IN THE COURTS

FEDERAL COURT OF APPEAL VALIDATES COMBINES ACT REVIEWABLE PRACTICE UNDER FEDERAL COMMERCE POWER

The Federal Court of Appeal, in a judgment by Mr. Justice Urie on March 6, found that s. 31.4 of the Combines Investigation Act is intra vires under the federal power over the regulation of trade and commerce in subsection 91(2) of the Constitution Act (BBM Bureau of Measurement and Director of Investigation and Research). The decision was unanimous, Hugessen, J. and Culliton, D.J. both concurring.

S. 31.4 is a civil law provision in Part IV.1 of the Act. It empowers the Restrictive Trade Practices Commission, upon application by the Director of Investigation and Research, to prohibit suppliers from engaging in exclusive dealing, tied selling and market restriction as defined when it finds that the practice is engaged in by a major supplier or is widespread in a market and it has or is likely to have specified anti-competitive effects. In Director of Investigation and Research v. BBM Bureau of Measurement (Oct. 30, 1981) R.T.P.C. No. 3, the Commission found BBM to be a major supplier engaged in tied selling within the meaning of s. 31.4 with the result that competition was likely to be lessened substantially. That decision was followed by the issuance of a Prohibition Order, the first ever issued by the Commission (see Canadian Competition Policy Record, December, 1981 and March, 1982). BBM appealed the Order under s. 28 of the Federal Court Act on the following grounds:

> 1. Because it is a co-operative association, rather than a business in the traditional sense, BBM has "members" but no "customers", and therefore is not engaged in "tied selling" within the meaning of s. 31.4(1) CIA.
>
> 2. "Tied selling" is an activity which requires both a "supplier" and a "customer", under s. 31.4 CIA. Because BBM is a co-operative whose members provide audience measurement data to themselves, no separate and distinct "supplier" and "customer" exist in respect of its activities, and therefore an essential element of the definition of "tied selling" under s. 31.4(1) CIA is missing.
>
> 3. BBM does not offer to supply either of its products (radio reports or television reports) on "more favourable terms or conditions" if a "customer" agrees to acquire the other product.
>
> 4. Part IV.1 CIA and in particular s. 31.4 therof is ultra vires Parliament, being legislation in respect of property and civil rights

within the provinces, under s. 92(13) of the Constitution Acts, 1967-1982 (the "Constitution") (formerly the British North America Act).

The Court advised counsel at the outset that they need only deal with the fourth point because it considered the other three to be without any merit. Mr. Justice Urie restated the fourth point as follows:

> "can section 31.4, which is in Part IV.1 of the Act, be upheld as being within the legislative competence of the Parliament of Canada and if so, under which head or heads of section 91 of the Constitution Acts, 1967 to 1982"

He considered first the applicability of head 91(2), the regulation of trade and commerce. Counsel for all parties had agreed that the only other possible heads were 91(27) (the criminal law) or the residual power under s. 91 for peace, order and good government.

His Lordship, after outling the scheme of Part IV.1 of the Act, stated:

> "In particular, the objective of the tied selling provision, section 31.4, is to utilize the expertise of the Commission to determine whether the trade practices which are the subject of an application by the Respondent are detrimental to the public interest for the reasons contemplated by the section, i.e., they will be if they are found to have the effect of reducing or eliminating competitors in the supply of goods and services or if they impede or are likely to impede entry of competition into the market."

He also took note of the fact that the burden of proof is upon the Director of Investigation and Research.

In considering the applicability of the trade and commerce head, Mr. Justice Urie noted that counsel for the Respondent had conceded that only the so-called second branch of that head as first enunciated in Citizens Insurance Company of Canada v. Parsons, (1881) A.C. 96 could apply. The first branch, according to the Parsons decision, would include "political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of interprovincial concern,..." The second branch stems from the additional statement in Parsons respecting the words "regulation of trade and commerce": "and it may be that they would include general regulation of trade affecting the whole dominion". The judgment specified, however, that regulation of trade and commerce "does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province".

Urie, J. relied extensively upon Mr. Justice Dickson's reasons for concurring in the results but not the reasoning of the majority decision in

Attorney General of Canada v. Canadian Transportation Limited on October 13, 1983 (not yet reported but described at length in Canadian Competition Policy Record, December, 1983). In that case, the Supreme Court of Canada overturned a decision of the Alberta Court of Appeal that only the Attorney General of Alberta was empowered to conduct criminal proceedings under subsection 32(1)(c) of the Combines Investigation Act in Alberta. Dickson, J. agreed with the Alberta Court of Appeal that the Attorney General of Canada cannot conduct criminal proceedings in respect of a federal statute whose constitutional validity depends solely on the criminal law power. However, after an exhaustive analysis of the jurisprudence, he concluded that subsection 32(1)(c) could be supported under the trade and commerce power as well as under the criminal law head; that conclusion enabled him to agree with the results of the majority decision that the Attorney General of Canada is empowered to conduct criminal proceedings under the subsection in Alberta. Mr. Justice Urie found Dickson J.'s reasons for finding subsection 32(1)(c) to be supportable under the trade and commerce head to be "equally applicable to the case at bar".

His Lordship cited in particular Dickson J.'s reasons for assessing subsection 32(1)(c) in the context of the regulatory scheme of the Act as a whole, and he expressed the view that the same analysis applies to s. 31.4. He also relied on Dickson, J. in determining that the scheme of the Act is valid under the trade and commerce head. Mr. Justice Urie stated:

> "As Dickson J. pointed out having found that the impugned provision -- in this case section 31.4 -- is not an isolated provision but rather forms part of a regulatory scheme, it must next be determined whether the scheme is valid under the second branch of the test in respect of the applicability of section 91(2) as set forth in the Parsons case. He said 'The fact of forming part of such a scheme is but one indicium of validity and not in itself determinative'. The test -- is the legislation concerned with matters of general interest throughout Canada -- has spawned various other indicia in the cases to ascertain whether the legislation meets the test. Dickson J. referred to some of them at page 37 of his reasons:
>
> (a) The presence of a national regulatory scheme;
>
> (b) the oversight of a regulatory agency;
>
> (c) a concern with trade in general rather than with an aspect of a particular business;
>
> (d) the provinces jointly and severally would be constitutionally incapable of passing such an enactment; and
>
> (e) the failure to include one or more provinces or localities would jeopardize successful operation in other parts of the country.

"The list is neither exhaustive nor is the presence of any or all of them necessarily decisive. Linden J. in the High Court of Ontario in R. v. Hoffman-Laroche, (1980) 28 O.R. (2d) 164 at 191-2, put the position in a way which I adopt:

> 'I am of the view that s. 34(1)(c) can also be constitutionally supported on the basis of s. 91(2). It is part of a legislative scheme aimed at deterring a wide range of unfair competitive practices that affect trade and commerce generally across commodity or area. The conduct being prohibited is generally of national and international scope. The presence or absence of healthy competition may affect the welfare of the economy of the entire nation. It is therefore within the sphere of the federal Parliament to seek to regulate such competition in the interest of all Canadians. (It would likely be otherwise, however, if the competition being regulated were merely of a local nature, in which case the matter might not fall within the federal trade and commerce power.)'

Following that reasoning, Mr. Justice Urie concluded that s. 31.4 is valid under the Trade and Commerce head. He stated:

> " I am of the opinion that section 31.4 meets all of the criteria above referred to and is, without more, valid federal legislation under section 91(2) of the Constitution Act 1867. Read in context with the other provisions of the Act, it is clearly part of a complex regulatory scheme, not aimed at a particular business or industry but at the general regulation of trade and commerce throughout Canada for the benefit of Canadians in general. Inevitably individual businesses will be affected and touched by its application. But, if that were to be determinative of its validity and meant that it was invalid the obvious necessity for its existence for the betterment of Canadians generally would be meaningless -- it would be a toothless tiger. By the same token, its valid existence does not encroach upon the authority of the provinces to enact legislation (as many have done) to regulate the business practices of those very businesses, for the protection of the citizens of those provinces as matters of property and civil rights. The authority provided by section 91(2) and by section 92(13) are, as I see them in this context, complementary. One does not erode the other. Resort may be had to each for the purpose of ensuring that (a) competition remains fair and keeps open for buyers throughout the county adequate, real options, on the one hand, and (b) on the other, that those buyers are protected from sharp, unethical business practices in their dealings with individual businesses or industries."

In view of that conclusion, he found it unnecessary and undesirable to consider whether the section could be supported under any other head.

COURTS ISSUE CONFLICTING JUDGMENTS ON CAPACITY OF COMBINES CHIEF TO INTERVENE BEFORE PROVINCIAL BOARDS

The Court of Appeal of New Brunswick on April 6, 1984 reversed a decision of a Judge of the Court of Queen's Bench that the Director of Investigation and Research under the Combines Investigation Act does not have the power or capacity to appear or be represented before a provincial board (Between Lawson A.W. Hunter, Director of Investigation and Research, Combines Investigation Act, Appellant, and Board of Commissioners of Public Utilities for the Province of New Brunswick and the New Brunswick Telephone Company Limited, Respondents). On April 18 the Court of Appeal of Newfoundland overturned an order by a provincial board which would have permitted the Director to appear before it (Between Newfoundland Telephone Company Limited, Appellant, and TAS Communications Systems Limited and Director of Investigation and Research Under the Combines Investigation Act and Board of Commissioners of Public Utilities, Respondents).

S. 27.1 of the Combines Investigation Act specifically empowers the Director to make representations before federal boards but does not mention provincial boards. It provides in part:

> "27.1(1) The Director, at the request of any federal board, commission or other tribunal or upon his own initiative, may and upon direction from the Minister shall, make representations to and call evidence before any such board, commission or other tribunal in respect of the maintenance of competition, whenever such representations or evidence are or is relevant to a matter before the board, commission or other tribunal, and to the factors that the board, commission or other tirbunal is entitled to take into consideration in determining such matter."

Both judgments referred to the decision of Mr. Justice Pace of the Nova Scotia Court of Appeal sitting in Chambers (Maritime Telegraph and Telephone Company Limited v. Board of Commissioners of Public Utilities and Air-Page Communications Ltd., (1981), 125 D.L.R. (3d) 252 (the Air-Page decision). In that case the Director sought leave to intervene in an appeal from a decision of the Board of Commissioners of Public Utilities, citing Rule 8.01(2) of the Nova Scotia Civil Procedure Rules. That Rule sets out the conditions under which the Court may grant leave to intervene. As Pace, J.A. pointed out, the Director had not intervened earlier when the matter was before the Board; as a result, the Director was not on record as an interested party. He dismissed the Director's application, concluding that the power of the Director to intervene before provincial boards was circumscribed by subsection 27.1(1) of the Combines Investigation Act and that "the Director does not have the statutory authority to intervene and that he has no claim or interest in the subject matter of the proceeding as defined by Rule 8.01 of the Civil Procedure Rules".

In the New Brunswick case, counsel for the respondents argued that the Air-Page decision means that by the Combines Investigation Act the Director is restricted to appearing before federal tribunals only and does not have the "capacity" to appear before provincial boards. Counsel for the Director argued that Air-Page did not refer to the capacity or power of the Director to intervene but rather to his statutory authority to do so. Mr. Justice Stratton of the Court of Appeal of New Brunswick concluded:

> "I do not believe that Pace, J.A. intended to give to s. 27.1 the restrictive interpretation that counsel for N.B. Tel. and the Board seek to place upon it. Rather, it is my opinion that the Air-Page decision necessarily turned on the construction of a specific rule of procedure of the Nova Scotia Supreme Court and that it ought not to be extended to govern the procedure of provincial regulatory boards or commissions. In my view, s. 27.1 simply empowers the Director to intervene before federal boards or commissions as of right regardless of their internal procedures. But in proceedings such as the present one, where the Director seeks to intervene before a provincial board, he does not intervene as of right but rather must request the board to permit an intervention in the same way the board would consider interventions from any interested party. In deciding whether to permit the Director to intervene, the board need look no further than its own rules of practice and procedure to resolve the issue. Generally speaking, in determining whether the Director may intervene, a board or commission must simply be satisfied that the Director has a valid interest in participating and can be of assistance in the proceedings."

Mr. Justice Stratton noted that, while the New Brunswick Board has no formal rules of practice and procedure, it had permitted a wide range of interests to appear before it. He expressed the view that is has the authority to hear such persons as it determines can be of assistance, and he allowed the appeal. Angers, J.A. concurred in the judgment of Mr. Justice Stratton; La Forest, J.A., who delivered a separate judgment, concurred in allowing the appeal.

In the Newfoundland case, Chief Justice Mifflin referred with approval to the finding of Pace, J.A. in Air-Page that the Director does not have the staturory authority to intervene, stating:

> "Even though it can be argued that his finding in relation to the authority of the Director to intervene is obiter, nevertheless in my view it is sound law."

His Lordship cited from the submission by counsel for the Director as follows:

> "The Director, in intervening before the Board, was acting in his capacity as a natural person. He was not purporting to exercise any of the powers of investigation specifically conferred upon him by statute, either by the Act or by any other enactment of Parliament. He was, quite simply, exercising the right of any individual to appear before the Board and ask to be heard. The Board, in the proper exercise of its own powers, consented to hear him. The Director is not a creature of statute. As such, he has a capacity and an existence of his own. To apply Lord Haldane's words, he is not a person whose legal existence is wholly derived from the words of a statute."

The Chief Justice disagreed, noting that the office of Director had been created by statute, and stating "He does not have a capacity and existence of his own". He added:

> "In my opinion the Board, in defining and establishing the procedure on hearings before it, cannot confer a right on a statutory creature, such as the Director, which the statute itself does not confer. Nor indeed should the Board confer standing on any person, statutory, corporate or otherwise, who has not been able to show an interest in the specific application before it. We are not here dealing with the powers and duties of the Board to obtain whatever information it desires by examination or otherwise given by sections 14, 15, 18, 35 and 113 of the Public Utilities Act. For the Board to discharge the obligations imposed on it by these sections intervention of the Director is not necessary. We are here dealing with the sole right of the Director to be made a party to proceedings. The Director admits that he has no specific interest in the subject matter and says that he desires only to be a guiding light to the Board."

The judgement of the Chief Justice was concurred in by Morgan, J.A. and, in a separate judgment, by Gushue, J.A. The latter pointed out that in his view the Director had neither status nor, if his only reason for appearing was to assist the Board, had the required interest been demonstrated.

PETROLEUM MAJOR CONVICTED ON A PRICE MAINTENANCE CHARGE

Imperial Oil Limited was convicted on one count of price maintenance under subsection 38(1)(b) of the Combines Investigation Act in the County Court for the Judicial District of York on April 14. A fine of $75,000.00 was imposed. Imperial plans to appeal.

Subsection 38(1)(b) provides:

> "38.(1) No person who is engaged in the business of producing or supplying a product... shall, directly or indirectly,
>
> .....
>
> (b) refuse to supply a product to or otherwise discriminate against any other person engaged in business in Canada because of the low pricing policy of that other person."

The case involved relations in 1981 between Imperial Oil and a convenience store and gasoline retailing business known as Community Chest in Elmvale, Ontario. County Court Judge J.B. Trotter noted "wide gaps in the various versions of what took place", and on the matter of credibility he found the evidence of Crown witnesses preferable to that of witnesses for the defendant.

Community Chest had experienced some difficulties because of the reluctance of its gasoline supplier to deliver part loads, which were required because of the small capacity of Community's tanks. Consequently, in April or early May, 1981 Community agreed to buy gasoline from Imperial Oil through G.R. McKenzie Fuels Ltd., a bulk sales agent for Imperial which does not take title to the gasoline but operates on a consignment basis. McKenzie Fuels services largely farms, homes, some construction companies and some gas bars which operate only during the summer months. In order to meet the competition of Community's previous supplier, McKenzie Fuels obtained Imperial's authorization to offer a discount of 2.5 cents per litre.

The nearest branded Imperial dealer was Petrie's Esso service station which was three miles from Community's location. The evidence indicates that there were complaints about Community's pricing and that they probably emanated from Petrie's. Community was offering ten cents per gallon off its pump price to local residents who had stickers supplied by Community on their cars. Judge Trotter stated:

> "Petrie bought fuel on consignment. He did not control the pump price, but his profit would suffer and so would Imperial's, if his volume decreased. Imperial, if it so wished, had the authority to match Community Chest's prices, but by its actions, used another way of meeting the competition."

Early in September, 1981 an official of Imperial informed McKenzie Fuels that Community's discount of 2.5 cents per litre was to be reduced to 1.4 cents. McKenzie Fuels, in order to keep the account in the face of competition, absorbed the difference for a few days. It then negotiated an agreement with Imperial whereby a fictitious account named Xandu Farms received a discount of 2.2 cents per litre, the deliveries actually going to

Community, and McKenzie Fuels absorbed .3 cents so as to bring the discount back to 2.5 cents. After one week, McKenzie Fuels was advised by an official of Imperial that there were to be no more deliveries either to Community or to Xandu Farms.

OUTSIDE THE COURTS

COMPETITION LAW REFORM BILL INTRODUCED

The long-awaited package of amendments to the Combines Investigation Act was introduced for first reading in the House of Commons as Bill C-29 by Consumer and Corporate Affairs Minister Judy Erola on April 2. its principal features are:

- S.32 on conspiracies is amended to remedy defects exposed by recent court decisions and to broaden the export exemption.

- The criminal law prohibition relating to mergers and monopolies is replaced by civil law provisions relating to mergers and abuse of dominant positions.

- A civil law provision relating to delivered pricing is introduced.

- Applications may be made to the Restrictive Trade Practices Commission for exemption of specialization agreements from the provisions dealing with conspiracies and exclusive dealing.

- Crown corporations engaged in most competitive activities are brough under the Act.

- Banks are brought more fully under the Act.

- Adjudication of mergers, dominant positions, delivered pricing and all presently existing reviewable practices is assigned to the courts rather than to the Restrictive Trade Practices Commission.

- Amendments are made to some of the provisions governing the investigatory procedures of the Director of Investigation and Research.