IN THE COURTS

COMBINES ACT SEARCH POWER HELD UNCONSTITUTIONAL BY ALBERTA COURT OF APPEAL

The Court of Appeal of Alberta, in a judgement by Mr. Justice Prowse on January 31, 1983, ruled that the powers of entry and search under ss. 10(1) and (3) of the Combines Investigation Act are inconsistent with s. 8 of the Charter of Rights and therefore invalid. The Crown is seeking leave to appeal. In the meantime, the decision is binding in Alberta and would provide an argument for anyone challenging the Director's power in another province. The Director does have the alternative of applying to a justice for authority to conduct a search under s. 443 of the Criminal Code where he believes an offence such as a price fixing conspiracy exists. That avenue is not, however, available to him in a research inquiry or an investigation of a reviewable practice under Part IV.1 of the Combines Investigation Act. The decision does not affect the power of the Director to call for persons and papers under s. 9 of the Act.

The case arose out of a search of the premises of the Edmonton Journal (a Southam paper) which officers of the Bureau of Competition Policy commenced in April, 1982. Southam applied to the Court of Queen's Bench of Alberta for an interim injunction against continuation of the search, one ground being that it was in violation of s. 8 of the Charter of Rights. The Trial Court dismissed the application but ordered that any documents taken be left with the Clerk of the Court pending determination of the issues.

S. 8 of the Charter provides that "Every one has the right to be secure against unreasonable search and seizure". Ss. 10(1) and (3) of the Combines Investigation Act provide:

> "10(1) Subject to subsection (3), in any inquiry under this Act the Director or any representative authorized by him may enter any premises on which the Director believes there may be evidence relevant to the matters being inquired into and may examine any thing on the premises and may copy or take away for further examination or copying any book, paper, record or other document that in the opinion of the Director or his authorized representative, as the case may be, may afford such evidence.
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> ....
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> (3) Before exercising the power conferred by subsection (1), the Director or his representative shall produce a certificate from a member of the Commission, which may be granted on the ex parte application of the Director, authorizing the exercise of such power."

S. 443(1) of the Criminal Code provides:

"443(1) A justice who is satisfied by information upon oath in Form 1, that there is reasonable ground to believe that there is in a building, receptacle or place

(a) anything upon or in respect of which any offence against this Act has been or is suspected to have been committed,

(b) anything that there is reasonable ground to believe will afford evidence with respect to the commission of an offence against this Act, or

(c) anything that there is reasonable ground to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant,

may at any time issue a warrant under his hand authorizing a person named therein or a peace officer to search the building, receptacle or place for any such thing, and to seize and carry it before the justice who issued the warrant or some other justice for the same territorial division to be dealt with by him according to law."

Mr. Justice Prowse held that, in the absence of exceptional circumstances, the requirements for issuing a search order at common law under the Criminal Code should be treated as minimal standards under the Charter. Summarizing those requirements, he stated:

"The basic requirements of a lawful search and seizure under the common law and under s. 443(1) of the Code may be summarized in the following propositions:

(a) the power to authorize a search and seizure is given to an impartial and independent person (at common law a justice) who is bound to act judicially in discharging that function.

(b) that evidence must satisfy the justice that the person seeking the authority has reasonable ground to suspect that an offence has been committed.

(c) that evidence must satisfy the justice that the person seeking the authority has reasonable grounds to believe, at common law, that stolen property may be on the premises or, under s. 443(1)(b), that something that will afford evidence of an offence may be recovered, and

(d) there must be evidence on oath before him."

His Lordship found that s. 10 of the Combines Investigation Act did

not fully meet any of the foregoing standards.

With regard to the test for an independent and impartial arbiter, he noted that one of the aims of the 1951 amendments to the Act had been a separation of the Director's functions of investigation and research from the Commission's functions of appraisal and report. However, he found that the functions of the Director and of the Commission overlapped in a number of ways including:

- Under s. 22(2)(b), where the Commission makes an interim report it may require the Director to make further inquiry.

- By s. 47(1) the Commission may initiate a research inquiry by the Director.

- By s. 13 the Commission may in any inquiry apply to the Attorney General of Canada "to appoint and instruct counsel to assist in an inquiry".

- "The Commission is also given powers to supervise the Director in the exercise of his functions, for instance under s. 17(1) when the Director wishes to examine someone on oath".

- The Commission may make remedial orders upon application by the Director under Part IV.1 of the Act.

Prowse, J. stated:

> "The result is that circumstances may arise where the Director is acting as investigator and prosecutor and the Commission is acting as investigator and judge with respect to breaches of the Act. Even though neither the Director nor the Commission can launch proceedings by way of indictment for offences under the Act such proceedings may follow the cumulative results of the discharge by each of them of their respective functions."
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> ....
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> "The purported separation of these powers into categories of research and investigation on the one hand and appraisal on the other does not in fact result in the separation of the function to the extent required to support the conclusion that the commissioner is an independent arbiter or a neutral and impartial person."

Mr. Justice Prowse also found that the review which a member of the Commission is required to carry out under s. 10(3) does not meet the requirement that a person seeking to exercise the power had reasonable grounds to suspect that an offence had been committed.

He cited Petrofina Canada Ltd. v. Chairman, R.T.P.C. et al (1980) F.C. 381 where the requirements under s. 10(3) were dealt with as follows:

> "Under those provisions, the Members are neither required nor authorized to determine the legality of the Director's decision to hold an inquiry; they are merely required to ascertain that there is, de facto, an inquiry in progress under the Act. The Members are not required or authorized, either, to pass judgment on the reasonableness of the motives prompting the Director to exercise his powers under sections 9 and 10. As the Members did not have to make decisions on those two points, they cannot, in my opinion, be blamed for not having required information on those points."

Prowse, J. stated:

> "Section 10(1) expressly sets out only two conditions for the exercise of the power by the Director. These conditions are that there must be 'an inquiry' and that the Director believe that 'there may be evidence relevant to the matters being inquired into' (emphasis mine). It is a reasonable implication of reading s. 10(1) and s. 10(3) together that the Commission, before authorizing a warrant, must be satisfied that the conditions in s. 10(1) exist.
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> If the powers accorded a member of the Commission under s. 10(3) are as found by the Federal Court of Appeal in the Petrofina case it follows that there is no review of the right to exercise the powers accorded persons under s. 10(1) in the course of an inquiry. Even if the two conditions referred to in the last paragraph are implied the section would not meet the minimal standards referred to above."

The respondents submitted that the safeguards at common law could be implied into the section or that the section could be "read down" by the courts. His Lordship rejected that, stating:

> "Under the Act as it is presently worded the Director may seek authorization to exercise his power to search in any type of inquiry. Different safeguards may be reasonably required in order to effect compliance with the Charter depending upon the nature and object of the inquiry. Thus, in order to render the unreasonable provisions of the Combines Act reasonable the Court would have to imply into s. 10 a number of different sets of safeguards whose application would depend upon the type of inquiry being conducted. Clearly this would involve the court in legislating and not adjudicating. It is Parliament which has traditionally expressed the guidelines for authorization of search and seizure, as, for instance, in the Income Tax Act and the Criminal Code."

Finally, Mr. Justice Prowse noted the absence of a requirement that an application under s. 10(3) be supported by evidence on oath. He said:

> "It is an obvious omission in the Act not to require evidence on oath when the power sought to be exercises is, in the words of Lord Scarman, 'a breath taking inroad on the individual's right of privacy and right of property'".

FEDERAL COURT OF APPEAL REVERSES TRIAL COURT DECISION AND SUSTAINS RTPC IN DISPUTE WITH COMBINES DIRECTOR

Mr. Justice Pratte of the Federal Court of Appeal, in a judgment on March 7, 1983, reversed the decision of the Trial Division and ruled that the Restrictive Trade Practices Commission is not bound to accede to a request by 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 judgment of the Trial Division is described in Canadian Competition Policy Record, December, 1982.

Mr. Justice Cattanach of the Federal Court, Trial Division had held that the responsibility for the conduct of an inquiry before the Commission under s. 47(2) of the Act was vested in the Director, who consequently had the right to determine the witnesses to be subpoenaed. He had also held that the issuance of a subpoena by the Commission was a purely administrative act which did not involve the exercise of any discretion.

Mr. Justice Pratte of the Federal Court of Appeal, on the other hand, ruled that the hearings were those of the Commission and were in no way under the control of the Director. He also found that the issuance of a subpoena by the Commission is not merely an adminstrative act but one which involves the exercise of discretion.

The full text of the Appeal Court's judgment is presented in Appendix I.

QUEBEC APPEAL COURT CONFIRMS CONVICTION OF WET FELT CARTEL

The Quebec Court of Appeal, in a judgment by Mr. Justice Jacques on December 2, 1982, dismissed an appeal by five of six Canadian producers of papermakers' wet felts who were convicted on a conspiracy count under s. 32(1)(c) of the Combines Investigation Act (Regina vs Albany Felt of Canada Ltd. et al. (1981), 52 C.P.R. (2d) 189(Trial)). Leave to appeal is being sought.

S. 32(1)(c) prohibits conspiracies

> "(c) to prevent, or to lesson, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportaion or supply of a product, or in the price of insurance upon persons or property, ..."

The decision is of particular interest, following as it does the acquittals by the Supreme Court of Canada in Aetna Insurance Company v. The Queen (1978) 1 S.C.R. 731 and in Atlantic Sugar Refineries Co. Ltd., et al. and the Attorney General of Canada, (1980) 2 S.C.R. 644. However, the decision is not surprising because the evidence of conspiracy was strong and the trial judge found that the control exercised by the accused over the market constituted a virtual monopoly.

A number of foreign co-conspirators were named in the charge and the evidence at the trial, which spanned the period from 1952 to 1974, revealed the existence of an international cartel. The trial judge summed up the evidence as follows:

> "The six accused in this case conspired among themselves and with others at various times on a continuing basis during ther indictment period to prevent or limit competition by setting uniform prices for their product, uniform terms and conditions of sale and to limit imports of such products. Among them they shared nearly the entire Canadian market but in changing proportions, for the period concerned. They raised their prices at will without the competitive restraints which Parliament has decreed should protect consumers. The evidence of the paper company consumers is to the effect that there was little or nothing they could do to resist price increases imposed by the various accused acting in concert. They could make no progress in securing consessions such as quantity discounts and in this area met a solid wall of stone."
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> ....
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> "That control of such a large share of the particular market constituted a vritual monopoly over the period of the indictment is clear to me and this beyond any reasonable doubt. Such tight control coupled with the marketing practices, in my view meets the tests of Howard Smith Paper and of Aetna."

The appellants cited twelve grounds for appeal, which Mr. Justice Jacques classified as follows:

- Admissibility of similar fact evidence
- Admissibility of documents under s. 45 of the Act

- No undueness in view of the sound economic and business reasons motivating the behaviour of the appellants
- Insufficient evidence.

Regarding similar fact evidence, Jacques, J.A. reviewed the evidence in question and found it all to relate to the charge, stating that "the similar fact evidence was properly admitted as relevant to intention and system, though of unequal weight".

Regarding s. 45, the appellants submitted that the trial judge erred in giving effect to the contents of documents introduced under s. 45 of the Act where such documents did not record anything as having been done, said or agreed upon. Their factum stated:

> "Therefore, it is submitted that on a proper construction of section 45, if a document on its face does not record anything as having been done, said or agreed upon, no presumption of fact is raised under s-s. (2)(c)(ii) of s. 45. Therefore a presumption of fact cannot be raised under that sub-section, by examining one by one or together a number of documents none of which separately records anything done, said or agreed upon."

S. 45 is designed to facilitate the admission of documentary evidence. It provides in part:

> "(2) In any proceedings before the Commission or in any prosecution or proceedings before a court under or pursuant to this Act,
>
> ....
>
> (c) a document proved to have been in the possession of a participant or on premises used or occupied by a participant or in the possession of an agent or a participant shall be admitted in evidence without further proof thereof and is prima facie proof
>
> (i) that the participant had knowledge of the document and its contents,
>
> (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, ..."

Mr. Justice Jacques, supported the trial judge and citing s. 26(7) and

s. 11 of the Interpretation Act, held that the words "a document" in s. 45 of the Combines Investigation Act do not include only a single or particular piece of paper but also several individual documents taken as a whole. He stated:

> "If one were to limit the interpretation of the word 'a document' as the Appellants would have us do, it would lead to absurd results. For example, a group of conspirators could draft an agreement eliminating completely any competition in prices and parcel it out among themselves on separate sheets of paper so that the text on each separate sheet would be meaningless by itself. If one were to follow Appellants in their reasoning, no Court could read these documents together in order to determine the agreement.
>
> "Therefore, I am of the opinion that each separate piece of paper need not record by itself something 'as having been done, said or agreed upon' so long as some of the documents seized, when read together, show that something was 'done, said or agreed upon'.
>
> "Secondly, with respect to the contents of the documents, that is with respect to the facts, prima facie proof of which the documents make, nothing, either in section 45, or in the rules of evidence, prevent a Court from referring to the rest of the evidence tendered in order to determine what a document, or several documents, record as having been done, said or agreed upon.
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> "It is quite proper to use testimonial evidence or any other admissible evidence (such as what may be known to the Court through judicial notice, e.g. the calendar either past or present) to determine meaning, reach and full significance of documents, to explain ambiguous documents, or to fill the gaps in incomplete documents, voluntarily or inadvertantly so."

With regard to evidence of undueness, the appellants argued that the trial judge had considered only the agreement as to pricing practices and import restrictions and had not taken into account competition in performance and service. Jacques, J.A. rejected that argument, stating:

> "The alleged benefit conferred ultimately upon the consumers by Appellants' policy of competing on the basis of 'earning business on performance rather than buying business on price' is certainly not a defense as was decided in the Howard Smith paper case referred to above.
>
> "Such proposition is tantamount to saying that a group of businessmen my choose, and impose upon a market, the area of their business where they will allow free competition. That is what the law, among other things, prohibits.

> "What businessmen consider 'sound economic and business reasons' is not a defense when contrary to law, as they are, since their implementation enables them to carry on their business 'virtually unaffected by the influence of competition'" (Note: the latter phrases is from the test applied by Cartwright, J. in Howard Smith Paper Mills v. The Queen, 118 C.C.C. 321, which Mr. Justice Jacques had cited earlier)

The appellants also argued that the trial judge "had erred in failing to find, on the evidence, that they had in mind an alleged object contrary to s. 32(1)(c)" of the Act. Jacques, J.A. stated:

> "...Appellants submit that there is no proof of their intentions. In their argument, they confuse 'mens rea' with motive. There is no doubt at all that their meetings, their discussions, their decisions were quite voluntary. That is sufficient to establish 'mens rea'. What the Appellants call the 'realities of the market place' have no bearing upon 'mens rea', they form part of their motives.
>
> "Mens rea is established when, in order to meet these realities, a group of businessmen meet and agree to measures designed to limit the freedom of the market, such as setting up their own scale of freedom."

Finally, Mr. Justice Jacques rejected the Appellants' submission that there was insufficient evidence. He dealt with this matter at considerable length, quoting excerpts from a number of the documents admitted as evidence. In quoting from two documents relating to a pricing agreement, he described them as "devastating for the Appellants and which were left unanswered and unexplained." The documents quoted are of considerable interest for the light they shed on the operation of an international cartel.

COMBINES DIRECTOR SEEKS RTPC ORDER TO COMPEL MOVIE DISTRIBUTORS TO SUPPLY INDEPENDENT EXHIBITOR

The Director of Investigation and Research under the Combines Investigation Act, in an application filed on December 22, 1982 under s. 31.2 of the Act, seeks an order by the Restrictive Trade Practices Commission to compel the major motion picture distributors in Canada to supply Cineplex Corporation's chain of movie theatres. Those against whom the order is sought are:

> Astral Films Limited
> Columbia Pictures Industries Inc.
> Paramount Productions Inc.

Universal Films (Canada)
Warner Bros. Distributing (Canada) Limited
United Artists Corporation
Twentieth Century-Fox Film Corporation

The film distributors will, or course have an opportunity of responding. An inquiry into the distribution and exhibition of motion pictures in Canada was commenced in 1976 following a formal application under s. 7 of the Act by nine citizens who were active in the Canadian film industry. They stated that the distributors had conspired to lessen competition in the rental and supply of motion pictures, thereby preventing Canadian films from having reasonable access to the Canadian exhibition market. As one result of evidence obtained, United Artists and Bellevue Film Distributors were each charged in separate prosecutions for local instances of price maintenance under s. 38, and Orders of Prohibition were granted by the Federal Court of Canada in 1979. The application to the RTPC mentioned above is a further result of the inquiry.

An article by William Johnson in the Toronto Globe and Mail of November 11, 1982 described the difficulties experienced by Canadian film producers in getting their films shown in Canada as well as problems faced by smaller exhibitors. According to Mr. Johnson, the Famous Players and Odeon theatre chains dominate film exhibition in Canada and they have exclusive arrangements with the major U.S. film distributors. Smaller chains of exhibitors including Cineplex generally cannot obtain major first-run films and this retards their growth. Also, Canadian film producers prefer to have their films distributed by a major U.S. distributor in order to reach a larger market. Only a few are accepted, however, and the others must seek exposure through the smaller theatre chains. Mr. Johnson wrote:

> "The links between the two big chains and the majors also restrict the growth of third and fourth theatre chains. Cineplex Corp., the innovative child of Garth Drabinsky, makes films (The Changeling, Tribute), distributes films through Pan-Canadian Film Distributors and exhibits on 150 screens across the country. Cineplex has recently been the prime exhibitor of Canadian films, particularly from Quebec.
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> "Cineplex's growth has been slowed because it cannot bid on major first-run films monopolized by the two giants. While Chariots of Fire played at the Cineplex Theatre in Los Angeles, the mother theatre in Toronto still could not show it because a chain had exclusive rights."

READY-MIX CONCRETE FIRMS FINED FOR CONSPIRACY

Mr. Justice Migneault of the Quebec Superior Court, Trial Division imposed heavy fines on four ready-mix concrete firms in the Quebec City area who pleaded guilty on one count under s. 32(1)(a) and one under s. 32(1)(d) of the Combines Investigation Act. Béton Québec Inc., Verreault Frontenac Inc., and Béton Canfarge Inc. were each fined $150,000.00 and Les Constructions Pilotes et Frêres was fined $15,000.00

The target of the conspiracy was Rocois Construction Inc., a general contractor. Rocois had found his reliance on ready-mix firms somewhat unsatisfactory for projects located some distance from a ready-mix plant. He imported several mobile concrete batching plants from Europe at unit costs of $100,000.00 or more which were suitable for use on projects above a certain size. He found the quality of concrete produced in those plants to be excellent and the cost to be substantially lower than buying from ready-mix firms. He then began offering his batching services to other contractors in the area, thus entering into competition with the ready-mix firms.

The four ready-mix firms, which accounted for about 70 per cent of the business in the area, adopted or attempted to adopt a number of measures against Rocois including the following:

- refusing to supply concrete to him
- refusing to supply concrete to any of his batching customers
- placing pressure on smaller concrete suppliers outside the conspiracy not to supply him or his customers
- attempting to induce suppliers of sand and crushed stone not to supply him
- offering to pay him to cease using his batching plants or else to buy the plants from him
- threatening to offer his competitors preferential prices on concrete

Ss. 32(1)(a) and (d) prohibit conspiracies:

> "(a) to limit unduly the facilities for transporting, producing, manufacturing, storing or dealing in any product,
>
> ...
>
> "(d) to otherwise restrain or injure competition unduly,"

S. 32(2) provides a number of defences against a charge under s. 32(1). S. 32(3) provides that those defences do not apply, inter alia, "if the conspiracy, combination, agreement or arrangement has restricted or is likely

to restrict any person from entering into or expanding a business in a trade, industry or profession."

There has been very little jurisprudence under subsections 32(1)(a) and (d), most of the conspiracy prosecutions having been conducted under s. 32(1)(c).

Rocois launched a civil suit in 1979 seeking recovery of damages from ready-mix firms under s. 31.1 of the Combines Investigation Act. That section, which was enacted in 1976, provides for such suits for damages resulting from conduct contrary to any provision of Part V of the Act or failure to comply with an order of the Restrictive Trade Practices Commission or a court under the Act. On December 4, 1979 the Federal Court, Trial Division found subsections 31.1(1)(a)(1) and 31.1(3) to be ultra vires (Rocois Construction v. Quebec Ready-Mix Inc. et al). That decision is under appeal by the Attorney General of Canada.

BID RIGGER PLEADS GUILTY ON PRICE MAINTENANCE COUNT

A sign maker who offered money to a competitor to submit a high bid pleaded guilty to a count under s. 38(1)(a) of the Combines Investigation Act in the Court of Sessions of the Peace in Montreal on December 3, 1982. Acme Signalisation was fined $30,000.00 and the owner, Mr. Brouillette, was fined $10,000.00.

S. 38(1)(a) makes it a crime for a person engaged in the business of producing or supplying an article or service:

> "(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;"

The federal Department of Public Works had issued a call for tenders on signs and, for reasons unconnected with the case, found it necessary to issue a second call. Persons responding to the second call could ascertain who had responded to the first call. Mr Brouillette approached a competitor, Signalisation Spectrolite and offered persons there several thousand dollars to submit a bid of an amount which he specified. Spectrolite reported the matter to the police.

Bid-rigging agreements are specifically outlawed by s. 32.2 of the Act, but no agreement had been consummated in this case.