IN THE COURTS

B.C. COURT OF APPEAL UPHOLDS DAMAGES AWARD IN COMMON LAW CONSPIRACY ACTION

The British Columbia Court of Appeal, in a judgment handed down on March 13, 1981, dismissed an appeal against a judgment of Mr. Justice Callagham of the Supreme Court of British Columbia awarding damages of $750,000 in a common law action for the tort of conspirary (British Columbia Lightweight Aggregate Ltd. v. Canada Cement LaFarge Ltd. - Ciment Canada LaFarge Ltée et al., 103 D.L.R. (3d) 587 (Trial); 123 D.L.R. (3d) 66 (Appeal). The appeal was limited to the issue of liability. A cross-appeal by the plaintiff seeking higher damages was also dismissed.

The defendants were Canada Cement LaFarge Ltd. and Ocean Cement Ltd., along with several affiliates of each. By a series of mergers and acquisitions, the two groups had by 1965 acquired control of nearly all the cement production in British Columbia, 80 per cent of the ready-mix market in the Lower Mainland, 95 per cent of the block market and 90 per cent of the pipe market. In 1962 or 1963 they entered into price fixing and market sharing agreements which ended competition between them. Representatives of the two groups would decide who would get each new project and the price it would bid; and the other would submit a higher bid. In 1974 some of the defendants pleaded guilty to conspiracy charges under s.32 of the Combines Investigation Act and were fined a total of $432.00. The charges related to the period 1961 through 1971.

In 1959 the plaintiff entered into production of a lightweight aggregate which was marketed as Saturnalite. It was used instead of sand and gravel in concrete and concrete products. The aggregate imparted lightness and certain other desirable characteristics to the final product. Fines were produced as a by-product and were used in concrete products as well. The defendants were basically producers of heavy concrete products and had their own sources of materials. The light weight aggregate was in competition with the materials of the defendants.

In 1963 the plaintiff entered into five-year agreements with the defendants to supply them with the aggregate, in return for which the plaintiff agreed not to enter into production of cement or concrete products. In 1965 the plaintiff wrote to Ocean and LaFarge, expressing his dissatisfaction with the agreements and stating his view that the spirit of the Combines Investigation Act was contravened by the two groups in sealing off the market by the purchase of outlets and by other cooperative action. New five-year supply agreements were then reached although neither side adhered strictly to the terms. In 1970, although the plaintiff had operated consistently at a loss throughout the years, he considered that his product had won acceptance in the

market and he did not seek to renew the agreements. In 1971 and 1972 respectively, Ocean and LaFarge discontinued the use of the plaintiff's aggregate, substituting a pumice which resulted in a product which was heavier in weight. The plaintiff went out of business in 1974.

Expert witnesses were called by the plaintiff, and their testimony was accepted by the trial judge. An engineer testified that there had been a disproportionate decline in the use of lightweight aggregate in British Columbia. An economist testified that there was no incentive for the defendants to use the aggregate because it replaced their own materials; and in the absence of competition, they were not forced to use it even when it would have been advantageous for their customers to have done so. An accountant testified that there would have been profits for the plaintiff if his sales had been larger.

The trial judge found there was insufficient evidence to establish that the defendants had deliberately conspired to drive the plaintiff out of business, but that it had been established that their unlawful acts had damaged the plaintiff. He stated:

> "...the plaintiff, in my view, has failed to establish by a preponderance of evidence that the defendants moved in concert with the deliberate intention of driving the plaintiff out of business. Accordingly, if the plaintiff does have a cause of action he must come within the definition of the tort of conspiracy involving unlawfulness which may be defined as follows:
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> > 'If two or more persons combine to do an unlawful act or to do a lawful act by unlawful means and in the carrying out of the act or acts damage results to another person then that other person will have an action in conspiracy for damages'."

The defendants contended there was no causal link between their conduct in operating a combine and the plaintiff's losses, but the Appeal Court accepted most of the trial Judge's reasons for finding such a connection.

The defendants argued that the plaintiff's losses were too remote. The Appeal Court rejected that argument as well, pointing out that the trial Judge had found the plaintiff to be a direct competitor of the accused because use of the plaintiff's aggregate meant less use of materials produced by the defendants. Referring to the trial Judge's findings and conclusions, the Appeal Court stated:

> "The trial Judge found as a fact that the plaintiff's business was destroyed by the conspiracy. He also found that the defendants should have foreseen that their conduct would damage the plaintiff.
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> There is ample evidence to support the conclusions reached by the trial Judge...He did, of course, find that there were additional

'causes' and in assessing the quantum of damages 'at large' he properly took these matters into account. He found that the plaintiff 'carried on a financially precarious enterprise and accordingly had only a marginal chance of survival'. He also found that the plaintiff had made errors in judgment. In summary, he found that a financially weak company with some evidence of mismanagement was forced out of business by the conduct of the defendants in eliminating competition".

The defence argued that there was no proof that the defendants intended to injure the plaintiff and that the real target of the conspiracy was the consumer. The Appeal Court disagreed, stating:

"We do not think that the law can be so narrowly construed. It is not necessary that there be express malice or 'deliberate' intent. The defendants are presumed to intend the natural and probable consequences of their acts. The learned trial Judge found that the defendants conspired to eliminate all competitors and succeeded in so doing ... It is idle, in the light of these facts, to suggest that the plaintiff was not one of the targets of the conspiracy. The defendants were aware that all persons and corporations engaged in the cement and concrete business were entitled to carry on their operations in a completely free and competitive market. They also knew, or ought to have known, that their conduct was such as to deprive the plaintiff of its legal right to operate its business in such a market. The plaintiff fell within the broad objective of the conspiracy, namely to lessen competition and control and share the market".

The defence argued that the means used by the defendants were not unlawful; that while it is an offence to agree to lessen competition unduly, it is not an offence to carry out such an agreement. The Appeal Court also rejected that argument, citing R.v. Connolly and McGreevy (1894) 1 C.C.C. 468 at p. 488 on the meaning of "unlawful". On appeal in that case, Boyd, C. referred with approval to the trial judge's description of the submission of agreed but apparently competing tenders as "unlawful" in the sense of being a thing of public mischief, and Ferguson, J., concurring, stated:

"...the word 'unlawful' has various significations. The putting in of several tenders ... seems to me to be insincere, untruthful and fraudulent, and most certainly intended to deceive...and very possibly a person would not be permitted to retain and hold a pecuniary advantage gained by such means. The learned Judge did not tell the Jury that the act was an indictable offence, or in so many words that it was a criminal act".

The B.C. Court of Appeal, in agreeing with this interpretation, added:

> "The carrying out of an agreement to unduly lessen competition, as here, is to deprive the plaintiff of a legal right and is hence unlawful".

Then after citing several judgements under the Combines Investigation Act which emphasized the encroachment of combinations upon the public right to competition, the Court stated:

> "It follows that the carrying out of an agreement to unduly lessen competition constitutes an injury to property (the right not to be deprived of the benefits flowing from a free a competitive market) and is unlawful in the sense that it may be restrained by injunction".

Moreover, the Court pointed out that the means used by the dfendants in carrying out the conspiracy were tortious and unlawful in that the bids submitted to customers had been fraudulent, and "This sort of conspiratorical conduct has always has been recognized as wrongful by the Courts."

BBM BUREAU OF MEASUREMENT APPEALS RTPC ORDER

The BBM Bureau of Measurement is appealing the Order which was issued on December 18, 1981 by the Restrictive Trade Practices Commission pursuant to its Decision in Director of Investigation and Research v. BBM Bureau of Measurement (Oct. 30, 1981) RTPC No. 3 (see Canadian Competition Policy Record, December, 1981). A decision by the Commission may be appealed to the Federal Court of Appeal on grounds specified in s.28 of the Federal Court Act.

The Commission, in its Decision of October 30, found BBM to be engaged in tied selling within the meaning of s. 31.4 of the Combines Investigation Act. The remedial order, which is the first to be issued by the Commission, sets out in considerable detail what BBM is prohibited from doing. BBM is specifically prohibited:

"1. from requiring any member/customer to acquire both its radio audience measurement service and television audience measurement service as a condition of supplying either one of the said products,

2. from offering to supply or supplying its radio audience measurement service and its television audience measurement service to any member/customer unless it does so by setting or charging a separate fee for each of the said products,

3. from offering to supply or supplying both its radio audience measurement service and its television audience measurement service to any member/customer at a fee lower than the sum of the separate fees for each of the said products,

4. from offering to supply or supplying both its radio audience measurement service to a member/customer on more favourable terms or conditions if that person agrees to acquire the Respondent's television audience measurement service or both its radio audience measurement and its television audience measurement service,

5. from offering to supply or supplying its television audience measurement service to a member/customer on more favourable terms or conditions if that person agrees to acquire the Respondent's radio audience measurement service or both its television audience measurement service and its radio audience measurement service,

6. from setting or charging a fee for supplying its radio audience measurement service to any member/customer that is based, in whole or in part, upon that person's billings for the purchase or sale of television broadcasting time or of both television and radio broadcast time,

7. from setting or charging a fee for supplying its television audience measurement service to any member/customer that is based, in whole or in part, upn that person's billings for the purchase or sale of radio broadcast time or of both radio and television broadcast time,

8. from setting or charging a flat fee (such as a membership fee) which must be paid by any member/customer in order that the said person be able to obtain either the Respondent's radio audience measurement service and its television audience measurement service, unless the Respondent does so by setting or charging a separate flat fee in respect of each of the said products,

9. from setting or charging a flat fee (such as a membership fee) which must be paid by any member/customer in order that the said person be able to obtain both the Respondent's radio audience measurement service and its television audience measurement service that is lower than the sume of the separate flat fees for each of the said products,

10. from engaging in a policy of setting or charging fees, including flat fees (such as membership fees), for the Respondent's radio

audience measurement service which are not directed towards recovering the full current costs of the said product determined in accordance with generally accepted accounting principles, including all direct costs, and indirect costs and corporate overhead pro-rated on the basis of direct costs,

11. from engaging in a policy of setting or charging fees, including flat fees (such as membership fees), for the Respondent's television audience measurement service which are not directed towards recovering the full current costs of the said product determined in accordance with generally accepted accounting principles, including all direct costs, and indirect costs and corporate overhead pro-rated on the basis of direct costs".

LEGALITY OF TELESAT'S MEMBERSHIP IN TRANS-CANADA TELEPHONE SYSTEM CONFIRMED ON APPEAL

The Ontario Court of Appeal, in a judgement handed down on March 16, confirmed the decision of the Supreme Court of Ontario in dismissing an action by Canadian Pacific Limited which sought a declaration that a 1976 agreement whereby Telesat Canada became a member of the Trans-Canada Telephone System was in contravention of the Telesat Canada Act (See Canadian Competition Policy Record, June, 1981 for background).

In 1977 the federal Cabinet approved the agreement after its rejection by the Canadian Radio-Television and Telecommunications Commission. The Director of Investigation and Research under the Combines Investigation Act had contended before the CRTC that the agreement would constrain competition between competing technologies, that it contained clauses specifically restricting competition and that it would impair the regulatory process.

H.D. LEE FINED $65,000 FOR PRICE MAINTENANCE

H.D. Lee of Canada Ltd., a manufacturer of jeans, was fined $65,000 on December 2, 1981 by the Court of Sessions of the Peace, District of Montreal, for price maintenance offences under s.38 of the Combines Investigation Act. The offences occurred in 1971 and the company was convicted on four counts in 1980 (see Canadian Competition Policy Record, December 1980). In imposing sentence, Judge Marcel Beauchemin noted that a larger jeans manufacturer, Levi Strauss, had been fined $150,000 in the County Court of the Judicial District of York after pleading guilty to eight counts under the same section of the Act.