

**FIVE OF EIGHT CHARGES AGAINST
NEWSPAPER CHAINS DISMISSED
ON MOTION OF NON-SUIT**

Note: The Thomson and Southam newspaper chains were acquitted of all remaining Combines Act charges in a judgment handed down on December 9. The reasons for judgment will be described in the March, 1984 issue of Canadian Competition Policy Record.

Mr. Justice Anderson of the Ontario Supreme Court, in oral reasons given on October 28 on a motion of non-suit by the defence dismissed five of the eight charges under the Combines Investigation Act at the trial of the Thomson and Southam newspaper chains. The Crown is appealing. The trial on the remaining three charges continued and was completed on Nov. 16.

A series of events led to the charges. In 1979 F.P. Publications Ltd. closed down its Montreal Star which had suffered heavy losses, and the publishing assets of the Star were subsequently acquired by Southam's Montreal Gazette. On January 31, 1980, Thomson acquired F.P. A number of other events occurred on August 27, 1980. Thomson closed the Ottawa Journal, leaving only Southam's Ottawa Citizen. Southam closed the Winnipeg Tribune, leaving only Thomson's Winnipeg Free Press; also, some of the Tribune's assets were acquired by Thomson. Thomson sold its half interest in Pacific Press to Southam, thereby bringing Southam full ownership of the Vancouver Sun and the Vancouver Province; prior to the sale the two papers had operated in competition with one another, Thomson's F.P. appointing the publisher of the Sun and Southam appointing the publisher of the Province.

The eight charges and their status after Mr. Justice Anderson's decision on the non-suit motion were:

- A general conspiracy charge relating to Montreal, Ottawa, Winnipeg and Vancouver, later amended at the Crown's request to exclude Montreal. That charge remained.
- Three charges (merger, monopoly and conspiracy) relating to Montreal. They were all dismissed.
- Three similar charges relating to Winnipeg. The monopoly charge was dismissed and the other two stood.
- A merger charge relating to Vancouver. It was dismissed.

Anderson, J. compared a non-suit motion with a motion for a directed verdict in a jury trial. He cited a United States authority to the effect that a decision on a non-suit motion "has to be determined according to whether or not there is any evidence upon which a reasonable jury, properly instructed, could return a verdict of guilty".

The basis of the Montreal conspiracy charge was an agreement whereby Southam's Gazette eventually acquired the publishing assets of the Star. However, Anderson, J. found that the decision to close the Star had been made before the agreement with Southam, and that F.P. had entered the agreement "to salvage as much as possible from the wreckage" in the interest of its shareholders. His Lordship dismissed the Montreal merger charge for much the same reason, stating:

"In my view, the agreement must be considered apart from the closure and so considered what Southam had, by agreement, was a contingent right to acquire certain assets which it did acquire subsequently, but it was not control of or interest in a business. The assets were assets of a business which was defunct, for all practical intents and purposes, when the agreement came about."

In dismissing the Montreal monopoly charge, he said:

"The submission is made on behalf of the Crown that, in considering whether the person having the monopoly has operated his business or is likely to operate it to the detriment or against the interests of the public, the Court can and should consider the situation which prevailed in the market before the monopoly came about. I am asked specifically to compare a situation in Montreal when there were two English language newspapers and the situation which now exists when there is only one. The situation said to comprise the Montreal monopoly is that there is only the Gazette, where previously there was the Gazette and the Star. I am not persuaded that one can usefully compare a situation in which there was no monopoly to one in which there is, with a view to deciding whether the monopoly is or is likely to be operated to the public detriment, nor am I persuaded that there is anything in Irving which leads one to that conclusion.

"It is the operation of the monopoly which must be examined and comparisons of a situation in which there was no monopoly are not helpful and could not be considered evidence that the monopoly is or is likely to be operated to the public detriment.

"The framing of the offence of monopoly in the Act tacitly acknowledges there may be monopoly without detriment. Proof of detriment must, therefore, go beyond the consequences which flow purely and simply from the fact of monopoly, to some abuse in its operation. The Crown did not submit that Southam had abused or was abusing the monopoly; in other words, there was no evidence of present detriment.

"It was suggested that there was a likelihood, once this case was over, and its repercussions had, to some extent died away, that that situation might change, was likely to change, and that abuse of monopoly would result. Having regard for the definition of 'likely'

which is the word used in the Act, and an alternative being 'probable', I am not prepared to accept that submission. I think it equally likely that having gone this way once, Southam may very well be persuaded that it does not wish to come this way a second time. So that there is, at best, a balancing of possibilities and, in my view, no likelihood or probability at all."

He dismissed the Winnipeg monopoly charge for the same reasons while noting that, unlike in Montreal, there was evidence that its formation had been a result of an agreement.

Finally, in dismissing the Vancouver merger charge, Mr. Justice Anderson noted that, unlike in Winnipeg, the merger had not led to the closing of either of the two dailies. Nevertheless, with Southam now in control of both dailies as a result of the merger, His Lordship could not say there was no evidence that a lessening of competition was likely. However, he could find no evidence that "a lessening of competition, not now evident, but likely in the future would be to the detriment or against the interest of the public." After citing Regina v. K.C. Irving Limited, 15 N.B.R. (2d) at page 467, he said:

"In other words, the evidence of detriment must be found in addition to the finding of a lessening, apart from the evidence which exists. Indeed it might be said, as a matter of law, that evidence of a likely lessening of competition in the future, unless coupled with evidence as to the specific manner in which the lessening will be to the detriment or against the interest of the public, is not properly admissible in proof of an offence of merger."

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

The Federal Court of Appeal, in a judgment handed down on November 29, dismissed an appeal by the National Hockey League against a decision of the Federal Court on August 9 that s. 17 of the Combines Investigation Act does not offend the Canadian Charter of Rights and Freedoms or the Canadian Bill of Rights. (John A. Ziegler et al v. Lawson A.W. Hunter, Director of Investigation and Research et al). The judgment of the Trial Court is described in the September issue of Canadian Competition Policy Record. The decision of the Appeal Court was unanimous, although each of the three justices on the panel wrote separate reasons.

S. 17 empowers a member of the Restrictive Trade Practices Commission, on an ex parte application of the Director, to order that any person in Canada be examined under oath or make production of documents. The case arose from an investigation by the Director of Investigation and Research into a suspected monopoly offence by the NHL in its refusal to permit the transfer of the St. Louis Blues hockey franchise to Saskatoon. The Director had obtained orders by a Member of the RTPC for hockey officials to appear for oral examination and to produce certain documents.