

## IN THE COURTS

COMPETITION BUREAU CARRIES ON  
WITH DIMINISHED SEARCH POWERS

Canada's Bureau of Competition Policy has been conducting its investigations under more difficult conditions following decisions in 1983 by the Alberta Court of Appeal and Collier, J. of the Federal Court, Trial Division that the Director's powers of entry and search under s. 10 of the Combines Investigation Act violate the Canadian Charter of Rights and Freedoms and are therefore unconstitutional (Southam Inc. v. Director of Investigation and Research (1983) 3 W.W.R. 385, and Thomson Newspapers Ltd. v. Hunter et al July 6, 1983, not yet reported). The Southam case has been appealed to the Supreme Court of Canada and the decision of that Court is awaited.

S. 10 permits entry and search in any inquiry conducted under the Act, including those under the criminal prohibitions in Part V, the reviewable practices under Part IV.1 and general inquiries under s. 47. Ss. 10(1) and (3) provide:

"10.(1) Subject to subsection (3), in any inquiry under this Act the Director or any representative authorized by him may enter any premises on which the Director believes there may be evidence relevant to the matters being inquired into and may examine any thing on the premises and may copy or take away for further examining or copying any book, paper, record or other document that in the opinion of the Director or his authorized representative, as the case may be, may afford such evidence.

...

(3) Before exercising the power conferred by subsection (1), the Director or his representative shall produce a certificate from a member of the Commission, which may be granted on the ex parte application of the Director, authorizing the exercise of such power."

The powers under s.10 were seldom if ever used in connection with general inquiries but they were routinely used in connection with inquiries under Part IV.1 and Part V. There have been no searches in connection with Part IV.1 inquiries since the Thomson decision by the Federal Court in July, 1983. Section 17 of the Act, however, provides powers to call for production of documents and for oral examination of witnesses before a Member of the Restrictive Trade Practices Commission.

Searches in connection with Part V inquiries are being conducted by obtaining search warrants under s.443 of the Criminal Code, which provides in part:

"443.(1) A justice who is satisfied by information upon oath in Form 1, that there is reasonable ground to believe that there is in a building, receptacle or place

- (a) anything upon or in respect of which any offence against this Act has been or is suspected to have been committed,
- (b) anything that there is reasonable ground to believe will afford evidence with respect to the commission of an offence against this Act, or
- (c) anything that there is reasonable ground to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant,

may at any time issue a warrant under his hand authorizing a person named therein or a peace officer to search the building, receptacle or place for any such thing, and to seize and carry it before the justice who issued the warrant or some other justice for the same territorial division to be dealt with by him according to law."

The use of s. 443 by the Director has been challenged on a number of occasions over the past year but the courts have held that the section may be used while s. 10 is inoperative as long as certain guidelines are followed.

On April 24, 1984 the Chief Justice of the Supreme Court of British Columbia in Chambers gave reasons for judgment respecting a petition by Dobney Holdings and others to set aside search warrants which had been obtained by the Director under s. 443. The grounds of the petitioners were.

1. That s. 443 is not applicable to offences under the Combines Investigation Act.
2. That the Information did not contain any specific averments of fact establishing detriment to the public which is an essential ingredient of an offence under s. 33 of the Act (merger and monopoly).
3. That there were inadequacies in the description of the documents to be sought, the locations to be searched and the time period in question.

The Chief Justice rejected the first two grounds. He pointed out that s. 27(2) of the Interpretation Act makes s. 443 of the Criminal Code applicable to offences or investigations under another Act unless the latter Act otherwise provides. He also cited a precedent to the effect that the commission of the offence alleged does not have to be proven on an application for a search warrant.

However, the Chief Justice quashed certain parts of the warrants as they related to documents or locations which he found not to have been properly included in the Information. He found references to documents relating to "corporate strategies" and "financial state" to have been too vaguely

worded. He permitted references to specific locations for search but rejected references to "and other storage areas used by the above companies". Finally, he quashed references in the warrants to a period of time prior to the incorporation of the companies.

On June 1, 1984 Mr. Justice Galligan of the Supreme Court of Ontario issued reasons for rejecting two separate motions to quash search warrants (Miles Laboratories Ltd. and Cole Book Stores Limited) which had been obtained by the Director. The question at issue was the meaning of s. 27(2) of the Interpretation Act which makes s. 443 of the Criminal Code applicable to offences or investigations under another Act "except to the extent that the enactment otherwise provides". His Lordship decided that, since the constitutionality of s. 10 of the Combines Investigation Act is before the Supreme Court of Canada, he should simply follow the preponderance of judicial opinion and find that the section is of no force and effect. He then found that an enactment of no force and effect is not a provision "otherwise" within the meaning of s. 27(2) of the Interpretation Act. He stated:

"As a result of the ruling that s. 10(1) of the Combines Investigation Act is of no force and effect if the combines investigators cannot have recourse to the search and seizure provision of the Criminal Code, then such investigations are deprived of the necessary, indeed, perhaps all important tool of search and seizure. It simply does not make sense to me that when the investigators cannot make use of s. 10(1) of the Combines Investigation Act they are denied the right to apply for and obtain a search warrant under the provisions of s. 443 of the Criminal Code."

On July 4, 1984 Mr. Justice Chevalier of the Quebec Superior Court in Hull brought down decisions on several applications including one by Canfarge Ltée of Montreal to quash warrants which had been obtained by the Director. He adopted the reasoning of Galligan, J. in the case described above and rejected arguments that a search warrant could not be issued under s. 443 of the Criminal Code in connection with investigations under the Combines Investigation Act. He also rejected arguments that the Justice of the Peace in Hull should not have issued a warrant for a search in Montreal or that the warrant should also have been referred to a justice of the peace in Montreal. His Lordship noted that the Justice of the Peace in Hull had been appointed with jurisdiction throughout the Province of Quebec to issue search warrants.

Counsel for Canfarge had also argued that the description of things to be seized was too vague, and Mr. Justice Cehvalier dealt at considerable length with judicial precedents in that regard. He listed the following principles which should serve as a guide in the issuance of search warrants:

- The things to be sought should be reasonably linked to the suspected offence.
- The things to be sought should be described in a manner not to leave the person carrying out the search with absolute

discretion in deciding what to seize. This determination rests with the justice of the peace and not with the executor of the search.

- Reasonable latitude should, however, be accorded in the description of things to be sought. This latitude should vary in scope according to the nature of the suspected offence, the inherent difficulty of the search and the extent of the material in connection with which the search is to be made.

In applying these principles, Mr. Justice Chevalier ordered the deletion of the phrase "and other documents" in the several places where it appeared in the warrant. The following is an example of how the phrase was used:

"Reports, statements, balance sheets, books, receipts, bills, computer printouts and other documents concerning the financial situation of the companies involved in the cement and prepared concrete industry, related to the offence described above." (emphasis added).

#### **COMBINES CHIEF WITHDRAWS MOVIES DISTRIBUTORS CASE**

Mr. Lawson Hunter, Director of Investigation and Research under the Combines Investigation Act, announced on July 31 that he has withdrawn his application of December, 1982 to the Restrictive Trade Practices Commission seeking orders for six major motion picture distributors to supply Cineplex Corporation with commercially valuable motion pictures.

In June, 1983, following undertakings made to him by the distributors, the Director obtained the RTPC's permission for a one-year postponement of the hearings on the application. The distributors, whose policies had favoured Famous Players and Odeon, undertook to make the best deal on an individual theatre-by-theatre basis with respect both to first and subsequent runs of each motion picture. They also undertook not to be a party to any agreement or arrangement with any exhibitor to determine the pattern of release for each of their motion pictures nor to grant any exhibitor the right of first refusal.

The Director reported to the Commission on the operation of the undertakings in April, 1984. He found a marked improvement in the ability of Cineplex and other independent exhibitors to obtain second runs of movies more quickly but little improvement in respect of first run movies. "It appears that Famous Players and Odeon continue to receive the right of first refusal for first runs in many cases", he stated.

Then, on May 29, Cineplex, a distant third among the three largest distributors, announced that it was acquiring Odeon, the second largest. The

Director made his final report to the Commission on the operation of the undertakings on July 31 when he announced his withdrawal of the application. He reported further improvements in distribution, while noting some continuing problems including difficulties for independent exhibitors other than Cineplex in obtaining first run movies. He concluded, nevertheless, and partly because of Cineplex's acquisition of Odeon, that there were no longer grounds to proceed with the applicable.

### **RESTAURANT EQUIPMENT SUPPLIER FINED FOR PRICE MAINTENANCE**

Cody-Food Equipment Ltd. of New Brunswick was fined \$9,000.00 and its successor was subjected to a Prohibition Order in York District County Court on June 20, 1984 after pleading guilty to a charge under s. 38(6) of the Combines Investigation Act. S. 38(6) provides:

"(6) No person shall, by threat, promise or any like means, attempt to induce a supplier, whether within or without Canada, as a condition of his doing business with the supplier, to refuse to supply a product to a particular person or class of persons because of the low pricing policy of that person or class of persons."

Cody was a restaurant equipment dealer and installer operating in the Atlantic Provinces. Cody and an installer, Cameron Restaurant Equipment Ltd., both bid on the supply and installation of a Durable Equipment Ltd. refrigerator. An official of Cody telephoned an official of Durable to the effect that if Durable sold a refrigerator directly to Cameron then Durable would lose Cody's business. Cody's business was important to Durable, whose official told Cameron it would not supply the refrigerator. Cameron lost the contract and Cody won it at a slightly higher price than Cameron had bid.

Cody was, at the time of the offence, a wholly-owned subsidiary of Cassidy's Limited. Cody was subsequently dissolved, and Cassidy's now operates an unincorporated business under the name of Cody Food Equipment. While the fine was imposed on the former Cody-Food Equipment Ltd., the Prohibition Order was directed at Cassidy's.

Durable was also charged with an offence under s. 38(1)(b) for refusal to supply, but the proceedings have been stayed.

### **SKI BOOT AND HARNESS MAKER CONVICTED ON SEVEN PRICE MAINTENANCE COUNTS**

Salomon Canada Sports Ltd. was convicted on four counts of price maintenance under s. 38(1)(a) and three counts under s. 38(1)(b) of the Combines Investigation Act in the District of Montreal Cour des Sessions de la Paix on March 19, 1984. A fine of \$100,000.00 and a Prohibition Order were imposed. The company was acquitted on another count under s. 38(1)(b) and it is appealing three of the convictions which involved events in Montreal.

S. 38(1) makes it a crime for any one engaged in a business

- "(a) by agreement, threat, promise or any like means, attempt to influence upward or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply a product within Canada; or
- (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 convictions were based largely on oral evidence of dealers and documentary evidence seized on the company's premises. Representatives of the Company had exerted strong efforts to persuade dealers in several points in British Columbia and in Montreal to keep their margins up to suggested levels, and in a number of instances had cut back supplies or refused to supply those who did not comply. The defence argued unsuccessfully in respect to the Montreal charges that the dealer involved had been making a practice of loss leader selling or "bait and switch" selling; s.38(9) makes those practices a defence against a charge under s. 38(1)(b).