Intelligence MEMOS

From: Robert Mysicka

To: Canada's Competition Watchdogs

Date: May 28, 2021

Re: **Sharpening a Dull Sword: Amending the Competition Act to Increase Scrutiny of Self-Regulators**

How do you know if the professional you are working with at an important time in your life – whether it is a lawyer, a realtor, or a doctor, to take just a few examples – is acting in your best interest, and not their own? Provinces have set up regulatory bodies ostensibly for the purpose of protecting consumers who deal with professionals. Governments in Canada are granting an increasing number of professionals and other occupations in the service sector the right to self-govern and self-regulate. In other circumstances, governments have delegated authority that they would normally have to self-regulated entities.

I have written before about the need for more oversight on self-regulated organizations (SROs) and the need for a political solution. SROs are granted their powers by government and any limits against potential abuses of such powers should therefore also be the responsibility of government.

Under Canada's system of federalism, federal laws normally take precedence over provincial legislation when the two conflict. In the case of agencies granted powers by the provinces, however, a form of reverse paramountcy applies as a result of the judicially created Regulated Conduct Doctrine (RCD). Under the RCD, provinces have the right to grant SROs the power to make rules that would otherwise contravene federal competition law.

In many instances, the delegation of power to SROs has created rules that restrict entry into markets, prevent innovation and facilitate self-dealing, all at a cost to consumers. This problem has seeped into many of the professions that operate under restrictive or exclusionary licencing or accreditation regimes.

These regimes can have laudable purposes. They can protect consumers from incompetent practitioners or information asymmetries that arise in the marketplace for complex services. However, where SROs are granted a de facto patent from the government to set their own rules, the incentive structure can and often does result in rules that restrict entry and reduce competition. For example, in our recent C.D. Howe Institute paper, my co-authors and I found evidence pointing to higher than average wages in the professions and increased costs for consumers.

Under Canada's current competition law, there are three possible approaches to dealing with anti-competitive conduct by SROs: Section 45 criminal conspiracy provisions, Section 78/79 abuse of dominance provisions, and Section 90.1, which addresses "agreements or arrangements between competitors." While numerous cases have been brought under Section 45 and its predecessors, virtually every SRO able to point to statutory authority for its activities has successfully defended such activities by application of the RCD. Putting aside the legal difficulties of Section 45, applying criminal sanctions to SROs seems disproportionate since many of these agencies can and do make honest mistakes. It is more reasonable for such mistakes, absent criminal intent, to instead be addressed under the Civil Reviewable provisions of the *Competition Act*. These sections enable the Commissioner of Competition to apply to the Competition Tribunal for an order prohibiting certain conduct.

This leads us to the Section 79 Abuse of Dominance Provisions. The Competition Tribunal found in *Commissioner of Competition v. Vancouver Airport Authority*, that as a matter of law the RCD does not apply to Section 79 because that provision does not contain the "leeway" language that would enable an agency to point to its public interest mandate to protect its rules from the scrutiny of competition laws. This could put some wind into the sails of applications brought against SROs since they could not automatically defend their actions by resorting to the RCD.

Section 79 of the Act is based on an enumerated, although not exhaustive, list of anti-competitive acts that are set out in Section 78. Those categories do not currently address action that could be taken by an SRO which, say, limits entry into a profession. Instead, the subsections address various anti-competitive acts taken by a firm in a dominant position, the majority of which are exclusionary in nature. Since one of the main concerns with SROs, particularly in the professions, is their dominance (exclusive licensing and therefore rule-making power) combined with the restrictive or exclusionary nature of the rules that they develop, it would be worthwhile for Parliament to consider an addition to the list in Section 78. For example, consistent with recommendations from some academics, it would be useful to add a subsection prohibiting regulatory restrictions that have the effect of impeding or preventing a competitor's entry into a market, or that eliminate a competitor from a market unless the regulator can establish a demonstrable public purpose or benefit from such restrictions.

An SRO clause of this nature would finally shift the onus to regulators to justify their rules, and provide for administrative monetary penalties or litigation at the Competition Tribunal, if they cannot. If the carrot of provincial fair access regimes does not give SROs motive to change their ways, maybe the stick of competition law can fill the void.

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