IN THE COURTS

MARKET DEFINITION BRINGS ACQUITTAL FOR TORONTO DRUGGISTS ON CONSPIRACY COUNT

The Metropolitan Toronto Pharmacists Association was acquitted in the Supreme Court of Ontario on November 27, 1984 on a conspiracy count under s. 32(1)(c) of the Combines Investigation Act. Madame Justice Van Camp found in her judgment that, while the Association and most of its members had agreed to refuse to supply prescription drugs under the terms and conditions of Green Shield's drug insurance plan, competition had not been prevented or lessened unduly thereby in any market. The decision is being appealed by the Crown.

The Metropolitan Toronto Pharmacists Association has about 500 members, most of whom are managers or owners and who represent most of the pharmacies, including the chains, in the area.

Green Shield is a non-profit corporation registered under the Prepaid Hospital and Medical Services Act of Ontario. It is one of a number of entities which administers, inter alia, drug prescription plans for groups of employees. A subscriber presents an identification care to a participating pharmacist who fills the prescription upon payment by the subscriber of a small part (35 cents in the case of automobile workers) of the total price and claims the remainder from Green Shield. The subscriber's employer frequently pays a large part of the cost of the plan. A participating pharmacist is one who has agreed to fill subscriptions for subscribers on the terms and at prices offered by Green Shield. There were 411 participating pharmacists in Metropolitan Toronto in 1979, accounting for about seven percent of Green Shield's business in Ontario. Green Shield had a policy of matching the prices and dispensing fees paid to pharmacists under the Ontario Drug Benefit Plan, which is operated by the Ontario government for a restricted group consisting largely of senior citizens.

Late in 1978, after it had announced its subscriber premiums for the following year, Green Shield learned about an unanticipated increase in dispensing fees to pharmacists which had been negotiated with the Ontario Pharmacists Association by the Ontario Drug Benefit Plan. Green Shield matched the dispensing fee increase but, to avoid losses, announced a unilateral reduction in the prices it would pay for some prescription ingredients.

The Metropolitan Toronto Pharmacists Association, whose members' costs were generally higher than those of pharmacists elsewhere in Ontario, objected to Green Shield's new price schedule.

Various actions against Green Shield's new tariff schedule were taken by the Association in 1979. A general meeting of the Association in March resolved unanimously that members "opt out" of Green Shield. Green

Shield and Blue Cross were advised of the resolution, the latter because it had announced a similar schedule which was to go into effect in May. At the time, a contract for the United Automobile Workers was in the process of being moved from Blue Cross to Green Shield. According to the judgment, Green Shield was "the only other major plan in Ontario which could handle the size of this coverage".

A letter was sent by the Association to all members in April, along with an opting out form which members were asked to complete and return to the Association. The judgment states that the letter advised:

> "...that the Executive had tried to negotiate with Green Shield to no avail and that the stated policy of Green Shield was to deal only with individual pharmacies. The letter pointed out that the Green Shield volume might be small for many pharmacies, but the danger was that, if the action were not challenged, other third parties might feel encouraged to 'use the same tactics'...It was pointed out that if enough pharmacists put pressure on Green Shield, it would likely agree to negotiate collectively as virtually all the other third party plans did."

There were some 117 notices of termination which used the opting out form. Executives of the Association kept other local Ontario pharmacists' associations informed of its actions. On April 26 there was another general meeting of the Association at which a resolution was passed that charges to third parties be the customary and usual charges to cash paying customers.

In May, Green Shield withdraw its price reductions and reverted to the Ontario Drug Benefit schedule. The Association then made other demands upon Green Shield. It wrote to its members to the effect that there were still outstanding issues and that the Association was still not endorsing the Green Shield plan but was leaving the decision of participation up to the individual pharmacies.

The Association asked Green Shield to reimburse pharmacists who had already filled prescriptions at the lower prices. It asked Green Shield to enter into discussions with the Ontario Pharmacists' Association on whether the dispensing fee should be the usual and customary charge made by the pharmacy to its cash paying customers. It asked that Green Shield's pricing of drugs be revised to conform with the guidelines of the Ontario Pharmacists' Association. Those guidelines include prices in the Comparative Drug Index published by the Ontario government and, for drugs not listed therein, the prices listed by the Drug Trading Company. The latter is a cooperative drug trading house whose shareholders and members are pharmacy owners or pharmacists. Van Camp J. stated:

> "Green Shield objected to the Drug Trading price as it was an artificially inflated method of calculating the cost of a pharmaceutical, but the Ontario Pharmacists' Association had adopted it as part of their guidelines."

A letter of July 18 from the Association to "all pharmacists" indicates that Blue Cross had agreed to pay the usual and customary dispensing fee and to adopt the Ontario Pharmacists' Association guidelines on drug prices. The outstanding differences between Green Shield and the Metropolitan Toronto Pharmacists Association had still not been resolved in September, 1979. The Association sent a letter to its members in that month noting that Green Shield was the only non-governmental third party payer which did not conform to the Ontario Pharmacists' Association guidelines and that it might soon become time to reconsider whether to honour the Green Shield prescriptions. Then, according to the judgment:

> "At a general meeting on October 18, when about 200 members were present, the Association approved a letter to Green Shield advising that the Association would be in touch with General Motors, Ford, Chrysler and the United Auto Workers to explain that Green Shield was the only third party carrier which did not comply with the Ontario Pharmacists' Association guidelines. The Association stated that the pharmacists might refuse to bill Green Shield directly if it continued to ignore the guidelines, that subscribers might be asked to pay cash and be given receipts, and that the Association intended to convey that opinion to members of other local associations throughout Ontario."

In November, in the words of Madame Justice Van Camp, "Green Shield wrote to the Association that it had capitulated and would be complying with the Ontario Pharmacists' Association guidelines".

Her Ladyship concluded that there had been an agreement, which she delineated as follows:

> "I find that there was an agreement by the Association and most of its members to have all pharmacists in Metropolitan Toronto and some elsewhere in Ontario refuse to supply prescription drugs to Green Shield subscribers on the basis of the Green Shield pre-payment plans. There was no agreement to refuse to supply prescription drugs to anyone. There was no agreement to refuse to supply prescription drugs to Green Shield subscribers. There was an agreement to refuse to supply prescription drugs to Green Shield subscribers on a co-payment basis (35 cents or otherwise). There was an agreement not to supply prescription drugs to Green Shield's subscribers on any basis other than cash payment by the customer with a receipt to be given whereby reimbursement might be sought from Green Shield. I find that the pharmacists were not attempting

> to set a fixed price to the customer. In fact, the alternative was sought, namely, the opportunity for each pharmacist to set his own price so that there might be competition to cash customers. There was no agreement among pharmacists supplying prescription drugs to lessen competition in the sale or supply of those drugs."

Madame Justice Van Camp then turned to the question of what market had been affected by the agreement. The charge referred to an agreement to prevent or lessen, unduly, competition "in the sale or supply of a product, to wit: prescription drugs supplied or sold to persons under drug prepayment contracts issued or administered by Green Shield Prepaid Services Inc., in the municipality of Metropolitan Toronto and elsewhere in the Province of Ontario". Van Camp J. noted submissions by defence counsel that the Toronto area constituted only seven percent of the Green Shield business, that there were other carriers competing in the sale of drug insurance contracts and that Green Shield had "only two percent of 60 percent of that business in Ontario and only .688 percent in Toronto". She stated:

> "What makes this charge unusual is that the definition of product in s.2 of the Combines Investigation Act ('product' includes an article and a service) means that the product here and the product market are synonomous, namely, the sale of prescription drugs to Green Shield subscribers on the basis of Green Shield pre-payment plan. The market is the Green Shield subscriber who holds an agreement whereby he may purchase drugs for a small down payment and have the balance of the charge billed directly to Green Shield."

She added:

> "It is the submission of counsel for the accused that the market herein has been artificially limited...Counsel submits that the relevant market is the market for prescription drugs for people covered under drug insurance plans in Ontario. In the market, since Green Shield has only two percent thereof, there could not be an undue lessening of competition even if Green Shield were completely eliminated from it. In that market, the pharmacists are intensely competitive in their prices. Green Shield was seeking to have its share of the market have no competition in price. In the drug insurance market, Green Shield was the only major company which was insisting upon fixing its own price..
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> "In effect, the Association and its member were competing in the prices that they charged to the subscribers in the drug insurance plans. They were refused to sell to a small percentage of that market who were covered under a plan which fixed the price that

would be charged by any pharmacist. Green Sheild was the only one of the thirty that dictated its price."

Summing up, she stated:

> "The Crown has proven that there was an agreement to refuse service to the group of people who insisted upon paying for the service in accordance with the Green Shield Plan. I accept the submission that this market was an artificial market when one is considering the purpose of the legislation and whether the agreement was one to lessen competition unduly. I have already referred to the size of that market. The business of the pharmacists is to supply prescription drugs. They are prepared to compete in that general market. I recognize that that market may be broken into several parts, but even when that market is reduced to the Green Shield subscribers, the pharmacists are prepared to supply the prescription drugs and to compete in doing so. The subscriber is not prevented from obtaining prescription drugs in a competitive market. If Green Shield will not reimburse them for the cost of the drug, the subscriber is entitled to discontinue his agreement with Green Shield on notice. I recognize that the Association has identified the group against which its action is directed as the Green Shield subscriber, who insisted upon purchasing in accordance with his agreement with Green Shield, but the members of the Association have agreed that they will supply to that group. They will simply not supply on the terms that the group requires. If Green Shield refuses to change its payment to the pharmacist, the subscriber will still obtain the prescription drugs and probably will obtain them through a drug pre-payment plan. The market for drug prescriptions could be divided into three parts: those who pay by cash; those who pay under the Ontario Drug Benefit Plan; and, those who pay under a drug insurance programme. It seems to me artificial to further reduce it to those who buy under one particular drug insurance programme, especially when that group is so small a proportion of the general market."

Her Ladyship concluded that the agreement was not one to lessen competition unduly and, consequently, dismissed the charge.

Editor's Note: The case is unusual in that, while the accused accounted for most of the Metropolitan Toronto market for drug prescriptions, the evidence is to the effect that the agreement was not directed against the large cash-paying part of the market but only against Green Shield and possibly some other suppliers of drug insurance plans. It would appear that the injury to competition was in preventing Green Shield (and possibly others) from competing in the sale of drug insurance plans by means of negotiating better terms from a sufficient number of individual pharmacists to make the plan viable. It might be argued that the existence of the agreement suggests that, in

its absence, a sufficient number of individual pharmacists otherwise would have been prepared to accept Green Shield's terms. Furthermore, it would seem open to question, in deciding whether or not the lessening of competition was undue, that the smallness of Green Shield's overall market share should have been the determining factor, particularly in the light of the fact that the judgment indicates that Green Shield was the only major plan in Ontario other than Blue Cross which could handle the size of the U.A.W. coverage. Both plans had incurred higher costs in response to pressure from the Metropolitan Toronto Pharmacists Association.

INFORMALITY OF BIDDING PROCEDURE BRINGS BID-RIGGING ACQUITTAL

Certain glazing firms were acquitted on two counts of bid-rigging under s. 32.2(1)(b) of the Combines Investigation Act by the Supreme Court of British Columbia on December 19, 1984. Mr. Justice Lander found that, while they had made rigged price quotations, there had been no call for bids within the meaning of the section. In addition, in two remaining charges one firm was convicted on one count and it and another firm were acquitted on the other (Her Majesty The Queen Against Coastal Glass and Aluminum Ltd., Central Glass Products Ltd. AND LOF Glass of Canada Ltd. (Formerly Known as Bogardus Wilson Limited). The Crown is appealing the acquittals.

S.32.2(1)(b) provides:

"32.2(1) In this section, 'bid-rigging' means

. . .

(b) the submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by agreement or arrangement between or among two or more bidders or tenderers,

where the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is made by any person who is a party to the agreement or arrangement."

Counts 2 and 4, which resulted in acquittals on the ground that no bids had been made in response to a request, each involved construction projects whose principals used the facilities of a bid depository operated by the Amalgamated Construction Association of British Columbia.[1] In each instance bids by general contractors and some trades but not glaziers were invited. Trades including glaziers who were not invited to bid through the depository would hear of the project through the ACA or a trade publication, could examine the plans in a plans room operated by the ACA, and could then telephone their prices to general contractors who intended to bid.

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1. For a description of the operation of bid depositories, see Restrictive Trade Practices Commission, Use of Bid Depositories in the Construction Industry, R.T.P.C. No. 55, Ottawa, 1976.

The evidence in Count 2, wherein Coastal, Central and LOF Glass were charged, disclosed that an official of Bogardus, after receiving telephone calls from officials of Coastal and Central, telephoned a so-called cover bid to general contractors, i.e. one that was higher than Coastal's. Coastal, who was expected to be and in fact was, the successful bidder, undertook to purchase certain materials for the job from Bogardus. The evidence in respect of Count 4, wherein Coastal and Central were charged, while somewhat different, also involved a telephoned cover bid.

Lander J., in concluding that there has been no call for tenders from glaziers, stated:

> "I have concluded that while there was a call for tenders or bids to the general contractors on Count 2 and 4, that the custom in the construction industry was that once it became known that an owner wished to construct a building, or whatever it might be, that a subtrade may either through the Amalgamated Construction Association or by whatever means obtain plans, do take-offs and submit quotations directly to the general contractor if there is not a specific direction or call that the bid depository system be utilized. I therefore have concluded and I accept the submission of counsel that there has been no call or request as contemplated by Section 32.2(1)(b) of the Combines Investigation Act with reference to the defendants charged in Counts 2 and 4."

His Lordship cited evidence that on public construction jobs there is a strict and accepted method of bidding to ensure fairness and competitiveness, and he stated:

> "The quote given by the subtrades and in this instance by the glaziers is not given in a specified form such as is defined in the legal notice B-2 nor was there any bid bond or surety required from the subtrades."

His Lordship also found that "the prices or quotations remitted to the prime contractors under Counts 2 and 4 are merely prices and do not amount to bids or tenders." In discussing the nature of a bid, he stated:

> "As to the word 'bid', I have concluded that this must be interpreted to be an offer which may be accepted by the offeree binding the offeror. In this instance the subcontractor to the prime contractor. It is well-known, for example, that an auction of one bid entered for a particular article at a particular price, and that bid is the highest bid amongst all bidders and accepted by the auctioneer, then there is a contract and the bidder is obliged to pay. I have considered and I mention once again the evidence of Mr. Voth, the prime contractor on the Chilliwack Intermediate Care Home job...for it was his view that neither party was bound by the

figure phoned by the glaziers to his office prior to his making a formal offer to the Chilliwack Intermediate Care Home Society".

A conviction against Coastal was registered on Count 1 and a fine of $85,000.00 was imposed. The evidence disclosed that Coastal, which was charged, and Central had made an arrangement regarding a building job that Coastal would submit a higher bid than Central's and that Central would purchase materials from Coastal "at a substantially higher price." On that particular job, tenders from glaziers had been specifically called for in writing, specifying how the tenders would be received, where the plans and tendering documents were available, and that a bid bond was required. Coastal submitted a signed tender, and Mr. Justice Lander noted that the form contained the following:

> "We acknowledge that this tender is irrevocable for 30 days from the closing date for tenders and that this tender shall not be withdrawn, amended or altered for any cause without the permission of the owner."

His Lordship indicated that Central would also have been convicted had they been charged.

Count 3, wherein Coastal and LOF Glass were charged, resulted in an acquittal, although Lander, J. found that there had been a request for tenders within the meaning of s. 32.2. The evidence was to the effect that there had been discussions between officials of Coastal and Bogardus Wilson. However, it appeared that Coastal had initiated the discussions because it wanted to submit a bid but not to win the contract. The evidence was unclear as to whether the official of Bogardus Wilson had gone as far as to reveal to Coastal what his bid would be.

OUTDOOR ADVERTISING FIRMS PLEAD GUILTY ON CONSPIRACY COUNT

Three outdoor advertising firms were fined a total of $700,000.00 and subjected to a Prohibition Order by the Supreme Court of Ontario on February 11, 1985 after pleading guilty on a conspiracy count under s. 32(1)(c) of the Combines Investigation Act. The fines were:

Mediacom Inc.	$400,000.00
Seaboard Advertising Co. Ltd.	$200,000.00
HOAL Investments Ltd. (formerly Hook Outdoor Advertising Ltd.)	$100,000.00

Seaboard and HOAL have now been amalgamated along with other firms to become Jim Pattison Enterprises Ltd. with headquarters in Vancouver.

The offence occurred between 1973 and 1976. A second conspiracy count relating to the period July 1, 1976 to April 1, 1981 was dropped along with a monopoly count against Mediacom.

An Agreed Statement of Fact describes three interlocking agreements among the accused and a number of unindicted co-conspirators.

There was an agreement to divide national sales solicitations on a territorial basis. Mediacom reserved for itself all sales of national advertising from advertisers originating east of Alberta, Hook had all such sales originating in Alberta, and Seaboard had all such sales originating in British Columbia. The firm making the sale usually receives ten percent of the value of the portion of the contract placed on the panels of other outdoor advertising firms. The accused had about 85 percent of total outdoor poster advertising in Canada. There are some so-called local plant operators but they could only solicit business in their own market areas. According to the Agreed Statement:

> "The accused enforced this agreement among themselves. As well, the accused on occasion took steps to ensure that none of the minor poster panel plant operators solicited national sales accounts. From 1973 to 1976 this agreement was incorporated into the Constitution and Rules and Regulations of the Outdoor Advertising Association of Canada, an industry wide trade association. Subsequent to 1976 the agreement was implemented by means of a large number of exclusive sales representation agreements entered into between the accused and most of the small plant operators prior to June 30, 1976."

There was an agreement to divide the ownership and operation of outdoor poster panels on a territorial basis. The accused each agreed not to own or operate poster panels in the territories of the other two. The Agreed Statement states:

> "This Agreement was enforced from 1973-1976 as part of the Constitution and Rules and Regulations of the Outdoor Advertising Association of Canada. The three accused were able to dominate this trade association since voting rights were allocated to each company on the basis of panel ownership. Subsequent to 1976 the accused used their exclusive national sales solicitation contracts which were entered into prior to June 30, 1976 to enforce this agreement; they refused to place the national sales which they solicited on the poster panels of a company that intended to compete with any participant in the arrangement.
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> There was no competition in any geographic market in Canada for outdoor poster panel advertising. Once an advertiser decided what geographic market he wished to put posters in he had no choice as to whose poster panels would be used."

There were also agreements on price discounts. While the three accused each set its own panel rates individually, they agreed on all discounts or promotional incentives until some time in 1976. The Agreed Statement describes how prices were affected by the collective implementation of a so-called "free production" program which Mediacom introduced:

> "a) In 1974 Mediacom expanded into the business of lithographic printing for outdoor posters and with the introduction of the 'Free Production' programme experienced rapid growth in the field.
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> b) The concept of 'Free production' involved Mediacom selling both the poster space and the printed poster in an integrated fashion. Mediacom offered the poster 'free' to anyone who purchased $50,000.00 or more of advertising space.
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> c) In fact the inclusion of the posters was not free. Prior to launching the promotion Mediacom calculated that the average cost of a poster when related to the cost of the advertising space, was 15% of the total. Mediacom estimated the portion of its contracts to which 'free production' would apply and calculated an additional 15% cost for those contracts. On the basis of this calculation Mediacom, in addition to its ordinary rate increase, built in an additional increase reflecting this 15% calculation in its panel rental rates generally about the time they offered the 'free' poster promotion.
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> d) Since the 'free production' programme was offered on an industry wide basis, some plant operators built a rate increase into their prices relative to the 15% calculation. During the implementation period, namely, January 1, 1974 to March 15, 1976 the industry wide rate increases triggered, in part, by 'free production' were:
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> | Mediacom | 37% |
> | Seaboard | 35% |
> | Hook | 46%" |

The Prohibition Order prohibits in considerable detail continuation or repetition of the offence. For example, Mediacom must price its printed posters separately from its poster panel space. Each of the accused when acting as national sales representative must, subject to certain conditions, not refuse to sell the outdoor panel space of any poster plant operator whose terms are acceptable to advertisers. Similarly, it may not refuse to sell space on its own panels to any other advertiser or person acting on the latter's behalf.

A spokesman for the Bureau of Competition Policy foresaw significant benefits to purchasers of advertising in the long run even though the immediate result would be to make contracts more difficult to negotiate.