IN THE COURTS

FEDERAL COURT FINDS RIGHT OF CIVIL ACTION UNDER COMBINES ACT UNCONSTITUTIONAL

In a judgment delivered on December 4, 1979, the Federal Court of Canada, Trial Division, has ruled that subsections 31.1 (1) (a) and 31.1(3) of the Combines Investigation Act are ultra vires of the Parliament of Canada. They deal strictly with a matter of a local nature involving a civil right which Section 92 of the British North America Act assigns exclusively to the Provinces (Rocois Construction v. Quebec Ready Mix Inc. et al.) The decision has been appealed by the Attorney General of Canada.

Section 31.1, which was among the amendments brought into force in 1976, provides in part:

> "31.1(1) Any person who has suffered loss or damage as a result of
>
> (a) conduct that is contrary to any provision of Part V, or
>
> (b) the failure of any person to comply with an order of the Commission or a court under this Act,
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.
>
> . . .
>
> (3) For the purposes of any action under subsection (1), the Federal Court of Canada is a court of competent jurisdiction."

The Court did not deal with subsection 31.1(1)(b), which was not at issue in the case before it. However, the reasoning of the Court would appear to be applicable to that subsection.

In his reasons for judgment, Marceau, J. rejected the argument that the provisions could be considered "properly ancillary" to a statute falling under the Federal power over criminal law. He said:

> "Here are provisions which were adopted to govern a purely civil action, benefitting only private parties and between private parties, the instituting of which remains completely independent of any criminal process. They are certainly not criminal provisions in themselves, and they cannot become so merely because the action to which they relate is one which may result from the commission of acts that have been declared to be criminal; the civil effects resulting from the commission of an act remain civil effects whether the act is prohibited as criminal or not. To conclude otherwise would be to deprive the concept of criminal law as opposed to civil law of any specific meaning."

Regarding the federal powers over trade and commerce (Section 91(2) and to legislate for peace, order and good government (the initial wording of Section 91), he stated:

> "In my opinion, the present state of the authorities on the interpretation that must be given to subs 2 and to the initial wording of s 91 does not provide any basis for concluding that the power to make laws on trade and commerce, or to legislate for the peace, order and good government of Canada, can enable Parliament to adopt general legislation on competition that will apply to local commerce as well as to inter-provincial or international commerce."

While ruling the provisions at issue unconstitutional, Marceau, J. expressed the view that civil remedies are available both in Quebec and in common law Provinces, and provided a number of supporting citations.

In the Hoffman-LaRoche Ltd. case, also described herein, which involved a prosecution under section 34(1)(c) of the Act (predatory pricing), Mr. Justice Linden of the Supreme Court of Ontario, in convicting the accused, held that the Act is supportable under all three relevant provisions of Sections 91 of the British North America Act (peace, order and good government), Head 2 (trade and commerce) and Head 27 (criminal law). The judgment was referring to the Act generally and did not refer specifically to section 31.1 of the Act which is periphal to other sections. It is, however, a decision of a court of equal jurisdiction with that of the Rocois Construction Case and is also under appeal.

HOFFMAN-LAROCHE CONVICTED OF PREDATORY PRICING

Hoffman-LaRoche Ltd. has been found guilty by the Supreme Court of Ontario of selling Valium (diazepam) to hospitals at unreasonably low prices contrary to section 34(1)(c) of the Combines Investigation Act but has been acquitted of the charge as it relates to Librium (chlordiazepoxide). The conviction is being appealed. The conviction, which is the first under the section, was contained in a 112 page judgment handed down on February 6 by Mr. Justice Linden. The section provides:

> "34(1) Everyone engaged in a business who
> .....
> (c) engages in a policy of selling articles at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have such an effect,
>
> is guilty of an indictable offense and is liable to imprisonment for two years."

Faced with competition from Frank Horner Ltd. and others, Hoffman-LaRoche supplied Valium free to hospitals for a year beginning June, 1970 and supplied it to all governments in Canada for one dollar per tender call. Over a number of years it gave some free Librium along with amounts purchased, frequently two free units for every one purchased; it also made some sales to governments at one dollar per tender call. Over the entire period of the charge over 174 million Valium units were distributed free to hospitals and governments, 41 million being sold; 26 million Librium units were distributed free, 17 million units being sold.

The Court rejected a defence argument that no sale within the meaning of the Act occurs when a giveaway takes place. Linden, J. stated:

> "In this case it is clear on the evidence that the drugs being 'given away' were part of a commercial operation, not a charitable one. Invoices were normally sent to the recipient with 'no charge' marked thereon, a practice seldom followed in a true gift situation. The donor's aim was to combat its competitors, and to maintain its place in the market in future. The so-called free drugs were really not gifts from the accused; the motivation behind them being completely commercial, they were all sales within the meaning of section 34(1)(c)."

Linden, J. dealt at length with the meaning of "unreasonably low". All the circumstances must be examined, including whether and to what extent sales are below cost, the period of time involved, whether the price cutting is offensive or defensive, and the long term benefits that will accrue to the seller. He stated that "If an article is sold for more than cost, it can never be held to be unreasonable." The Court was not satisfied beyond a reasonable doubt that the Librium deals were at unreasonably low prices. Profit margins were enormous and considerable qualities could be given away along with amounts purchased without incurring losses, although some sales had been below cost.

On the other hand, the Court held that the free sales of Valium to hospitals for a year were unreasonably low. The same applied to the widespread sale of Valium to governments for one dollar per tender call, but the latter went beyond the scope of the indictment which referred only to sales to hospitals.

Section 34(1)(c) requires either an effect or tendency of substantially lessening competition or a design to have such an effect, and the Crown stressed the latter in its case. The Court found from the evidence that, while officials of Hoffman-Laroche "may honestly feel they were seeking only to protect their market from Horner and others, they were doing so by means of a tactic that was designed to eliminate competitors and to substantially lessen competition in the hospital market." Linden, J. also stated:

> "In seeking to discover the true intent of Roche during the year of free Valium, it should be noted that Roche was prepared to lose, and did lose, $2,600,000 worth of Valium sales to prevent a forecasted loss of only $600,000 in sales to Horner in that year. This manifests to me that Roche was interested not in competing with Horner but in preventing Horner from competing. Otherwise it would not pay for Roche to give away such a large amount of Valium. Roche's aim could only have been to eliminate Horner from the hospital market and to warn others that they too would be eliminated if they tried to compete with Roche in the hospital market."

The defence challenged the constitutional authority of the Attorney General of Canada who had preferred the indictment under section 15(2) of the Combines Investigation Act. The section provides:

> "The Attorney General of Canada may institute and conduct any prosectuion or other proceedings under this Act, and for such purposes he may exercise all the powers and functions conferred by the Criminal Code on the attorney general of a province."

The Crown also relied upon section 2 of the Criminal Code which, inter alia, provides that with respect to proceedings which are instituted at the instance of the Government of Canada and conducted by or on its behalf in respect to a violation or conspiracy to violate an Act of the Parliament of Canada, "Attorney General" in the Code means the Attorney General of Canada.

The defence challenge was based primarily upon a statement in a dissenting opinion by Mr. Justice Dickson (Pratte, J. concurring) of the Supreme Court of Canada in Regina v Hauser (1979) 46 c.c.c. (2nd) 481. In that case the majority held that the Attorney General of Canada was authorized to institute and prosecute cases under the Narcotic Control Act by virtue of the Peace, Order and Good Government clause of section 91 of the B.N.A. Act. The power of the federal government to institute and prosecute cases founded on the criminal law power in that section was, however, discussed as well and Dickson, J. stated in his dessenting opinion:

> "Broadly speaking, then, the division of authority would be as follows:
> .....
> (3) The Attorney General of the Province would have exclusive authority in respect of federal statutes, the pith and substance of which is criminal law."

Linden, J. dismissed the challenge, stating:

> "The power granted to the federal Parliament in section 91(27) to make laws in relation to criminal law and procedure in criminal matters includes, in my view, the authority to determine the manner in which criminal law will be enforced. This involves, in my opinion, not only the authority to prescribe the rules for the enforcement of the law, but also who should conduct it."

He also found that section 34(1)(c) of the Combines Investigation Act may be constitutionally supported under both the residual power of the federal Parliament and under the federal trade and commerce power (section 91(2)).

The policies of Hoffman-LaRoche with respect to Librium and Valium have been attacked by competition authorities in a number of countries, starting with the U.K. in 1973. The British case was eventually settled by a payment of 3.75 million pounds and an undertaking by the company to abide by voluntary price restraint. In Germany, after six years of litigation, the Supreme Court absolved the German firm of having abused its market position. Cases against the company in Holland and Denmark also ended in failure.

CO-OPERATIVE ADVERTISING PLAN VIOLATES PRICE MAINTENANCE BAN

A.&M. Records of Canada Ltd. pleaded guilty to ten counts under section 38 of the Combines Investigation Act in York County Court on January 21, 1980. The relevent parts of section 38 as amended in 1976 are:

> "38(1) No person who is engaged in producing or supplying a product...shall, directly or indirectly,
>
> (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 or advertises 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."

Prior to the amendments of 1976 the prohibition was limited largely to the fixing by the supplier of a specific resale price, markup or maximum discount. The company pleaded guilty to counts under the section both as amended and as it was prior to 1976.

According to an agreed statement of facts read into the record by the Crown attorney, A&M distributes pre-recorded tapes and records to independent retailers and to other distributors called rack jobbers, and assists them in promoting the product in advertising and otherwise. Advertising is a most important marketing tool both at the distributor and retail level. A & M formulated a co-operative advertising policy whereby it paid varying proportions of the cost of advertisements placed by its clients. In the period from January, 1975 to July, 1978 A & M consistently refused to pay for advertisements below specified prices.

The written policy of the accused was:

"A & M must not be advertised below its normal everyday cost. Such conditions tend to cheapen the image of our product. Failure to comply with these conditions would result in forfeiture of any advertising monies contributed by A & M."

According to the Court record:

"The written policy of the accused did not explain the meaning of 'normal everyday cost'; however, sales representatives of the accused company and the manner in which the advertising policy was implemented by the accused revealed that to qualify for co-operative advertising funds, clients of the accused could not advertise the accused's products at a price below 'dealer' cost.

"'Dealer cost' varied with the volume of sales of the accused's customers and price changes; however, for the time frame as set out in the information, dealer cost of a $7.98 suggested list price album was either $4.09 or $4.55.

"'Dealer cost' was not the actual cost price to the accused's customers but only the starting wholesale price specified on the accused's price lists. In practice, because of various discounting programmes offered by the accused to customers for volume sales, prompt payment, or other otherwise, the actual cost prices of albums was up to 12% less than the dealer cost."

PAPERMAKERS' WET FELT CARTEL BRINGS CONVICTION

Six producers of papermakers' wet felts were found guilty of an offence under section 32(1)(c) of the Combines Investigation Act by the Quebec Superior Court (Criminal Jurisdiction) in Montreal on January 7, 1980. The convicted firms are:

Albany Felt Company of Canada Ltd.
Ayers Ltd. - Ayers Ltée
Dominion Ayers Limited
Huyck Canada Limited
Penmans Limited
Porritts & Spencer (Canada) Limited

Fines totalling $545,000 and a prohibition order were imposed. The companies have appealed.

The offence occurred in the period from 1952, when there were just two producers, to 1974. The accused and certain unindicted co-conspirators accounted for over 90 per cent of wet felts sold in Canada. The product is used on machines for the manufacture of paper.

In his judgement, Mr. Justice Charles A. Phelan noted that the proof of price fixing was largely inferential. However, the Court found that representatives of the companies met regularly at meetings of the Canadian Felt Association, company price lists were virtually identical, and the issuances of new price lists were proclaimed within a very short period of time. There was also uniformity of terms and conditions of sale including refusal to grant quantity discounts.

A number of unindicted co-conspirators were named, including the Organization of the Felt Industry in Europe (O.F.E.), the British Paper Machine Felt Export Association and divers members thereof. The Court found that:

> "It is in proof that the accused through the Felt Association carried out regular relationships with British felt makers and the O.F.E. of Europe whereby the various parties parcelled up the world and each would have agreed to stay within his staked out territory. Failure to adhere to the rules of the game brought forth anger and threats of reprisal. As parties to these international arrangements, I conclude that the accused did agree and arrange to limit imports in conjunction with the several foreign unindicted co-conspirators and in so doing acted intentionally to lessen or prevent competition in the Canadian market from foreign sources."

In finding that the accused did agree and arrange to prevent or lessen competition unduly as required by section 32(1)(a) of the Act, the Court cited in particular the judgment of the Supreme Court of Canada in R v Aetna Insurance Company et al (1977 34 C.C.C. 2nd ed. 157), R v Elliott (1905) 9 C.C.C. 505, Osler J.A. at page 661 and Howard Smith Paper Mills et al v The Queen (1957 S.C.R. 403).

The Court concluded in part:

> "The six accused in this case conspired among themselves and with others at various times on a continuing basis during the indictment period to prevent or limit competition by setting uniform prices for their products, uniform terms and conditions of sale and to limit imports of such products. Among them they shared nearly the entire Canadian market...They raised their

> prices at will without the competitive restraints which Parliament had decreed should protect consumers...
>
> "It is clear that the Minutes of the Felt Association concealed more than they revealed of the proceedings of the members of the group.
>
> "That control of such a large share of the particular market constituted a virtual monopoly over the period of the indictment is clear to me and this beyond any reasonable doubt. Such tight control coupled with the marketing practices, in my view, meets the tests of Howard Smith Paper and of Aetna."

FERTILIZER FIRMS ACQUITTED OF PRICE FIXING

Six fertilizer producers in western Canada were acquitted of a charge under section 32(1)(c) of the Combines Investigation Act in a judgment by the Honourable Mr. Justice Brennan of the Supreme Court of Alberta, Trial Division, on January 16, 1980. The accused were:

Cominco Ltd. - Cominco Ltée
Imperial Oil Limited
Northwest Nitro-Chemicals Ltd.
Sherritt Gordon Mines Limited
Simplot Chemical Company Limited
Western Co-operative Fertilizers Limited

After a trial lasting 150 days the Court found that the Crown had failed to prove that the accused had entered into a conspiracy with one another and with a number of unindicted co-conspirators, so there was no need to consider the question of undue prevention or lessening of competition as required by the Act.

The decision has not been appealed.

The Crown's case rested fundamentally on evidence of common fertilizer retail prices after all discounts, bonus, sales incentives and manufacturer, distributor and dealer mark-ups were taken into account. The pricing systems of the accused varied considerably but the Crown introduced expert testimony, which the Court accepted, that the apparent retail prices as disclosed by the documentary evidence were either identical or very similar. Against this, however, the Court noted an "abundance of evidence" introduced by the accused that they had in many instances granted discounts, bonuses or other sales incentives not disclosed in the Crown's evidence. The Court also found that dealers did not generally make it a practice to adhere to the retail selling prices as disclosed by Crown evidence. Aside from that discrepancy, the

Court did not accept the Crown's contention that the apparent common prices could only have flowed from a conspiracy. Indeed, the Court found that the Crown's own evidence disclosed a highly competitive climate in the fertilizer industry. It found that an inference as reasonable as that suggested by the Crown was that the similarity of apparent retail prices came about as a result of the highly competitive climate.

In an obiter dictum the Court dealt with the treatment to be accorded hearsay evidence under section 45(2)(c) of the Combines Investigation Act, which provides:

> "(2) In any proceedings before the Commission or in any prosecution or proceedings before a court under or pursuant to this Act,
>
> .....
>
> (c) a document proved to have been in the possession of a participant or on the premises used or occupied by a participant or in the possession of an agent of a participant shall be admitted in evidence without further proof thereof and is prima facie proof
>
> (i) that the participant had knowledge of the document and its contents,
>
> (ii) that anything recorded in or by the document as having been done, said or agreed upon by any participant or by an agent of a participant was done, said or agreed upon as recorded and, where anything is recorded in or by the document as having been done, said or agreed upon by an agent of a participant, that it was done, said or agreed upon with the authority of that participant,
>
> (iii) that the document, where it appears to have been written by any participant or by an agent of a participant, was so written and, where it appears to have been written with the authority of that participant."

The Court agreed with a submission by the Crown that any document which meets the requirements of the subsection including any hearsay contained therein should be admitted in evidence. It disagreed with a further submission by the Crown that any such hearsay evidence should be accepted as proof of that which it states unless contradicted by other acceptable and credible evidence. After citing Pennell, J.

in Regina v Canadian General Electric et al (1976), 15 O.R. (2nd), 360 at pages 364-366 and referring to R. v Aluminum Co. of Canada Ltd. et al. (1976), 29 C.P.R. (2nd) 183, together with an unreported decision of June 18, 1979 of McCluny, J. of the Supreme Court of Alberta, Trial Divison in R. v Lethbridge Concrete Products Ltd. et al., the Court stated:

> "I would simply like to add to the remarks of Pennell, J., that it is my opinion that if the legislature of this country intended to alter the rule of law against attaching any credance whatsoever to hearsay evidence, subject only to those exceptions which have come into being only after many years of experience, and which have been so long established that it has virtually become a part of the heritage of English speaking nations and of which even most laymen are aware, it would do so only in the most explicit terms. Such explicit terms are not contained in Section 45(2)(c)."

SUPREME COURT REJECTS PLEA BY GULF OIL (U.S.) FOR RELEASE OF URANIUM EVIDENCE

In a judgment on March 18, 1980 a five-member bench of the Supreme Court of Canada has unanimously rejected on grounds of public policy as determined by the Government an application of Gulf Oil Corporation of Pittsburg to enforce letters rogatory issued by a United States District Court in Illinois and one in California to obtain uranium documents held by two of Gulf's subsidiaries in Canada (Gulf Oil Corporation v Gulf Canada Ltd. et al.). The application had been opposed by the Attorney-General of Canada.

Gulf Oil and Gulf Minerals Canada are involved in litigation in the United States District Court for the Northern District of Illinois, and Gulf Oil and others in litigation in the United States District Court for the Southern District of California which relates to the former uranium cartel and the failure of Westinghouse and others to meet contracts to supply customers with uranium at specified prices. Thousands of pages of evidence in the hands of Gulf Minerals Canada Ltd. and Gulf Canada Ltd. were sought. The letters rogatory called for an official of each of the subsidiaries to be brought before a Special Examiner in Toronto for interrogation,

> "and to bring with them all notes, documents, or other written or printed material in their possession or control or in the possession or control of Gulf Minerals Canada Limited or Gulf Canada Limited in any way related to conversations, discussions or meetings that took place between January 1, 1972 and December 31, 1975 involving them or any director, officer, employee, servant or agent of Gulf Minerals Canada Limited and Gulf Canada Limited or any other person in relation to the exporting from Canada or marketing for use outside Canada of uranium or its derivatives or compounds."

According to Gulf Oil, the evidence was needed to avoid orders in the United States litigation which might result in default judgments or a denial of the right to raise defences to which the Canadian evidence has relevance. The Canadian subsidiaries were unwilling to supply the documents voluntarily because of the prohibition against disclosure in the Uranium Information Security Regulations issued under the Atomic Energy Control Act.

The application for enforcement of the letters rogatory relied upon section 43 of Part II of the Canada Evidence Act, which provides in effect that a Canadian Court may in its discretion enforce a letter rogatory issued by a foreign court.

One argument put forward by Counsel for Gulf Oil was that the regulations were invalid because they were not authorized by the Atomic Energy Control Act. In his reasons for judgment, Chief Justice Laskin declined to rule on that, holding that the application for enforcement of the letters rogatory would fail whether or not the regulations were valid. Assuming they were invalid, the central issue was whether public policy could be invoked as argued by Counsel for the Attorney-General of Canada and whether it was of sufficient weight to overcome considerations of comity. The Chief Justice stated:

> "...it seems to me that the resistance (by the Canadian Government) to disclosure was not so much a matter of the maintenance of secrecy as it was of an assertion of Canadian sovereignty to resist the extraterritorial application of United States antitrust laws.
>
> The Government of Canada was on record in the Chicago action by an amicus brief presented to Judge Marshall that it regarded its sovereign position to be put in question by the attempt to secure disclosure of the information now sought under the letters rogatory."

Then, after quoting from the Government's amicus brief and from a press release by the Minister of Energy Mines and Resources in 1977, the Chief Justice stated:

> "...it is the policy rather than the regulations that, in this case, is a factor of the Court's exercise of its discretion."

Counsel for Gulf Oil argued that the public interest was not adequately described nor had it been shown how the public interest would be damaged by disclosure of the documents requested. In dealing with that, the Chief Justice distinguished between cases where Crown Privilege is asserted in Canadian litigation and enforcement of letters rogatory for purposes of proceedings in foreign courts. He said:

> "It is not for a Court, when called upon to consider whether it should enforce letters rogatory, to take issue with the Government's determination of public policy or to measure its impact. It may be that different considerations will operate where a Canadian Court is concerned with Canadian litigation arising out of issues turning on Canadian law. Nor do I think there is any doubt in this application by Gulf Oil as to what is the public policy which the Government of Canada asserts. Again, there may be room for closer examination, and even assessment, where in Canadian litigation Crown Privilege is asserted and the Court may be disposed to examine the documents for which the privilege is claimed. I do not agree that any such assessment or examination is invariably required to enable a Court to consider whether, in its discretion, it should enforce letters rogatory calling for the production of documents for purposes of proceedings before a foreign tribunal."

The Chief Justice also rejected an argument by counsel for Gulf Oil that public interest immunity should not be attached to trading or commercial activities of the Government. He said:

> "...where the Government is party to the arrangements out of which the documents, whose disclosure is sought, emerge, and it has prompted the arrangements as a facet of its energy policy in which the marketing of uranium is a central feature, I fail to see how public policy can be ignored in the interest of comity towards a foreign court, as if the policy was essentially a reflection of private considerations without any public, governmental interest."

COMPETITION BUREAU OVERCOMES SECRECY HURDLE IN URANIUM INQUIRY

In a judgement handed down by Heald, J. on January 11, 1980, the Federal Court of Appeal dismissed an application under section 28 of the Federal Court Act "to set aside a decision of the Restrictive Trade Practices Commission dated September 12, 1979 by which the applicant McManus (an official of the Atomic Energy Control Board) was ordered to answer a certain question put to him by Counsel for the Director of Investigation and Research in the course of a hearing before the said Commission."

In September, 1977 the then Minister of Consumer and Corporate Affairs publicly directed the commencement of an inquiry under the Combines Invesitgation Act into the marketing of Canadian uranium. In the course of the inquiry Mr. McManus was called to testify at a hearing before a Member of the Restrictive Trade Practices Commission pursuant to section 17 of the Combines Investigation Act. On advice of Counsel, he refused to answer whether he had attended a particular meeting where uranium marketing had allegedly been discussed. Subsequently, Mr. R.S. McLellan, Q.C., a Member of the Commission, ruled that Mr. McManus was obliged to answer the question. That was the decision which was the subject of the appeal to the Federal Court.

Counsel for the applicants based their case upon section 26 of the Atomic Energy Control Act relating to disclosure of information, the Oath of Fidelity and Secrecy which the applicant had been required to sign as an officer of the Board, the Official Secrets Act and the Uranium Information Security Regulations. All these arguments were rejected by the Court.

Before hearing arguments on the merits the Court requested and heard argument as to whether the matter was one which the Court had the power to review under section 28. In argument only one counsel submitted that the Court was without jurisdiction. In view of the Court's decision on the merits, however, it found it unnecessary to decide the question of jurisdiction.