

APPENDIX I

TEXT OF REASONS FOR JUDGMENT BY MR. JUSTICE PRATTE OF THE FEDERAL COURT OF APPEAL ON MARCH 7, 1983 IN MATTERS BETWEEN THE RESTRICTIVE TRADE PRACTICES COMMISSION AND O. GERALD STONER (APPELLANTS) AND THE DIRECTOR OF INVESTIGATION AND RESEARCH, COMBINES INVESTIGATION ACT (RESPONDENT)

REASONS FOR JUDGMENT

PRATTE J.

This is an appeal from an order of the Trial Division directing the Restrictive Trade Practices Commission and its Chairman to accede to a request made by the Director of Investigation and Research under the Combines Investigation Act and issue subpoenas requiring the Presidents or Chief Executive Officers of five petroleum companies to attend and give evidence in an inquiry conducted before the Commission.

There is only one issue to be resolved: has the Commission the duty, when an inquiry is held before it pursuant to subsection 47 (2) of the Combines Investigation Act, to issue all the subpoenas that the Director may request? The Trial Division answered that question affirmatively. First, it held that the responsibility for the conduct of the inquiry before the Commission was vested in the Director who, as a consequence, had the right to determine the witnesses to be subpoenaed. Second, it held that the issuance of a subpoena by the Commission was a purely administrative act which did not involve the exercise of any discretion.

Under the Combines Investigation Act, the main responsibility of the Director is to make inquiries. Those inquiries are made either pursuant to section 7 or under section 47.

Section 8 provides that the Director must make an inquiry whenever there is reason to believe that:

- (i) a person has contravened or failed to comply with an order made pursuant to section 29, 29.1 or 30.
- (ii) grounds exist for the making of an order by the Commission under Part IV.1, or
- (iii) an offence under Part V or section 46.1 has been or is about to be committed ...

In those cases, the Director must inquire "into all such matters as he considers necessary to inquire into with the view of determining the facts."

That inquiry is conducted in private (subsection 27(1)) and the Commission takes no part in it. The members of the Commission, however, may be called upon to make orders so as to enable the Director, in the course of his inquiry, to compel the production of evidence or the attendance of witnesses. Indeed, the Director does not have the power, under the statute, to compel the production of evidence or to summon a witness. If the Director needs to exercise those powers during the course of an inquiry, he must make an ex parte application to a member of the Commission and obtain an order as provided in sections 9, 10, 12 and 17.

A section 8 inquiry may lead to four possible outcomes: the Director may realize that the matter does not justify a further inquiry and decide to discontinue the inquiry; he may form the view that grounds exist for making an order under Part IV.1 of the Act, in which case he will apply for such an order; he may refer the matter to the Attorney General of Canada; finally, if the evidence obtained discloses an offence under Part V, the Director must report his findings to the Commission and, then, sections 18 and 19 of the Act come into play. These two sections read as follows:

18. (1) At any stage of an inquiry,

(a) the Director may, if he is of the opinion that the evidence obtained discloses a situation contrary to any provision in Part V, and

(b) the Director shall, if the inquiry relates to an alleged or suspected offence under any provision of Part V and he is so required by the Minister,

prepare a statement of the evidence obtained in the inquiry which shall be submitted to the Commission and to each person against whom an allegation is made therein.

(2) Upon receipt of the statement referred to in subsection (1), the Commission shall fix a place, time and date at which argument in support of such statement may be submitted by or on behalf of the Director, and at which such persons against whom an allegation has been made in such statement shall be allowed full opportunity to be heard in person or by counsel.

(3) The Commission shall, in accordance with this Act, consider the statement submitted by the Director under subsection (1) together with such further or other evidence or material as the Commission considers advisable.

(4) No report shall be made by the Commission under section 19 or 22 against any person unless such person has been allowed full opportunity to be heard as provided in subsection (2).

19. (1) The Commission shall, as soon as possible after the conclusion of proceedings taken under section 18, make a report in writing and

without delay transmit it to the Minister.

(2) The report under subsection (1) shall review the evidence and material, appraise the effect on the public interest of arrangements and practices disclosed in the evidence and contain recommendations as to the application of remedies provided in this Act or other remedies.

.....

As, under section 18, the Commission may clearly become involved in an inquiry, section 21 confers on the Commission and its member "all the powers of a commissioner appointed under Part I of the Inquiries Act", including, of course, the power to summon witnesses.¹

So much for the inquiries held by the Director pursuant to section 8. Apart from the inquiries held for the purposes mentioned in that section, the Director may also hold inquiries of a more general nature under section 47. That section, which is the only one which expressly regulates that kind of inquiry, reads as follows:

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

(b) upon direction from the Minister shall carry out a general inquiry into any matter that the Minister certifies in the direction to be related to the policy and objectives of this Act,

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.

It is common ground that the inquiry during which the Commission refused to issue the subpoenas requested by the Director was held pursuant to section 47. It related to the petroleum industry in Canada and had been commenced by the Director in 1973. Until 1981, it had been conducted in

(1) (Sections 4 and 5 of the Inquiries Act are quoted here in the text of the judgement.)

private in accordance with the provisions of the statute relating to section 8 inquiries. On February 27, 1981, the Director sent to the Chairman of the Commission a voluminous statement of the evidence collected during the course of that inquiry together with the following covering letter:

Pursuant to section 47 of the Combines Investigation Act, I am submitting to you in English and in French, a Statement of Evidence and Material collected in the above inquiry so that, pursuant to the said section, the Restrictive Trade Practices Commission can consider it together with such further evidence or material as you consider advisable and report thereon in writing to the Minister of Consumer and Corporate Affairs.

Following the receipt of that letter, the Commission decided to hold public hearings to receive further evidence on the same subject. It is in the course of those hearings that the Commission rejected the Director's request for the issuance of subpoenas.

It may not be necessary, in order to dispose of this appeal, to determine whether the inquiry that was being held by the Commission when it refused to issue the subpoenas was under the responsibility of the Director or of the Commission. However, I feel obliged to say that I cannot agree with the opinion expressed by the learned Judge of first instance that that inquiry was under the direction and responsibility of the Director.

If the inquiry in question had been held by the Commission pursuant to section 18, following the submission of a statement of the evidence obtained by the Director during a section 8 inquiry, there would have been no doubt, in my view, as to the characterization of that inquiry. Until the submission of a statement of evidence pursuant to section 18, a section 8 inquiry is a private inquiry made by the Director and the Commission is not involved in it. However, once a statement of evidence is filed pursuant to section 18, that situation changes. Then the Commission takes over: it must give the Director an opportunity to submit argument in support of the statement; it must give to all those against whom allegations are made in the statement an opportunity to refute those allegations; it must hear "such further or other evidence" as it considers advisable; it must, finally, make a report pursuant to section 19. It is clear, in my view, that when the Commission decides, under section 18, to hold hearings to obtain "further or other evidence", those hearings are under its sole control. Those hearings are not conducted by the Director who, therefore, does not have the power to decide the evidence that the Commission will hear.

Counsel for the respondent submitted, however, that the situation is different when an inquiry is held pursuant to section 47. That section contemplates, said he, an inquiry to be made by the Director and in the course of which evidence is brought before the Commission. It follows, according to that submission, that the Commission has the duty to hear all the evidence that the Director wishes to adduce before it in the course of that inquiry. In that

sense, the inquiry before the Commission would be under the control of the Director.

This submission rests entirely on the wording of subsection 47(2) which imposes on the Commission the duty "to consider any evidence or material brought before it under subsection (1) ...". As subsection 47(1) does not indicate how the evidence gathered by the Director during the course of his inquiry must be brought before the Commission, counsel for the respondent infers from those words in subsection 47(2) that the Director may choose to bring the evidence before the Commission by making his inquiry in the presence of the Commission during its public hearings.

I must confess that the manner in which subsection 47(2) is drafted lends some credibility to the respondent's contention. However, I cannot accept it. Section 47 provides for inquiries in which both the Director and the Commission play a part. The part of the Director is described in subsection 47(1): he must carry out an inquiry which, for the purposes of the Act, is deemed to be a section 8 inquiry. Now, an inquiry by the Director is not, as I understand it, an inquiry before the Commission; it is a private inquiry which is conducted as if it were a section 8 inquiry. I cannot interpret subsection 47(1) as giving the Director the power to decide to make his inquiry before the Commission. The part to be played by the Commission in a section 47 inquiry is described in subsection 47(2): it must consider the evidence "brought before it under subsection (1) together with such further evidence or material as the Commission considers advisable" and "report thereon ... to the Minister". In my view, the use of the words "the evidence brought before it under subsection (1)" does not support the inference that the Director may choose to bring that evidence before the Commission by making his inquiry in its presence. The only inference that, in my view, can be drawn from those words is that section 47 contemplates that the Director will, after he has completed his investigation, bring the evidence that he has collected before the Commission for its consideration. This does not imply that the inquiry be made before the Commission but, rather, that the evidence already obtained by the Director in the course of his private inquiry will be transmitted to the Commission.

My conclusion, therefore, is that when the Commission, after having been informed by the Director of the evidence collected by him during a section 47 inquiry, decides to hold hearings to hear further evidence, those hearings are those of the Commission and are, in no way, under the control of the Director. It follows that the Director cannot tell the Commission what kind of evidence should be adduced at those hearings.

The crucial point in this case, however, is not the characterization of the inquiry that was being held when the Commission refused to issue the subpoenas; it is the characterization of the power of the Commission to summon witnesses. Was the Trial Division right in holding that the issuance of a subpoena by the Commission is a purely administrative act "analogous to the issuance of a subpoena by the Courts of the land"? In my opinion, it was not.

The power to summon witnesses belongs to the Commission by virtue of section 21 which confers on the Commission and its members all the powers of a commissioner appointed under Part I of the Inquiries Act. I do not know any authority supporting the proposition that the power to summon witnesses is purely ministerial and does not involve the exercise of a discretion. If that proposition were true, the Commission would have to accede to any request to summon witnesses, however abusive it might be. This, of course, is unacceptable. The Commission has a duty not to use its power in an unfair or oppressive manner. It is true that under the Rules of most Courts, the issuance of subpoenas is a purely administrative act. However, this is so because, under those Rules, subpoenas are to be issued on demand by officers of the Court. It is the Rules of the Courts which make the issuance of subpoenas a purely administrative function. Here, no such rules have been adopted by the Commission.

Counsel for the respondent argued that, in refusing to issue subpoenas, the Commission prevented the Director from adducing evidence which he had the right to adduce. This argument presupposes, however, that the Director has the right to determine the evidence that will be heard by the Commission during its hearings. I have already indicated that, in my view, the Director has no such right.

I would, for these reasons, allow the appeal, set aside the order of the Trial Division and, pronouncing the judgment that the Trial Division should have pronounced, I would dismiss the respondent's application. I would make no order as to costs.

J.F.C.C.

"I agree.

John J. Urie J."

"I agree.

William F. Ryan J."

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