessary to inquire into with the view of determining the facts.

Section 17(1) is a procedural or implementation section affording the Director the right to make application to the Restrictive Trade Practices Commission for an order for the examination of anyone in Canada and the production of the documents of such a person and for such examination the RTPC shall have the powers of a superior court for the enforcement of its subpoenas. Such a section of course presupposes a valid subject of inquiry and is not an independent source of a right to institute an inquiry under the statute.

Here the Director in at least two parts of the record has revealed the purpose of the inquiry concerning the Law Society. The application of the Director to the RTPC for an order establishing the hearing includes in para. 16 thereof:

16. The foregoing information gives me reason to believe that the Law Society of British Columbia and the Benchers of the Society have committed an offence under section 32 of the Act in that they have agreed or arranged to lessen competition unduly in the supply of legal services in the province of British Columbia by maintaining and enforcing an arrangement to restrict advertising. This arrangement has the effects of lessening competition unduly with respect to prices, quantity and quality of production, markets or customers, and channels and methods of distribution and has restricted and is likely to restrict any person from entering into and expanding his business in the profession. I believe that the person named in this application may give material evidence in this inquiry.

In a letter to the Law Society prior to the institution of the inquiry proceeding, the appellant Director stated:

At the same time, I must remind you that the provisions of Part V of the Act are criminal offences and under section 8(b) I am required to conduct an inquiry whenever I have reason to believe that an offence has been or is about to be committed. You can appreciate that I am obligated to carry out my statutory responsibilities.

In the letter to the Law Society from the appellant Director announcing the inquiry, the style, heading or reference at the opening of the letter used the following language:

In the Matter of the Combines Investigation Act
and

In the Matter of an Inquiry Relating to the Production, Purchase, Sale and Supply of Legal Services and Related Products in the Province of British Columbia

The body of the letter included the following statement:

While the conduct of the Society will be inquired into in these hearings it is not possible to identify at this point the additional persons, if any, whose conduct will also be the subject of inquiry. It is expected that Donald Jabour and Victor Stephens will be among the witnesses examined. Any person who wishes to make application for representation during the examination or the examination of other witnesses may do so at the commencement of the hearings.

There is no doubt, nor was it otherwise contended before us, that the inquiry was launched for the purpose of inquiring into the possible commission of an offence by the re-

spondents and perhaps others under s. 32 of the CIA, and specifically an offence relating to alleged lessening of "competition, unduly, in the supply of legal services in the province of British Columbia".

Taking s. 32 as an entity it is evident that the parliamentary intent in 1975 was to expand the ambit of the section to include at least some aspects of the professions and their activities. The respondents contend the amendments do not extend the reach of the section to their activities as a governing body. The appellants take the opposite view and assert that the effect of these amendments is to regulate the professions in the same way as "trade and industry" (save where specially prescribed defences may relate differently as between the categories of trade, industry and profession).

The Regulated Industries Cases

The relationship between provincial regulatory statutes and the federal law has been discussed repeatedly in the courts. These cases are generally referred to as the 'regulated industries cases'. The appellants rely on these authorities to demonstrate the paramount position of the federal authority, at least where:

- (a) the provincial statute does not expressly authorize the conduct of the public authority before the court, and
- (b) the federal statute expressly renders such conduct criminal.

The respondents on the other hand draw from these cases the conclusion that unless the federal statute clearly conflicts with the provincial regulatory statute, the proper interpretation is that which avoids any conflict. Some of the interveners counter the position of the appellants in (b) above and brief reference will be made to that later in these reasons.

These decisions generally deal with provincial marketing schemes for natural products and the courts have found that neither the provincial statute nor the action of the public agencies administering them conflict with the federal competition legislation.

The earliest of these cases is *R. v. Chung Chuck*, [1929] 1 D.L.R. 756, a decision of the British Columbia Court of Appeal. The Court found a provincial statute establishing a marketing agency to regulate volume and prices of certain farm products offended neither the federal powers in trade and commerce nor criminal law, and specifically would not constitute an offence under s. 498 of the Criminal Code so as to conflict with that provision (as the forerunner of s. 32 then was). Macdonald J.A. for the court stated at p. 759:

Whether or not s. 498 is intra vires of the Dominion parliament, it cannot be said that to operate under an Act of the provincial legislature validly enacted enabling producers to market the products of the soil by orderly methods and under such restrictions as will tend to insure a fair return, is to commit a criminal offence within the meaning of s. 498 ...

Granted that the Act is intra vires following its provisions and acting under its sanction cannot constitute a criminal offence.

The principal thrust of the judgment was that adherence to the provincial statute could not amount to an intent "unduly" to limit production. The court went so far later in its

judgment as to say that to the extent the two statutes were in conflict, s. 498 was ultra vires. In the end the Court of Appeal found that there was no conflict between the two statutes. It should be noted because of the argument by the appellants that the Benchers were essentially private in nature as compared to an agency staffed by provincial public servants, that the Marketing Committee in the Chung Chuck case was appointed by the Lieutenant Governor in Council but two of the three members were to be appointed from the growers of the produce being marketed or by shippers of that produce, and the third member was appointed by the Lieutenant Governor in Council from outside these classes. The majority of the Committee fixing volume and prices, therefore, appears to have been drawn from the members of the trade or industry in question, and the actions of this Committee were not subject to confirmation by the provincial government.

Under a Quebec statute a Commission appointed by the province established minimum prices for the sale of milk in the Province of Quebec. The Court in *R. v. Simoneau* (1935), 65 C.C.C. 19, followed the same line of reasoning as in *Chung Chuck* and found no conflict between the provincial and federal statutes, and further that compliance with a valid provincial statute could not result in an action contrary to the public interest. The Court did not consider the action of the Dairy Commission to be an 'agreement' as the term is used in the combines legislation, and concluded that the essential element of agreement amongst competitors was missing. The Saskatchewan Court of Appeal in *Cherry v. The King ex rel. Wood* (1937), 69 C.C.C. 219, had to consider provincial milk marketing legislation and again found no conflict between the local statute and the federal combines legislation. Martin J. A., as he then was, writing for the Court, considered the impact of s. 498 of the Code at p. 226:

... as it is argued that the powers of the Milk Board particularly of fixing prices fall within the purview of the criminal law, one might well inquire who are the persons who conspire or combine in exercising the powers conferred upon the Board by the Legislature? The elements essential to a prosecution under s. 498 are not present in actions taken by the Board for the purpose of exercising the powers conferred upon it by the statute. 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; if this were so the Province could not exercise the powers conferred upon it with respect to property and civil rights over which it has exclusive power.

The Court was there concerned with the practical problem of the presence or absence of 'intent' on the part of provincial administrators to breach the federal law. The judgment continued at p. 227:

There is no intent in the Milk Control Act to limit unduly the production, processing or distribution of milk or to unreasonably enhance the price thereof; there is no intent to restrict trade in milk to the oppression of indi-

viduals or to the injury of the public generally; on the contrary the object of the statute is to improve conditions in the production and sale of an important product with a regard primarily for the interests of the public. I can therefore see no ground for the suggestion that the Act conflicts with the Criminal Code.

It should be noted that in none of these cases so far has there been any requirement in the provincial statute for approval by the province of any regulations adopted by the statutory body for the control of the activities in question. Neither is there any uniformity about the appointment of the agencies or the relationship between members thereof and the community under the agencies' regulation. If the outcome of any of these cases depended upon the distance between the regulated and the regulator or his mode of appointment by the province, none of the courts have been moved to make comment.

This Court in *Ontario Boys' Wear Ltd. v. The Advisory Committee*, [1944] S.C.R. 349 examined at length an industrial labour regulatory scheme which established wages, hours and other conditions of work for "interprovincially competitive" industries in Ontario. The legislation provided for the appointment by the province of a board to collect assessments from participating employers and employees for defraying expenses of the regulatory scheme, and for advisory committees to enforce the schedule of wages and hours as adopted by employers and employees in conferences in the various industries and in the various provincial regions brought under the regulatory impact of the statute. The combination of the Act, the regulations promulgated thereunder by the Board, and the Schedule adopted by the employers and employees in conference, represented a very comprehensive and detailed program concerning hours of work, wages, overtime and working conditions. Pertinent to this appeal the statute provided that the Schedule could "fix the minimum charge which may be paid, accepted or contracted ..." for the labour content of any service work and "the minimum charge which any employer or employee may contract for or accept for any service ..."

Kerwin J., as he then was, stated at p. 359:

As Kellock, J.A., points out, the legislature would undoubtedly have authority to enact anything which is found in the schedule and I agree with him that such legislation (and therefore the combined effect of the Act, regulations and schedule) cannot be said to be a "combine" within the meaning of the Dominion Act.

Chief Justice Kerwin returned to the *Ontario Boys' Wear* case in giving judgment in *Reference re The Farm Products Marketing Act*, [1957] S.C.R. 198, at pp. 205-06:

It was contended by Mr. Pepper that the Combines Investigation Act, R.S.C. 1952, c. 314, and ss. 411 and 412 of the Criminal Code, 1953-54 (Can.), c. 51, and the Agricultural Prices Support Act, R.S.C. 1952, c. 3, are relevant and prevent the Ontario Legislature from enacting clause (l) of subs. (1) of s. 3 of *The Farm Products Marketing Act* and therefore the administrative agencies provided for by that Act, from operating. The point is determined against that contention as to the Combines

Investigation Act by the decision of this Court in *Ontario Boys' Wear Limited et al. v. The Advisory Committee et al.*, [supra]. With respect to that Act and also to the sections of the Criminal Code referred to, it cannot be said that any scheme otherwise within the authority of the Legislature is against the public interest when the Legislature is seized of the power and, indeed, the obligation to take care of that interest in the Province.

The provincial statute established a Marketing Board and empowered it to approve marketing or regulatory schemes subject to Lieutenant Governor in Council approval, which schemes might include the establishment of local boards or a marketing agency for the actual conduct of marketing operations. The Board could then authorize the marketing agency to pool receipts from the sale of regulated products, to deduct therefrom expenses of the scheme, and to distribute the net proceeds of sale amongst the participating producers. Such a regulatory scheme was to be established when ten per cent of the producers of the product in question in the part or parts of the province in question petitioned for such a scheme. Rand J. dealt with the same point at pp. 219-20:

The Provincial statute contemplates coercive regulation in which both private and public interests are taken into account. 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 enactments are directed.

Locke J. put the point in these words at p. 239:

In my opinion, neither the provisions of the Combines Investigation Act, R.S.C. 1952, c. 314, nor of s. 411 of the Criminal Code, 1953-54 (Can.), c. 51, are objections to the schemes in question to the extent that they are within the powers which may be validly granted by the Legislature under the terms of the British North America Act. It cannot be said, in my opinion, that within the terms of para. (a)(vi) of s. 2 of the Combines Investigation Act the scheme "is likely to operate to the detriment or against the interest of the public, whether consumers, producers or others". Rather is it a scheme the carrying out of which is deemed to be in the public interest. Furthermore, the offence defined by s. 2 which renders a person subject to the penalties prescribed by s. 32 is a crime against the state. I think that to perform an act which the Legislature is empowered to and has authorized cannot be an offence against the state.

In *R. v. Can. Breweries Ltd.*, [1960] O.R. 601, McRuer C.J.H.C., in trying a charge under the merger provisions of the CIA, after referring to authorities founding its constitutional base, went on to say at p. 611:

From these 2 cases I conclude that when I apply the Act as an Act designed to protect the public interest in free competition, I am compelled

to examine the legislation of the Provinces to see how far they have exercised their respective jurisdictions to remove the sale of beer from the competitive field and to see what areas of competition in the market are still open. Having made this examination I must then decide whether the formation or operation of the merger lessened or is likely to lessen competition to an unlawful degree in the areas where competition is permitted.

In all the Provinces the sale of beer is under direct government control. The extent to which control is exercised varies from Province to Province, but every provincial legislature has by statute assumed some definite control over the market.

The Court found that the provincial legislation authorized the fixing of the price at which all beer could be sold in the province:

There may, however, be areas of competition in the market that are not affected by the exercise of the powers conferred on the provincial body in which restraints on competition may render the operations of the combine illegal. In this case the only areas of competition that can be of any benefit to the consumer that are left open to the accused and its competitors, are in the matter of quality, taste, services and packaging. The evidence shows that in these limited areas, competition between the accused and others in the industry is without restraint. [p. 630.]

From these authorities the parties draw opposing conclusions. The appellants would limit the scope of the provincially-regulated industries cases to the marketing of natural products. I see no basis in any of the judgments relied upon or in constitutional law generally for such an arbitrary and narrow principle. In fact, in at least two of these cases (Ontario Boys' Wear and Can. Breweries, *supra*) the courts were concerned with other industries.

The appellants, the Attorney General for Canada et al., would limit the application of the principle enunciated in these cases to instances where the province in its statute promulgates a complete regulatory scheme. More precisely these appellants rely on the absence in the provincial statute here of any provision expressly dealing with advertising by members of the Law Society. The courts in these cases have said in various ways that compliance with the edicts of a validly enacted provincial measure can hardly amount to something contrary to the public interest. Since all the cases examined above approach the CIA on the basis of a criminal charge, actually or potentially arising under it, the element of public interest was always present. In *Can. Breweries, supra*, (p. 605) the Court proceeded on the basis that the word "unduly" in s. 32 connotes substantially the same meaning as the more general words in the same statute "operated or is likely to operate to the detriment or against the interest of the public". Even the 1975 amendments to s. 32 (*supra*), by the addition of subs. 1.1, did not remove "unduly" from the operative provision, s. 32(1). 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.

Returning to the case at hand and the activities of the Benchers under the authority of the Legal Professions Act, *supra*, the question which arises is whether their actions could constitute an offence under Part V of the CIA, specifically s. 32(1). The operative words at the beginning of s. 32 are: "Every one who conspires, combines, agrees or arranges with another person". These words are broad enough to include all the Benchers acting as a group or individually or the Law Society as a corporate entity and any one or more of the Benchers or of its statutory officers, or indeed any one with whom the Law Society may have acted jointly. Consequently if any two of these persons, natural or legal, voluntarily entered into an agreement condemned by the CIA, the offence would be constituted, and on suspicion of such a situation an inquiry under s. 48 might well be ordered. What happened here, however, is something different in character both in fact and in law. In the words of Rand J. in *Farm Products Reference*, *supra*, at pp. 219-20, the provincial statute is "coercive" as applied to members of the provincially regulated group, whereas the federal statute is directed towards "voluntary combinations or agreements". Here the 'agreement' was apparently the determination by the Discipline Committee that the appellant Jabour by advertising as he did was guilty of professional misconduct. In so 'agreeing', the Benchers are said not only to have been doing that which was permitted by their admittedly valid parent statute but were in fact discharging their assigned duties under that Act. Mention has already been made of the Professional Conduct Handbook. It is not a regulation with any statutory or regulatory base in law. There has been no regulation promulgated by the Benchers on the subject of advertising. The regulation of such conduct in the record in these appeals has been effected by disciplinary decision.

It was not so argued before us but the adoption of policies by the Benchers as discussed in the Handbook might be included in the alleged criminally conspiratorial conduct. That such determinations were made by the Benchers pursuant to and within the provincial statute was not contested. The question is therefore: by the taking of any of these actions and proceedings have the Benchers "conspire[d], combine[d], agree[d] or arrange[d] ... (c) to prevent, or lessen, unduly, competition in the ... supply of a product, ... or ... (d) to otherwise restrain or injure competition unduly"? I do not believe so. The Benchers were directed by the statute ("The Benchers shall appoint ... a discipline Committee", s. 43 *supra*) to establish a Discipline Committee with power to inquire into the conduct or competence of members. This duty is found in the context of a wide range of powers granted to the Law Society to govern the profession in the interest of the public and the members of the Society. The words adopted by Parliament in s. 32 and restated above are not ordinarily found in language directed to the actions of persons holding office under a provincially authorized regulatory body and discharging their responsibilities to the community pursuant to their constitutive statute. This is particularly so where the group said to be acting "conspiratorially" was in fact proceeding at the time in question as a deliberative body whose existence was mandated by a provincial statute. When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.

I do not find the words adopted by Parliament in s. 32(1) taken by itself properly construed and applied to relate to the action taken by the Law Society acting in accordance with their legislative authority, as I have concluded, under a valid provincial statute. However, the appellants, as we have seen, contend that the addition of subs. (6) has enlarged the impact of s. 32 so as to include the respondents and their activities. The Court of Appeal concluded that it did not:

It has been argued that the exemption in s. 32(6) of an agreement that "relates only to a service and to standards of competence and integrity that are reasonably necessary for the protection of the public ..." demonstrates an intention to include governing bodies within the scope of the Act. The trial judge accepted that argument ... I am not able to agree with that reasoning. There are service industries that are not controlled by bodies with a statutory base. And there are associations of professional persons apart from the statutory governing bodies. It is those other associations, and associations of non-professional persons who render services, that s. 32(6) has in mind. These bodies may deal with competence and integrity and if they do, s. 32(6) fixes the court with the responsibility of deciding reasonableness.

I do not think that the presence in the amendments of s. 32(6) indicates an intention to extend the Act to bodies established by valid provincial legislation to govern the professions.

I am not persuaded that Parliament intended by the 1975 amendments to take within the Act governing bodies of professions. Nor am I persuaded that the language is apt to describe the deliberations of persons holding office under provincial legislation. The language describes voluntary private agreements.

The learned trial judge took the opposite view concerning subs. (6) stating:

Essentially it is argued that on a fair reading of s. 32 there is no reference to the governing bodies of any self-regulating profession and therefore it must refer to private arrangements of individual members of the profession. The interpretation contended for is untenable. Section 32(6) affords a statutory defence to a prosecution where the agreement or arrangement relates only to standards of competence and integrity. Standards of competence and integrity are not set by individual members, they are set only by the governing body and therefore s. 32 must refer to the governing bodies as well as to private individual arrangements by members of the profession. If it were otherwise there would be no reason to include s. 32(6) in the Act.

Nor am I able to agree with the submission that s. 32(6) does not refer to the governing bodies because by that section the standards of competence and integrity are left to the trial judge and the defence afforded by this section does not relate to the standards as determined by the governing body. By that section the Court only determines whether the agreement or arrangement relates to standards of competence and integrity that in the opinion of the governing body are reasonably necessary for the protection of the public and not whether the governing body was right or wrong in that opinion. In short, the Court does not substitute its opinion for that of the governing body.

Counsel points out that in his examination for discovery, the defendant Bertrand, admitted that it was a generally known circumstance that the legal profession in Canada was provincially regulated. Given the fact that Parliament had this knowledge, it was submitted that, had they wished to include the governing bodies, express words would have been used and Parliament would not have relied upon general words which could reasonably be construed to be limited to individuals. Implicit in Parliament's knowledge that the legal profession was provincially regulated was the knowledge that competence and integrity were matters over which only the governing bodies had jurisdiction. Thus by including s. 32(6) in the Act, Parliament thereby clearly expressed its intention to include the governing bodies.

In my view subs. (6) does not operate to make a fundamental change to the plain meaning of the main operating provision of the section, that is s. 32(1). By its own terms subs. (6) is a limited directive to a court hearing a charge under subs. (1). It is to subs. (1) that one must look to determine the breadth of the parliamentary grasp. Section 32 is criminal legislation, whatever basis other parts of the CIA may have constitutionally. A defence-creating provision is hardly an appropriate place to find an expansion of the charging provision. 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 subs. (6) (or subs. (1)) such non-statutory bodies. The defence thereby afforded would perhaps in such a circumstance have application to a charge brought against such a non-statutory group or body under subs. (1) of s. 32. That case of course we do not now have before us. I find no assistance in the authority relied upon by the appellants, *Pharmaceutical Society of Great Britain v. Dickson*, [1968] 2 All E.R. 686 (H.L.), to support a contrary interpretation of s. 32 including subs. (6). The courts of the United Kingdom do not have a federal separation of sovereignty to consider when examining statutes and are not concerned with the situation arising where otherwise valid operations of one level of government may or may not be included in the proper reach of the legislation of the other level of government. For example, in the Court of Appeal, Lord Denning M.R. stated (s(1967] 2 All E.R. 558, at p. 567):

If the council of a professional body should make a rule which is in restraint of trade, it is as much subject to the law of the land as anyone else.

That statement is of course as true here as it is in the United Kingdom, but that is not the issue before the Court. The professional body here has made a rule with reference to the discipline of a member in a manner and concerning a subject which is clearly within provincial competence. With this fact in mind the Court is then asked to construe s. 32 to determine whether or not the "offences in relation to competition" established by the federal Parliament include provincially authorized activities on the part of the governing body. There the defendant-council was not a statutory governing body. By analogy it was the equivalent of the Canadian Bar Association, and the statutory body, which was not before the Court, was equivalent to the Law Society of British Columbia. The rules in question were not statutory. The defendant body had no public mandate. It was not a case of construing statutes which moved in opposite directions.

I conclude that on a proper construction of s. 32 taken as an entity, the section does not apply to the Law Society in the circumstances of this appeal.

American jurisprudence was advanced by the appellants in support of the federal jurisdiction over the Benchers' conduct. Two decisions of the United States Supreme Court have considered the relationship between federal anti-trust legislation and state action in the regulation of the practice of law. In *Goldfarb v. Virginia State Bar* (1975), 421 U.S. 773, the Court found the tariff of fees adopted by the voluntary Bar Association to be without the statutory authority of the state and therefore essentially a private, anti-competitive activity. The state statute accorded to the Supreme Court of the state, not the Bar Association, the power to regulate the practice of law. The state Court did not approve the tariff of fees in question; the federal statute therefore applied. The opposite result occurred in *Bates v. State Bar of Arizona* (1977), 433 U.S. 350. The disciplinary code adopted by the Supreme Court of Arizona prohibited advertising. The state Bar, through its Board of Governors, acting under the rule adopted by the Supreme Court, suspended the offending attorney. The Supreme Court of the United States found that such a rule did not violate the federal anti-trust statute since the rule imposing the restraint was an act of government, that is an action brought about by the State of Arizona acting in its sovereign capacity. Consequently, the action was not prohibited by the Sherman Act of the United States. Blackmun J. for the majority of the Court stated at p. 362:

The disciplinary rules reflect a clear articulation of the State's policy with regard to professional behaviour. Moreover, as the instant case shows, the rules are subject to pointed re-examination by the policy-maker-- the Arizona Supreme Court--in enforcement proceedings. Our concern that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced in such a situation; we deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active.

The Supreme Court had been delegated in the State of Arizona statute the supervisory function here consigned in the British Columbia statute to the Law Society. The ultimate

appeal in respect to the rules of procedure in Arizona lay to the Supreme Court. Here the appeal on disciplinary matters lies to the Court of Appeal of the province. (The lengthy discussion by the Court of the First Amendment of the United States Constitution dealing with free speech is not relevant to our purposes.)

In both of these cases the Court made reference to *Parker v. Brown* (1943), 317 U.S. 341, where a question arose as to the efficacy of a crop prorating program of the State of California in confrontation with the provisions of the Sherman Act regulating competition federally. At least from the point of view of statutory interpretation the case is useful to us. Chief Justice Stone at p. 351 stated:

The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.

and later in the judgment at p. 352:

... the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy.

Of particular interest in this appeal is the observation of the Chief Justice at p. 351:

... an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

The rule in the United States therefore seems to be that where the state legislatures take action directly or authorize a sub-agency to regulate the practice of law, the resultant actions do not offend the federal statute. Conversely where the state does not authorize the action taken by the governing agency purporting to regulate its members, the federal statute does apply. Beyond that the American decisions concern the Bill of Rights of the U.S. Constitution and are not here helpful. There seems to be something of a parallel between the *Bates* decision, *supra*, and the regulated industries cases, but beyond that the United States discussions are of little direct application here.

Question 2 says this:

2. If the Combines Investigation Act does apply, is it in that respect intra vires the Parliament of Canada?

In view of the answer given to question 1 it is not necessary to answer this question. The intervener, the Attorney General of Ontario, took the view that "the Criminal Law

power cannot validly proscribe acts as criminal which the Legislature of a province has expressly authorized". In support of this proposition one might make reference to the comment of Locke J. in *Farm Products Reference*, supra, at p. 239. We are not called upon to decide this issue, however, if question 1 is to be answered in the negative.

The appellant, the Attorney General of Canada, placed the basis of the CIA in constitutional law under the trade and commerce power in part, that is s. 91(2) of the Constitution Act, but made no submission as to how this would advance the position of the appellants with reference to a proceeding under s. 32. The interpretation of s. 32 will of course produce the same answer under question 1 whatever its constitutional base may be. In my view the discussion of the trade and commerce power does not advance the appellant's position.

There remains the third question in the *Jabour* action:

Does the ruling of the Benchers of the Law Society of British Columbia prohibiting the appellant from informing the public about the type and cost of legal services provided, violate the appellant's right to freedom of speech in Canada?

Freedom of speech has been valued as a fundamental right in this country, the United Kingdom and elsewhere for centuries. While the right to freedom of expression has on occasion been loosely described and sometimes insecurely planted in the law, reference can be found to it in such early formal documents as the Bill of Rights of 1689. Sometimes the right, as in that instance, was confined to freedom of debate in the Houses of Parliament; sometimes it is confined to freedom of the press; and sometimes the expression 'freedom of speech' or 'freedom of expression' is intended to connote the widest right of independence of expression free from unlawful suppression, interference or punishment. Where the right is not entrenched beyond the reach of Parliament or Legislature, as has been done for example in the First Amendment to the United States Constitution, the right is subject to curtailment by valid statute law.

These various rights of freedom of expression are discussed at length in this Court by Chief Justice Duff in the *Reference re Alberta Statutes*, [1938] S.C.R. 100, at pp. 132-33:

Under the constitution established by The British North America Act, legislative power for Canada is vested in one Parliament consisting of the Sovereign, an upper house styled the Senate, and the House of Commons. Without entering in detail upon an examination of the enactments of the Act relating to the House of Commons, it can be said that these provisions manifestly contemplate a House of Commons which is to be, as the name itself implies, a representative body; constituted, that is to say, by members elected by such of the population of the united provinces as may be qualified to vote. The preamble of the statute, moreover, shows plainly enough that the constitution of the Dominion is to be similar in principle to that of the United Kingdom. The statute contemplates a parliament working under the influence of public opinion and public discus-

sion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals. This is signally true in respect of the discharge by Ministers of the Crown of their responsibility to Parliament, by members of Parliament of their duty to the electors, and by the electors themselves of their responsibilities in the election of their representatives.

His Lordship was there concerned of course with the need in the operations of the democratic community organized under The British North America Act for the freest possible discussion in order that Parliament would be constantly working under the influence of public opinion and public discussion. The Reference in question related to the operation of newspapers in the Province of Alberta and in the first instance therefore the Court was dealing with that version of the right to freedom of expression usually referred to as freedom of the press.

His Lordship continued at p. 133:

The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means, to quote the words of Lord Wright in *James v. Commonwealth*, [[1936] A.C. 578], "freedom governed by law."

It might be helpful to set out Lord Wright's complete statement from the *James* case, *supra*, at p. 627:

"Free" in itself is vague and indeterminate. ... Free speech does not mean free speech; it means speech hedged in by the laws against defamation, blasphemy, sedition and so forth; it means freedom governed by law.

(Vide W.R. Lederman, *The Nature and Problems of a Bill of Rights*, 37 Can. Bar. Rev. 4.)

When all these broad discussions have been duly recorded we must return to the point of departure as I find it conveniently described by Beetz J. in *A.G. (Can.) and Dupond v. Montreal*, [1978] 2 S.C.R. 770, at p. 796:

None of the freedoms referred to [and reference had been made to freedom of speech] is so enshrined in the Constitution as to be above the reach of competent legislation.

The freedom of expression with which the Court is here concerned of course has nothing to do with the elective process and the operations of our democratic institutions, the House of Commons and the provincial Legislature. We are indeed speaking about the

right of economic free speech, the right to commercial advertising. It can hardly be contended that the province by proper legislation could not regulate the ethical, moral and financial aspects of a trade or profession within its boundaries. If the province were to declare that price advertising of legal services was to be controlled in the manner described in *Can. Breweries, supra*, in the case of beer advertising and beer sales, would not such provincial legislation be *intra vires*? Clearly the right of a licence-holding member of the law profession practising in the Province of British Columbia is subject to some provincial regulations. One of those regulations might amount to a curtailment of the ability of the licence holder to advertise his or her services. The same attack might be made upon the CIA where it would otherwise be applicable. A restriction in the form of misleading advertising as in s. 36 of that Act is just such a lawful regulatory restriction on freedom of expression or freedom of economic speech as has been alleged here. This being so we are returned to the initial question as to whether or not the Benchers were authorized by the provincial statute to do what it has done in the discipline action relating to the appellant *Jabour*. If the answer is "Yes" then the submissions advanced with reference to the freedom of speech are answered. If the answer is "No" it is unnecessary to answer the question raised with reference to the right to free speech. The regulations and rulings of the Benchers with reference to advertising have already been set forth. Some matters may, in accordance with those rulings, be made the subject of public announcement, others may not. According to the *factum* of the appellant *Jabour* on March 30, 1979 after these proceedings had been commenced, new rulings were passed by the Benchers permitting "certain advertising of services by lawyers". Similar comment is found in the *factum* of the Law Society in the appeal by the Attorney General of Canada. Reference is there made to "current rulings and resolutions of the Law Society under which fee and other advertising is permitted in British Columbia" Thus it can be seen from the submissions of both appellants and respondents that the regulation of advertising is an ongoing function of the Benchers under the provincial statute. If the consequence of this action, assuming it to be valid in law, is the reduction of the ability of the member of the Law Society to make public announcements concerning the practice of law, such a consequence does not, as a violation of an asserted right to freedom of speech, invalidate the otherwise valid provincially-delegated legislative action.

As I have already concluded for reasons advanced earlier that the action taken by the Benchers herein was authorized by the province of British Columbia, the answer to the third question in my view is "No".

In the result therefore, in the Law Society action on the appeal to this Court by the Attorney General of Canada, the Restrictive Trade Practices Commission and Bertrand, I would answer the first question "No"; the second question need not in the circumstances be answered; and the third question I would answer "No". In the *Jabour* action on the appeal of the appellant *Jabour*, I would answer the first question "No"; the second question need not in the circumstances be answered; and the third question I would answer "No".

For all these reasons I would dismiss both appeals. As the questions in each appeal raise identical issues, except question 3 in the *Jabour* appeal, I would allow the respondents costs in this Court against all appellants except that there shall be only one counsel fee recoverable for both appeals in this Court, the same to be borne equally as between the appellants in the Law Society action and the appellant *Jabour*.

Appeals dismissed with costs.