IN THE COURTS

FEDERAL COURT FINDS COMBINES ACT POWER OF SEARCH VIOLATES CHARTER OF RIGHTS

The Federal Court, Trial Division, rule on July 6 that the powers of entry and search under s.10 of the Combines Investigation Act are contrary to the Canadian Charter of Rights and Freedoms (Thomson Newspapers Limited et al v. Director of Investigation and Research et al).

Last January the Court of Appeal of Alberta also found s. 10 to be unconstitutional (Southam Inc. v Director of Investigation and Research, et. al (1983) 3 WWR 395), and that decision is under appeal to the Supreme Court of Canada. However, strictly speaking, the Alberta decision applies only in Alberta while the more recent decision of the Federal Court applies throughout Canada. As a consequence, the Bureau of Competition Policy will not conduct any more searches under s. 10 at least until the Supreme Court of Canada renders its decision in the Southam case. Instead, where a search is considered necessary, application will be made to a justice for a search warrant under s. 443 of the Criminal Code where criminal offences such as price fixing under Part V of the Act are suspected. There will, however, be no further searches in connection with investigations into reviewable practices under Part IV.1 of the Act; the same would apply in connectioin with general or research inquiries under s. 47 of the Act, but the search power has never been used in connection with such investigations as far as is known.

The Federal Court decision respecting s. 10 was rendered by Mr. Justice Collier. On the day prior to the decision combines officers had commenced searches at the offices of a number of Thomson-owned newspapers as part of an investigation into suspected predatory pricing under s. 34 of the Act. Counsel for Thomson applied to the Federal Court for an order to quash the search orders on the ground that s. 10 of the Combines Investigation Act is contrary to s. 8 of the Charter of Rights. S. 8 provides that "Everyone has the right to be secure against unreasonable search or seizure".

The relevant parts of S. 10 of the Combines Investigation Act are:

> "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.

...

> (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."

Collier, J. granted the relief sought, stating that he endorsed the view of the Court of Appeal of Alberta that ss. 10(1) and (3) of the Combines Investigation Act are inconsistent with s. 8 of the Charter.

A ruling with respect to s. 10 by Madam Justice Van Camp of the Supreme Court of Ontario on May 4 (R.v. Metropolitan Toronto Pharmacists Association) is also of interest, having been made after the decision of the Alberta Court of Appeal in the Southam case and before that of the Federal Court in the Thomson case. The Metropolitan Toronto Pharmacists' Association was on trial for alleged conspiracy offences under s. 32(1)(c) of the Act. Counsel for the accused, relying upon Southam, objected to the admission as evidence of documents which had been seized under s. 10 prior to the enactment of the Charter on the ground that it offended s. 24 of the Charter. S. 24 provides:

> "24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
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> (2) Where, in processings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

Van Camp, J., after pointing out that the onus of proof is upon the applicant under s. 24, ruled against the accused because the documents had been seized prior to the enactment of the Charter and because pre-existing rights against certain types of search and seizure had been extended by the word "unreasonable" in s. 8 of the Charter. However, in case she had erred in her decision, she decided she should consider the application of the decision of the Alberta Court of Appeal in the Southam case which in effect is that any search made under s. 10 is of no force and effect and is an unreasonable search under s. 8 of the Charter regardless of how the search was conducted or of the authorization. In this respect that Court had found that s. 10 of the Combines Investigation Act does not set out the minimal requirements for search and seizure at common law and under the Criminal Code. Moreover, it held that the defect is not offset by the requirement in ss. 10(3) that a member of the Commission certify a search authorization by the Director because there is insufficient separation of the functions of the two offices. Madam Justice Van Camp after saying that she had reservations concerning that decision stated:

> "With the deference that should be accorded, it is my opinion that the decision therein did not look to see if s. 10 could be applied consistently with the Charter, if there could be an interpretation that would not offend the Charter. Section 10(3) does not set out what is to be put before the Director (sic) on an ex parte application, but neither does s. 10(5) which provides for an ex parte application to a judge when a director or his authorized representative has been refused admission to the premises or to anything thereon. Section 10(3) can be interpreted to require that a member of the commission, before signing the certificate, has made an independent decision and has looked to see what is the evidence or reason for the belief of the director that there may be evidence on the premises relevant to the matters being inquired into. Section 10 does not prevent the hearing before the commission being an impartial one even though one member of the commission has signed the authorization for search. It has been recognized that searches may be reasonable even when not all the legal requirements have been met. The Charter itself, in s. 8, makes no requirements. When s. 10 can be read together with s. 8 of the Charter, it would seem to me that such an interpretation should be made and the section should not fall because it does not state explicitly the minimal requirements for a search, especially so when s. 8 itself sets out no requirements and, in effect, contemplates that there will be weighed, in deciding the reasonableness of the search, the nature of the invasion of privacy of the individual, weighed with the need to enforce the law."

Her Ladyship then turned to one other aspect involving s. 8 of the Charter and the Pharmacists' Association. She pointed out that, even if s. 8 had been infringed by the search and seizure, it would still have to be established that having regard to all the circumstances the admission of the documents would bring the administration of justice into disrepute. She decided in the negative, stating:

> "Here, an officer, in 1979, acting under the authority given by the section of the Act then in effect, called at the home of what was thought to be the secretary of the accused Association, was given entry after showing his search authorization, was permitted to inspect the documents and to take them, found on the premises what purported to be the minute books and lists of membership and termination notices given by people purporting to be members of the Association, made the search only in the one room of the home which was, in effect, an office. It would seem to me that that would be a search which failed to meet the test of what the ordinary member of the community, presented with all the circumstances, would find shocking or disturbing."

FEDERAL COURT CONFIRMS VALIDITY OF COMBINES ACT POWER TO CALL FOR PERSONS AND PAPERS

Associate Chief Justice Jerome of the Federal Court, Trial Division, in a judgment on August 9, found that s. 17 of the Combines Investigation Act does not offend the Canadian Charter of Rights and Freedoms (John A. Ziegler et al v. Lawson A.W. Hunter, Director of Investigation and Research et al).

The decision arose out of an investigation by the Director of Investigation and Research into a suspected monopoly offence by the National Hockey League in its refusal to permit the transfer of the St. Louis Blues hockey franchise to Saskatoon. He had obtained orders by a Member of the Restrictive Trade Practices Commission under s. 17 for hockey officials to appear for oral examination and to produce certain papers. Counsel for the NHL applied to the Federal Court to quash the orders on the grounds that s. 17 is contrary to sections 2, 7 and 8 of the Charter and to s. 2(d) of the Canadian Bill of Rights.

The relevant parts of s. 17 of the Combines Investigation Act are:

> "17.(1) On an ex parte application of the Director, or on his own motion, a member of the Commission may order that any person resident or present in Canada be examined upon oath before, or make production of books, papers, records or other documents to such member or before or to any other person named for the purpose by the order of such member and may make such orders as seem to him to be proper for securing the attendance of such witness and his examination, and the production by him of books, papers, records or other documents and may otherwise exercise, for the enforcement of such orders or punishment for disobedience thereof, all powers that are exercised by any superior court in Canada for the enforcement of subpoenas to witnesses or punishment of disobedience thereof.
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> (2) Any person summoned under subsection (1) is competent and may be compelled to give evidence as a witness.
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> (3) A member of the Commission shall not exercise power to penalize any person pusuant to this Act, whether for contempt or otherwise, unless, on the application of the member, a judge of the Federal Court of Canada or of a superior or county court has certified, as such judge may, that the power may be exercised in the matter disclosed in the application, and the member has given to such person twenty-four hours notice of the hearing of the application or such shorter notice as the judge deems reasonable."

S. 2 of the Charter includes the fundamental freedoms of conscience, religion, thought, peaceful assembly and association. S. 7 specifies the right to life, liberty and security of persons and "the right not to be deprived thereof except in accordance with the principles of natural justice". S. 8 provides that "Every one has the right to be secure against unreasonable search or seizure." The relevant parts of s.2 of the Canadian Bill of Rights provide that unless it is expressly declared by an Act of Parliament that it shall operate nowithstanding The Bill of Rights, "no law of Canada shall be construed or applied so as to ...

> "(d) authorize a Court, tribunal, Commission, Board or other authority to compel a person to give evidence if he is denied counsel, protection against self-incrimination or other constitutional safeguard."

Jerome, A.C.J. dealt first with the question whether s. 17 of the Combines Investigation Act is, in his words, "contrary to the guarantee of privacy and freedom from search and seizure" as articulated in the Charter. After expressing full agreement with the two recent decisions striking down s. 10, he stated:

> "... but the issue before me is not search and seizure but the authority to bring persons or documents before the Commission by way of subpoena. There is no uninvited entry upon the premises of any citizen and there is no forcible seizure of property. We are dealing with a summons which cannot be obtained until the Respondents have first fulfilled the requirements necessary for the commencement of an investigation. In addition, a further formality must be observed in that the Director of Investigation and Research must apply to a member of the Restrictive Trade Practices Commission for the subpoena in question. it is true that these applications need only be made by one arm of the Respondents' operation, as it were, to the other but nevertheless the application must be made in writing and in a form satisfactory to the issuing Commissioner. I think it is an apt comparison that for the purposes of any civil or criminal proceeding in any court in the country, a citizen can be called forward to fulfill his obligation to testify under oath by a subpoena or summons which can be obtained in a most perfuncory manner. Finally as I read section 17(3) the Respondents are unable to impose any sanctions upon the failure to comply unless they first come to this Court, upon notice to the Applicants for that very purpose. Adding to this the Applicants' right, upon receipt of the subpoena, to secure the advice of counsel as to compliance, attendance, testimony and production of documents, the comparison with unwarranted search and seizure simply breaks down. I cannot accept the submission that the authority conferred by section 17 is subject to those safeguards of privacy and freedom from search and seizure as enshrined in the Charter and as so eloquently set out in the Southam judgement."

His Lordship then turned to the question whether s. 17 offends the protection against self incrimination in s. 2(d) of the bill of Rights. He found that it does not because of the compellability of witnesses who are not accused persons to testify and the protection afforded by s. 5 of the Canada Evidence Act the applicability of which in effect is specifically confirmed by s. 20 of the Combines Investigation Act. S. 5 of the Canada Evidence Act provides:

> "5.(1) No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.
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> (2) Where with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial Act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence."

Jerome, A.C.J. then stated:

> "It is quite significant that the protection does not take priority over the duty of witnesses to testify as is the case with the accused person. On the contrary the duty to testify is re-affirmed but, under appropriate protection. It is of equal significance that neither in the case of the accused or the witness has the principle ever gone beyond oral testimony so as to embrace documentary evidence.
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> ...
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> "Section 2(d) has not only embodied the principle in the Bill of Rights but has added the directive to the Courts to render inoperative any legislation which may be construed or applied in such a way as to deny to protection against self-incrimination. In this case I must determine whether these applicants in being summoned to this kind of preliminary proceeding are being denied that protection and the answer is that they are not."

And he dismissed the N.H.L. application with costs.

COMBINES ACT EVIDENTIARY PROVISION OVERCOMES CONSTITUTIONAL CHALLENGE

Madam Justice Van Camp of the Supreme Court of Ontario ruled on May 4 that s. 45(2) of the Combines Investigation Act does not offend s. 11(d) of the Canadian Charter of Rights and Freedoms. (R.v. Metropolitan Toronto Pharmacists' Association).

S.45(2) provides:

"(2) In any proceedings before the Commission or in any prosecution or proceedings before a court under or pursuant to this Act,

(a) anything done, said or agreed upon by an agent of a participant shall prima facie be deemed to have been done, said or agreed upon, as the case may be, with the authority of that participant;

(b) a document written or received by an agent of a participant shall prima facie be deemed to have been written or received, as the case may be, with the authority of that participant; and

(c) a document proved to have been in the possession of participant or on premises used or occupied by a participant or in the possession of an agent of 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,

(iii) that the document, where it appears to have been written by any participant or by an agent of a participant, was so written and, where it appears to have been written by an agent of a participant, that it was written with the authority of that participant."

S. 11(d) of the charter provides:

"11. Any person charged with an offence has the right...

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;"

The ruling was made during a trial of alleged conspiracy offences under s. 32(1)(c) of the Combines Investigation Act (see article above on another ruling made at the same time in connection with s. 10 of the Act).

Her Ladyship quickly accepted the position of the Crown that ss. 2(a), (b) and (c)(i) are consistent with the Charter, being "little more than statements of the common law as it applied to individuals". Counsel for the accused dealt mainly with ss. 2(c)(ii), arguing that the words "prima facie proof" shifts the onus of proof from the Crown to the accused and removes the presumption of innocence. Her Ladyship expressed "no doubt but that the section did change the common law", and she cited strong statements from other decisions about the extent to which the section had changed the law of evidence. After reviewing the jurisprudence she concluded however, that:

> "...in summary, because this is not a reverse onus section, because it does not cast upon the accused the burden of proving any element of the offence, because s. 45(2)(c)(ii) may be read in such a way that it does not give evidentiary effect to acts and statements described within the document which are hearsay and not within the personal knowledge of the agent or participant recording those facts, because it may be interpreted so that the weight of the evidence is for the court, because it states only that statements in a document which are recorded therein may be received as prima facie proof of what is so recorded, in my opinion, the presumption of innocence is not displaced by s. 45(2)(c)(ii) which, in consequence, is not invalid by reason of the Charter."