

**HUNTER v. SOUTHAM: THE DECISION AND ITS EFFECT**

By Calvin S. Goldman(\*)

Introduction

On September 17, 1984, the Supreme Court of Canada handed down its decision in the case of Lawson A.W. Hunter et. al. and Southam Inc. The Supreme Court held that sections 10(1) and 10(3) of the Combines Investigation Act ("the Act") were inconsistent with section 8 of the Canadian Charter of Rights and Freedoms ("the Charter") and were therefore of no force or effect. The Court of Appeal of Alberta had declared that sections 10(1) and 10(3) were inconsistent with the Charter<sup>1</sup>, and the Supreme Court dismissed the government's appeal.

The Supreme Court's decision may have broad implications for other sections of the Act and for searches conducted and to be conducted by combines officers. The decision also bears upon search provisions in other statutes. This paper will summarize the main aspects of the Supreme Court's decision and then discuss the effect of the decision on future cases.

The Decision

Mr. Justice Dickson (as he then was), speaking for the unanimous eight member panel of the Court, initially reviewed the main facts including the following. The authorization given by Mr. Hunter to his officers to search the premises of the Edmonton Journal, a division of Southam Inc. was certified by a member of the Restrictive Trade Practices Commission ("the R.T.P.C.") on April 16, 1982, which was the day before the Charter was proclaimed in force. The officers attended at the premises of the Edmonton Journal on April 19, 1982 with their certified authorizations and indicated that they wished to search a broad range of files. As Dickson J. stated:

"The authorization has a breathtaking sweep; it is tantamount to a license to roam at large on the premises of Southam, Inc. at the stated address 'and elsewhere in Canada'."

---

\* Mr. Goldman is a member of the firm of Blake, Cassels & Graydon, Toronto.

The officers declined to say under which section of the Act the inquiry had begun. They declined as well to provide any further information as to the nature of the inquiry apart from that contained in the authorization. Southam Inc. then brought an application for an interim injunction which was heard by Cavanagh J. and denied. Southam appealed to the Alberta Court of Appeal. Of interest, the Court of Appeal ordered that as an interim provision, the seized documents be sealed pending the appeal. Subsequently, a unanimous five member panel of the Court of Appeal held that sections 10(1) and 10(3) of the Act were of no force or effect.

In the Supreme Court, the appellants submitted that the constitutionality of section 10 ought to be considered on the basis of whether its provisions could be applied in a manner consistent with section 8 of the Charter. They submitted that the authorization by a member of the R.T.P.C. was that of a neutral arbiter. They also submitted that combines officers require specialized search techniques for the detection of offences they are investigating, and as a result, section 10 did not authorize an unreasonable search. The appellants relied upon the decision of Van Camp J. in The Queen v. Metropolitan Toronto Pharmacists' Association (unreported, Ont.H.C., May 4, 1983).

The general issue addressed by the Supreme Court was the meaning to be given to the term "unreasonable" in the section 8 guarantee from unreasonable search or seizure. In that regard, Dickson J. then dealt with a series of specific questions. As to the first question of when the competing interests of the parties in respect of a search ought to be addressed, His Lordship concluded that there must be a means of preventing unjustified searches before they occur. In order to avoid being inconsistent with section 8, there must be a valid procedure for prior authorization of searches under the Act; the same requirement exists for other statutes unless it is not feasible in the particular circumstance to do so. As to the second question of who must grant the authorization, Dickson J. stated:

"For such an authorization procedure to be meaningful it is necessary for the person authorizing the search to be able to assess the evidence as to whether that standard has been met, in an entirely neutral and impartial manner. ...The person performing this function need not be a judge, but he must at a minimum be capable of acting judicially."

His Lordship then reviewed the nature of the functions of a member of the R.T.P.C. under the Act as set forth in sections 9, 10, 12, 13, 17, 22(2)(b), 27.1, 45.1 and 47, and concluded:

"In my view, investing the Commission or its members with significant investigatory functions has the result of vitiating the ability of a member of the Commission to act in a judicial capacity

when authorizing a search or seizure under s.10(3). This is not, of course, a matter of impugning the honesty or good faith of the Commission or its members. ...A member of the R.T.P.C. passing on the appropriateness of a proposed search under the Combines Investigation Act is caught by the maxim nemo iudex in sua causa. He simply cannot be the impartial arbiter necessary to grant an effective authorization.

On this basis alone I would conclude that the prior authorization mandated by s.10(3) of the Combines Investigation Act is inadequate to satisfy the requirements of s.8 of the Charter and consequently a search carried out under the authority of ss.10(1) and 10(3) is an unreasonable one."

Although the above defect alone rendered a search under section 10 to be unreasonable, Dickson J. went on to consider whether there were other defects in section 10. In that regard, the next question he addressed was the basis upon which the balance of competing interests must be assessed. His Lordship referred to both the lack of any explicit criteria for granting an authorization under section 10, and the Federal Court of Appeal's decision in the Petrofina case<sup>2</sup> where it was held that although members of the R.T.P.C. must act judicially they are not required to review the legality or reasonableness of the Director's exercise of power under section 10. As a result, His Lordship stated:

"(I)t follows that the decision of the Director in the course of an inquiry to exercise his powers of entry, search and seizure is effectively unreviewable. The extent of the privacy of the individual would be left to the discretion of the Director. A provision authorizing such an unreviewable power would clearly be inconsistent with s.8 of the Charter."

His Lordship also held that even if section 10 allowed a member of the R.T.P.C. to satisfy himself as to the reasonableness of the Director's belief and the legality of the inquiry without requiring him to do so, that would still be inadequate as it was necessary that some objective standard be established. Even then, the necessary objective standard would not be satisfied if the Director need only establish that evidence may be on the premises as is presently stipulated in section 10(1). Rather, in the same manner that section 443 of the Criminal Code requires that there be reasonable grounds to believe that there is evidence of an offence on the premises, so ought section 10 of the Act. His Lordship concluded:

"In cases like the present, reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search,

constitutes the minimum standard, consistent with s.8 of the Charter, for authorizing search and seizure. Insofar as ss.10(1) and 10(3) of the Combines Investigation Act do not embody such a requirement, I would hold them to be further inconsistent with s.8.

#### Effect of the Decision

The Supreme Court's decision has finally resolved the conflicting decisions in the lower courts on the constitutionality of sections 10(1) and 10(3) of the Act<sup>3</sup>. However, there are a number of other sections of the Act which may now be more susceptible to constitutional challenge than they were prior to the Southam decision. For example, sections 9 and 12 of the Act, which provide for certification by a member of the R.T.P.C. before the Director can require written material to be submitted to him, may be subject to challenge. If those sections are considered to give rise to constructive searches or seizures within the meaning of section 8 of the Charter, then they may be unreasonable because none of the criteria set forth in the Southam case are applicable. There is no impartial arbiter for the prior authorization procedure; there is no effective review procedure; there is no requirement that the Director establish under oath that he has reasonable grounds that evidence exists and that an offence has been committed.

There already have been challenges under the Charter to section 17 of the Act. In Zeigler et al v. Hunter<sup>4</sup> the Federal Court of Appeal held that section 17 of the Act was not inconsistent with section 8 of the Charter. In that case, Marceau J. agreed with the decision of the Alberta Court of Appeal in the case of Alberta Human Rights Comm. v. Alberta Blue Cross Plan<sup>5</sup> that a forced production of documents is a "seizure", but he held that the scope of production requested was not unreasonable in the circumstances. Hugessen and LeDain JJ. held that an order in the nature of a subpoena duces tecum under section 17 is neither a search nor a seizure within the meaning of section 8 of the Charter<sup>6</sup>. The Federal Court of Appeal did not have the opportunity of considering the Supreme Court's analysis of section 8 in the Southam case. In R.L. Crain et al. v. Couture and R.T.P.C. et al.<sup>7</sup> Scheibel J. of the Saskatchewan Court of Queen's Bench concluded that section 17 is inconsistent with section 7 of the Charter, and the case is presently before the Saskatchewan Court of Appeal. If it is held in that case or another case that section 17(1) gives rise to a constructive search or seizure, then in view of the absence of the Southam case criteria, there is likely to be inconsistency with Section 8 of the Charter<sup>8</sup>.

Since the July, 1983 decision of the Federal Court in the Thomson case<sup>9</sup>, combines officers have conducted searches of suspected Part V offences through the process of applying for search warrants under section 443 of the Criminal Code. (In Alberta, section 10 searches were stopped earlier after the Court of Appeal's decision in Southam.) In view of the Supreme Court's decision, section 443 will continue to be the authority for those searches until such time as section 10 is amended to comply with the criteria set out by the Supreme

Court. Although section 10 permitted searches in relation to inquiries under Part IV.1 or section 47, it is quite doubtful that section 443 could be used for any such inquiries. Search warrants issued under section 443 are valid if the officer establishes under oath that there are reasonable grounds to believe there is in a specific place evidence relating to the commission of an offence.

The grounds upon which search warrants may be challenged are far more extensive than any challenge that could have been brought in relation to a section 10 authorization. While any considered discussion of the procedural requirements of search warrants is beyond the scope of this paper, it may be sufficient for present purposes to note: the items sought must be specified with particularity in order to avoid the officers going on a fishing expedition<sup>10</sup>; the warrant must also state the nature of the alleged offence giving rise to the search with sufficient detail so that person whose premises are the subject of the search is able to know the reason for the search<sup>11</sup>; the grounds for the informant's belief must be set out in the information in a sufficient manner<sup>12</sup>; once the items seized are returned to the justice pursuant to section 446, any member of the public is generally entitled to inspect the warrant and the information giving rise to it unless it can be shown that the ends of justice would be subverted<sup>13</sup>; solicitor-client privilege may be raised in a motion to quash a warrant and the privilege necessitates special consideration in the issuance of the warrant<sup>14</sup>.

Although a number of cases have recently raised the question of whether the search warrant provisions of the Criminal Code are applicable to searches under the Act, it has now been decided in three provinces that they are<sup>15</sup>. Most recently, the Ontario Court of Appeal in the case of Miles Laboratories Ltd. and Coles Book Stores Limited v. A-G Canada et al. (unreported, October 9, 1984) dismissed an appeal from the order of Galligan J. holding the Criminal Code provisions were applicable. As a result, combines searches may continue to be conducted pursuant to section 443.

One of the significant issues that will likely arise in future cases is the effect of the Southam decision on searches already conducted under section 10 of the Act. In R. v. Burns Foods Ltd. et al.<sup>16</sup>, the Alberta Provincial Court, applying the Court of Appeal's decision in Southam, held that evidence gathered in a 1974 search under the Act was to be excluded pursuant to section 24 of the Charter. That Court declined to follow the decision of Van Camp J. in the Metropolitan Toronto Pharmacists' case, supra, who applied the Ontario Court of Appeal's decision in R. v. Antoine<sup>17</sup>, in holding that evidence gathered in a 1979 search ought not to be excluded under section 24 of the Charter. Van Camp J.'s decision was based on her conclusions that the Charter did not operate retrospectively and that in any event, the 1979 search was not one which would bring the administration of justice into disrepute within the meaning of section 24(2) of the Charter. There are numerous cases dealing with the issue of the application of the Charter to events that occurred prior to its proclamation in April, 1982, and a discussion of those cases is beyond the scope of this paper<sup>18</sup>. Most of those cases pertain to section 11(b) of the Charter.

However, in Re Chapman and The Queen<sup>19</sup>, the Ontario Court of Appeal held that an order could be made under section 24(1) of the Charter excluding evidence seized under a search warrant prior to the Charter, and in so doing the Court commented that section 24(2) of the Charter could be invoked at trial when "all the circumstances" are before the court<sup>20</sup>.

In light of the many, often conflicting, decisions on the matter, it is likely that the admissibility of evidence obtained under section 10 searches will depend on whether in the circumstances of each case the admission would offend section 24(2) of the Charter. In circumstances where a search was conducted under section 10 after the Alberta Court of Appeal's decision in the Southam case, defence counsel will have an additional argument in favour of excluding the evidence as it can be submitted that the Bureau should not have proceeded with such searches once the Court of Appeal declared sections 10(1) and 10(3) unconstitutional. In the Southam case, the Court of Appeal directed that the seized documents be returned to Southam but that was after the documents had been sealed up pending the Court's determination. It may be rather late for a person subjected to a section 10 search to bring a similar application for the return of seized documents, unless the documents were also sealed; depending on the circumstances, the preferable route may be to apply to exclude the documentary evidence before the judge hearing the case<sup>21, 22</sup>.

The proper role and function of the R.T.P.C. is now an issue that may have to be addressed. Having regard to the Supreme Court's comments that a member of the R.T.P.C. cannot act as an impartial arbiter to authorize a search, the question arises as to whether the R.T.P.C. ought to continue to have both investigatory and adjudicative functions. For example, an issue may arise as to whether the R.T.P.C. can act or appear to act as an impartial adjudicator in respect of PART IV.1 proceedings given its other investigatory functions which gave rise to the Supreme Court's comments.

The Supreme Court's decision will also have implications for searches under other statutes. Section 231 of the Income Tax Act contains a number of provisions relating to audits, entries and search functions, some of which may be open to challenge on the basis of the Southam criteria. Section 231(1)(d) in particular may be susceptible to challenge. As well, section 11(6) of the Ontario Securities Act does not contain the Southam criteria and may see a court challenge to its constitutionality in the near future. The Ontario Securities Commission may be faced with the same problem of having both investigatory and adjudicative functions. By way of further illustration, the criteria established in the Southam decision are not satisfied by: section 15 of the Consumer Packaging and Labelling Act; section 22 of the Food and Drugs Act; section 10 of the Narcotic Control Act<sup>23</sup>; and section 139 of the Customs Act.

The Southam decision also bears upon the interpretation that ought to be given to section 52(1) of the Constitution Act, 1982. The Supreme Court declined to read into section 10 of the Act the appropriate standards in order to avoid a find of inconsistency within the meaning of section 52(1).

FOOTNOTES

1. [1983] 3 W.W.R. 385. The Alberta Court of Appeal's decision is discussed in the Vol. 4, No. 1 issue of the Canadian Competition Policy Record, March, 1983 at p. 1-5. Sections 10(1) and 10(3) of the Combines Investigation Act 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."

Section 8 of the Charter provides that "Everyone has the right to be secure against unreasonable search or seizure".

2. [1980] 2 F.C. 386.
3. See for example, Helix Investments Ltd. et al. v. Director of Investigation and Research (1983), 73 C.P.R. (2d) 55 (F.C.); Thomson Newspapers Ltd. et al. v. Director of Investigation and Research (1983), 73 C.P.R. (2d) 67 (F.C.); R. v. Metropolitan Toronto Pharmacists' Association, supra.
4. (1983), 51 N.R. 1 (F.C.A.); 75 C.P.R. (2d) 222 (F.C.). Section 17 empowers a member of the R.T.P.C., on an ex parte application of the Director, to order that any person in Canada be examined under oath and make production of documents.
5. [1983] 6 W.W.R. 758.
6. Leave to appeal to the Supreme Court of Canada was denied in March, 1984.
7. (1983), 10 C.C.C. (3d) 119.
8. It may be noted that the Supreme Court of Canada has recently heard argument in the case of Irvine et al. v. R.T.P.C. on appeal from the

Federal Court of Appeal (1981), 65 C.C.C. (2d) 108. Although the appeal pertains to the conduct of a hearing under section 17 of the Act, the issues addressed relate to the matter of representation by counsel having regard to section 20(1) of the Act and section 7 of the Charter.

9. Supra, footnote 3.
10. R. v. Fauteaux, Ex parte Morgentaler (1970), 3 C.C.C. (2d) 187 (Que. Q.B.), aff'd [1972] Que. C.A. 219, leave to appeal to S.C.C. refused [1972] S.C.R. xiii; R. v. Colvin, Ex Parte Merrick et al., [1970] 3 O.R. 612 (H.C.); Re Purdy et al. and The Queen (1972), 8 C.C.C. (2d) 52 (N.B.C.A.).
11. Re Alder et al. and The Queen (1977), 37 C.C.C. (2d) 234 (Alta. S.C.).
12. s.443; R. v. Kehr (1906), 11 O.L.R. 517; R. v. Colvin, supra.
13. A-G N.S. et al. v. MacIntyre, [1982] 1 S.C.R. 175.
14. Re Borden & Elliot and The Queen (1975), 30 C.C.C. (2d) 337 (Ont. C.A.); Descoteaux et al. v. Mierzwinski and A-G. Que. et al., [1982] 1 S.C.R. 860.
15. See the discussion in the Vol. 5, No. 3 issue of the Canadian Competition Policy Record, September 1984, at p. 17-20.
16. (1973), 76 C.P.R. (2d) 223 (Alta. Prov. Ct.).
17. (1983), 41 O.R. (2d) 607.
18. See for example, R. v. Antoine, supra; Re Mills and The Queen (1983), 43 O.R. (2d) 631 (C.A.), leave to appeal to the S.C.C. granted on September 23, 1983.
19. (1984), 46 O.R. (2d) 65.
20. But see R. v. Longtin (1983), 41 O.R. (2d) 545 (C.A.) which held that section 8 of the Charter does not have a retrospective effect.
21. For a discussion of section 24 of the Charter, see R. v. Simmons (1984), 45 O.R. (2d) 609 (C.A.) per Howland C.J.O. at p. 631-635; see also R. v. Rao (1984), 46 O.R. (2d) 80 (C.A.) where at p. 107-108 and p. 110 Martin J.A. refers to searches conducted under a statute not yet declared unconstitutional.
22. Just prior to publication of this paper, the very recent decision of the Manitoba Court of Appeal in Blackwoods Beverages Ltd. et al. v. Her Majesty the Queen et al. (unreported, November 20, 1984) came to the author's attention. That case involved an appeal from an order of the Manitoba Court of Queen's Bench holding that 1977 and 1981 seizures of

documents under section 10 of the Act were illegal and unreasonable, that the documents should be returned and that the documents were inadmissible in evidence at any preliminary inquiry or subsequent proceeding. The majority of the Court of Appeal (Monnin C.J.M. and O'Sullivan J.A.) allowed the appeal, holding the order was premature and there was insufficient evidence before the Court of Queen's Bench to support the order made on a preliminary motion; rather, a ruling of that nature ought preferably to be made when all the circumstances are before the court at the preliminary inquiry or at trial. The Court applied the Southam decision of the Supreme Court and in so doing, Monnin C.J.M. stated that the pre-Charter section 10 searches were lawful when effected but they are now illegal. Notwithstanding the illegality and although section 24(1) of the Charter could be invoked by the Court of Queen's Bench on a preliminary motion, Monnin C.J.M. held that section 24(2) ought not to be applied until all the circumstances are put before the court by way of proper evidence. Matas J.A., in dissent, held that this was an appropriate case for the Court of Queen's Bench to exercise its authority either under section 24(1) of the Charter or under its inherent jurisdiction in order to make the necessary orders to halt the proceedings. His Lordship referred to the Chapman and Longtin cases, supra, and held that it would not be giving retrospective effect to section 8 of the Charter to provide a remedy for the continued infringement of the respondents' rights.

23. See in this regard R v. Rao, supra.