

IN THE COURTSSUPREME COURT REVERSES
SUGAR CONVICTIONS

The Supreme Court of Canada, in a majority judgment delivered by The Honourable Mr. Justice Pigeon on July 18, 1980, reversed the conviction by the Quebec Court of Appeal of four sugar companies on a conspiracy count under s. 32(1)(c) of the Combines Investigation Act.¹ The Honourable Mr. Justice Estey dissented. The companies were:

Atlantic Sugar Refineries Co. Ltd.
Redpath Industries Limited
St. Lawrence Sugar Limited
S.L.S.R. Holdings Limited

Following their trial in the Quebec Superior Court in 1976, the companies were acquitted of one count under s. 32(1)(b) and one count under s. 32(1)(c). On appeal by the Crown, the Appeal Court of Quebec reversed the acquittal on the charge under s. 32(1)(c). Fines totalling \$750,250.00 were imposed. S. 32(1)(c) as it was for the period covered by the charge and prior to the amendment effective July 1, 1976, provides;

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

(c) to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale storage, rental, transportation or supply of an article, or in the price of insurance upon persons or property...

...

is guilty of an indictable offence and is liable to imprisonment for two years."

The facts relating to the charge under s. 32(1)(c) related to pricing and market shares. Listed prices were uniform. Redpath, the largest company, posted its prices in its lobby and they were quickly available to competitors, and competitors were also able to discover Redpath's pricing formula from available data. There was no evidence of communication between the accused on prices. On this aspect of the charge the trial judge found there was no collusion.

(1) Regina v. Atlantic Sugar Refineries et al. (1975) 26 C.P.R. (2d) 14; (1976) C.S. 421 (Trial).

Regina v. Atlantic Sugar Refineries et al. (1978) 41 C.C.C. (2d) 209; 91 D.L.R. (3d) 618 (Appeal).

The three producing companies were allotted fixed market shares under Wartime Controls until 1949, and these shares varied only slightly until 1958. In the latter year there was a price war instigated by Redpath, which temporarily increased its share but at heavy financial cost. Ownership of Redpath changed and the companies resumed their traditional market shares. In 1964, Cartier entered production and obtained ten per cent of the Eastern Canadian market. Thereafter, the shares of the three companies were adjusted but in proportion to their traditional shares. The three companies granted selective discounts to large buyers, the extent of the discounting depending upon whether the seller was above or below its traditional market share.

The Quebec Court of Appeal found that the trial judge had concluded on the evidence that "the maintenance of traditional market shares...which were adjusted but in the same proportion when Cartier came on stream...was the result of a tacit agreement between the accused". In this respect he had also found that "Although each stressed that this was the result of an independent decision, one would be ingenuous not to be aware that there was and continues to be a tacit agreement to this effect." The trial judge made an express finding that there was no evidence of any communication between the accused. The Quebec Court of Appeal went on to say, however, that he had erred in law by instructing himself that the Crown must prove that the accused intended to prevent or lessen competition unduly, and that he should have convicted the accused in view of his findings of fact. Mayrand, J.A. said that the essential facts which the Crown must and did prove were:

- "(a) an agreement to which the respondents were party;
- (b) the object of that agreement was to lessen competition;
- (c) if carried out, the agreement would have lessened competition unduly."

The Supreme Court of Canada, however, in the majority judgment by Mr. Justice Pigeon, found that the issue was exclusively whether the lessening of competition was undue. In this respect, in discussing the question of tacit agreement and undueness he stated, inter alia:

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"(Crown Counsel's) contention was that an agreement to restrict competition so as not to alter relative market shares was the equivalent of an agreement not to compete at all, that it was totally destructive of competition and therefore undue in law. As to this I might point out immediately that the trial judge did find evidence which he accepted of actual competition and would refer to the passage quoted from his judgment at pp. 100-101 of the report. I fail to see how it can be said that the 'tacit agreement' found by the trial judge meant the elimination of competition when it is a fact that competition did subsist and that it did subsist, not in violation of the 'tacit agreement', but as an integral part of the course of conduct from which the 'tacit agreement' was inferred."

Pigeon, J. also stated:

"The basis for an inference of 'tacit agreement' was in a way stronger for the uniform price list than for the maintenance of market shares. There was a feature which could be considered as the making of an offer, that is the publication of a price list which meant that it was immediately made known to the competitors by the brokers. Hence, I find that the trial judge quite properly on that point put the burden on the defence to disprove the evidence of collusion."

He then continued:

"The situation was different in respect of the adoption by Redpath of a maintenance of traditional market share sales policy. There is no evidence that this policy was in any way made known to its competitors. Furthermore, it was not like the list price a perfectly defined policy. The method by which it was to be in force, the selective price cuts to big buyers, was left to the judgment of those who were to implement that policy. There is no suggestion that the extent of the price cutting was to be made known to the competitors. On the contrary the evidence is that, when there was competitive bidding, the quotations submitted differed appreciably. On the other hand, just as the competitors would in time become aware of Redpath's pricing formula, they would inevitably become aware of its marketing policy and Redpath's president was conscious of this when adopting it.

"When, as expected, the competitors did adopt a similar policy, did this mean that an agreement had been reached? In order to make an agreement by tacit acceptance of an offer there must not only be a course of conduct from which acceptance may be inferred, there must also be a communication of the offer. In the case of the list price, this was apparent and did cast a burden on the defence. But there was no such communication of the marketing policy. In those circumstances, did the 'tacit agreement' resulting from the expected adoption of a similar policy by the competitors amount to a conspiracy? I have great difficulty in agreeing that it did because the author of Redpath's marketing policy was conscious that its competitors would inevitably after some time become aware of it in a general way and also expected them to adopt a similar policy which would also become apparent.

"It appears to me that the Crown's contention implies ...that...each of the refiners was obliged to endeavour to increase its market share at the expense of the others, otherwise it was agreeing to lessen competition unduly. In my view the trial judge was correct in rejecting this submission. None of the refiners was obliged to compete more strongly than it felt desirable in its own interest. Each refiner was entitled to decide not to seek to increase its market share as long as this was not done by collusion and, in my view, the trial judge was right in coming to the conclusion that what he called the 'tacit agreement' to maintain market shares was not an agreement to lessen competition unduly.

"As I have already indicated, I cannot agree with the submission that this 'tacit agreement' to maintain market shares involved the elimination of competition. On the contrary, as we have just seen, the evidence is clear that it involved only a lessening of competition. When it discontinued the financially disastrous price cutting whereby it had increased its share of the market, Redpath realized that without any price cutting it was not only losing the excess but failing to maintain its former market share. The decision to strive for stability on the basis of maintaining 'historical market share' was therefore not a decision to forego all price competition. On the contrary, it meant that some price concessions would be made to the big buyers but that this would be adjusted so as to maintain the 'historical market share' as close as

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possible without any increase or diminution. That this involved a lessening of competition is apparent. However, it is equally clear that it did not involve a suppression of competition."

Coming then to the meaning of undueness, Pigeon, J. cited Ritchie, J. in Aetna Insurance Co. and others v. The Queen (1978, 1 S.C.R., 731), who had quoted the following from the trial judge's assessment of the meaning of "unduly":

"What is criminal is an agreement that is intended to lessen competition improperly, inordinately, excessively, oppressively or one intended to have the effect of virtually relieving the conspirators from the influence of free competition. There is no requirement for the Crown to prove the existence of a monopoly and it is a question of fact as to whether the agreement reaches the point of intending to lessen competition unduly..."

He then went on to say:

"I find it abundantly clear that, applying this test to the facts found by the trial judge, it is impossible to say that he erred in law when coming to the conclusion that the Crown had failed to prove an agreement to lessen competition unduly. I am unable to find in the reasons for judgment in the Court of Appeal any sound basis for concluding otherwise and, as I have already indicated, I am unable to find any valid reason for so concluding on the facts relied on by counsel for the Crown."

His judgment concluded with the following:

18 "I must also point out that while, as was stressed in Aetna, the offence lies in the agreement made with the intention to lessen competition unduly, not in the actual result of the agreement, no such distinction has to be made when, as here, the only evidence of the agreement is found in the course of conduct from which it is inferred. In the present case, the 'tacit agreement' which the trial judge found was obviously to lessen competition as it was in fact lessened... Whether this was a criminal offence depends exclusively on whether competition was thus lessened 'unduly'. While the offence charged is truly criminal in nature and therefore requires mens rea, this does not mean that, assuming the 'tacit agreement' was illegal, the accused...had to be conscious of its illegality. If it had been intended to lessen competition 'unduly' it would have been no defence that the accused mistakenly thought that the intended lessening of competition would not be

'undue'. It is always for the Court to decide on the facts whether an agreement to lessen competition means that competition is to be lessened 'unduly' and the views of the accused on that are irrelevant."

It may be of some significance that in both Aetna and this case the majority judgments did not specifically comment on the decisions of the trial judges that there must be established an intention to lessen competition unduly, particularly in the light of the last quotation herein from the majority judgment ("...as was stressed in Aetna, the offence lies in the agreement made with the intention to lessen competition unduly"). Prima facie, that would seem to refer to the intent of the parties rather than to the object of the agreement.

The Honourable Mr. Justice Estey, in a fourteen page dissent, concluded that the trial judge had indeed made an error of law and should have convicted the accused on the basis of the facts he had found. He held that the trial judge had found an undue lessening of competition but had erroneously placed upon the Crown a requirement to prove that the intended lessening of competition had been undue. In support of that position, he cited the following two excerpts from the trial judge's reasons:

"Where the accused at the beginning of the period controlled 99.8% of the eastern Canadian market, an agreement to lessen competition would be tantamount to extinction, and so would be undue. The extinction of competition would in those circumstances require the combined action of all the accused to be effective, for if one decided to allot a portion of its market share to a newly arrived competitor, whatever the other two planned would be for nought."

. . .

"On the evidence, I find that the maintenance of traditional market shares - which were adjusted but in the same proportion when Cartier came on stream - was the result of a tacit agreement between the accused. But in my opinion, it has not been shown that this agreement was arrived at with the intention of unduly preventing or lessening competition. The reason for maintaining traditional market shares was to avoid a price war which would have resulted had the accused taken the only method of increasing them by price cutting through extensive discounts."

Estey, J. disagreed with an argument of the appellants that they could not be convicted under s. 32(1)(c) of a tacit agreement. Relying partly upon the judgment of the Ontario Court of Appeal in Regina v. Armco Canada Ltd. et al. (1976) 13 O.R. 32, they argued that there must be some communication between the parties. Estey, J. stated:

"The argument of the applicant that a tacit agreement cannot support a conviction under s. 32(1)(c) carries by implication the notion that s. 32 somehow imports the doctrines of the law of contracts into criminal law. 'Agreement' with nothing more perhaps would connote parties competent at law, the presence of an animus contrahendi, consideration flowing between parties, and the rules of contract law as to form and perhaps even proof. Here, however, we have a section that refers to 'conspires, combines, agrees or arranges'. Each word adds meaning to the sentence. The agreement clearly need not be enforceable for axiomatically it is not. The parties to the transaction must be deemed to know that it is unenforceable as being illegal. They have by their conduct indeed foresaken the ordinary recourse to civil law. The agreement may be proven, in the sense of being capable of discernment by the finder of fact from all the surrounding circumstances, including the conduct of the parties."

He also said:

"The 'act of agreeing' is but another way of describing a meeting of the minds of the persons charged. How those minds meet or how the act of agreeing occurs is not limited to the rules and practices of contract law. The four words describe 'agreement' in the broad sense accorded to that word in the language and not the narrow term of art from a specialized branch of the law."

Estey, J. also disagreed with a defence argument that conscious parallelism fell short by axiom of a conscious agreement to enhance prices unduly. He stated:

"In count 2 the undue lessening of competition has been alleged to have been brought about by the consistent practice on the part of the accused of proportional market sharing. It might be in some commercial circumstances that the defence, or at least the consideration, of conscious parallelism would be a valid element in the legal position of

accused under s. 32. It should be borne in mind, however, that the tribunal here was not concerned with a market shared by a wide range of suppliers in which a pattern of 'conscious parallelism' arose. There were three principal suppliers serving ninety-eight per cent of the market for some years during the period of charge and thereafter serving ninety per cent of the market. For almost a quarter of a century they remained in almost arithmetically perfect formation. Different considerations might come into play in a shifting market region or area supplied by a large number of participants each disporting itself according to its own interpretation of the doctrine of economic survival of which conscious parallelism apparently forms a part."

SUPREME COURT CONFIRMS ACQUITTAL
IN B.C. AUTO PARTS CONSPIRACY CASE

The Supreme Court of Canada, in a judgment handed down by Mr. Justice Martland on March 27, 1980 confirmed the quashing by the Court of Appeal for British Columbia of an appeal against the acquittal on two counts under s. 32(1)(c) of the Combines Investigation Act in R. v Chatwin Motors Limited et al.¹

The Crown, in its appeal to the B.C. Court of Appeal argued that the trial judge had made eleven errors of law. That Court, Craig, J.A. dissenting, after hearing the appeal, granted a motion by the Respondents to quash the appeal because the grounds filed by the Crown did not involve questions of law alone.

The case involved five automobile dealers in Port Alberni who were indicted under three counts under s. 32(1)(c) as it was prior to the amendments of 1976. They were charged with having unlawfully combined, agreed or arranged to prevent or lessen, unduly, competition in the sale, transportation or supply of parts and accessories for motor vehicles by agreeing (1) to add a common freight charge to the selling price (2) to add a common surcharge to sales and (3) to a common policy in relation to rebates given for returned parts and accessories. The accused were acquitted on all three counts and the first two were appealed.

¹Regina v. Chatwin Motors Limited, et al (Supreme Court of British Columbia, Victoria, B.C., June 7, 1977 unreported (Trial)).

At the trial the Crown did not allege common selling prices, and its evidence related largely to the so-called "captive" parts market which accounted for fifteen to twenty per cent of the total parts market in the area. "Captive" parts are those which may only be obtained from an automobile manufacturer or his franchised dealer.

The trial judge, Mr. Justice Ruttan, found that the alleged agreements had been made, but he emphasized the lack of evidence of agreement on the base prices. He cited Mr. Justice Rothman in Regina v. Aluminum Company of Canada Limited et al (1977) 29 C.P.R. (2d) 183 at p.211 as follows:

"...here there is no evidence whatever of price fixing or common prices and no indication that this was the intended effect...I am not aware, and counsel was not aware, of any Canadian decision in which an agreement to pass on a bare increase in cost, in the absence of price-fixing or common prices, was found to be illegal under section 32(1)(c) or the equivalent provision previously contained in the Criminal Code. In virtually every case that comes to mind, where price competition was held to be lessened, there were common prices fixed."

Ruttan, J. then went on to state:

"So in the present case if the price does play an important role, it can only do so because of some agreement to fix a common price or follow a common pricing formula or listing. There was no evidence here of any relationship between the 3% or 10% surcharges and real prices, since the respective dealers did not agree to fix common prices or price lists.

I am aware that there were manufacturers' master sheets with suggested retail prices. But there is no suggestion in the evidence that these master sheets were followed carefully by the distributors, even between the two dealers of General Motors products in the same town of Port Alberni. So whatever the agreement was between the parties, there was no apparent effect on real prices, since there was no base price on which agreements took effect."

Seaton, J.A., in delivering the majority judgement of the Court of Appeal quashing the appeal, found that the trial judge, in citing the above, had not held that it would be wrong in law to find that an agreement to pass on a bare cost increase could constitute a breach of s. 32(1)(c). Rather, he found that the trial judge "adopted the reasoning of Mr. Justice Rothman, not in the sense of adopting law but as adopting reasoning that appealed to him."

Martland, J. agreed with the conclusions reached by Seaton, J.A. and concluded that the trial judge, fully cognizant of the applicable legal principles, had decided on the facts that the Crown had failed to prove commission of the offences charged in the two counts under appeal.

ALBERTA COURT FINDS RIGHT OF
CIVIL ACTION UNDER COMBINES
LAW CONSTITUTIONAL

The Court of Queen's Bench of Alberta, in a judgment by The Honourable Mr. Justice Rowbotham on June 23, 1980, has found s. 31.1 of the Combines Investigation Act to be within the legislative competence of the Parliament of Canada as legislation pertaining to the general regulation of trade and commerce throughout Canada as provided in s. 91(2) of the British North America Act. He found that it could not be sustained under the peace, order and good government power set out in the preamble to s. 91 of the Act or as criminal law in s. 91(27). S. 31.1 of the Combines Investigation Act, which came into force in 1976 provides a right of civil action where a person has suffered loss or damage as a result of conduct contrary to Part V of the Act or the failure of any person to comply with an order of the Restrictive Trade Practices Commission or a Court under the Act.

The decision was on a pre-trial motion relating to a suit by Henuset Bros. Ltd. against Syncrude Canada Ltd., Alberta Energy Company Ltd., International Union of Operating Engineers Local 955, and Canadian Bechtel Limited. Henuset alleges damages as a result of conduct by the defendants contrary to s. 32 of the Combines Investigation Act. Alberta Energy brought the pre-trial motion to determine the constitutional validity of s. 31.1.

Rowbotham, J., after noting that the Judicial Committee of the Privy Council in Propriety Articles Trade Association v. Attorney General of Canada (1931) 2 D.L.R. 1, the possibility of the Act being supported by the trade and commerce clause had not been ruled out, stated:

"If the Combines Investigation Act as it stood in 1927 could have been supported by the 'trade and commerce' power, there is much greater justification for the proposition that the present Act, as recently amended, is legislation that is intra vires of the federal parliament for the general regulation of trade and commerce throughout Canada."

He distinguished the question before him from that of MacDonald et al. v. Vapor Canada Limited et al. (1976) 66 D.L.R. (3rd) p.1. In that case the Supreme Court of Canada found s. 7(e) of the Trade Marks Act ultra vires of the Parliament of Canada. That subsection provides that no person shall "do any other act or adopt any other business practice contrary to honest industrial or commercial usage in Canada." Rowbotham, J. stated:

"Section 7(3)(sic) of the Trade Marks Act, even when read together with the other subsections and in conjunction with Section 53 thereof, is vague and disjunctive. Section 31.1 of the Combines Investigation Act relates directly to parts IV, IV.1 and V thereof by reference to conduct prohibited in those parts. Section 7(e) of the Trade Marks Act, either alone or in conjunction with the other subsections and with Section 53 thereof is not linked to any overall scheme for the regulations and control of offences which adversely affect the conduct of trade and commerce. Section 31.1 of the Combines Investigation Act, because of its connection with the parts referred to above, is a part of a comprehensive scheme for the regulation and control of anti-competitive trade practices throughout Canada. The acts prohibited by Section 7 of the Trade Marks Act are statutory enactments of existing torts. Many of the acts prohibited by Part V of the Combines Investigation Act are also variations of the common law tort of conspiracy but many others are not."

He concluded:

"When Section 31.1 is read in context with the other provisions of the Combines Investigation Act, as amended by Chapter 76 of the Statutes of Canada, 1974-75-76, it forms an integral part of an overall legislative and regulatory scheme or tapestry for the general regulation of trade and commerce throughout Canada, and, although it affects to some degree property and civil rights in the provinces, it is within the legislative competence of the Parliament of Canada pursuant to Section 91 subsection 2 of the British North America Act."

Regarding the peace, order and good government power, Rowbotham, J. concluded:

"Because Section 31.1 of the Combines Investigation Act does not deal with an emergency, is not intended to be temporary legislation, does not, in any clear sense, relate to a subject matter that was overlooked or unforeseen at the time of the enactment of the British North America Act in 1867 and has some affinity with trade and commerce which makes it specific in nature but broad in scope, I am of the opinion that it cannot be supported constitutionally by the 'peace, order and good government' power..."

Regarding the federal power over criminal law, he concluded:

"Ever since the Board of Commerce case, anti-competition legislation has been accompanied by penal sanctions. These penal sanctions have been carried into the present Combines Investigation Act and added to with respect to the new offences created in Part V. There is no rational functional connection between the right to sue for damages envisaged by Section 31.1 of the Act and those penal sanctions because an examination of the wording of the legislation indicates that a civil cause of action may be commenced independently of any criminal proceedings. Section 31.1 cannot therefore be justified as legislation enacted pursuant to the provisions of Section 91, subsection 27 of the British North America Act."

As reported in the June issue of the Record, the Federal Court of Canada, Trial Division, found on December 4, 1979 that ss. 31.1(1)(a) and 31.1(3) of the Combines Investigation Act are ultra vires of the Parliament of Canada. (Rocois Construction v. Quebec Ready Mix Inc. et al.). Regarding the federal powers over trade and commerce (Section 91(2) and to legislate for peace, order and good government, that Court stated:

"In my opinion, the present state of the authorities on the interpretation that must be given to subs 2 and to the initial wording of s 91 does not provide any basis for concluding that the power to make laws on trade and commerce, or to legislate for the peace, order and good government of Canada, can enable Parliament to adopt general legislation on competition that will apply to local commerce as well as to inter-provincial or international commerce."

B.C. COURT OF APPEAL REVERSES
LEGAL ADVERTISING JUDGMENTS

The British Columbia Court of Appeal, in a judgment handed down by Mr. Justice Seaton on August 20, has found that the Law Society of British Columbia has the power to prohibit B.C. lawyers from advertising their legal services and that the Combines Investigation Act does not apply to such a prohibition. It is not yet known if the decision will be appealed.

In January, 1978, Mr. Donald E. Jabour, a member of the Law Society of British Columbia, published newspaper advertisements announcing the opening of "a new concept of law office" and listing his fees for common kinds of legal services. He also installed a large illuminated sign over his office with the words "The North Shore Neighbourhood Legal Clinic, Donald E. Jabour, Barrister and Solicitor". In February he was given notice of a hearing to be conducted by the Discipline Committee of the Law Society. In March, before the hearing took place, he launched an action in the Supreme Court of B.C. seeking a declaration that the Law Society's rulings and policies prohibiting advertising were contrary to the Combines Investigation Act and in violation of the fundamental right of free speech, and seeking damages both under s. 31.1 of the Combines Investigation Act and at common law. On May 12 the Discipline Committee found Mr. Jabour guilty of conduct unbecoming a member of the Society and on May 23 recommended that he be suspended from the practice of law for six months. The suspension was held in abeyance pending the outcome of Mr. Jabour's legal action.

On May 15, the Director of Investigation and Research, Combines Investigation Act, launched a formal inquiry into the conduct of the Law Society and scheduled a hearing for the taking of evidence before a Member of the Restrictive Trade Practices Commission in Vancouver on May 29. On May 24 the Law Society started an action in the B.C. Supreme Court seeking declarations that the Combines Investigation Act does not apply to the Law Society or, if it does, "then to such extent the ... Act ... is ultra vires the Parliament of Canada."

The Trial Court heard the two actions together, excluding the matter of damages sought by Mr. Jabour. In the Jabour action the Trial Court ruled, on April 11, 1979:

1. The policies and rulings of the Law Society with respect to advertising by members were not authorized by any provision of the Legal Professions Act.

2. "There being no specific nor implicit authorization in the Legal Professions Act, for the defendants to impose what I have 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...
3. "...the Combines Investigation Act and amendments thereto are not ultra vires of the Parliament of Canada."

In his reasons for judgment in the Jabour action, Mackoff, J. said:

"Although the Benchers in my view do not have the statutory authority to impose this blanket restraint on advertising by members of the Law Society, the Benchers do have, not only the authority, but also the duty, to ensure that any advertising by a lawyer does not depart from the standards set by the Benchers in matters of competence, honesty, integrity and quality, nor bring the profession into disrepute."

Seaton, J.A., in delivering the judgment of the Court of Appeal, could find no basis in the Legal Professions Act for the Trial Judge's conclusion that the Law Society was authorized to regulate but not to prohibit advertising. He stated:

"They 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."

Dealing further with the question of specificity, he said:

"There is no specific power to prohibit advertising to be found in the Act. There are few specific powers - most are general and broad. It does not matter whether they are specific. What matters is whether they are granted. In my view the power to prohibit commercial advertising is granted as part of the broad regulatory power conferred by the Act. The Benchers are given a general power to determine what conduct is to be acceptable in the practice of law and even outside the practice for those who are members. Provided the conduct can be found to be contrary to the best interest of the public or of the legal profession, or that it tends to harm the standing of the profession, it is within the ambit of the Benchers' power."

He added, however, that the Benchers' powers to prohibit advertising are not unlimited but, apart from citing one or two examples beyond such powers, did not consider it useful to define the outer limits of control within the jurisdiction of the Benchers.

In dealing with the applicability of the Combines Investigation Act, the Appeal Court noted s. 32(1) which outlaws agreements unduly lessening competition, and s. 32(6) which provides:

"(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 Court also cited s. 2 of the Act which defines a service as meaning "a service of any description whether industrial, trade, professional or otherwise".

Referring to the limitation of the exemption is s. 32(6) to arrangements relating to "standards of competence and integrity", Seaton, J.A. said no one had argued that the Benchers of the Law Society had so restricted its activities, and he added:

"It has been the view of those within the Federal Department of Consumer and Corporate Affairs that the amendments to the Combines Investigation Act gave them responsibility to oversee the work of the Law Societies that have acted under provincial legislation since Confederation. It is their contention that s. 32(6) is determinative and that it sets limits on the power of the Law Society and the Benchers. They say those limits have been exceeded and that consequently the Society or the Benchers have or may have committed one of the crimes set out in s. 32."

Having found that the Legal Professions Act empowers the Law Society to prohibit Mr. Jabour's advertising, Seaton, J.A. stated:

"In the past provincial bodies making orders pursuant to provincial legislation have not been found to be in breach of the combines legislation. Nor have those who have complied with such orders been found to be in breach of the federal legislation. Nor has the provincial legislation been found to be ultra vires."

And, returning to the question of specificity, he said:

"Whether the powers have been granted to the regulatory body in specific language as opposed to broad general language, does not offer a valid distinction. The essential thing is that the power be granted. There is nothing in the Act to show an intention to override provincially authorized regulatory bodies, whether they are directed in specific terms or general terms."

Seaton, J.A. held that s. 32(6) of the Combines Investigation Act indicated an intention only of applying the Act to service industries not controlled by bodies with a statutory base. He said:

"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 of the amendments of s. 32(6) indicates an intention to expand 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."

In conclusion, he stated:

"...that the powers vested in the Benchers by the Legal Professions Act stand unimpaired by the Combines Investigation Act, that the duties of the Benchers are to be discovered in the provincial legislation without regard for the exemption in

s. 32(6) of the federal legislation, and that the Benchers can, notwithstanding the combines legislation, prohibit lawyers from advertising."

He rejected an argument that the rules of the Law Society violated a fundamental right of free speech. Citing Samur v Quebec (1953) 2 S.C.R. 299, he stated:

"This and other cases support the proposition that the provinces cannot legislate in relation to free speech. But they can, when legislating in relation to other matters, limit freedom of speech. Thus, free speech is qualified by the laws relating to defamation and by other laws...Each alleged limitation upon freedom of speech has to be examined separately to ensure that the legislation bestows the power to limit the particular type of speech in question, and that the subject matter of the legislation is within provincial competence. That is why I said earlier that there is a presumption against limitations upon freedom of speech."

And he found that the provincial legislation validly bestowed upon the Benchers the power to ban the kind of speech they had banned.

The Court did not find it necessary to deal with the question of the constitutionality of the Combines Investigation Act since he had found it did not apply to the Law Society.

FEDERAL COURT DECIDES PROCEDURAL
ISSUES IN PROCEEDINGS BEFORE REST-
RICTIVE*TRADE PRACTICES COMMISSION

The Federal Court of Canada, in a judgment by Mr. Justice Cattanach on June 11, 1980, ruled on some procedural issues which arose in hearings before the Restrictive Trade Practices Commission on a reviewable practice under Part 1V.1 of the Combines Investigation Act involving Bombardier Limited. The Commission's powers to issue orders in respect of specified restrictive business practices only date from 1976 and the first substantive order has yet to be issued. Some applications for orders by the Director of Investigation and Research have been withdrawn following settlement with the parties.

The hearings related to an application by the Director of Investigation and Research pursuant to s. 31.4 of the Act for an order that would require Bombardier to cease the practice of exclusive dealing in the sale of its snowmobile products. Before making such

an order under the section the Commission must find, inter alia, that competition is or is likely to be lessened substantially.

Counsel for the Director presented his case before the Commission first and he did not call an economist to testify on the questions whether competition is or is likely to be lessened substantially. Counsel for Bombardier called Dr. Skeoch, an economist, as an expert witness who gave his opinion as to the economic principles which should be considered in determining whether competition is likely to be lessened substantially. At the conclusion of the defence case, counsel for the Director called Dr. Rosenbluth, an economist, as an expert witness to give evidence in rebuttal of that of Dr. Skeoch. The Commission, over the objections of the defence, agreed to hear Dr. Rosenbluth. In doing so, it was influenced by two considerations: first, that it considered it would be useful to hear his views and, second, that the strict rules of a court should not necessarily be applicable with the same stringency to the proceedings before a tribunal such as the Commission.

In the course of Dr. Rosenbluth's testimony, counsel for the defence requested that the witness produce a considerable number of documents. A good deal of material was eventually produced, but a number of documents were withheld on grounds of solicitor/client privilege. Of those latter documents, the Commission ordered that the following three be produced:

- The Brief to Counsel prepared by the Bureau of Competition Policy for Counsel being an analysis of the Applicant's evidence to be presented to the Commission in this Application, 31.4 of the Combines Investigation Act, and other materials relating to the Inquiry, but not necessarily relating to this specific Application
- A "Summary of Bombardier's Response" prepared for Counsel by Mr. T.P. Going
- A 17 page report prepared by Dr. Rosenbluth dated March 1, 1980 being his expert analysis of the economic effects of exclusive dealings by the Respondent

The Federal Court had before it applications for the following orders:

- The Attorney General sought an order quashing the decision of the Commission requiring the production of the three documents as contrary to law in that they were privileged.

- Bombardier sought an order quashing the decision of the Commission that it should receive the evidence of Dr. Rosenbluth and prohibiting the Commission from taking any account of that evidence in reaching its decision on the application before it.
- In the alternative, Bombardier sought an order prohibiting the Commission from taking any account of the evidence of Dr. Rosenbluth unless the three documents were produced to counsel for Bombardier and he was afforded full opportunity to cross-examine the witness thereon.

The Federal Court considered the applications by Bombardier first. On his first application, counsel for Bombardier argued (1) that the opinion evidence of an economist on how to determine whether competition is likely to be lessened substantially was an essential ingredient of the Director's case, and (2) that the criterion of fairness had been breached because the procedure in the law courts had been breached. Counsel for the Director argued that such evidence was not an essential part of the Director's case because all the relevant facts had been established which warranted the grant of the order sought. He argued that Dr. Rosenbluth's evidence was proper rebuttal in reply to the new facts introduced by Dr. Skeoch which could not have been reasonably anticipated by the Director.

Cattanach, J. found that the evidence of an economist was not an essential part of the Director's case. He noted that s. 31.4(2) required a finding that competition is or is likely to be lessened substantially. He stated:

"...if competition was lessened by the practice of exclusive dealing by Bombardier then the circumstance contemplated by subsection 31.4(2) would have been satisfied without the necessity of establishing that it would be likely to do so.

I should think that whether competition has been lessened is susceptible of proof by concrete facts and like proof that the lessened competition had been caused by and was directly attributable to exclusive dealing. Therefore there would be no necessity to call an expert witness to testify in this respect when the matter is self-evident from the facts established. I can well appreciate that different considerations might well prevail when the effect of exclusive dealing is to be forecast upon a future market but that too might be so convincingly established by proof of past facts that a conclusion one way or other must follow."

He found that Dr. Skeoch's evidence was new evidence and that its rebuttal by the Director's counsel was justified. He stated:

"...the evidence of Dr. Skeoch was 'new evidence' and was the proper subject of rebuttal. The exact evidence to be given by Dr. Skeoch could not be ascertained with certainty by the adverse party and accordingly the Commission properly exercised a discretion vested in it. Superimposed over this is that the Commission is not bound by the rules prevailing in a law-court provided that in not doing so it does not act unfairly. The opinion of an expert witness is only as valid as the reasons upon which that opinion is based. Those reasons are subject to the test of cross-examination. The facts upon which the expert's opinion is based may also be disputed whether from his personal knowledge or facts given to him. The source of facts upon which the expert's opinion is based may also be disputed as to its validity. Being possessed of those rights that evidence is not accepted at its face value and is subject to attack by the party adverse in interest. In the light of these circumstances it cannot be said that the Commission had acted unfairly in acting as it did."

For these reasons he denied the motion to quash the decision of the Commission to receive the evidence of Dr. Rosenbluth and prohibiting the Commission from taking account of such evidence in arriving at its decision on the case before it.

Cattanach, J. said that the Commission admitted the evidence of Dr. Skeoch "no doubt because they welcomed any assistance proffered". While not required to decide the question, he said the evidence was in all likelihood properly admissible.

With regard to the alternative order sought by Bombardier, counsel for Bombardier agreed that the documents at issue were privileged, but argued that the privilege had been waived by their production to Dr. Rosenbluth. Cattanach, J. declined to grant the alternative order sought because it was premature. He said:

"In the circumstances applicable a waiver of privilege would only arise if opinions expressed by Dr. Rosenbluth are based upon premises that came to his knowledge from the documents supplied to him.

Whether that is so can best be ascertained from the witness even though there may be grounds for so conjecturing."

For the same reasons, he granted the order sought by the Attorney General, thus reversing the order of the Commission that the documents be produced.

APPEALS DISMISSED IN ROLEX RESALE
PRICE MAINTENANCE CASE

The Ontario Court of Appeal, in a judgment by Mr. Justice McKinnon on March 31, 1980, dismissed appeals by the Crown and the Company from a trial court judgment and prohibition order following the trial of Rolex Watch Company of Canada Limited on resale price maintenance charges.

The County Court of York Toronto, on September 11, 1978, convicted Rolex on two counts and acquitted them on two other counts, all under s. 38(2)(a) of the Combines Investigation Act as it was before the amendments of 1976. In addition to a fine of \$15,000 on each of the two counts, the Court imposed a prohibition order against the doing of any act or thing directed towards the continuation or repetition of the offences, including suggesting retail or resale prices for the Company's products. No previous order had included that latter requirement. It applies whether or not it is made clear to the customer that he is under no obligation to accept the suggestion and would in no way suffer in his business relations with the Company should the suggestion not be accepted.¹ In addition, the Company is prohibited from pre-ticketing goods sold to any of its customers.² These two prohibitions apply for a period of three years commencing 30 days from the signing of the order. The Crown appealed the acquittals and the Company appealed the convictions, the fines and the prohibition order. All appeals were dismissed by the Court of Appeal.

Evidence on the counts which brought acquittals was entirely documentary and was not refuted by oral evidence. The trial judge considered the relevance of s. 45(2)(c) of the Act which, as worded at the time of the events, provided that a document proved to have been in the possession of a participant or an agent of a participant

"...shall be admitted in evidence without further proof thereof and is prima facie proof

(i) that the participant had knowledge of the documents and its contents,

¹S. 38(3) as enacted in 1976 permits suggestion of a resale price if these matters are made clear to the persons to whom the suggestion is made.

²S. 38(5) has the effect of permitting pre-ticketing.

- (ii) that anything recorded in or by the document as having been done, said or agreed upon by any participant or by an agent of a participant was done, said or agreed upon as recorded and, where anything is recorded in or by the document as having been done, said or agreed upon by an agent of a participant, that it was done, said or agreed upon with the authority of that participant,
- (iii) that the document, where it appears to have been written by any participant or by an agent of a participant, was so written and, where it appears to have been written by an agent of a participant, that it was written with the authority of that participant."

In acquitting Rolex on the two counts despite s. 45(2)(c) the trial judge relied to a considerable extent upon the Sunbeam case.¹ In that case, the Supreme Court of Canada reversed a conviction on two counts charging resale price maintenance where the evidence was largely documentary. Ritchie, J., speaking for the majority, had said:

"I do not think that any authority is needed for the proposition that, when the Crown has proved a prima facie case and no evidence is given on behalf of the accused, the jury may convict, but I know of no authority to the effect that the trier of fact is required to convict under such circumstances."

At the Appeal the Crown referred to s. 24(1) of the Interpretation Act which post-dated the Sunbeam case. That section, which is not qualified by the phrase prima facie, provides:

"24(1) Where an enactment provides that a document is evidence of a fact without anything in the context to indicate that the document is conclusive evidence, then, in any judicial proceedings, the document is admissible in evidence and the fact shall be deemed to be established in the absence of any evidence to the contrary."

The Crown argued that s. 24(1), coupled with s. 45 of the Combines Investigation Act, in effect overruled the majority judgment of the Supreme Court of Canada in the Sunbeam case.

¹Sunbeam Corporation (Canada) Limited v. the Queen (1969) S.C.R. 221; (1969) 2 C.C.C. 189; 1 D.L.R.(3d) 161; 56 C.P.R. 242

It submitted that the trial judge no longer had the right and power to weigh the evidence in determining the guilt or innocence of the accused once the facts "proved" by the documents established all the constituent elements of the offence charged.

The Court of Appeal disagreed. McKinnon, A.C.J.O. said:

"The words 'prima facie' have not been deleted from s. 45(2)(c) and I have some doubt whether s. 24(1) has any application in these proceedings. In any event, the trial judge was entitled to interpret the documents to determine what 'facts' they were evidence of and to consider whether they contained, internally, 'evidence to the contrary' and, in weighing that evidence, to conclude that he was not persuaded beyond a reasonable doubt of the guilt of the accused."

The Company, in support of its appeal against the prohibition order, pointed out that s. 38 of the Combines Investigation Act as it was at the time of the offence had been repealed in 1976 and a new s. 38 substituted for it. The Company argued that there could be no prohibition order relating to the new section prohibiting "the continuation or repetition of the offence" or the doing of any act or thing "directed towards the continuation or repetition of the offence." The Company cited s. 35 of the Interpretation Act which deals with the repeal of an enactment in whole or in part.

The Court of Appeal took the view that s. 36 dealing with repeal of an enactment and substitution of another enactment, rather than s. 35 of the Interpretation Act was the relevant provision. It provides in part:

"(c) every proceeding taken under the former enactment shall be taken up and continued under and in conformity with the new enactment so far as it may be done consistently with the new enactment;

. . .

(f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed to have effect as a consolidation and as declaratory of the law as contained in the former enactment."

In dismissing the appeal, McKinnon, A.C.J.O. stated:

"In my view, it is clear that the substance of of the new s. 38(1)(a) is the same as the former s. 38(2)(a) and a prohibition order can issue in the terms of the new subsection. The gist of the offence under both the old and new section is resale price maintenance. Section 30 confers a jurisdiction on the Court after a conviction has been registered, and the prohibited acts recited in the prohibition order granted are clearly acts 'directed toward' a continuation or repetition of the offence of resale price maintenance."

HORIZONTAL PRICING ACTION
VIOLATES PRICE MAINTENANCE BAN

The County Court of Yale, B.C. convicted the owner of an automobile rental company on two counts under s. 38(1)(a) of the Combines Investigation Act for having attempted to influence upward the prices of his competitors (R. v. Peter Campbell, June 14, 1979). A fine of \$500.00 on each count was imposed. Previously, all convictions under the subsection had applied to vertical rather than horizontal pricing actions. S. 38(1)(a) provides in part:

"38(1) No person who is engaged in the business of supplying a product...shall, directly or indirectly,

(a) by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada; or"

Prior to the amendments of 1976, s. 38 clearly applied only to attempts by a producer or supplier to require resale at a specified price or not lower than a specific minimum price. The amended subsection is not restricted to resale nor to an attempt to require resale at a specified price, and by its terms is applicable in respect of horizontal as well as vertical restraints coming within the prohibition of the section.

Essentially, the Court found that Mr. Campbell attempted to influence upward the prices at which his competitors would rent sub-compact automobiles. At the time of the offence the automobile rental firms in Kelowna were engaged in a price war. In his oral reasons for judgment, Judge McClellan stated:

"Now, I am convinced that at the time Mr. Campbell's motives were not to corral the market for himself as sometimes is done and this section is breached. I am certain that his motive was to stop, if he could, the price war and restore the market to something which would render some stability to it and possibly a living to those engaged in it...However, I am satisfied that what he actually did, when he called upon the two parties, Mr. Klein and Mr. Egyed, and also when he spoke to Miss Munro...at least on one occasion and possibly others, he attempted to influence upward the price for which those vehicles would be rented, whatever his motive. That was no doubt his - I can only conclude that from the fact that he kept presenting them with his tariff of rates in advance as to what he was going to charge as effective the 1st of January, things of that nature. As to the conversation with them, I have no doubt in my mind that many times he kept saying to them, 'You're not going to make any money at these rates, you're going to go broke at these rates.' Had he left it at that, my task would have been an easy one, but he went somewhat further...I am convinced beyond a reasonable doubt that in those conversations the Accused did refer to the Sears Car Rental Company and indicated to them that if the price war were to continue he could, if he wished, use that particular company, to use his own words, 'as a club'...he emphasized it to the extent that both of them understood that there was the possibility, if there was further price war, that the Sears Company would be entering the market with greatly reduced rates."

BROADCASTERS IN VANCOUVER ACQUITTED
OF CONSPIRACY CHARGE OVER CREDIT
SCREENING

The Supreme Court of British Columbia in a judgment by The Honourable Mr. Justice McKay on July 8, 1980 acquitted broadcasters operating two television stations and eight radio stations in Vancouver of a charge of conspiracy to lessen competition unduly under s. 32(1)(c) of the Combines Investigation Act. The corporate accused were:

British Columbia Television Broadcasting System Ltd.
Western Approaches Limited
Radio N.W. Ltd.
Q Broadcasting Ltd.

CKWX Radio Ltd.
Jim Pattison Industries Ltd.
Great Pacific Broadcasting Ltd.
CHUM Western Ltd.
Moffat Communications Ltd.
City and Country Radio Ltd.

Six individuals, each of whom was an advertising manager of one of the broadcasting stations, were also charged.

The case involved an agreement by the accused not to grant a customary fifteen per cent discount to advertising agencies not accredited by the Canadian Association of Broadcasters, the recognized association of radio and television stations across Canada. Ten of the twelve stations supplying broadcast time were encompassed by the agreement.

In his reasons for judgment, McKay, J. noted that the purpose of the agreement was to control the granting of credit to financially unstable advertising agencies. He found that the standards of accreditation were reasonable and that the broadcasters encouraged agencies to become accredited. Those not accredited could have bought broadcast time with cash but generally preferred to obtain it through an accredited agency by paying them the equivalent of a small percentage of the fifteen per cent discount.

In considering whether competition had been lessened unduly as required by the statute, McKay, J., after quoting from the Supreme Court of Canada decision in Aetna Insurance Co. and 72 other Corporations v. The Queen (1977) 75 D.L.R. (3d) 332, stated:

"...as I read the decision of Ritchie, J. in the Aetna case...I am entitled to consider what the actual effects of the agreement were on the question of whether the object of the agreement was to lessen competition unduly. One would have thought, if the agreement had any significant impact, that there would be a substantial body of evidence to support that position."

Then, after reviewing the evidence of three witnesses who had been to some extent affected by the agreement, he found that, while the agreement did lessen competition in the supply of broadcast time to unaccredited agencies, the effect on competition was minimal and the Crown had failed to prove an undue lessening of competition.

GOLF PROS PLEAD GUILTY
TO CONSPIRACY COUNT

The Canadian Professional Golfers' Association (C.P.G.A.) and the Canadian Professional Golfers' Association of British Columbia pleaded guilty in the Supreme Court of British Columbia on June 13, 1980 to a charge under s. 32(1)(c) of the Combines Investigation Act of conspiring to lessen competition unduly in the sale of professional lines of golf equipment in the Lower Mainland Region of British Columbia. The C.P.G.A. was fined \$40,000.00 and the B.C. Association was fined \$10,000.00. The Court declined the Crown's request for a prohibition order. The resources of the Associations are limited and they will have to levy an assessment against their members to pay the fines.

Professional lines of golf clubs and golf balls are perceived as a distinct product apart from other retail lines. They are generally higher in price and quality, and distributed by manufacturers only to pro shops and not to normal retail and sporting goods stores. In his reasons for sentence Berger, J. stated:

"Arrangements were made...with the manufacturers of pro line golf clubs and golf balls that this line of equipment would be sold to the public only through premises run by golf pros belonging to the two associations. The by-laws of the two associations and the policies that they pursued were intended to restrict advertising by members, to prevent members from entering into partnership for the sale of pro line equipment with any non-members, and to restrict sale of pro line equipment by members to non-members for resale. They sought to get manufacturers to refuse to supply members who refused to go along. They took disciplinary proceedings against such members to avoid 'leakage'. They followed a policy of insisting upon forty per cent mark-up on the sale of pro line golf equipment."

SHOE MANUFACTURER PLEADS GUILTY
TO PRICE MAINTENANCE COUNTS

Church and Co. (Canada) Limited, manufacturers of Dack's, Hartt and other quality shoes, pleaded guilty on June 7, 1980 in the Provincial Court (Criminal Division) for the Judicial District of York to twenty-eight counts under s. 38 of the Combines Investigation Act of attempting to influence upward the prices of its products. A fine of \$64,000.00 was imposed.

According to an agreed statement of fact, the company followed a practice of establishing suggested retail prices and of taking actions to ensure that retailers did not sell below those prices. Under a cooperative advertising program dealers received credits of 50% of advertising costs up to a certain maximum but only if the advertisements did not announce "sale", "discount" or "less than regular price". In one isolated incident in Brampton a company representative had a disagreement with a retailer over questions of pricing and supply and then complained to the local police. According to the agreed statement:

"...Mr. Roos (the dealer) stated that shortly after Moffett (the company representative) left his store he was visited by members of the Peel Regional Police Force. The police had a search warrant and seized all the Dack's products that he had in stock. Mr. Roos stated that he was advised that the warrant was issued on the basis that the accused company's area representative Mr. Dave Moffet informed the police that Roos had stolen Dack's shoes in his possession."

FINES IMPOSED IN HOFFMAN-LAROCHE
AND A&M RECORDS CASES

The Supreme Court of Ontario has fined Hoffman-LaRoche Limited \$50,000 for violating subsection 34(1)(c) of the Combines Investigation Act (see June issue of the Record for details of the case).

The Crown had sought a fine of one million dollars. Mr. Justice Linden, in his reasons for sentence on June 12, 1980, stated that a fine "which is more than nominal, but which is not harsh, would be appropriate". He cited the good reputation of the company, the unliklihood that they would repeat the offence, the fact that the offence was committed in self-defence and the declining profits of the company. He also pointed to the fewness of prosecutions under the subsection and the fact that this was the first conviction under it.

A & M Records of Canada Limited was fined \$35,000.00 in York County Court on August 5 on one count of price maintenance under s. 38 of the Combines Investigation Act. Sentences on the other nine courts to which the Company pleaded guilty were suspended. (See June issue of the Record for details of the case).