IN THE COURTS

NEWSPAPER CHAINS ACQUITTED

Mr. Justice Anderson of the Supreme Court of Ontario, in reasons delivered orally on December 9, acquitted the Thomson and Southam newspaper chains of the remaining three counts under the Combines Investigation Act. As reported in the December issue of Canadian Competition Policy Record, the other five charges were dismissed on a motion of non-suit on October 28. The Crown has decided not to appeal and it has withdrawn its notice of appeal on counts which were dismissed on the non-suit motion in October. Also the Crown has dropped a charge against Mr. William J. Carradine, Vice President Administration of Southam, that he impeded a federal investigation by destroying a document. In his reasons of December 9, Mr. Justice Anderson observed that there was one other perfectly logical explanation for tearing up the document in that Mr. Carradine may have considered the document was sufficiently confidential that he did not want its contents known even to members of his staff.

The trial concerned Counts 1, 3 and 5. Count 1 charged a general conspiracy relating to events in Vancouver, Winnipeg, Ottawa and Montreal although, as amended by the Crown, events in Montreal were not directly involved. Count 3 charged conspiracy in Winnipeg and Count 5 charged a merger offence in Winnipeg.

The principal events leading to the prosecution began with the closure of the Montreal Star by F.P. Publications in September, 1979 following heavy losses. Subsequently, Southam's Montreal Gazette acquired and eventually exercised an option to purchase the Star's presses, and F.P. obtained an option to acquire one-third of the shares of the Gazette which was profitable. In January, 1980, Thomason acquired F.P. In July, 1980, Thomson exercised the F.P. option to acquire a one-third interest in the Gazette. The following events occurred on August 26 and 27, 1980. On August 26 Thomson closed the Ottawa Journal, leaving only Southam's Ottawa Citizen. On August 27 Southam closed the Winnipeg Tribune, leaving only Thomson's Winnipeg Free Press, and the Tribune's physical assets and name were acquired by Thomson. Thomson sold its half interest in Pacific Press to Southam, thereby bringing the latter full ownership of the Vancouver Sun and the Vancouver Province; prior to the sale the two newspapers occupied the same premises, Thomson's F.P. appointing the publisher of the Sun and Southam appointing the publisher of the Province. Lastly, Thomson sold back F.P.'s one-third interest in the Montreal Gazette to Southam.

In dealing with counts 1 and 3, counsel for the Crown contended that a conspiracy within the meaning of the Act could be inferred from the foregoing events and from other evidence including records of meetings between Mr. Gordon Fisher, President of Southam and Mr. John Tory, Deputy Chairman

of Thomson in the period March to July inclusive, 1980. He dealt at some length with a defence position that the closings of August had been decided upon independently by the two chains because of losses being suffered stating in part:

> "The fact that Mr. Fisher, in his own mind, said to himself and to the Board, 'I have no difficulty in deciding to recommend to you to close the Tribune no matter what happens anywhere about anything' is not, in my submission, conclusive of what the controlling and directing mind of the company did ...
>
> "When I acknowledge that in the minds of Mr. Fisher and his Executive Committee in deciding to close the Tribune the same can be said on the Thomson side, was obviously an aversion to losing money. That does not deal with the whole question. The question is whether or not, recognizing that aversion, they decided that (sic) they would do is close it at a point in time that would otherwise be attractive in terms of the negotiation for rationalization in other markets that was then present. The question is whether or not the agreement that they struck with Thomson was a factor that induced the closing of the paper. It does not have to be the only factor. In other words the consideration that passed between the parties was a factor influencing the directing mind of Thomson and Southam in the circumstances."

Counsel for the Crown also contended that, at the very least, the time at which the Tribune closed, if not the fact of its closing, was determined by arrangement. He argued that but for that arrangement the Tribune would have continued in existence for some undetermined period, and for that period at any rate competition was prevented or lessened unduly.

The Crown's case that there had been a conspiracy relied on discussions and disclosures which occurred at meetings between Mr. Fisher and Mr. Tory. Mr. Justice Anderson described some of the salient points in the Crown's summary of Mr. Tory's evidence as follows:

> "By the end of June, 1980 it had been made clear to Fisher that Thomson would sell Southam the one-third interest in Montreal. Also Southam would purchase 50% interest in Pacific Press. Tory advised Fisher that he had no success in selling the Journal, which he had told Mr. Fisher in May was to be either sold or closed. Mr. Tory hoped that Southam might be the buyer of last resort for the Journal. By July 2, Fisher indicated that he was considering closing the Tribune and that if that action was taken the Free Press might need additional press capacity. On July 28, Fisher advised Tory that he was going to recommend to the Executive Committee of Southam that the Tribune be closed. Tory confirmed the need for additional capacity at the Free Press if this action was taken. Tory again

suggested that Southam should acquire the Journal and received a pretty definite 'no'. At the August 5 meeting between Mr. Tory and Mr. Fisher, Mr. Tory was advised that the Executive Committee had decided to close the Tribune. Mr. Tory understood that the financial success of a surviving paper was favourably affected by the closing of a competitor.

"The Crown contends that these discussions and disclosures constituted mutual inducements communicated by one company to the other to close the Journal and Tribune respectively."

Messrs. Fisher and Tory were among those who gave evidence for the defence. They denied any conspiracy, citing particular problems in each of the four cities which had to be resolved. Thomson and Southam were uncongenial business partners and their joint ownership of Pacific Press was unsatisfactory. Thomson's Ottawa Journal and Southam's Winnipeg Tribune were both losing money and the respective owners of those papers had reached independent decisions that they must be closed. F.P.'s decision to close the Montreal Star was reached before the arrangements with Southam in that city were discussed.

The various transactions of August 26 and 27 are all covered by a single document signed by Messrs. Fisher and Tory. They however, took the position that the decisions to close the Winnipeg Tribune and the Ottawa Journal had been made independently by Southam and Thomson respectively, and that making all the arrangements at once was for reasons of expediency and did not reflect a conspiracy as the Crown had contended. Mr. Fisher stated in evidence:

"There was a perception that - I think a perception that we came to and I believe Mr. Tory came to when we were looking at the circumstances in four markets, separate circumstances in four markets, that there was certainly a period in my office with my executives of looking at that situation and asking ourselves whether the arguments in favour of all those things happending on the same day were stronger than the arguments against them all happening on the same day. We came to the conclusion that the arguments in favour of them all happening on the same day were the stronger of the two sets of arguments and there was a determination that if we were going to have a mess, let's have one mess and deal with it at once and not have the industry and our employees across the country thinking that those things unfolded separately, that they would never know when the end would come, when was the last shoe going to drop, and it was their job that was going to be at stake next.

"Q. ... What I have been asking you is why it was that the transactions that came out of your dealing with Tory was a three-part transaction, no part to go without the other. Why wasn't the

transaction structured so that, as I think you said in your evidence, there were three independent, completely separate deals standing alone...?

"A. ... there was simply a belief on our part that it would be easier for the public to understand, for our investors to understand, for our employees to understand, for the Combines authority to understand, for the labour departments of provincial governments to understand to the extent that they had to, for the Securities Commission to understand, for the stock exchange to understand, if we put the whole thing out on the table at one time. Both companies were public companies. Both companies had a responsibility to advise their shareholders, the exchanges, the Securities Commission, of transactions that were material and we had a perception that it was better to do it once and not to do it twice or three times or four times."

The outcome of the trial depended to a considerable extent upon the weight to be attached to the evidence of the executives of the accused companies, which Mr. Justice Anderson found to be credible. Dealing with Count 1, he stated:

"The first and most obvious, and perhaps also most formidable obstacle for the prosecution, as I view the case, is that it can succeed only if the evidence of Messrs. Fisher, Donegan and Tory is either disbelieved or disregarded. Obviously the latter is impossible and on the record before me the former would be improper. Indeed Crown counsel very fairly conceded in the course of argument that he did not impugn the truthfulness of the evidence given by any of these witnesses. Since, upon their evidence, the conspiracy which the Crown alleges is denied, and an alternative and unobjectionable explanation of the impugned events is given, I find it difficult to see how the case for the Crown goes any further. However, I propose to explore the issues in more detail."

In considering the four elements of the alleged conspiracy, His Lordship stated:

"... it seems to me that little turns on the situation in Vancouver and Montreal. In the meeting between Tory and Fisher, it would appear that there was substantial agreement early on that Southam should acquire Thomson's interests and there does not appear to have been any significant difficulty in arriving at a price.

"Viewing the individual elements, the critical ones appear to me to be the closing of the Journal and the closing of the Tribune. In respect to these events, the impetus, in my view, came from Thomson's decision to sell or close the Journal. I find it entirely

reasonable and accept, Fisher's explanation for why, it having been decided that the Tribune was to be closed, its closing must be as nearly as possible coincidental with that of the Journal."

He also stated:

"Two elements principally have given me difficulty. First is the coincidence of timing and the second is the knowledge which must be imputed to Tory and Fisher in negotiating the transactions and carrying them to a conclusion.

.....

"Mr. Fisher said there was a 'deal' and with that I agree. The deal was that the solution to the four problems should be as nearly as possible simultaneous. While much evidence on that score could be referred to, it is probably sufficient to refer to Exhibits 222 and 227, the timetable and the closing documents. The confluence of events there referred to could only have come about by arrangement. But it was a an arrangement very different in its nature and consequences than the conspiracy alleged in the indictment and enlarged in the particulars. I find the reasons advanced for closing these transactions at one and the same time to be logical and persuasive. I am not persuaded that it constitutes an offence under section 32(1)(c) of the Act. With one possible limited exception, I cannot see how an arrangement, that the four events in question should occur at the time at which they did occur, can be held to be an agreement to prevent or lessen competition. The one limited exception has to do with the closing of the Winnipeg Tribune. It is difficult to avoid the conclusion that the date of its demise was hastened to some undetermined extent by the reflections of Fisher on the prospective closing of the Journal, and his consequent conclusion that the closing of the Tribune must occur before the Journal closed, or as nearly as possible at the same time.

"On one view of the matter, one can say that the date of closing, although influenced by what Tory had said, was simply a part of the decision of Southam to close the paper, and that it was not in any way determined by any arrangement with Thomson. On the other hand, one can say that the events of August 26 and August 27 occurred on those dates (rather than some others) as a result of some arrangement between Thomson and Southam. I incline to the conclusion that, properly interpreting what occurred, the date of closing was simply an incident of the decision to close the paper."

Turning to Southam's purchase of Thomson's half-interest in Pacific Press, His Lordship found that, while it was an agreement and one which "would change the nature of the competition between the Sun and the Province", he was not satisfied that it was one which would prevent or lessen competition. He pointed to evidence that arrangements for operating the two papers in

competition with one another, which dated back to 1957, were still in effect. He also referred as follows to the evidence of an expert witness who had been called on behalf of Thomson and who described the situation as it existed in 1982:

> "He obviously considered the quality of competition between the two newspapers under the same ownership to be different from where the two newspapers are separately and independently owned and controlled. At the same time, he indicated that the situation in Vancouver was somewhat different from what is normally found where two papers are under the same ownership in that the two editorial departments were separately operated, national advertising was sold in common but local display advertising was sold entirely separately without benefit of a joint rate or a joint sales staff, and classified advertising was sold in competition with competitive prices, although the two papers shared a single phone room and, to a certain extent, single staff. Circulation was also sold independently and competitively."

Anderson, J. then dealt with a position of the Crown that the knowledge which must be imputed to Fisher and Tory supported an inference of conspiracy. He said:

> "They must be taken to have known and understood the full nature and extent of their respective problems and the way in which those problems were related. The evidence discloses that they appreciated, as they must inevitably have done, that the solution of these problems would confer substantial financial benefits on the corporations for whose affairs they were responsible. They must have realized that the events concerned were politically and legally sensitive. They must be taken to have been advised and fully aware of the possible implications in the circumstances of the Combines Investigation Act. These elements of knowledge are fundamental to the Crown's case. I have earlier cited some portions of the argument of Crown counsel in that regard and I wish to refer again to one portion in which, in my view, the fundamental weakness of the Crown's case is reflected. It is that portion of the argument which is in the following terms:
>
> > 'Look at the reality of the situation, four markets being discussed in terms of rationalization, meaning the absence of head-to-head broadsheet competition, carried all the way forward until the discussion (sic) is finally reached, all four things together. Bang, it is done. People conscious of the law, recognizing that they have to find a way to do it within the framework of the law, their communication was so frequent, their contact was so intimate, the exchange of information so confidential that they failed and what they thought, in their

> mind, was an independent arrangement was, in fact, conspiracy.'
>
> "Try as I may, those do not sound to me like the constituent elements of a criminal offence.
>
> "The Crown's argument seems to me to put corporations faced with the problems which faced Thomson and Southam in some such dilemma as this. If they are fully aware of the nature of the problems, and the problems are to some extent reciprocal and related, so that certain solutions would involve the commission of an offence, they are incapable or arranging and carrying out solutions which do not involve an offence. I would be slow to conclude that the law creates any such dilemma."

His Lordship concluded, with respect both to Counts 1 and 3, that the Crown had failed to prove the alleged conspiracy, which made it unnecessary for him to consider whether any prevention or lessening of competition had been undue.

Count 5 alleged a merger offence through an agreement

> "...whereby Southam would cease publication of the Winnipeg Tribune and Thomson would acquire with the acquiescence and concurrance of Southam control over an interest in the whole or part of the business of the Winnipeg Tribune..."

His Lordship found that the agreement did not constitute the acquisition of "any control over or interest in the whole or part of the business of a competitor" as required by the definition of an illegal merger in the Act. The agreement provided for the acquisition by Thomson of the fixed assets and name of the Tribune following its cessation of publication, and His Lordship accepted the position of the defence that the business of the Tribune had not been acquired. He tied this conclusion to his earlier finding that the closing of the Tribune had been an independent decision by Southam rather than part of an agreement with thomson. He stated:

> "I have already concluded with respect to count number one that the decision was an independent decision. That being the case, it is my conclusion that the purchase by Thomson of the Tribune asets was a purchase of the assets of a defunct business and not a going concern. In my view it would be only the purchase of assets from a business which was a going concern which would constitute an acquisition within the meaning of that work as used in the definition of a merger.
>
> "it is true that the body was still warm, so to speak, when the conveyance of assets became effective. However, if the demise of

> the Tribune as a business was, as I have concluded, attributable to an independent decision of its owners and, as an incident of its demise, its owners decided to sell certain of its assets, I do not think the interval of time between the closing of the paper and the conveyance of the assets is material.
>
> "...if I were persuaded that the transactions of August 27 were a sham to cloak the conspracy which the Crown alleges, I would not hesitate to look through the form of the transaction which pertains to the Winnipeg assets, and hold that there had been an 'acquisition' within the meaning of the definition."

His Lordship relied on the same reasoning to find that the Crown had not proven a lessening of competition to the detriment of or against the interests of the public within the meaning of the merger definition. He concluded that the lessening of competition following closure of the Tribune had been a result of market forces and a decision by Southam.

SUPREME COURT OF CANADA UPHOLDS IMMUNITY OF CROWN URANIUM FIRMS FROM ALLEGED CARTEL PROSECUTION

The Supreme Court of Canada, in a majority decision on December 15, 1983 dismissed an appeal from a decision of the Ontario Court of Appeal (Regina v Uranium Canada Ltd. - Uranium Canada Limitée 39 O.R. (2d) 474) which held that Eldorado Nuclear Limited and Uranium Canada Limited are immune from prosecution under the Combines Investigation Act. The decision, while shielding the two Crown firms from prosecution for their parts in the alleged uranium cartel, nevertheless reduces considerably the immunity of Crown agents. Following the decision the government instituted a stay of proceedings against the private sector accused, namely Dennison Mines Ltd., Gulf Canada Minerals Ltd., Rio Algom Ltd. and Uranerz Canada Ltd. In a statement issued on December 20, Justice Minister Marc McGuigan said that since the Crown companies could not be prosecuted it would be unfair to prosecute the private companies.

The majority judgment was delivered by Mr. Justice Dickson with Chief Justice Laskin and Justices Ritchie, Beetz and Chouinard concurring. Madame Justice Wilson dissented in part with Mr. Justice McIntyre concurring she would have held Uranium Canada but not Eldorado to be immune from prosecution.

The two Crown companies were among those charged in 1981 under s. 32(1)(c) of the Act in connection with the former uranium cartel. They applied successfully to the Supreme Court of Ontario for writs of prohibition against a provincial court judge ordering him not to proceed with a preliminary

inquiry into the charge against them because they were agents of the Crown and the Act did not apply to them.

Dickson, J. dealt first with the question whether the Combines Investigation Act binds the Crown. He held that it does not, largely because the Act does not purport to do so and because of s. 16 of the Interpretation Act which provides:

> "no enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except only as therein mentioned or referred to"

He pointed out that, unlike the Crown, a Crown agent is personally responsible for an unlawful act and the question is whether the act is unlawful. Where the agent commits a tortious act is is unlawful under the common law and s. 16 is irrelevant. In such circumstances, "There is no immunity that the agent can claim". However, where the source of the unlawfulness is a statute, Mr. Justice Dickson analysed the situation as follows:

> "Where the only source of the unlawfulness is a statute, however, the analysis is entirely different. Reference to a statute is necessary for criminal responsibility in Canada, apart from contempt of court, because s. 8 of the Criminal Code precludes any conviction for an offence at common law. If a person commits an act prohibited by statute, and the Attorney General seeks to prosecute for violation of that statute, the preliminary question that must be asked is whether that person is bound by the statute. If not, the person simply does not commit a violation of the statute. The situation is not that the person is immune from prosecution even though there has been an unlawful act; rather, that there has been no unlawful act under the statute. I have already said that the Combines Investigation Act does not bind the Crown. If Uranium Canada and Eldorado share the Crown's immunity, they can have committed no offence under the Act.
>
> "Both the majority and the dissent in the 1959 CBC case, supra. ((1959) S.C.R. 188) accepted that propositon of law that s. 16 of the Interpretation Act extends to agents of the Crown. This Court's decision in Formea Chemicals Limited v. Polymer Corporation Limited, (1968) S.C.R. 754 also makes it clear that a reference to the Crown in a statute extends to Crown Agents. If this were not the interpretation given to s. 16, the section would have no meaning, since the Crown only acts through servants and agents. Crown agents benefit from Crown immunity because they are acting on behalf of the Crown. The critical question, then, is whether Uranium Canada and Eldorado were acting as agents."

Then, after noting that each of the two companies is by statute expressly made an agent of Her Majesty "for all its purposes", he described the extent of the immunity so created as follows:

> "The fact that these statutory provisions make each of the respondent corporations 'for all its purposes' an agent of the Crown does not mean, however, that these companies act as Crown agents in everything they do.
>
> "Statutory bodies such as Uranium Canada and Eldorado are created for limited purposes. When a Crown agent acts within the scope of the public purposes it is statutorily empowered to pursue, it is entitled to Crown immunity from the operation of statutes, because it is acting on behalf of the Crown. When the agent steps outside the ambit of Crown purposes, however, it acts personally, and not on behalf of the state, and cannot claim to be immune as an agent of the Crown. This follows from the fact that s. 16 of the Interpretation Act works for the benefit of the state, not for the benefit of the agent personally. Only the Crown, through its agents, and for its purposes, is immune from the Combines Investigation Act."

Moreover, Mr. Justice Dickson expressed disagreement with the statement in the reasons of the Ontario Court of Appeal that under the statutory provisions at issue "there are no limits on the status of the agency". He went on to say:

> "I think it is also important to draw a distinction between (i) acts committed in the course of fulfilling Crown purposes but in no way undertaken in order to effect Crown purposes; and (ii) those acts committed which are designed to effect Crown purposes. Whereas the latter situation does invoke Crown immunity, the former does not. I refer, by way of illustration to R. v. Stradiotto, (1975) 2 O.R. 375(C.A.). In that case a member of the militia was charged with careless driving...At the time, Stradiotto was driving a Department of National Defence vehicle while in his official militia duties. The Ontario Court of Appeal rejected the claim of Crown immunity on the basis that Stradiotto could have effected Crown purposes without violating the Highway Traffic Act. I agree with the result reached in Stradiotto, but not with the reasoning of the Ontario Court of Appeal. In my view, the reason Crown immunity could not be invoked was that the careless driving was wholly incidential to official militia purposes. The careless driving was in no manner in the furtherance of the Corwn purposes of the militia. In driving carelessly, Stradiotto stepped outside Crown purposes and no longer was acting as agent. Accordingly, he could not claim immunity."

Dickson, J. then considered the position of each of the two corporate respondents in turn. In the case of Uranium Canada he noted that its corporate powers in its letters patent issued under Part 1 of the Canada Corporations Act were to be exercised subject to the approval of the Governor in Council, that its board of directors consisted entirely of senior public servants, it had no place of business other than the offices of the Department of Energy, Mines and Resources, it had no employees and its total assets were $9.00 received in payment for directors' qualifying shares. The minister's activities in respect of uranium are subject to approval by the Governor in Council under the Atomic Energy Control Act. "In broad terms", he said, "Uranium Canada's corporate functions are to buy and sell uranium and related products with the approval of the Governor in Council, and to exercise such other powers with respect to the acquisition, production and utilization of uranium as the Minister may direct." And he concluded:

> "I have no doubt marketing arrangements relating to uranium come within the powers conferred by paragraph (c) of Uranium Canada's letters patent. They cannot be said to be incidental to the company's powers. Such powers, however, are to be exercised 'subject to the approval of the Governor in Council'. J. Holland J. concluded on the basis of the relevant legislation and the affidavits filed on the application that Uranium Canada is a Crown agent incorporated for a single purpose of carrying out the policy of the government of Canada relating to atomic energy, and that in so doing it operated under the directing mind of the Minister of Energy, Mines and Resources, and with the approval of the Governor in Council. Nothing in the records indicates otherwise. Whether Uranium Canada acted with or without government approval is important because the Atomic Energy Control Act provides that Uranium Canada is a Crown agent 'for all its purposes', not that it is a Crown agent in whatever it does. If Uranium Canada performed the acts complained of in the information with the approval of the Governor in Council, it acted within 'its purposes' and is entitled to immunity as a Crown agent. If, on the other hand, it acted without such approval, it acted outside 'its purposes', and beyond the scope of its agency, and cannot claim to be immune on the basis that it entered the alleged combine on behalf of the Crown."

Turning to Eldorado, His Lordship noted that, unlike Uranium Canada, its corporate objects do not restrict it to acting with the approval of the Minister or the Governor in Council. "Whatever the de facto relationship between Eldorado and the government may be", he said, "the Company's corporate objects clauses and the relevant statutes leave it free to operate without government direction." As a consequence, he concluded that the common law would not recognize Eldorado as a Crown agent since it does not meet the de jure control test, but was of the view that this did not deprive Eldorado of entitlement to Crown immunity when acting within its corporate purposes. After reviewing the jurisprudence he concluded it indicates that the

de jure test applies only in the absence of specific language indicating the body acts on behalf of or as an agent of the Crown. And, referring to Formea Chemicals Limited v. Polymer Corporation Limited (1968) S.C.R. 754, he stated:

> "The 'agent for all its purposes' designation was held to be determinative; there was no inquiry into the actual independence of Polymer. I think this case make it clear that when an enactment refers to the Crown, and a particular body is expressly made a Crown agent for all purposes, the enactment embraces the statutory agent. This applies to the construction of s. 16 of the Interpretation Act."

He added:

> "The major difference between Uranium Canada and Eldorado is that while the former is closely controlled by government, the latter, at least on paper, is not. Yet the statutory provisions making both corporations Crown agents for all their purposes are identical. I do not think it is admissible, without rewriting the statutes, to interpret these identical provisions differently. The status of Crown agents 'for all its purposes' gives each such agent the benefit of Crown immunity under s. 16 of the Interpretation Act. The draftsmen of the governing statutes of Uranium Canada and Eldorado may well have been thinking of immunity from taxing statutes rather than criminal statutes, but the result is that there is immunity from both as long as the corporations are acting within their respective authorized purposes."

Mr. Justice Dickson concluded that, absent any indication that the companies acted outside corporate objects for other than Crown purposes, they are immune from the Combines Investigation Act. He stated:

> "There is nothing in the statutory framework or in the letters patent of either Company to suggest that agreements or arrangements to lessen competition in the production, sale or supply or uranium are extraneous to the state purposes for which the two Companies were incorporated.
>
> "The Attorney General says, however, the prohibition orders in this case were premature because the question whether either company exceeded its authority is a factual matter to be determined only upon evidence the Attorney General will lead in proof of the charges at the preliminary inquiry, and at subsequent trial if either Company should be committed for trial.
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> "The Attorney General does not make any positive assertion that Uranium Canada acted without approval of the Governor in

Council. If the Attorney General had evidence to this effect, or other evidence tending to show that Uranium Canada or Eldorado acted for other than Crown purposes, he should have so indicated by way of affidavit at the application before J. Holland J. No such evidence was presented there, or alluded to here. This matter has now been before three courts. In my opinion there is no merit in the submission that the prohibition orders were premature. The Attorney General has had ample opportunity to demonstrate, or at least assert categorically, that in entering the allegedly unlawful agreements and combinations the two companies acted for other than Crown purposes. The Crown is immune from the Combines Investigation Act; the respondents are agents of the Crown. Prima facie, the conduct complained of is within the scope of Crown purposes for which the companies were incorporated, which, as found by J. Holland J. is to implement national policy relating to atomic energy in all its aspects. Absent some indication that the Companies acted outside corporate objects for other than Crown purposes, they are immune from the terms of the Combines Investigation Act as agents of the Crown, and the Provincial Court Judge lacked jurisdiction to inquire into the charges."

Madame Justice Wilson agreed that the Crown is immune from prosecution under the Combines Investigation Act by virtue of s. 16 of the Interpretation Act, but she differed from the majority in respect of the immunity of Crown agents. She stated:

"In my view the authorities governing the scope of immunity of Crown agents demonstrate that the courts must apply a two-step test in determining whether an agent of the Crown is entitled to assert the Crown's immunity. The first step is to decide whether the agent is authorized, expressly or impliedly, to perform the acts in question. In making this determination it is not enough to say that the purpose for which the acts are performed is an authorized purpose; the Court must also determine that the means which the agent uses to accomplish the purpose are expressly or impliedly authorized. If as a matter of statutory interpretation the means are authorized, the agent is entitled to immunity. If, however, there is no such authorization, the Court must move to the second step. The second step is to decide whether or not the agent is, for all intents and purposes, the alter ego of the Crown. If because of the degree of control - and by this is meant de jure as opposed to de facto control - which the Crown is able to exercise over the agent it is impossible for the Court to characterize the agent's act as anything other than the act of the Crown, the agent is entitled to assert Crown immunity whether or not its governing statute authorizes the means by which the agent carries out its statutory purposes. If, however, the Crown does not have that degree of control, the agent will not be entitled to assert the immunity if the means it used are outside the purview of the statute."

She disagreed with the distinction made by the majority between wrongs under the common law and those created by statute. Referring to the explanation of the maxim that "the King can do no wrong" in Tobin v. The Queen (1864) 33 L.J.C.P. 199, she stated:

> "...servants and agents of the Crown are under an obligation to obey the law which is enforceable in the courts even if the sovereign's personal obligation to do so is not enforceable in the same manner. To remove breaches of statute from the ambit of this principle would create an enormous range of executive action which would not be subject to independent judicial control."

She also stated:

> "...I would find that where there is no express authorization to perform the alleged acts, the court should presume that acts which violate the law are the unauthorized acts of the agent for which he will be personally liable. The onus should be on the agent to show that he could not carry out his mandate without the commission of such acts...
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> ....
>
> "By applying for an order of prohibition at this stage of the proceedings the respondents in this case have made it impossible for the courts to assess whether or not the acts alleged were necessary to enable the respondents to carry out their statutory mandate."

Following her two-step approach, Madame Justice Wilson held that, in the absence of a factual inquiry, neither of the respondents could assert Crown immunity under the first test of express or implied authorization. She agreed that Uranium Canada could meet the second test of being the alter ego of the Crown, stating:

> "Uranium Canada operates under the direction of the Minister of Energy Mines and Resources and exercises its powers 'subject to the approval of the Governor in Council'. The identify between Uranium Canada and the Crown is accordingly just about as close as it could be. If the Governor in Council approved the alleged illegal acts of Uranium Canada I agree that Uranium Canada should be entitled to the Crown's immunity."

In the case of Eldorado, however, she stated:

> "Eldorado, on the other hand, has a wide measure of latitude with respect to the way in which it exercises its corporate powers. Indeed, I can find nothing in the governing legislation or in its letters patent to require it to respond to government directives. It

> is trite law that a corporation is a separate entity from its shareholders and that is is to the corporation and not the shareholders that the directors' duties are owed. It seems to me, therefore, that Eldorado's capacity exceeds its authority as agent of the Crown and that it can have 'purposes' of its own. If this is so I do not believe that is agency status is conclusive of its right to immunity.

After reviewing the Letters Patent, Supplementary Letters Patent and the governing statutes including the Financial Administration Act, she expressed the view that it was quite unrealistic to treat Eldorado either in fact or law as the alter ego of the Crown in exercising all its powers.

In conclusion, Madame Justice Wilson made the following comment:

> "We might ask in this case whether Parliament ever contemplated that the respondents would go about the implementation of their statutory purposes by means of an illegal conspiracy with others, counting on the protection of their Crown immunity and leaving their co-conspirators to the full rigours of the law."

MOVERS PLEAD GUILTY TO PRICE FIXING COUNT: GET FINES AND TOUGH PROHIBITION ORDERS

The five principal household goods moving van lines and a trade association pleaded guilty on December 14 before Chief Justice Evans in the Supreme Court of Ontario to a conspiracy count under s. 32(1)(c) of the Combines Investigation Act. They were:

Allied Van Lines Limited
United Van Lines (Canada) Ltd.
North American Van Lines Canada Ltd.
Aero Mayflower Transit Co. Ltd.
Atlas Van Lines (Canada) Ltd.
Canadian Household Goods Carriers' Tariff Bureau Association

Each was fined $50,000.00 and subjected to a comprehensive Order of Prohibition which was imposed by the Court under paragraph 30(1)(a) of the Act.

The Statement of Facts filed by counsel for the Attorney General of Canada states:

> "Non competitive behaviour by the accused in the interprovincial household goods moving industry has been prevalent

over a period of almost two decades. This has been a result of joint rate making and product standardization, initially by four and later by all five of the accused van lines. Throughout the three phases of the conspiracy, the accused altered their institutions and their methods for obtaining uniformity in the prices being charged and the services being offered to the public. The vehicles for these practices have been the various Trade Associations including the accused, Tarrif Bureau of which the other accused were members. Accordingly, competition has, throughout the period set out in the indictment, been lessened unduly because the accused had almost absolute control of the supply side of the interprovincial household goods transportation market."

The detailed Prohibition order must be among the most stringent ever issued under the Act. It prohibits in detail any repetition of the offence, in effect dissolves the Association by prohibiting it from any operations or activities whatsoever after December 31, 1983 except what is necessary to wind up its operations, prohibits virtually all communications with competitors on competition-related subjects and prohibits disciplinary action against each line's own franchisees for rate cutting. Even the terms of what the lines may do are carefully circumscribed. They may, for example, do things expressly authorized or required by law, and the Order does not prohibit independent action such as the following:

"(a) a van line from stating a rate or rates to be used by its own carriers provided that such carrier may adopt rates different from those stated by its van line and that this is made known to its carriers;

(b) a van line from defining products to be offered by its carriers or defining minimum standards of quality or performance for any product, whether such product is defined or not, provided that any such carrier may offer different products and this is made known to its carriers;

(c) a van line for disciplining any of its carriers for using the van line's name(s), trade name(s) or trade mark(s) when offering a product different from that defined by its van line if such product is of a standard of quality or performance lower than that defined by the van line or in connection with the transportation of commodities other than household goods;

....

(f) a carrier from authorizing its van line to file or submit or cause to be filed or submitted any rate with any government body or regulatory agency in Canada on the carrier's behalf

> provided that no bureau, agent or service that is filing or submitting rates on behalf of another van line or carrier thereof is used to do so; ..."

In addition, there are detailed requirements applying to each van line with respect to materials to be provided to each of its directors, officers, department managers and carriers from time to time over the next five years, such as a copy of the Order, statement of compliance by the van line, obtaining signed statements from each of the above persons as to receipt of and understanding of such materials and submission of written statements of compliance to the Director of Investigation and Research from time to time.

The period covered by the indictment began in 1963 and, according to the Statement of Facts:

> "Initially, all the van lines except Atlas and after 1973, all the accused van lines adopted and amended rates, on behalf of their agents, for the movement of household goods based on a sophisticated pricing formula, resulting in tariffs so similar in form, content and effective date, as to be virtually identical. These tariffs were made up of numerous sections and rules applying to each of the various services provided by the van line agents. Accordingly, the rates charged the public, for the movement of household goods within Canada, based upon the weight of the goods and the distance travelled, were almost always the same, not only amongst agents within a particular van line, but amongst all van line agents, regardless of their van line affiliation."

In the period 1963-68 four of the van lines controlled the Moving and Storage Conference which was one of three divisions of the Canadian Warehousing Association. They used it "to coordinate both their rates making and product standardization activities and to implement their policies in connection therewith". Through a number of committees of the Conference they communicated collusively:

> "(1) to develop and establish common rates, for their agents to charge the public, for the transportation of household goods throughout Canada;
>
> (2) to standardize a package of services to be offered to the public from which van line agents were prohibited from deviating;
>
> (3) to create and maintain a mechanism for monitoring their agents to ensure that only those rates and services that they had established and standardized were actually offered to the public; and

(4) to discipline their agents for charging rates or providing services other than those that they had established."

The combines investigation was commenced in 1966 but was delayed pending a court decision on the question whether the transportation of household goods was transportation of "articles" within the meaning of sections 2 and 32 of the Act as they then were. The Supreme Court of Canada decided in the affirmative in November, 1968 (Canada Warehousing Association v. The Queen (1969) S.C.R. 176).

In the period 1968-73 the industry operated under a new trade association structure. The Moving and Storage Conference broke away from the Canadian Warehousing Association and two new trade associations were formed. One, the Canadian Household Goods Carriers' Tariff Bureau carried out the tariff related functions formerly conducted by the Moving and Storage Conference. The other, the Canadian Association of Movers, took over the functions of the Conference which were unrelated to rates, such as legislation, public relations, liaison with government, consumer relations, metric conversation and statistics.

Beginning late in 1968, following the reorganization, there were discussions between the industry and the Director of Investigation and Research under the Act with a view to resolving the issues by a Consent Order under s. 30(2) of the Act. These discussions broke down, however, and the investigation was resumed and new evidence collected. According to the Statement of Facts, the evidence disclosed that the conspiracy had changed "only in form but not in substance". The Statement adds:

> "...a scheme of the accused was developed to establish rates for van line agents in a manner that would make it appear that the rates were originating not from the Tariff Bureau but from one of the van lines so as to show that the identical rate being charged, was the result of price leadership rather than joint rate making. However, the accused were in possession of documents which revealed that the Tariff Bureau even before the rates of the so-called price leader were made public was distributing such rates to every van line and their agents and deeming them to have agreed to such rates if notification to the contrary was not received within ten days.
>
> ....
>
> "In addition to agreeing upon and filing these virtually identical rates, the van lines were also continuing to standardize, through the Tariff Bureau and the CAM, the quantity and quality of services that their agents were providing to the public. This was achieved by training programmes conducted by the two trade associations for van lines agents..."

The final phase of the investigation was begun with a new search in 1976 following indications that Atlas had been persuaded to join the conspiracy. According to the Statement of Facts:

> "The information obtained as a result of this search revealed that although the so-called price leadership and 'opting in' procedures that had previously been followed had been modified, agents of all the van lines, including Atlas, were on the same tariff and as before were, through the Tariff Bureau, continuing to exchange proposed rate changes amongst themselves prior to such rate changes becoming effective.
>
> "Also during this period, all the accused van lines were individually, with each other's direct assistance and collectively through their trade associations, closely monitoring their agents to ensure that there was no deviation from the agreed upon rates and established services which were uniform throughout the industry. The documents also revealed during this phase of the conspiracy that there had been direct rate discussions between some of the accused van lines and that a further 55 tariffs and amendments thereto, filed by the five van lines on behalf of their agents were virtually identical. The tariffs were so similar in content that they included even spelling and grammatical errors wherever these occurred. The only differences found were on the front covers of the Tariffs of each van line, which bore that van line's name and tariff identification number."

SUPREME COURT OF CANADA DECLINES TO HEAR APPEAL ON VALIDITY OF COMBINES ACT POWER TO CALL FOR PERSONS AND PAPERS

The Supreme Court of Canada on March 8 dismissed an application by the National Hockey League for leave of appeal from a decision by the Federal Court of Appeal on November 29, 1983 that s. 17 of the Combines Investigation Act does not offend the Canadian Bill of Rights or 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 case focussed largely on the Canadian Bill of Rights.

SASKATCHEWAN COURT STRIKES DOWN COMBINES ACT POWER TO CALL FOR PERSONS AND PAPERS

The Saskatchewan Court of Queen's Bench, in reasons by Mr. Justice Scheibel on December 1, 1983, ruled that s. 17 of the Combines Investigation

Act, which provides for oral examination of person in the course of an investigation, is inconsistent with the Canadian Charter of rights and Freedoms and is therefore of no force or effect. At the same time, he ruled that s. 45 which lays down rules of evidence is valid. The Crown is appealing the ruling in respect of s. 17. The case was brought by R.L. Crain Inc., Moore Corporation Ltd. and Lawson Business Forms (Manitoba) Ltd.

S. 7 of the Charter provides:

> "7. Everyone has the right to life, liberty and security of the person and the right not to be deprived therof except in accordance with principles of fundamental justice."

Subsections 17 (1) and (2) and subsections 20(2) of the Combines Investigation Act provide:

> "17.(1) On the 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 therof, all powers that are exercised by any superior court in Canada for the enforcement of subpoenas to witnesses or punishment of disobedience therof.
>
> "(2) Any person summoned under subsection (1) is competent and may be compelled to give evidence as a witness.
>
> ...
>
> "20(2) No person shall be excused from attending and giving evidence and producing books, papers, records or other documents, in obedience to the order of a member of the Commission, on the ground that the oral evidence or documents required of him may tend to criminate him or subject him to any proceeding or penalty, but no oral evidence so required shall be used or receivable against such person in any criminal proceedings thereafter instituted against him, other than a prosecution for perjury in giving such evidence or a prosecution under section 122 or 124 of the Criminal Code in respect of such evidence."

Mr. Justice Scheibel assigned substantive as well as procedural guarantees to s. 7 and he found that s. 17 is not saved by the protection agsinst self-incrimination which is provided by s. 20(2). Another case involving s. 17 is under appeal to the Supreme Court of Canada (Irvine et al. v. Restrictive Trade Practices Commission et al., (1981) 56 C.P.R.(2d) 83; 62 C.P.R. (2d) 1).

The loss of s. 17 would create serious investigatory difficulties for the Bureau of Competition Policy. While under s. 20(2) oral evidence obtained under s. 17 may not be used against the witness in subsequent court proceedings, the witness runs the risk of prosecution for perjury or under s. 122 or 124 of the Criminal Code if he subsequently gives conflicting testimony in court. S. 122 concerns false statements in extra-judicial proceedings and s. 124 concerns contradictory evidence.

HOG PACKERS IN ALBERTA FINED FOR PRICE FIXING

Three meatpacking firms pleaded guilty to price fixing charges under s. 32(1)(c) of the Combines Investigation Act in the Court of Queen's Bench of Alberta on December 9, 1983. Three other firms who were also charged pleaded not guilty, and the trial was proceeding. Those pleading guilty were:

Burns Foods Limited
Gainers Limited
Eschem Canada Inc. (formerly Swift Canadian Co. Ltd.)

Those pleading not guilty were Canada Packers Inc. and Intercontinental Packers Ltd. along with its subsidiary, Red Deer Packers Ltd.

A Statement of Facts filed by the Attorney General of Canada describes the nature of the offences, which occurred during the years 1968-74 inclusive. The Alberta Hog Producers Marketing Board was created in 1968 and became the sole seller of hogs in the fall of 1969. Prior to that most hogs were bought by the packers from the producers, and the prices paid were generally those paid for carload lots sold at public auctions held weekly in several Alberta centres. The Statement summarizes the sales method which the Board adopted as follows:

> "At the outset the Board sold the hogs by a teletype auction known as a Dutch auction. As offering prices were printed on the teletype in descending graduations of five cents per hundred weight, packer-buyers punched a button on the teletype at their own plant to indicate a bid at the price shown. Sales were confirmed later between the Board and the packer-buyer with details of each sale being communicated to the other packers save for the name of the buyer.

The Statement goes on to summarize the nature of the offence in the following terms:

> "At about the time this system was first implemented in December of 1969, representatives of the accused met to review the impact of the insertion of the Board into the marketing of slaughter hogs in Alberta. The accused were desirous of finding a way to maintain their position in the market, including historical market share and to buy slaughter hogs at prices they considered to be reasonable in a market which, to them, had historically produced fair and reasonable prices for hogs.
>
> "At this meeting the Plant or Provision Managers of the accused exchanged information as to the share of the market they had historically achieved and each declared an intention not to lose that share.
>
> Once the Dutch Auction system began the accused had a continuing concern that this new system would result in a lack of price predictability for slaughter hogs.
>
> "At subsequent meetings the Plant or Provision Managers of the accused agreed to attempt to purchase slaughter hogs from the Board within a narrow price range which price range would be determined and generally agreed upon as required.
>
> "This price range was established based upon a daily analysis of market factors affecting hog prices, including such items as prices in other Canadian and U.S. markets, availability of hogs generally, pork-operation profitability demand for pork and pork products generally and the price level of hogs in the Alberta market at the close of the preceding day. Following this independent analysis the Provision Managers of the accused frequently and sometimes daily communicated to each other the narrow price range (usually $.50 or less) within which they would attempt to buy hogs from the Board. This agreed price range so arrived at would normally then be given by the Provision Manager to his Hog Buyer.
>
> "When there was a sufficient supply of hogs, communication between the accused was generally not necessary either to stabilize the market or to permit the accused to buy hogs at what they considered to be fair and reasonable prices. However, they continued to communicate about the price range to be paid for hogs based on what their market evaluations told them was fair and reasonable at the time."

The Statement concludes, however, by describing at some length a number of "mitigating factors". The Dutch Auction system was implemented by

the Board without consulting the packers, and the latter perceived that the Board was using its monopoly position in ways detrimental to them. For example, the packers were denied access to information which they needed to assess market conditions. Also, the packers suspected the Board "of having withdrawn lots of hogs when desirable price levels were not achieved and of having offered the same hogs for sale later the same day with the purpose of obtaining a higher price when Packers were scrambling to meet their kill requirements." The hog slaughtering and pork processing operations of the accused frequently operated at a loss.

The packers who pleaded guilty also reached a settlement of $700,000 in a class action suit which had been launched by seven hog farmers acting for all Alberta hog producers. The other packers have not settled with the hog producers and they have challenged the class action before the Alberta Court of Appeal.

APPEAL COURT CONFIRMS ACQUITTAL ON HORIZONTAL PRICE MAINTENANCE COUNT

The Court of Appeal of New Brunswick, in reasons handed down on January 17, upheld the acquittal by the New Brunswick Court of Queen's Bench of a group of Moncton landlords on a charge of price maintenance under s. 38(1) of the Combines Investigation Act (Regina v. Alan D. Schelew et al. (1982) 38 N.B.R. (2d) 340).

The case involved horizontal price maintenance as distinct from the vertical variety such as where a supplier seeks to maintain the prices of his dealers. The only other case of that kind was Regina v. Peter Campbell (1981) 51 C.P.R.(2d) 284 which resulted in a conviction by the County Court of Yale, B.C.

Prior to the 1976 amendments, the scope of s. 38 was clearly restricted to resale price maintenance of the vertical variety. In effect, it prohibited a dealer from requiring or inducing or attempting to induce any other person to resell an article or commodity at or at not less than a specified price. As amended in 1976 the scope of the section has been extended to services, and seemingly, to horizontal price fixing without any requirement to prove undueness. Thus. s. 38(1) now provides in part:

> "38.(1) No person who is engaged in the business of producing or supplying a product...shall, directly or indriectly,
>
> (a) by agreement, threat, promise or any like means, attempt to influence upways, 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 at the trial was to the effect that Mr. Schelew was officially Secretary-Treasurer of the Moncton and District Landlords Assocition Inc., although he often presided and occasionally acted as its solicitor, and he was also an agent for a number of the accused companies. He attempted to influence the members of the Association to raise rents by a total of $75.00 per month in three stages during 1979 following termination of rent controls. There was a meeting of the Association which was attended by less than 20 per cent of the members, at which a majority voted to accept Mr. Schelew's advice in that regard. Subsequently, Mr. Schelew wrote a letter to all members, which was signed by another accused, advising them of the decison and urging members to implement it. The members of the Assocition accounted for only a small part of the total rental accomodation in the relevant area.

The judgment of the Court of Appeal was unanimous, reasons being delivered by Mr. Justice La Forest with whom Mr. Justice Ryan concurred, and Mr. Justice Angers delivered separate reasons. La Forest, J.A. concluded that the facts did not support the charge, and he found it unnecessary to consider points of law which the appellant had raised. He agreed with the Trial Judge's acceptance of oral evidence that those at the meeting had had neither the intention nor the capability of implementing the so-called agreement. Also, while he concluded that Mr. Schelew had undoubtedly attempted to influence upwards the price of rental accomodation, he did not consider that the evidence conclusively established that there had been any threat, promise or any like means to attempt to do so.

Mr. Justice Angers dealt with the meaning to be attached to s. 38(1) as it applies to horizontal restraints. After expressing some puzzlement about the intent behind the 1976 amendments, he stated:

> "Suffice it to say that the general purpose of s. 38 is to prevent price manipulatons which may restrict the freedom of trade. The apparently far-reaching terms of the new wording of s. 38 must be interpreted with that purpose in mind.
>
> "To sustain a conviction, therefore, the Crown must prove that the accused were persons engaged in the business of supplying a product. Although the trial Judge expressed doubts as to whether providing rental accomodations constituted 'supply a product' I would assume by virtue of the definitions that it does.
>
> "The Crown must also prove the prohibited act. It is an attempt to alter the prices at which other persons deal with their product. I refrain from using the words 'influence' and 'discourage' as they may erroneously but naturally be thought to mean influence or discourage people when, in fact, they refer to prices at which other persons supply their product.

"Finally it is not every attempt to manipulate (upward or downward) or maintain prices that is prohibited but only those attempts made by 'agreement, threat, promise or any like means'. Such an attempt achieved by threat or promise directed at persons may be, at least in some instances, a tangible concept, but where there is no vertical distribution link, it is difficult to conceive an agreement between horizontal entities which could constitute the attempt prohibited by the section. Indeed, it seems to me that an agreement between horizontal entities must, if it is to constitute an attempt to alter the prices at which other persons supply their product, have some constraining effect on those other persons. It must be of such magnitude as to be capable of affecting prices in such a way as to restrict the freedom of trade of suppliers who are not part of the agreement."

He then concluded:

"The evidence, thoroughly reviewed by my brother La Forest, clearly shows that no landlord felt bound by a majority decision of their association, let alone by any agreement of other landlords. At best, there was an attempt to influence landlords to raise their rents but no agreement of sufficient magnitude to affect prices so as to restrict the freedom of other landlords to fix their own prices."

OUTSIDE THE COURTS

COMBINES CHIEF PROPOSES REMEDIES FOR ALLEGED ANTI-COMPETITIVE PRACTICES IN PETROLEUM INDUSTRY

The final written argument on behalf of the Director of Investigation and Research, Combines Investigation Act, was filed in February with the Restrictive Trade Practices Commission in its Petroleum Inquiry. Some 800 pages in length, it also outlines the Director's remedial proposals. His proposals will be further elaborated at hearings in April and May which are scheduled to permit clarifications of final arguments and to hear evidence of remedial panels of experts. The final written arguments by the petroleum companies were to be submitted on March 20, 1984. Final hearings in June and July will permit final responses and rebuttals, after which the Commission must complete its report.

The Director's remedial proposals cover international crude trading, refining and marketing. With regard to international crude trading he reiterates the allegations in the original Statement of Evidence (Green Book) of 1981 that the oil companies have paid excessive prices to foreign affiliates for