

IN THE COURTS

**FEDERAL COURT SUSTAINS COMBINES DIRECTOR IN
DISPUTE WITH RTPC ON CONDUCT OF PETROLEUM INQUIRY**

Mr. Justice Cattanach of the Federal Court, in a judgement on October 22, ruled that the Restrictive Trade Practices Commission must act on a request of the Director of Investigation and Research under the Combines Investigation Act to subpoena certain oil company officials to appear at the Petroleum Inquiry hearings. The RTPC has appealed to the Federal Court of Appeal and a decision is expected early in 1983.

The case reflects differences between the Commission and the Director as to their respective roles in research inquiries under s.47 of the Combines Investigation Act, the relevant parts of which are:

"47(1) The Director

- (a) upon his own initiative may, and upon direction from the Minister or at the instance of the Commission shall, carry out an inquiry concerning the existence and effect of conditions or practices relating to any product that may be the subject of trade or commerce and which conditions or practices are related to monopolistic situations or restraint of trade, ...

and for the purposes of this Act, any such inquiry shall be deemed to be an inquiry under section 8.

- (2) It is the duty of the Commission to consider any evidence or material brought before it under subsection (1) together with such further evidence or material as the Commission considers advisable and to report thereon in writing to the Minister, and for the purposes of this Act any such report shall be deemed to be a report under section 19..."

The Director contends that he is responsible for the conduct of the Inquiry, not only up to the point where the evidence he has collected and his "Green Book" have been placed before the Commission, but also during the hearings before the Commission. The Commission, on the other hand, contends that the inquiry becomes that of the Commission when the Director has placed his material before it, and that it is for the Commission to decide whether or not it will consider further evidence. These differences surfaced early in the Inquiry when the oil companies objected to the sequence in which the Director proposed that the different aspects of the subject be taken up. In that instance a compromise proposal by the Commission was followed.

The events which finally brought the issue before the Federal Court occurred during the hearing relating to the international aspects of the inquiry.

The period covered by the Green Book ends in 1973, and the Commission has shown some dissatisfaction with the progress of the Director in placing more current evidence before it. In September, it was understood that the Director's case had been largely completed except for certain statistical compilations which were in the final stages of analysis before their presentation. Some of the oil companies agreed to take the stand in the interim. Imperial Oil's response to the international aspects of the Green Book included a massive printed report and appearances by officials including the company president; counsel for the Director had an opportunity of cross-examining those witnesses. For its part, Gulf Canada indicated that there were no longer any officials in the company who had had responsibility for international oil purchasing during the period of the Green Book; it presented an analysis of the international aspects of the Green Book which had been prepared on its behalf by an economist, Professor Leonard Waverman of the University of Toronto.

Counsel for the Director expressed concern that if some oil companies did not bring knowledgeable officials to the hearing there would be no opportunity to cross-examine them. On September 30, he wrote to the Commission requesting that the presidents of Gulf Canada, BP Canada, Petro Canada, Shell Canada, Ultramar Canada and Texaco Canada be subpoenaed. He indicated that the Director would not use the subpoenas if the companies themselves undertook to call evidence in the international phase of the hearings.

The Acting Secretary of the Petroleum Inquiry replied for the Commission on October 4, refusing the request. Citing the Rules of Practice and Procedure which the Commission had laid down for the Petroleum Inquiry, he said that the request did not comply with the requirements. He also stated in part:

"The Commission has been extremely patient and indulgent over the last several months with respect to the state of preparedness of the Director's evidence in the International phase of the hearings. The hearings, after all, result from a highly critical document issued by the Director. Efforts to accommodate the Director have resulted in lost hearing time as well as in the interruption of the International phase of the hearings in order to hear some Marketing evidence.

"Since at least as early as May 10, 1982, and until your letter of September 30, 1982, you have repeatedly assured the Commission and the others participating in the hearings that the balance of the Director's case in the International phase consisted only of certain limited subjects as described by you, which subjects did not include or involve anything like the request made in your letter of September 30. Understandably the petroleum companies wish to know exactly where the Director does and does not stand before they tender their evidence, and Imperial Oil tendered its evidence prior to completion of the Director's case on the basis of your assurance regarding the limited scope of your remaining evidence in the International phase. Gulf has prepared its

written evidence, and is apparently poised to proceed with its case, again presumably on the basis of those assurances.

"The Commission also notes that you closed the pre-1974 portion of the Director's International case in May, and that as you have stated on the record, you make no allegations, at least as yet, relating to the post-1973 period."

The Director responded by applying to the Federal Court for an order of mandamus directing the Commission and its Chairman to issue the subpoenas.

Mr. Justice Cattanach, in his reasons for judgement in favour of the Director, held that responsibility for conduct of an inquiry is vested in the Director and continues to be so throughout the hearings before the Commission, and that it is the duty of the Commission to hear and consider evidence brought before it. He also held that the issuance of a subpoena by the Commission is merely an administrative act in which the Commission has no discretion, and is not an act to be made upon a judicial or quasi-judicial basis. After stating that reference must be made to the statute as a whole to discover what is intended by s. 47, he said:

"Under section 8 it is the Director who causes an inquiry to be made to determine the relevant facts.

"Under section 14 the Director may terminate the inquiry if he is satisfied the evidence is insufficient but with the concurrence of the Commission when evidence is adduced before it.

"Under section 18 the Director may terminate the inquiry at any stage and embark upon a prosecution.

"By section 27 the Director is charged with the responsibility of making representation to Federal Boards to maintain freedom of competition.

"He is thus the watchdog of free enterprise and competition.

"Clearly, therefore, the scheme of the Act is that the responsibility for the conduct of an inquiry is vested in the Director and that responsibility continues to lay upon him throughout the hearing before the Commission under section 47. It does not terminate at the outset of the hearing before the Commission but is an on-going inquiry to be conducted by the Director.

....

"The refusal by the Commission to issue subpoenae to compel the attendance of witnesses to give evidence considered by the

Director to be material and essential to the inquiry transcends a mere rejection of evidence and is tantamount to the Commission declining to enter upon an inquiry which is its duty to enter. In short, it is a declining of jurisdiction."

Mr. Justice Cattanach also referred to the Rules of Practice and Procedure which the Commission had cited in refusing to issue the subpoenas. He found that the Director had not consented to the Rules and he said:

"I entertain reservations as to the validity of such procedure and whether it is binding upon the parties."

FIRST PROSECUTION FOR ATTEMPTING TO INDUCE A SUPPLIER TO CUT OFF A COMPETITOR BRINGS GUILTY PLEA

Judge W.G. Mahaffy of the Provincial Court in Sudbury on July 8, 1982 fined S&E Furnishings Limited, carrying on business as Sudbury Furniture Market, \$2,000.00 on each of six counts under s.s. 38(6) of the Combines Investigation Act and on one count under ss. 38(1)(a). The accused had earlier pleaded guilty to the charges. This is the first case under ss 38(6) to come before the courts and one of the few in which a retailer has been prosecuted under ss. 38(1)(a).

Ss. 38(6) provides:

"(6) No person shall, by threat, promise or any like means, attempt to induce a supplier, whether within or without Canada, as a condition of his doing business with the supplier, to refuse to supply a product to a particular person or class of persons because of the low pricing policy of that person or class of persons."

S&E had six retail furniture outlets in Sudbury and elsewhere in Northern Ontario. The charges under ss. 38(6) related to attempts by S&E to induce a number of manufacturers to stop supplying a competitor, Bel Furniture (Sudbury) Ltd. Bel had joined a buying group, Prestige Ltée, whose purpose was to obtain lower prices by volume buying. The evidence included a form letter which Mr. Montpellier, President of S&E, sent to five furniture manufacturers. In the letter, he asked for a written agreement from the addressees that they would notify Prestige not to sell to Bel, "or otherwise we will be forced to look for another supplier starting June 1st, 1979". Other evidence included a confidential unsigned memorandum which was found at S&E's Sudbury store and which was addressed to "All Store Managers". It stated that "Any sales representatives or manufacturer selling the following stores will no longer be selling our chain", and listed a number of furniture retailers including Bel. A form letter in similar terms and referring to the 1979 letter was sent to three of the five manufacturers in April, 1980 because a new Bel outlet had recently obtained chesterfields manufactured by one of the three.

Ss. 38(1)(a) makes it an offence for anyone who, inter alia, is engaged in the business of supplying a product, to:

- "(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;"

Evidence relating to the charge under ss. 38(1)(a) including letters in 1980 and 1981 which Mr. Montpellier wrote to two suppliers in which he threatened to stop buying from them unless they did something about the low prices of Yolles Furniture and Appliances in Sudbury. In those letters, Mr. Montpellier did not specify what kind of action he wanted the suppliers to take.

SUPREME COURT OF CANADA REFUSES TO HEAR OUTDOOR ADVERTISERS' BID TO HAVE COMBINES COUNTS QUASHED

The Supreme Court of Canada refused on August 9, 1982 to hear an appeal by a group of outdoor advertising firms who were seeking the quashing of an Information which was laid against them under the Combines Investigation Act. The appellants were Mediacom Industries Inc., Mediacom Inc., Hoal Investments Ltd., Seaboard Advertising Co., Ltd., Neonex Consumer Group Ltd., and Jim Pattison Enterprises Ltd.,

The Information, which was laid in July, 1980, contained two counts under s. 32(1)(c) relating to conspiracy against the five companies and two counts under s. 33 relating to monopoly against two of the companies which are affiliated.

On arraignment before Judge Meen of the Ontario Provincial Court on January 20, 1982, motions were made to quash the charges or discharge the applicants on the ground that the counts were nullities. Failing in that, applications were made to the Supreme Court of Ontario:

- By way of certiorari to quash the Information;
- by way of prohibition to prohibit any judge from proceeding with a preliminary inquiry into the charges;
- in the alternative by way of mandamus to require Judge Meen to hear and decide on the merits of the applicants' motion to quash the Information.

Mr. Justice Labrosse of the Supreme Court of Ontario found on March 9 that Judge Meen had dealt with the merits and he dismissed all the applications (see Canadian Competition Policy Record, June, 1982).

The companies then appealed to the Ontario Court of Appeal, but their appeal was dismissed in an oral decision on May 27, 1982.

Resumption of the preliminary hearing has been scheduled to begin on January 31, 1983.

SHIRT MAKER CONVICTED ON TWO OF FOUR PRICE MAINTENANCE COUNTS

York County Court Judge E.F. Wren, in a judgement on May 6, 1982, convicted Cluett, Peabody, Canada Inc. on one count under ss. 38(1)(a) and one count under ss. 38(1)(b) of the Combines Investigation Act and acquitted them on two other counts under ss. 38(1)(a). A fine of \$10,000.00 was imposed for each of the two convictions. The convictions are under appeal.

S. 38(1) makes it an offence for a person who, inter alia, is engaged in the business of producing or supplying a product to:

- "(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
- (b) refuse to supply a product to or otherwise discriminate against any other person engaged in business in Canada because of the low pricing policy of that other person."

The case involved the marketing of Arrow shirts. The conviction under s. 38(1)(a) stemmed from an "off price" advertisement of shirts by the Hudson's Bay Company in Montreal in which the Arrow name was used. That led to a complaint by an employee of Eaton's to the Arrow sales representative in Montreal. The latter then complained to Bay officials that their conduct could lead to a price war. A Bay official advised the Arrow representative that he did not want that to happen and he led him to believe that the Bay would not do the same thing again. The principal documentary evidence, which was supported by other evidence, was a letter from the Arrow representative to his superior reporting the affair. Judge Wren found that there had been an agreement and that its purpose was indirectly to discourage the reduction of prices in the region.

The conviction under s. 38(1)(b) involved a refusal by Arrow to supply S&R Department Stores Limited in Kingston. A Mr. Unsworth of S&R applied to be opened as an Arrow account but was rejected on the written ground that Arrow had adequate distribution in the area. An Arrow sales representative, Mr. Bailey, had visited the S&R store and Judge Wren accepted Mr. Unsworth's account of that visit. Judge Wren stated:

"It was Mr. Unsworth's sworn evidence that when Mr. Bailey first visited the store, he inquired whether the word "discount"

would be removed from the sign outside the store because it would not be in keeping with carrying Arrow products.

"He further testified that on Bailey's being advised that S&R was a discount store and sold at whatever price they saw fit and would discount Arrow shirts, Bailey responded that his company ... did not allow its retailers to sell below suggested list price and that he would have to take it up with the head office. Mr. Unsworth further testified that two or three weeks later, Bailey advised him that his company was taking the position that the Kingston area had adequate distribution. When Mr. Unsworth demurred, Mr. Bailey replied, according to Mr. Unsworth's evidence, that since his was a discount store selling below suggested retail price, it would not be accepted. When asked if S&R would be supplied if they agreed to maintain price, Mr. Unsworth testified that Bailey's answer was that it was possible, but that there would be fear that future management of S&R would not abide by the agreement."

In accepting Mr. Unsworth's evidence and rejecting Mr. Bailey's evidence which was basically a denial of any mention about not supplying discounters, Judge Wren stated that not only was Mr. Unsworth's evidence unshaken in cross-examination and that he was impressed with his evidence but that he had rejected Mr. Bailey's evidence where it was in conflict with Mr. Unsworth, most importantly because of a memo dictated by Mr. Bailey as being an accurate account of a message he had left for his superior which he considered bore out the essential substance of Mr. Unsworth's evidence.

One of the counts under s. 38(1)(a) which brought an acquittal involved relations of Arrow employees with a retail outlet in Toronto owned by Mr. Nick Furlano and known as Mr. Tuxedo. Arrow supplied a clearance of dress shirts to Mr. Tuxedo in the expectation that the latter would retail them at a low price. Mr. Tuxedo sold some of the shirts to another retailer, Taylor's Department Store, which in turn retailed them at a low price. A third retailer complained to Arrow about Taylor's low price. An Arrow representative then told Mr. Furlano of Tuxedo that he did not want him to act as a distributor and to please stop supplying Taylor's. Mr. Furlano continued to supply Taylor's. There was evidence that Arrow's concerns were the pressure on the store of the complainant to reduce his prices and the usurpation by Mr. Tuxedo of Arrow's function of selecting a retailer.

The Crown's allegation was that the accused directly or indirectly by agreement, threat or promise or like means attempted to influence upward or discourage the reduction of the price at which Mr. Tuxedo supplied or offered to supply the product. The Crown did not submit any evidence of threat or promise but did allege an agreement.

In acquitting the accused, Judge Wren found that Arrow had sold a clearing to Mr. Tuxedo fully expecting him to sell at whatever price he chose.

Also, he found that the request made by the Arrow representative that Mr. Tuxedo not continue selling to Taylor's did not constitute an agreement.

The Crown submitted that, if the Court was not satisfied that there had been an agreement or arrangement, the conduct of Arrow's representative constituted, by s.24 of the Criminal Code, the offence of an attempt to commit the offence defined in s. 38(1)(a) of the Combines Investigation Act. S. 24 of the Criminal Code provides:

"24(1) Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence."

In Judge Wren's words, the Crown's submission related to "establishing an attempt to agree to attempt to influence retail prices". He cited Regina v. Dungey, (1980), 50 C.C.C., (2d), 86. In that case the Ontario Court of Appeal held that there is no offence known to law of attempt to conspire to commit a further substantive offence, but it left open the question whether it would be possible to have an attempted conspiracy where the conspiracy is the substantive offence. Judge Wren concluded:

"...although the Code definition of attempt in Section 24 is clearly applicable to offences created in the Combines Investigation Act, I am of the opinion that it is not an offence known to law to attempt to agree to attempt to effect (sic) prices."

"In Section 38(1)(a) it is not the agreement which is the substantive offence, but rather the attempt to influence prices. The agreement is but one manner of committing the substantive offence.

"In any event, I am not convinced that (the) request to please not continue to supply Taylor's ... is capable of being characterized as an attempt to effect an agreement or arrangement."

The other count under s. 38(1)(a) which resulted in an acquittal involved relations between Arrow employees and Robinson's Department Store in Kitchener. Arrow had a policy of selling large quantities of clearance merchandise to Robinson's, fully expecting that Robinson's would sell at discount prices. The Crown sought to prove an agreement between an Arrow representative and the buyer for Robinson's not to use the Arrow name in off price advertising. Judge Wren found that the Crown had failed to prove its case beyond a reasonable doubt.

AUTO GLASS DEALER FINED FOR PRICE MAINTENANCE

Trans Canada Glass Ltd. was fined \$4,000.00 on September 13, 1982 by the County Court of Cariboo in Prince George, B.C. after pleading guilty to one count of price maintenance under s. 38(1)(a) of the Combines Investigation Act. A Prohibition Order against repetition of the offence was also imposed upon the company.

Trans Canada Glass carries on business in many parts of Canada; its activities include the wholesaling of glass to automobile glass replacers and the operation of a chain of automobile glass replacement shops. Its shops in Eastern Canada are known as Speedy Auto Glass. The Prohibition Order applies to the company's automobile glass activities throughout Canada.

PRINCE GEORGE BOTTLERS PLEAD GUILTY ON CONSPIRACY COUNT

Holders of Coca Cola and Pepsi Cola bottling franchises in Prince George, B.C. pleaded guilty to a conspiracy charge under s. 32(1)(c) of the Combines Investigation Act in the Supreme Court of British Columbia on May 5, 1982. Fines totalling \$100,000 were imposed and a prohibition order was issued against repetition of the offence. (Her Majesty the Queen against Goodwill Bottling North Limited, Nechako Contracting Limited (formerly known as Nechako Beverages Ltd. and Sietic Management)).

Crown Counsel told the Court:

"In the course of the investigation in 1977 ... a vast number of documents were seized from the various companies as well as the various franchisors. It is apparent from a variety of telexes, memos, letters and price invoices that an agreement existed and had existed since January of 1974, the purpose of which was to fix prices and lessen competition. The agreement included the setting of identical prices, the setting of price differentials, the taking of identical price increases and the elimination of various practices seen as disruptive such as discounting, the participating in advertising schemes that might have the effect of lowering prices such as the Pepsi Challenge ... and other marketing techniques.

"The effect of the activities of these companies was to virtually end competition in relation to the soft drink market in the Prince George area for some three years."

Counsel for Goodwill Bottling commented to the Court:

"...ironically how all those arose was over the Pepsi Challenge, where there had been large advertising across the nation of Pepsi versus Coke. They thought they would dispose of that in this area and that led to other things."