IN THE COURTS

ALBERTA APPEAL COURT BARS ATTORNEY GENERAL OF CANADA FROM CONDUCTING COMBINES CASE

The Alberta Court of Appeal, in a judgment delivered by Mr. Justice Prowse on February 17,* found that the Combines Investigation Act depends for its validity upon the federal power relating to criminal law, that it cannot be supported either under the trade and commerce power or the residual power relating to peace, order and good government, and that only the Attorney General of Alberta is empowered to conduct criminal proceedings under s. 32 of the Act in Alberta. The decision which is referred to herein as C.N. Transportation, conflicts with R.V. Hoffman-LaRoche Limited** in which the Ontario Court of Appeal ruled that the federal power over criminal law does give the Attorney General of Canada jurisdiction to conduct criminal proceedings under the Act and that, in addition, the Act can be supported under the federal powers over trade and commerce and peace, order and good government. The Attorney General of Canada is appealing the Alberta decision to the Supreme Court of Canada.

The decision will undoubtedly lead to challenges in other provinces of the authority of the Attorney General of Canada to conduct proceedings under the Act. Also, and potentially of even greater significance, the decision can only add to questions about the constitutional validity of the civil procedures for adjudication of reviewable practices in Part IV. of the Act, especially in their application to intraprovincial trade.

The challenge to the authority of the Attorney General of Canada to conduct prospecutions under the Combines Investigation Act followed a decision by the Court of Appeal of Alberta in Regina v. Hauser and Attorney General of Alberta(Intervenant) (1977) 6 W.W.R. 501. In that case, which involved the Narcotic Control Act, the majority held that the Act created offences the constitutional validity of which depends upon s. 91(27) (criminal law) of the British North America Act, and that the Attorney General of Canada cannot conduct prosecutions under it in Alberta. On further appeal, (1979) 1 S.C.R. 984, a majority of the Supreme Court of Canada ruled that the Nacotic Control Act is based upon the federal residual power (peace, order and good government) and that the Attorney General of Canada can prosecute in respect of a violation or conspiracy to violate under an act of Parliament the consitutional validity of which does not depend upon s. 91(27).

* Canadian National Transportation, Limited, Canadian National Railway Company (Appellants) and the Provincial Court of Alberta and the Attorney General of Canada (Respondents) and in the Matter of Regina v. alltrans Express Ltd. et al.

** (1981) 62 C.C.C. (2d) 118.

In Hoffman-LaRoche the accused was convicted of an offence under s. 34(1)(c) of the Combines Investigation Act relating to predatory pricing. The defence, relying primarily upon Hauser, challenged the constitutional authority of the Attorney General of Canada to institute and conduct the prosection pursuant to s. 15(2) of the Combines Investigation Act and s. 2 of the Criminal Code both of which purport to endow the Attorney General of Canada with such authority. Both the Trial Court and the Ontario Court of Appeal rejected the challenge, holding that both s. 2 of the Criminal Code and s. 15(2) of the Combines Investigation Act are within the legislative competence of Parliament under its criminal law power. While not strictly required to do so in view of that finding, both Courts also held that the Combines Investigation Act can be supported under the federal powers over peace, order and good government and over trade and commerce.

The C.N. Transportation proceedings involved a challenge to the authority of the Attorney General of Canada in Regina v. Alltrans et al. An information was laid on November 5, 1979 on behalf of the Attorney General of Canada charging twenty highway transport companies and eleven individuals under s. 32(1)(c) of the Combines Investigation Act with conspiring to prevent or lessen unduly competition in interprovincial transportation. On June 18, 1980, when those charged appeared in the Provincial Court of Alberta, submissions were made on behalf of some of the accused that since the proceedings related to a criminal offence only the Attorney General of Alberta had jurisdiction to conduct prceedings in Alberta relating to such an offence. The Provincial Court Judge ruled that the Attorney General of Canada was lawfully authorized to so act. Application was then made to the Court of Queen's Bench for an order against the continuation of proceedings while being conducted on behalf of the Attorney General of Canada.

The judgment of the Court of Queen's Bench was delivered by Mr. Justice Medhurst on December 16, 1980. He considered himself bound by the decision of the Court of Appeal of Alberta in Hauser to the effect that the Attorney General of Canada cannot institute proceedings or prosecute offences which are in substance criminal. However, he concluded that the Combines Investigation Act can be supported under the federal trade and commerce power as well. Accordingly, he found that the Attorney General of Canada can prosecute for a violation of s. 32(1)(c).

On further appeal to the Court of Appeal of Alberta the judgment by Mr. Justic Prowse confirmed the decision of that same Court in Hauser to the effect that only the Attorney General of Alberta is empowered to conduct criminal proceedings in Alberta, and therefore reversed the decision of Medhurst, J. by finding that the Combines Investigation Act can only be supported under the federal power in respect of criminal law. Accordingly, he found that only the Attorney General of Alberta is empowered to conduct criminal proceedings under s. 32(1)(c).

His Lordship, after reviewing the case law at some length, concluded that "generally the Combines Investigation Act and in particular the offence charged in the information" is within federal competence under s. 91(27) (criminal law) of the B.N.A. Act. He then considered submissions by counsel for the Attorney General of Canada that the Act could also be supported under other heads of s.91 of the B.N.A. Act.

With regard to the federal power over trade and commerce, his Lordship noted that the question whether the Combines Investigation Act could be supported under that head had been left open by Lord Atkin in Proprietary Articles Trade Association v. A.G. for Canada (1931) A.C. 310 where the latter stated:

> "...their Lordships in the present case forbear from defining the extent of that authority. They desire, however, to guard themselves from being supposed to lay down that the present legislation could not be supported on that ground."

Prowse, J.A. cited the judgment of the Privy Council in Citizens Insurance Company of Canada v. Parsons (1881) 7 A.C. 96, in which the two branches of federal power under s. 91(2) were enunciated. The first is the regulation of interprovincial or international trade. The second, in the words of the Privy Council "may" include "general regulation of trade affecting the whole Dominion". Then, after referring to subsequent cases including Labatts Breweries of Canada v. A.G. of Canada (1979) 30 N.R. 496, Mr. Justice Prowse made the following statements regarding the competence of Parliament under s. 91(2):

> "(1) It is not within the competence of Parliament to 'regulate by legislation the contracts of a particular industry of trade...'
>
> (2) The power to regulate inter-provincial and international trade does not give Parliament per se the power to regulate intra-provincial trade although
>
> 'if confined to external trade and inter-provincial trade, the section might well be competent under Head no. 2 of section 91; and if the legislation were in substance concerned with such trade, incidental legislation in relation to local trade necessary in order to prevent the defeat of competent provisions might also be competent...(Duff, J. the Reference re Dominion Trade and Industry Commission (1936) S.C.R. 378 at 382.'
>
> (3) The lack of authority to legislate the regulation in the provinces of particular occupations, as such 'by a licensing sysem or otherwise...'(R.v. Eastern Terminal

> Elevator Co. (1925) S.C.R. 434 per Duff, J. at 447) is not overcome by purporting to embrace a large percentage of all trade.
>
> (4) The same limitation with respect to control by regulation of business or trade in a province applies equally to the control of production."

His Lordship noted with approval that Counsel for the Attorney General of Canada did not argue that the Act could be supported under the first branch of federal power under s. 91(2), i.e., the regulation of interprovincial or international trade. He said, "The legislation is clearly directed at pernicious commercial practices without regard to provincial boundaries."

Counsel for the Attorney General of Canada relied upon the second branch of federal power, i.e., general regulation of trade affecting the whole Dominion in the words of the Parsons decision. Prowse, J.A. stated:

> "The gist of the submission made on behalf of the Attorney General of Canada was that the Combines Investigation Act considered as a whole, constituted the regulation of competitive practices in trade and commerce and was a 'general regulatory scheme to govern trading relations going beyond merely local concern...
>
> "...Counsel for the Attorney General of Canada referred to the following sections of the Act to support the conclusion that the Act constitutes a scheme of general regulations within s. 91(2): s. 31.3 which empowers the Commission to order a supplier to cease a practise of consignment selling; s. 31.4 which provides for similar orders prohibiting ...suppliers from engaging in exclusive dealing or tied selling; s. 31.5 under which the Commission is given power to deal with the effect of foreign judgments, s. 28 dealing with customs; and s. 29 dealing with Patents of Inventions and Discovery."

His Lordship then stated:

> "These regulatory provisions in themselves would not in my view, however, provide a foundation for a whole legislative scheme not otherwise valid.
>
> "A regulatory scheme which depends for its validity on s. 91(2) of the B.N.A. Act may include regulatory features which depend for their validity upon other federal powers.
>
> For example, the powers found in s. 28 and s. 29 of the Combines Investigation Act depend for their validity upon s.

91(3) and s. 91(22) of the B.N.A. Act respectively. Merely by combining in one act a number of regulatory reatures that are valid under other heads of federal power does not give validity to other provisions of the Act which cannot be supported under a head of power in s. 91 unless such other powers constitute a scheme under the second branch of s. 91(2). If I assume, without deciding, that s. 31.3 and s. 31.4 are intra vires the Parliament of Canada, I am of the view that such limited regulatory power does not cast a net wide enough to bring within its ambit other sections setting out offences not directly concerned with the 'regulation of trade and commerce', but merely with harmful and iniquitous commercial practices as such. Such practices when viewed as other than criminal activities fall within s. 92(13) property and civil rights ...

"...To adopt the position urged by the Attorney General of Canada would in my opinion be trantamount to creating a new enumerated head of power under s. 91 entitled 'competition'. It is said that competition affects the being of the economic community of Canada as a whole. I think there are few factors in our life that do not affect the country as a whole whether it be educational, health, the welfare of the people both economic and social or, as in this case competition. This argument, in my view, overlooks the basic factor in our political life which is that Canada is a federation with a distribution of powers made for the purpose of fostering the development of the country and all its parts rather than the development for the benefit of a particular part. The powers of government have been distributed with that in mind. Competition involves many factors including credit, duties, transportation, contracts and their terms. Those powers have been dealt with under the B.N.A. and as one would expect they have been distributed by giving certain powers to the Provinces and certain to the federal government. In my view and with due respect, I am of the view that the judgments in Hoffman La Roche give no effect to the federal system of government enshrined in the B.N.A. Act. they overlook and, indeed, perpetuate the two fallacies set out in the judgment of Duff, J. in the Eastern Terminal judgment and referred to by Estey in the Labatt Breweries case.*

* Elsewhere in his judgment, Prowse, J.A. said:

"The first of these fallacies was that the mere fact that a substantial portion of the grain trade is export trade does not bring local trade within its jurisdiction. The second was the contention that 'the Dominion has such power because no single province, nor, indeed, all the provinces acting together, could put into effect such a sweeping scheme.'"

> "In summary, I am of the opinion that the Combines Investigation Act deals with ethical conduct in commercial practice and makes ... the breach of certain ethical standards crimes. In so doing, Parliament is not purporting to deal with contracts per se but rather with the conduct of the parties, conduct that it is competent to treat as criminal under 91(27). The right to negotiate the terms of a contract cannot be divorced from the right to contract and forms an integral part thereof. The Combines Investigation Act when viewed as a regulatory scheme and not as criminal law under 91(27) does not incidentally affect property and civil rights but is legislation in relation thereto. As such it is beyond the competence of the Parliament of Canada."
>
> "...In my view merely because the exercise of federal power under 91(27) has a commercial aspect does not bring it within 91(2). If it requires support under the criminal law power then it is not a valid exercise of the power set out in s. 91(2)."

In dealing with the peace, order and good government power, his Lordship stated:

> "I do not think that the ethical practices dealt with by the Combines Investigation Act as crimes can be said to be directed at national emergency nor to a subject matter that did not exist at the time of confederation. The latter power is directed at novel situations not novel solutions to problems that have plagued mankind for generations and were recognized at common law at the date of confederation.
>
> "It is urged that the POGG powers of the Federal Government are invoked because the commercial practices prescribed by the Combines Act have become matters of 'national concern transcending the local authorities power to meet and solve by legislation.' In my view, however, the mere fact that all provinces are faced with similar problems does not invoke the POGG power as a matter going beyond provincial concern or interest. That argument which I reject when applied to the Trade and Commerce Power can for the same reasons not be applied to the POGG power. It is valid federal legislation and becomes so under an enumerated head of s. 91, the Federal power relating to criminal law."

Prowse, J.A., after referring to the "reading down" doctrine, concluded that it has no application in interpreting the Combines Investigation Act. He cited Peter W. Hogg's Constitutional Law of Canada, page 91, as follows:

> "The general idea that a law should not be held to be wholly invalid just because it overreaches the limits of jurisdiction in certain

respects is obviously in accord with a properly restrained role for the courts. Reading down allows the bulk of the legislative policy to be accomplished while trimming off those applications which are constitutionally bad."

His Lordship then stated:

"Having concluded that the Parliament of Canada was competent to pass the relevant provisions of the Combines Investigation Act under s. 91(27) (Criminal Law) and in particular the provision of the Act which made the alleged offence a crime there is no need to read down the Act in an attempt to give it validity under another head."

EDMONTON JOURNAL CHALLENGES COMBINES DIRECTOR'S SEARCH METHODS UNDER RIGHTS CHARTER

The Edmonton Journal has filed a civil suit seeking a permanent injunction and damages on the ground that a search of the newspaper office by officers of the Director of Investigation and Research violated the Charter of Rights.

Officers of the Bureau of Competition Policy began the search on April 19 in connection with an inquiry under the Combines Investigation Act with particular reference to s. 33 (merger and monopoly) and s. 34(1)(c)(predatory pricing). The inquiry may relate to special deals offered to subscribers of the Edmonton Journal, which competes with the Edmonton Sun. Counsel for the Department of Justice ordered the search suspended when the Journal applied to the Court of Queen's Bench of Alberta for an interim injunction against continuation of the search. The appellant contended that the search was unreasonable on a number of grounds including the refusal of the officers to state the nature of the complaint and that it was thereby in violation of s. 8 of the Charter of Rights. S. 8 of the Charter provides that "Everyone has the right to be secure against unreasonable search and seizure".

Mr. Justice Cavanagh, in an Order dated May 5, ordered suspension of the search and sealing of the seized documents pending submission of written argument. On May 20 he delivered his decision, dismissing the application for an interim injunction but requiring the documents to continue to be sealed until the point of law has been determined.

The matter came before the Court of Appeal of Alberta on May 26 on short notice. In a Memorandum of Judgement, Chief Justice McGillivray noted that the search had been completed and that an interim injunction to

restrain it would be useless. He ordered that the seized documents continue to be sealed until the appeal has been heard in September. The questions to be decided are:

(a) Do the courts of Alberta have jurisdiction? Counsel for the Attorney General of Canada indicated he would argue that the matter should be dealt with by the Federal Court.

(b) Is section 10 of the Combines Investigation Act in whole or in part inconsistent with the provisions of the Constitution to the extent that they are of no force or effect? S. 10 authorizes entry of premises and seizure of documents.

CROWN URANIUM FIRMS HELD IMMUNE FROM COMBINES PRESECUTION

The Supreme Court of Ontario, in a judgment delivered by Mr. Justice Holland on April 23, ruled that Uranium Canada Limited and Eldorado Nuclear Limited are immune from prosecution under the Combines Investigation Act as agents of the Crown. The Minister of Justice appealed the decision.*

The two crown companies were among those charged in July, 1981 under s. 32 (1)(c) of the Act in connection with the former uranium cartel. They applied to the Supreme Court of Ontario for writs of prohibition against a Provincial Court Judge ordering him not to continue proceeding with a preliminary inquiry into the charge against them.

Mr. Justice Holland noted s. 3 of the Government Companies Operation Act which provides that every such company "is for all its purposes an agent of Her Majesty and its powers may be exercised only as an agent of Her Majesty." He also noted the absence of a clear inclusion of Crown agents in the Combines Investigation Act, the common law doctrine that "the King can do no wrong", and s. 16 of the Interpretation Act which provides:

> "No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except only as therein mentioned or referred to."

*On June 11, as this issue was going to press, the Ontario Court of Appeal upheld the decision of the Supreme Court of Ontario.

While a number of arguments were advanced against immunity, Mr. Justice Holland found it unnecessary to deal with them in this case and said that the correct approach in his opinion was not to inquire "whether the Crown agent was liable for crimes committed but rather to determine whether the Crown is bound by the Combines Investigation Act, for it is only if the Crown and its agents are found thereby that the conduct complained of can be considered criminal and thus be made the subject of the charge." He also stated:

> "It is clear that the long-standing historical immunity of the Crown or its agent is not to be lightly dispensed with. Section 16 of the Interpretation Act was in force before the commencement of the period specified in the charge, prior to the incorporation of Uranium Canada and prior to the inclusion of Eldorado under the protection granted by section 3 of the Government Companies Act. Whatever the intention of Parliament relating to the application of the Combines Investigation Act to these companies, adequate time has expired to permit this to be done. Nothing has been done and at present there is no language in the Combines Invesitation Act which purports to make the statute binding upon Her Majesty or to affect Her Majesty's rights or prerogatives in any manner. The language of section 16 is, on the other hand, clear and unambiguous."

In considering whether crown agents could be held to be bound by the Act by necessary implication, Mr. Justice Holland noted that Laskin, C.J.C. in Her Majesty in Right of the Province of Alberta and Canadian Transport Commission, (1978) 1 S.C.R. 61 adopted the following statement from the judgment of Lord du Parq in Province of Bombay and Municipal Corporation of the City of Bombay and Another, (1947) A.C. 58:

> "...If it can be affirmed that, at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficient purpose must be wholly frustrated unless the Crown were bound, then it may be inferred that the Crown has agreed to be bound. Their Lordships will add that when the court is asked to draw this inference, it must always be remembered that, if it be the intention of the legislature that the Crown shall be bound, nothing is easier than to say so in plain words."

Holland, J. Then went on to say:

> "Applying this test, could it be said that the beneficient puprose of the Combines Investigation Act, and particularly section 32 (1)(c), would be wholly frustrated unless these companies as Crown agents were bound by necessary implication. Surely not, for the Combines Investigation Act has been alive and well since its passage in 1923 and there have been many successful prosecutions thereunder to date."

Mr. Lawson Hunter, Director of Investigation and Research under the Combines Investigation Act, attended a conference on regulatory reform in Toronto on May 20. He indicated that, if the Trial Court's decision was upheld on appeal, he would recommend to his Minister amendments to bring Crown corporations under the Act. He expressed the view that it is wrong in principle for Crown corporations in competition with the private sector not to be subject to the same laws as their competitors.

ONTARIO COURT OF APPEAL UPHOLDS FIRST BID-RIGGING CONVICTION

The Ontario Court of Appeal, in a judgment delivered orally by Mr. Justice Robbins on May 25, 1982, dismissed appeals by Travelways School Transit Ltd. and Lorne Wilson Transportation Limited against their conviction by the Supreme Court of Ontario for bid-rigging under s. 32.2 of the Combines Investigation Act.

The Trial Court's judgment (R. v. Charterways Transportation Limited, Travelways School Transit Ltd., Lorne Wilson Transportation Limited and Arthur James Ellen), which was rendered in May, 1981, is described in the September, 1981 issue of Canadian Competition Policy Record.

TRUCKERS LOSE BID TO INVOKE ONTARIO BUSINESS RECORDS PROTECTION ACT

Trucking companies seeking to avoid compliance with United States subpoenas for documents have learned that the Ontario Attorney General's office interprets the Ontario Business Records Protection Act as applying only to originals of documents.

The question arose in connection with a United States grand jury investigation of price fixing by Canadian and American member companies of the Niagara Frontier Tariff Bureau. The Bureau is authorized by the Interstate Commerce Commission to set rates between Canada and certain American states, but the Justice Department asserts that, especially since trucking deregulation, the authorization does not provide complete immunity from the antitrust laws. Subpoenas were issued last autumn to obtain documents located in Canada for the grand jury. Mr. Charles S. Stark, Chief, Foreign Commerce Section, Antitrust Division, explained in an address to the World Trade Institute on May 20:

"...the Justice Department for some years has generally followed a

> practice of seeking foreign located documents on a voluntary basis, rather than by compulsory process. Our decision to depart from that practice in this investigation followed extensive consultations with the Canadian Government, in which we told them about the nature and extent of the investigation. In turn, they advised us that they would not oppose the subpoenaing of relevant documents in Canada, and that they would consult with appropriate provincial officials."

The companies resisted compliance, and contempt proceedings were begun in Washington, D.C. in February, 1982. At the same time, the companies involved filed an action in the Supreme Court of Ontario effectively seeking a declaratory judgment as to whether the Business Records Protection Act precluded their complying with the subpoenas. The Act prohibits removal of corporate records in compliance with any requirement, order, directive or subpoena of a legislative, administrative or judicial authority outside the Province. A representative of the Ontario Attorney General's office advised the Court that the Attorney General had no intention at that time to apply for an order to prohibit transmission of the documents. The Supreme Court declined to interpret the statute on procedural grounds. According to Mr. Stark, the Ontario Attorney General's office wrote to one of the companies that they interpreted the law as applying only to originals of documents and not to copies.

Canada is a party to co-operative and consultative arrangements respecting restrictive business practices, both directly with the United States and as a member of the Organization for Economic Co-Operation and Development (OECD). The 1969 Basford-Mitchell Understanding with the United States provides in part:

> "Each country will, insofar as its national laws and legitimate interests permit, provide the other with information in its possession of activities or situations, affecting international trade, that the other requires in order to consider whether there has been a breach of its restrictive business practices laws."

The 1979 Recommendation of the OECD provides in part:

> "...the Member countries should co-operative in developing or applying mutually satisfactory and beneficial measures for dealing with restrictive business practices in international trade. In this connection, they should supply each other with such relevant information on restrictive business practices as their legitimate interests permit them to disclose; and should allow, subject to appropriate safeguards, including those relating to confidentiality, the disclosure of information to the competent authorities of Member countries by the other parties concerned, whether accomplished unilaterally or in the context of bilateral or multilateral understandings, unless such co-operation or disclosure would be contrary to significant national interests."

Co-operation with the United States in a matter such as that of the truckers is clearly within the spirit of these understandings, and is not contrary to any significant national interest. At the same time, the narrow interpretation placed by the Attorney General of Ontario's office on the Business Records Protection Act could well become a matter of concern in a case which did involve a significant national interest.

In July, 1980,following difficulties with the Americans over the uranium litigation, the federal government introduced Bill C-41, The Foreign Proceedings and Judgments Act (see Canadian Competition Policy Record, September, 1980). As yet, however, it has not carried the Bill beyond first reading.

OUTDOOR ADVERTISERS' BID TO QUASH INFORMATION REJECTED

The Supreme Court of Ontario, in a judgment by Mr. Justice Labrosse on March 9, dismissed applications by a group of outdoor advertising companies to quash an Information which was laid against them under the Combines Investigation Act (Between Mediacom Industries Inc. - Les Entreprises Mediacom Inc. and Mediacom Inc., Applicants, and Her Majesty the Queen and Between Hoal Investments Ltd., Seaboard Advertising Co., Ltd., Neonex Consumer Group Ltd. and Jim Pattison Enterprises Ltd. and Her Majesty the Queen).

In July, 1980 an Information was laid containing two counts under s. 32(1)(c) against all the applicants and two counts under s. 33 against the Mediacom companies. On arraignment on January 20, 1982 before Judge Meen of the Ontario Provincial Court, motions were made to quash some or all of the counts or to discharge all the applicants. Judge Meen dismissed the motions. He ruled that a magistrate presiding at a preliminary inquiry has no authority to quash an information but does have power to discharge without hearing the Crown's evidence if the information discloses no offence known to Canadian law. He could not find any substantive grounds in support of the argument of the applicants that the counts were nullities.

The following applications were then made to the Supreme Court of Ontario:

1. by way of certiorari to quash an information;

2. by way of prohibition to prohibit Judge Meen or any other judge from proceeding with a preliminary inquiry into the charges set out in the Information;

3. in the alternative by way of mandamus to require Judge Meen to hear and decide on the merits of the applicantw' motion to quash the Information.

With regard to the application for mandamus, Mr. Justice Labrosse found that Judge Meen had dealt with the merits of the application and mandamus was not available to the applicants.

With regard to the "extraordinary remedies of certiorari and prohibition", Labrosse, J. found they were only available to the applicants if the Information disclosed no offence known to law and was therefore a nullity, in which case the applicants should have been discharged. The applicants argued that the Information was a nullity because it failed to comply with the provisions of s. 510(3) of the Criminal Code as it was virtually incomprehensible. In this respect, they argued that it failed to give sufficient details to identify the transaction referred to. While Mr. Justice Labrosse considered that the number of amalgamations which had occurred might have rendered part of the counts difficult to read, he found that the nature of the monopoly and of the conspirary alleged in the four counts were clear.

Argument was also submitted that subsection 32(1.1) enacted in 1976 changed the nature of the offence, the charge covering a period both before and after the enactment of that subsection. The subsection provides that for greater certainty the prosecution, in a charge under ss. 32(1), is not required to prove that the conspiracy would be likely to virtually or completely eliminate competition or that the object of any or all of the parties was to eliminate competition completely. Labrosse, J. stated that in his opinion this had not changed the law but clarified any confusion as to the test stated by Mr. Justice Cartwright as he then was in his judgment in Howard Smith Paper Mills v. The Queen (1957) S.C.R. 403. The test stated by Cartwright, J. was narrower than the previously existing one.

His Lordship also considered that amendments of subsection 32(2) of the Act in 1976, with the effect that certain previously existing defences were removed or altered and new defences added, did not relate to the nature of the offence but rather to statutory defences or exemptions which might be raised.

Mr. Justice Labrosse concluded that it could not be said that the count disclosed no offence known to law.

FEDERAL COURT EXTENDS SOLICITOR - CLIENT PRIVILEGE TO NOTARIES UNDER INVESTIGATION BY COMBINES DIRECTOR

The Federal Court of Canada, in a judgement delivered by Mr. Justice J.E. Dubé on April 23, 1982, held that communications between a client and his notary are privileged when they meet the criteria which govern

solicitor-client privilege under the common law (La Chambre des Notaires du Quebec, Requérante, La Commission sur les Pratiques restrictives du Commerce, Intimée, et la Directeur des Enquetes et Recherches, Intimée). The Court declined to accord that status to documents of the Chamber of Notaries of Quebec concerning notaries which did not meet the criteria of solicitor - client privilege even though their confidentiality is established by Quebec provincial law.

The decision related to a search of the premises of the Chamber and seizure of documents by duly authorized officers of the Director of Investigation and Research in the course of an inquiry under the Combines Investigation Act. The inquiry concerned the supply of services by notaries, and evidence of price fixing contrary sections 32 and 38 of the Act was being sought. The Chamber claimed that the document in question were privileged and sought an order from the Federal Court annulling the authorization to search and the seizure of all documents. The seized documents were sealed and left in the hands of the Chamber pending a decision by the Court.

The documents in question were of the following kinds:

- Reports of the chamber's Inspection Committee which are made following inspection of the registers of individual notaries. Such reports could reveal irregularities and even crimes committed by notaries, and could include documents relating to the affairs of clients of notaries.

- Documents of the Chamber's Discipline Committee, including complaints about notaries and admissions of infractions by notaries.

- Documents of an officer of the Chamber with the title of Syndic, whose function is to receive complaints about notaries and investigate them.

Dubé, J. took note of Quebec provincial statutes which require notaries to respect clients' rights to professional secrecy and which accord privileged status to communications between notaries and the Chamber in connection with inspection and discipline. He also noted that the Combines Investigation Act is federal criminal law and that s. 7(3) of the Criminal Code provides in part:

> "(3) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of the Parliament of Canada, except in so far as they are altered by or are inconsistent with this Act or any other Act of the Parliament of Canada."

His Lordship held that the common law, which governs the extent of the solicitor-client privilege, does not apply directly to notaries. However, he held that, when communications between a client and his notary meet the criteria governing solicitor-client privilege, such documents should also be privileged. Public documents or documents which must be recorded in public registers would not be privileged. Moreover, he held that documents of the chamber are not privileged except to the extent that they comprise documents which meet the criteria of solicitor-client privilege. He held that provincial laws which accord confidentiality to certain kinds of Chamber documents cannot limit the kinds of evidence which are admissable in criminal courts.

Accrodingly, Dubé, J. dismissed the application but recognized that his general directives might have to be followed by decisions respecting individual documents.

FIRST CONTESTED ADVERTISING ALLOWANCE CASE BRINGS CONVICTION

The Provincial court of British Columbia, in a judgment handed down in Vancouver on April 15, 1982, convicted Koss Limited on a count under s. 35 of the Combines Investigation Act and imposed a fine of $2,500 along with an Order of prohibition. The only other case under the section to reach the courts was in 1974 when Rubbermaid (Canada) Limited pleaded guilty in Brampton to five counts and was fined a total of $15,000.

s. 35 provides in part:

> "35(1) In this section, 'allowance' means any discount, rebate, price concession or other advantage that is or purports to be offered or granted for advertising or display purposes and is collateral to a sale or sales of products but is not applied directly to the selling price.
>
> (2) Every one engaged in a business who is a party or privy to the granting of an allowance to any purchaser that is not offered on proportionate terms to other purchasers in competition with the first-mentioned purchaser ...is guilty of an indictable offence and is liable to imprisonment for two years."

Koss, a supplier of sound equipment, extended a co-operative advertising allowance equivalent to three per cent of sales to each of Eaton's, Simpson's and Woodwards. No such allowances were offered to other dealers who were in competition with the former three. The allowances were not to be reflected on individual invoices but were to be accrued and released upon request.

In his reasons for judgment, Judge K.J. Libby dealt with the requirement in s. 35(1) that the allowance must be collateral to a sale. In the absence of cases, he referred to Canadian Competition Law: A Business Guide,

by C.J. Michael Flavelle, Toronto, 1979, which states on page 232:

> "The term 'collateral to' requires only that the allowance given is somehow connected to, or related to, the sale in question, and is not totally separate from such sale or sales."

Judge Libby rejected an argument by the defence that Koss had a national advertising program and not a regional one. He said:

> "...we certainly didn't see any Simpson Company advertising in the western part of this country, and I'm sure that in the eastern part they saw no Woodwards advertising and yet the defendant company was prepared to provide advertising allowances to both of those companies during the times alleged."

MONCTON LANDLORDS ACQUITTED OF HORIZONTAL PRICE MAINTENANCE

The Court of Queen's Bench of New Brunswick, Trial Division, dismissed a charge of price maintenance under s. 38 of the Combines Investigation Act against a group of Moncton Landlords on February 15, 1982. Those changed were Alan D. Schelew, Alyre Boucher, Bram Enterprises Ltd., Jamb Enterprises Ltd., A.I. Enterprises Ltd., J.S. Management & Consultants Ltd., and the Moncton and District Landlords Association Inc. The Crown is appealing.

The case involved horizontal price maintenance as distinct from resale price maintenance. The only other case of that kind was Regina v. Peter Campbell (1981), 51 C.P.R. (2d) 284. It resulted in a conviction by the County Court of Yale, B.C., and is described in Canadian Competition Policy Record of September, 1980.

Prior to the 1976 amendments, the scope of s. 38 was clearly restricted to resale price maintenance. In effect, if prohibited a dealer from requiring or inducing or attempting to induce any other person to resell an article or commodity at or at not less than a specified price. As amended in 1976 the scope of the section has been extended to services and, seemingly, to horizontal price fixing without any requirement to prove undueness. Thus, s. 38 now provides in part:

> "38.(1) No person who is engaged in the business of producing or 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..."

A notable feature of the two cases of horizontal price maintenance which have been prosecuted has been the presence of an individual who was a strong motivating force in the alleged attempt to influence prices upward.

The essential facts of the Moncton landlords case were not in dispute. In his judgment the trial judge, Barry, J. said that Mr. Schelew, as lawyer for the Landlords Association and as agent for the accused companies, attempted to influence the members of the Association to raise rents by a total of $75.00 per month in three stages during 1979 following the termination of rent controls. There was a meeting of the Association which was attended by less than 20 per cent of the members, at which a majority voted to accept Mr. Schelew's advice in that regard. Subsequently, Mr. Schelew wrote a letter to all members which was signed by Mr. Boucher, advising them of the decision and urging members to implement it. The members of the Association only accounted for a small part of total rental accomodation in the relevant area.

Mr. Justice Barry, in his written reasons for judgement, noted a lack of authorities on the application of s. 38 to horizontal price maintenance. After referring to the treatment of horizontal price maintenance in Chapter 10 of Roberts*, he stated:

> "It is not helpful because even the author does not appear to have contemplated a situation like the present one. He expresses the opinion that motive is important and the effect of the agreement would have to be the restriction of price competition. The agreement, if any, between the accused herein could not possibly have the effect of limiting price competition as only a very small proportion of landlords belonged to the Association and only 10% of those attended meetings, the purpose of which had been primarily to obtain relief from taxes and concessions under the rent control regulations...I find it impossible to find any mens rea or criminal intent or motive..."
>
> "...It is possible to interpret the Statute in such a way that the accused might be caught by its provisions. However, the words 'product', 'service' and 'supply' are so broadly defined that ' an agreement to influence upwards' might be inferred from any conversation or letters involving three or more persons who were engaged in real estate operations."

Barry, J. expressed uncertainty that Parliament had intended the section to cover a landlord-tenant relationship. He said:

*R.J. Roberts, Anticombines and Antitrust, Butterworths, Toronto, 1980.

> "It could easily have said so. It certainly intended to prevent agreements which by some means would influence upwards prices for goods and services. Nothing in the reading of the Statute would indicate any clear intention to control a landlord-tenant situation which normally is a provincial matter.
>
> .....
>
> "The Crown maintains that renting an apartment is a 'service' within the Act. it may be such but surely Parliament could have said so clearly had it so intended. It should be said that unlike in the case of manufacturers of products, the accused had no means of enforcing the alleged agreement."

Mr. Justice Barry expressed doubt that the accused could be said to have influenced rents upwards when they had no means of enforcement. He said:

> "In all cases I have been able to find, commodities were involved but services are now included. The 'influencor' possessed some means or power to achieve the desired result. The accused here had no such power. 'Influence' has many meanings but I would doubt that in a criminal case, it would include 'suggestion'."

Mr. Schelew was an officer of all the changed companies, but Barry, J. rejected an argument by the Crown that that was not a defence. He stated:

> "The Crown states that the question of principal and agent is not a defence as, to constitute a defence, it must be the principal influencing the agent, not vice versa. The word 'agent' is broadly defined in section 45.... but only for the pruposes of that section. I do not accept the Crown's submission that an agent must have authority to bind the principal to fall within the section."