

IN THE COURTS

COURTS TACKLE POST-SOUTHAM COMBINES SEARCH ISSUES

The decision of the Supreme Court of Canada in Southam that the search and seizure powers under s. 10 of the Combines Investigation Act are ultra vires has been followed by several related decisions in lower courts. Those decisions have helped to clarify the status of evidence obtained in searches prior to Southam and the conditions under which the Bureau of Competition Policy can conduct searches and seizures under s. 443 of the Criminal Code.

The status of evidence obtained under s. 10 of the Combines Investigation Act depends in part upon the date of its seizure. The Charter of Rights and Freedoms was proclaimed on April 15, 1982. On January 31, 1983 in Southam Inc. v Director of Investigation and Research, (1983) 3 W.W.R. 385, the Alberta Court of Appeal held S. 10 to be of no force and effect by virtue of the Charter. The Federal Court, Trial Division, on July 6, 1983 in Thomson Newspapers Ltd. v Hunter, Director of Investigation and Research, (1983), 73 C.P.R. (2d) 67, rendered a similar decision. Finally, the Supreme Court of Canada upheld the Alberta Court of Appeal's decision in Southam on Sept. 17, 1984. The Bureau of Competition Policy did not conduct any searches under s. 10 after the Federal Court decision and has relied instead upon s. 443 of the Criminal Code to conduct searches in connection with suspected criminal offences such as price fixing. There have been no further searches in connection with inquiries into reviewable practices, which are all civil provisions.

There may be a lapse of several years between the time of a search and the launching of a prosecution. Consequently, questions arise about the status of evidence seized under s. 10 prior to the proclamation of the Charter, and after the proclamation but before the Supreme Court of Canada's decision.

Calvin S. Goldman, writing in Canadian Competition Policy Record of December, 1984, concluded that the admissibility of evidence obtained under s. 10 searches will likely depend upon whether in the circumstances of each case the admission would offend s. 24(2) of the Charter (bring the administration of justice into disrepute). He noted three decisions which involved searches prior to the Charter. In Rex v. Burns Foods Ltd., et al, (1983), 76 C.P.R. (2d) 223, the Alberta Provincial Court held that evidence gathered in a 1974 search was to be excluded pursuant to s. 24 of the Charter. Earlier, however, Van Camp, J. of the Ontario Supreme Court in R.V. Metropolitan Toronto Pharmacijs Association ruled on May 4, 1983 that evidence gathered in a 1979 search ought not to be excluded under s. 24 of the Charter, holding that the Charter does not operate retrospectively and that in any event the 1979 search was not one to bring the administration of justice into disrepute. In Blackwoods Beverages Ltd. et al. v. Her Majesty the Queen et al., the Manitoba Court of Appeal on November 20, 1984 in a majority decision (Monnin, C.J.M. and O'Sullivan J.A.)

allowed an appeal against an order of the Manitoba Court of Queen's Bench holding that 1977 and 1981 seizures under s. 10 of the Act were illegal and unreasonable, that the documents should be returned and that they were inadmissible in evidence. The Court of Appeal held that 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 be made when all the circumstances are before the court at the preliminary inquiry or at trial.

In an even more recent case Mr. Justice Lander of the Supreme Court of British Columbia, in his judgment of December 4, 1984, adopted the reasoning of the Blackwoods case and dismissed an application to squash a 1979 search order under s. 10 and to order the return of the seized documents (Between Her Majesty The Queen, respondent, and LOF Glass of Canada Ltd., petitioner).

There have been two recent decisions involving searches which were conducted after the Charter but before the Supreme Court of Canada's decision. On February 22, 1985, Mr. Justice Denault of the Federal Court, Trial Division, rendered a decision in Skis Rossignol Ltee. Ltd. et al and Lawson A.W. Hunter et al respecting documents seized under s. 10 in August, 1982. Denault, J. ruled that the searches and seizures had been illegal, null and void, and all documents including extracts from and photocopies of documents seized were to be returned except those necessary for the criminal prosecution. After noting that the documents authorizing the search did not contain any errors, that the search and seizure had been conducted in a normal manner, and the only basis on which they were being attacked was that sections 10(1) and (3) of the Combines Investigation Act had been declared inoperative and incompatible with section 8 of the Charter, His Lordship stated:

"Except for the decision rendered by the Supreme Court, no special circumstances were thus established by the applicants; they also argued that the respondents, who are officers of the Crown, should have known that the Alberta Court of Appeal had held, in January 1983, that sections 10(1) and 10(3) of the Act were incompatible with section 8 of the Charter. This argument cannot be accepted, since they would then have had to assume what the Supreme Court's decision would be. Even admitting the seriousness of certain circumstances, however, would it be appropriate and just, by way of remedy, to exclude the evidence thus gathered? It is obvious that prohibiting the Crown from using it would amount to prohibiting the Crown from presenting legally obtained evidence in a criminal proceeding, and this is contrary to the principles of law.

"Consequently, without even considering section 24(2) of the Charter, it seems to me that the applicants have not established any special circumstances such as would justify my granting the relief sought on the mere fact that the Supreme Court recently decided that such an authorization, search and seizure were reasonable".

On January 17, 1985, Judge Jean Sirois of the Court of Sessions of the Peace in Montreal (The Queen v Henry Galler Inc.) made a similar decision respecting documents seized during a search in July, 1982 which he found had been conducted in a normal manner. He expressly disagreed with the Alberta Provincial Court's Burns Foods decision and cited with approval the decision of Mr. Justice Martin of the Ontario Court of Appeal on November 15, 1984 in Her Majesty the Queen and Brian Noble. In that case, s. 10(1)(a) of the Narcotic Control Act authorizing entry and search under a writ of assistance was invalidated but the evidence which had been obtained under it was admitted. Martin, J.A. had stated:

"Although I have reached a different conclusion than the trial judge with respect to the constitutional validity of the provisions of s.10(1)(a) authorizing the search of a dwelling under a writ of assistance, and have, consequently, held that the search in this case contravened s.8 of the Charter, I am, nonetheless, of the view that the admission of the evidence of the finding of the narcotic drug as a result of the search would not bring the administration of justice into disrepute, and that the evidence was properly admitted. The trial judge found that Sergeant Kay was acting in good faith. The provisions of s.10(1)(a) authorizing the search of a dwelling-house under a writ of assistance had not been held to be constitutionally invalid by the Court of Appeal of any province. Indeed, there are presently conflicting decisions with respect to the constitutional validity of the provisions of s. 10(1)(a) authorizing the search of a dwelling-house pursuant to a writ of assistance. The search was carried out in a reasonable manner with due regard to the appellant's other constitutional rights. Moreover, the trial judge found as a fact that Sergeant Kay reasonably considered that he was confronted by a situation of urgency which made the obtaining of a search warrant impracticable. Circumstances of urgency, as previously noted, are properly a factor to be taken into account in determining whether the admission of evidence uncovered by a warrantless search where a warrant is required would bring the admission of justice into disrepute."

The Bureau of Competition Policy has encountered a number of challenges in court to the use of s.443 of the Criminal Code for the conduct of searches and seizures (see also Calvin S. Goldman, supra, and Canadian Competition Policy Record, September, 1984, pages 17-20). In general, the courts have imposed stricter conditions on the use of the section than they did on the use of s.10 of the Combines Investigation Act. They have, for example, insisted upon more specificity as to the things being sought and the locations to be searched, as well as a showing of reasonable grounds for believing that there is evidence to be found. S. 443 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 an 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."

On January 23, 1985 Mr. Justice Smith of the Supreme Court of Ontario, Toronto Motions Court, quashed a search warrant in William Aikenhead Door & Hardware Ltd. (Applicant) and P. Wagschal et al which had been issued because of suspected bid-rigging offences in connection with two building projects. His Lordship agreed with the applicant that no grounds were set out in the Information that could justify a belief on the part of the Justice that any offence had been committed. He stated:

"My review of the information reveals that the only evidence before the justice came from 'a trustworthy person' without any identification whatever of the individual or of his source of knowledge. There is no allegation that the 'trustworthy person' is a police informer, an allegation that may have attracted the usual privilege nor is it claimed that there was any promise of confidentiality. This is not a mere technical defect within the jurisdiction of the justice. The justice never acquires jurisdiction unless he believes on the basis of the information that there are reasonable grounds. It is not the informant who must believe, it is the justice. A 'trustworthy person' without more may turn out to be an employee with an axe to grind, an eavesdropper, a thief, a competitor, or a mere gossip who heard it from someone else. It is not possible for a justice on such a basis to be satisfied, certainly not with any degree of confidence, that he has reasonable grounds."

At the same, Smith, J. disagreed with a contention by the applicant that the warrant was also invalid because it authorized seizure of documents relating to projects other than the two in question. He stated:

"I cannot agree. Evidence of bid rigging in the Merrill Lynch Canada Tower project or any other project from January 1, 1984 (all of these projects being mentioned in the information and in the

warrant) can be of assistance in the Crown's effort for instance in defining a context or establishing a scheme or similar acts which in turn could conceivably or perhaps even likely constitute evidence of the commission of the two offences mentioned. That kind of evidence therefore, can help satisfy the justice pursuant to s. 443 of the Criminal Code that there are reasonable grounds to believe that the offences defined were committed. As long as the materials and the documents are either shown or are said in the information to relate to the offences set out and defined, the warrant to follow will not amount to a carte de blanche or to an authorization to launch a fishing expedition. A certain latitude must be allowed."

On April 9, 1985 Associate Chief Justice Parker of the Supreme Court of Ontario quashed search warrants which had been issued on March 17, 1985 under s.443 in connection with a hostile takeover bid for Fathom Oceanology Ltd. by Fleet Aerospace Corporation. At the time the warrant was issued Fleet had not yet acquired any shares of Fathom, although it did so shortly afterwards. On March 18, the Director of Investigation and Research applied to the Federal Court, Trial Division for an interim injunction under s.29.1(3) of the Combines Investigation Act to restrain Fleet from acquiring any Fathom shares. That application was adjourned and then dismissed on March 27.

Parker, J., in considering the application to quash the search warrants, noted that the Crown, in seeking an interim injunction had filed an affidavit stating that the investigation was continuing and that 'it is the intention of the Attorney General of Canada upon completion of the aforesaid investigation and analysis to institute proceedings in the Supreme Court ... pursuant to s. 30(2) of the Combines Investigation Act'. His Lordship pointed out that s. 30(2) relates to injunctive relief and that no reference had been made to the laying of a charge under s. 33 as it relates to an illegal merger. He stated:

"Does the information relied on here give reasonable and probable grounds that an offence has been committed? If one looks at the grounds for belief in the information, the offence alleged is one that is likely to take place in the future, it does not refer to an offence that has taken place.

"The first paragraph of the grounds for belief state that 'Fleet will purchase' and that 'Fleet will be in a position to take possession of the Fathom shares on Tuesday, March 19, 1985'. Another indication that the action complained of is anticipatory is in paragraph 6 which states that Fathom has expressed an interest in bidding and that this expected competition will be eliminated by the takeover.

"The facts set out in paragraph 2 of the grounds for belief are also misleading. The informant deposes that Fathom and Fleet are the only Canadian companies capable of supplying the sonar handling equipment to the Canadian government. It does not say they are the only companies capable of supplying the equipment. The informant assumes that Fathom will go out of business in the future. It may or may not. The takeover offer states that there is no present intention to dismantle Fathom or dispense with its present management. What the information is saying is that if the acquisition proceeds, it can be presumed that it will be detrimental to the public. This is not so.

"It is clear that the seeking of the search warrant was for purposes other than those set out in s. 443. The Director wished to secure an interim injunction and sought material to support it by way of a warrant under s. 443. It would seem that the investigator, knowing the limitations of s.443, made a bald assertion that an offence has been committed, but the grounds set out in the information refer not to a committed offence, but to an anticipated offence. In fact, on the date the information was sworn, not one share of Fathom had been acquired by Fleet or any of its directors. Nowhere in the information seen by the Justice was there a reference to the pending interim injunction application. There must be full and frank disclosure of the true purpose of the warrant. How can we say the Justice of the Peace was acting judicially if he did not have full disclosure or was misled? The informant states that he believes offences have been committed. It is significant that no offence has yet been charged. It may be that at a later stage the Director will decide to charge the applicant, but as of the date of the information, no such decision had been made.

It is not enough that the Justice of the Peace accept the belief of the informant. He must rely on the evidence submitted to support that belief. I find that the Justice of the Peace was not in a position to determine that an offence had been committed based on the reasons set out in the information. Before the provisions of the Criminal Code can be invoked, the Director must be pursuing the investigation of an offence that has been committed, not merely inquiring as to the likelihood of an anticipated offence."

Finally, there have been two decisions on appeals from a decision by Chief Justice McEachern of the Supreme Court of British Columbia in chambers on April 18, 1984 (Dobney Holdings et al.). As described in Canadian Competition Policy Record, September, 1984, pp. 18-19, Chief Justice McEachern set aside in part search warrants which had been issued under s. 443 of the Criminal Code. One of the deficiencies he noted was that, while the time period specified in the warrants was 1969-84, there was no evidence before the Justice of the Peace to support the possible commission of an offence before

November 1, 1973. Dobney appealed on the ground that there was authority for the proposition that on an application for certiorari the court could sever portions of the warrants where there was lack of jurisdiction shown but on such application the court could not amend the warrants to search. The Crown cross-appealed, contending that despite the many cases dealing with the provisions of s. 443 where certiorari has been employed to quash a search warrant, certiorari does not lie to challenge the validity of search warrants.

On February 14, 1985 Mr. Justice Hinkson of the Court of Appeal of British Columbia (Carrothers and Hutcheon, J.J.A. concurring) agreed with the judge in chambers that the time period covered by the warrants was excessive but held that he had exceeded his jurisdiction by amending the warrants. He held that there is no statutory authority permitting a superior court, on certiorari application, to amend a search warrant. As a consequence, the Court quashed the search warrants. The court dismissed the cross-appeal.

Dobney then applied for an order directing the return of their documents. In his judgement on March 6, 1985 Mr. Justice Esson of the Court of Appeal of British Columbia in chambers summarized his conclusions as to the relevant law as follows:

- "1. A reviewing court, on quashing a search warrant, has power to order return of any goods seized under the warrant.
2. If the Crown shows that the things seized are required to be retained for the purposes of a prosecution, either under a charge already laid or one intended to be laid in respect of specified chargeable offence, the court may refuse to order the return.
3. No particular formality is required in order for the Crown to show the requisite element of necessity to retain the things.
4. The power to order the return of goods is incidental to the power to quash but may also arise under s. 24(1) of the Charter if the search and seizure was unreasonable as well as illegal.
5. The conduct of the prosecuting authorities in relation to the search and seizure is a factor to be considered in deciding whether to exercise the discretion.
6. Other factors to be considered in exercising the discretion may be the seriousness of the alleged offence, the degree of potential cogency of the things in proving the charge, the nature of the defect in the warrant and the potential prejudice to the owner from being kept out of possession."

He then went on to state:

"In this case the Crown is not in a position to make a categorical assertion that any of the documents are needed for a prosecution. It does not know because it has not yet had a chance to examine the documents. What it relies upon is evidence placed before the justice of the peace which provides reasonable grounds for alleging that an offence was committed, and the fact that business records of the several companies can, in the nature of things, be expected to contain documents relevant to the proof of such an offence.

.....

"Having in view the nature of the alleged offence and the nature of the documents seized, I consider that to be a reasonable position... I therefore conclude that the position put forward by the Crown is sufficient to meet the test of showing that retention of the documents is needed for the purposes of a prosecution.

"There is no basis for criticism of the conduct of the authorities. They have, it would appear, been as considerate and cooperative as their duties permit and, in particular, have acted reasonably in cooperating with the appellants to obtain a ruling on the validity of the search warrants before examining the documents.

.....

"What the Crown asks is that the documents remain in the custody of the Justice of the Peace until it has had an opportunity to seek a fresh warrant which will permit seizure and search of whatever documents are covered by it.

.....

"That appears to be a reasonable approach."

His Lordship thereupon ordered that "the Justice of the Peace return the documents to the appellants within seven days from the date of service of this order provided that, if a new warrant or warrants has been obtained before the expiration of seven days, the Justice of the Peace is to deliver to the Crown all documents covered by the warrant or warrants and to return to the appellants all other documents."

ONTARIO SUPREME COURT JUSTICE HOLDS PRIVATE SUIT PROVISION IN COMBINES ACT ULTRA VIRES

Mr. Justice Rosenberg of the Supreme Court of Ontario, in ruling on an application before the Toronto Motions Court, held on September 4, 1984 that s. 31.1 of the Combines Investigation Act is ultra vires. (Between City National Leasing Limited, Plaintiff, and General Motors of Canada Limited, Defendant). The decision is under appeal and the Attorney General of Canada will be represented in support of the constitutional validity of the section.

S.31.1 authorizes private suits for recovery of damages resulting from conduct contrary to the criminal prohibitions in Part V of the Act or from the failure of any person to comply with an order of the Restrictive Trade Practices Commission or a court under the Act.

The case concerned a private suit by City National claiming damages against General Motors. The notice of motion included allegations that General Motors had discriminated against City National by providing interest rate support to competitors of City National but not to City National in the purchase of trucks from General Motors dealers contrary to s. 34(1)(a) of the Combines Investigation Act. General Motors was successful in its application to the Toronto Motions Court to strike out the parts of the notice of motion which were based upon sections 31.1 and 34 of the Combines Investigation Act.

Rosenberg J. found for the applicant on grounds not related to the constitutional issue. The impugned truck sales had been made by General Motors dealers rather than by General Motors itself, and his Lordship decided that such purchases do not constitute purchases from General Motors within the meaning of s. 34(1)(a). Moreover, sales from 1970 to 1980 were involved, and he concluded that s. 31.1, even if constitutional, was not retroactive; consequently, the sales prior to the coming into force of s. 31.1 in January, 1976 could not provide a cause of action under the section.

Turning to the constitutional issue he noted the previous cases, which have left the status of the section in an unsettled state. The section was held to be ultra vires in 1979 by the Federal Court, Trial Division in Rocois Construction Inc. v. Quebec Ready Mix Inc., 105 D.L.R. (3d) 15. In 1980 at trial the Supreme Court of Ontario in Seiko Time Canada Ltd. v. Consumers Distributing Co. Ltd., 112 D.L.R. (3d) 500, held that the common law tort of passing off was applicable and the action did not need assistance from s. 31.1 but followed the Rocois decision in holding the section to be ultra vires. While the Court of Appeal upheld the trial judgement, it expressly stated that its decision was not to be taken as agreeing with the Trial Judge that s. 31.1 was ultra vires. The section was held intra vires in 1980 as part of a comprehensive scheme for the regulation of trade and commerce by the Alberta Court of Queen's Bench in Henuset Bros. Ltd. v. Syncrude Canada Ltd. et al, 114 D.R.R. (3d) 300.

Mr. Justice Rosenberg indicated that he would not have been prepared to grant the motion on the question of the constitutionality of s. 31.1, citing the decision of Dube J. of the Federal Court, Trial Division in 1982, Burnaby Machine & Mill Equipment Ltd. v. Berglund Industrial Supply Co. Ltd. et al, 64 C.P.R. (2d) 206 at page 212 as follows:

"Again, I must repeat that the power of the court to strike out a pleading, or portions thereof, as disclosing no cause of action should be exercised only in plain and obvious cases. The state of the jurisprudence on s. 31.1 of the Combines Investigation Act is not yet so clear and settled that pleadings resting thereon should be struck out on such a preliminary motion."

Mr. Justice Rosenberg said that, taken by itself, s. 31.1 is a matter of property and civil rights and "falls squarely within" the words of Chief Justice Laskin in MacDonald v. Vapour Canada Ltd. (1976), 66 D.L.R. (3d) 1. In that case 7 (e) of the Trades Marks Act was ruled ultra vires; it provided that "No person shall ... do any other act or adopt any other business practice contrary to honest industrial or commercial usage in Canada." Chief Justice Laskin stated on pp. 25-6:

"The plain fact is that s. 7(e) is not a regulation, nor is it concerned with trade as a whole nor with general trade and commerce.

....

"One looks in vain for any regulatory scheme in s. 7 let alone s. 7 (e). Its enforcement is left to the chance of private redress without public monitoring by the continuing oversight of a regulatory agency, which would at least lend some colour to the alleged national or Canada-wide sweep of s. 7(e). The provision is not directed to trade but to the ethical conduct of persons engaged in trade or in business, and, in my view, such a detached provision cannot survive alone unconnected to a general regulatory scheme to govern trading relations going beyond merely local concern. Even on the footing of being concerned with practices in the conduct of trade, its private enforcement by civil action gives it a local cast because it is as applicable in its terms to local or intra-provincial competitors as it is to competitors in inter-provincial trade."

(Emphasis added.)

Mr. Justice Rosenberg then addressed the question whether s. 31.1 could be justified as part of a scheme of regulation. After noting the Act's "complex scheme for its enforcement", he concluded:

"It is clear that s. 31.1 is not part of the complex scheme set up by the Act. It is not dependent on any finding by the Director or the Commission. For some seventy-five years the Act operated

without such a provision. It cannot be justified as a necessary part of an administrative scheme set up by the Act."

Finally, in considering whether s. 31.1 is "necesssarily incidental" or "truly ancillary" to other provisions in the Act or the regulation of trade and commerce, he cited Martland J. in The Regional Municipality of Peel v. McKenzie and the Attorney General of Canada et al (1982), 42 N.R. 573 (S.C.C.). That case concerned s. 20(2) of the Juvenile Delinquents Act. It provided that upon finding a child to be a juvenile delinquent, a judge could order the child to be placed in a particular situation and could determine who was to pay for support. Mr. Justice Martland stated at page 585:

"This is not legislation in relation to criminal law or criminal procedure, and it was not truly necessary for the effective exercise of Parliament's legislative authority in these fields. ... It could not be justified in the absence of a direct link with federal legislative power under s. 91(97). There is no direct link between the municipality 'to which the child belongs' and the issue of the child's criminality. The obligation sought to be imposed on the municipality arises only after the criminal proceedings have been completed and sentence has been imposed."

(Emphasis added.)

Mr. Justice Rosenberg concluded:

"I am of the view that the Peel and McKenzie case applies to the case at bar. The right of a private individual to sue is not truly necessary for the Combines Act to be effective. Section 31.1 is accordingly ultra vires the Parliament of Canada."

COURT REJECTS BID FOR INTERIM INJUNCTION TO HALT TAKEOVER

Mr. Justice Muldoon of the Federal Court, Trial Division, in a decision on March 27, 1985, dismissed an application by the Attorney General of Canada for an interim injunction under s.29.1 of the Combines Investigation Act to prevent Fleet Aerospace Corporation from acquiring control of Fathom Oceanology Ltd. S. 29.1 was proclaimed in 1976 but had never been invoked. It provides in part:

"29.1(1) Where it appears to a court, on an application by or on behalf of the Attorney General of Canada or the attorney general of a province,

- (a) that a person named in the application has done, is about to do or is likely to do an act or thing constituting or directed

toward the commission of an offence under Part V or section 46.1, and

- (b) that if the offence is committed or continued
 - (i) injury to competition that cannot adequately be remedied under any other section of this Act will result, or
 - (ii) a person is likely to suffer, from the commission of the offence, damage for which he cannot adequately be compensated under any other section of this Act and that will be substantially greater than any damage that a person named in the application is likely to suffer from an injunction issued under this subsection in the event that it is subsequently found that an offence under Part V or section 46.1 has not been committed, was not about to be committed and was not likely to be committed.

the court may, by order, issue an interim injunction forbidding any person named in the application from doing any act or thing that it appears to the court constitute or be directed toward the commission of an offence, pending the commencement or completion of a prosecution or proceedings under subsection 30(2) against the person."

The section permits ex parte applications in situations of urgency, in which case any injunction issued may not have effect for more than ten days. Subsection 30(2) provides for an order of prohibition by a superior court against commission of an offence or of any act so directed, and authorizes dissolution of a merger or monopoly.

Events leading to the application began with an announcement by Fleet on February 18 of a proposed takeover bid to acquire all the outstanding shares of Fathom. Fathom opposed the bid and sought the assistance of the Combines Director. Trading in Fathom shares was suspended by the Ontario Securities Commission. Trading was resumed on March 19, at which time Fleet began acquiring Fathom shares. It had acquired about 70 percent of the shares at the commencement of the hearing before Mr. Justice Muldoon on March 25.

On March 18 the Director applied ex parte to Jerome, A.C.J. of the Federal Court, Trial Division, for the interim injunction. That application was adjourned to March 21, at which time Mr. Justice Collier adjourned it to March 25. Mr. Justice Muldoon noted that both Justices "severally and on separate days, declined to acknowledge any urgency in the situation and equally declined to proceed ex parte on this application".

In examining the definition of "merger" (i.e. illegal merger) in s.2 of the Act, His Lordship pointed out that a merger "must bear all the pejorative

connotations expressed in the definition, such as acquiring control, lessening competition and harming the interest of the public, or there is no so-called 'merger'."

According to the evidence, Fleet and Fathom have been the Canadian manufacturers of sonar handling equipment, the latter producing types not made by the former. However, Fathom had recently expressed interest in supplying a type made by Fleet, and was successful in bidding against Fleet for a subcontract. His Lordship stated:

"If Fleet and Fathom be competitors at all, such status appears to be little more than embryonic at the present. If they be not competitors, then the definition of a merger is not engaged, and no offence is in the offing. Bruce William Gowan, Fleet's Secretary-Treasurer, in his affidavit cogently casts considerable doubt upon the applicant's proposition that they are, in fact, competitors."

Other evidence which Muldoon, J. noted was that Fathom could not legally come under Fleet's complete control for another 45 days and that the text of Fleet's offer indicated that no immediate changes were planned. Pointing out that, if the merger did lead to a lessening of completion, the government could still seek an injunction under s. 30(2), he stated:

"In any event, it seems that if the Attorney General moves with diligence and determination under subsection 30(2), Fathom's position in the market will not be irrevocably prejudiced, if at all, before the issue can be litigated, or at least before the commencement of the litigation. On the material before the court, it is more speculative than reasonable and probable that the acquisition of shares will lessen competition in the near future."

In dismissing the application, Mr. Justice Muldoon cited the late Chief Justice Laskin of the Supreme Court of Canada in Regina v. K.C. Irving et al. (1976) 32 C.C.C. (2d) 1 at pages 12 and 13 to the effect that proof of detriment must be adduced and cannot be assumed from market control. Muldoon, J. concluded:

"In the present, time-metered procedural proceedings, and without daring to hint at or predict the outcome of the impending substantive proceedings, which are to be adjudicated on the evidence which will be adduced in the High Court of Ontario, the applicant has not presented clear and cogent reasonable and probable grounds for an injunction pursuant to section 29.1, despite the able conduct of the case by counsel for the Attorney General. Section 29.1 furnishes a valuable instrument for the prevention of the economic and commercial offences described in the Combines Investigation Act. The application fails because of a lack of reasonable and probable grounds supported by evidence. To adduce

such evidence may be difficult, but unless Parliament were to reformulate the legislation, it will always be necessary in this kind of proceeding. The Attorney General's problem here is very similar to that mentioned in the Irving case, above. The dismissal of the application in this proceeding, being of a procedural nature, will not foreclose the Attorney General from a future application if other better evidence should come to hand.

FEDERAL APPEAL COURT QUASHES RTPC MEMBER'S AMENDMENT OF SUBPOENA

The Federal Court of Appeal, in a judgment by Mr. Justice Marceau (concurring in by Heald, J. and Stone, J.) on March 14, 1985, upheld an application under s.28 of the Federal Court Act by the combines Director to set aside an amendment made by a Member of the Restrictive Trade Practices Commission to an order by the Chairman of the Commission requiring the attendance of certain persons and the production of specified documents.

The case involved examination of witnesses before a Member of the Commission in the Director's monopoly investigation into the refusal of the National Hockey League to allow transfer of the St. Louis Blues franchise to Saskatoon. The Director had obtained orders by the Chairman of the Commission under s.17 of the Act requiring officers of the NHL clubs to attend and to produce documents including financial statements of the member clubs. The member clubs asked the Commission to accept unified reports of club operations aggregated in three groups so as to preserve confidentiality instead of requiring the individual financial statements as ordered. The Commission Member, Mr. L.R. Wilson, agreed, summarizing his views as follows:

"My conclusion is that the financial statements of the N.H.L. member clubs are not relevant in the light of the unified form of reporting by member clubs. The unified report of the operations system provides all the pertinent facts needed to assist the Respondent without entering a zone of privacy and confidentiality which should be respected during an investigation."

The Director argued that it was a clear error in fact on the part of the Commission to find that the information contained in the "unified reports of operations" could render irrelevant the financial statements, and an error in law to consider that in an inquiry into a monopoly there is a zone of privacy and confidentiality which has to be respected.

Marceau, J. agreed with both of the Director's arguments. On the issue of privacy, he stated:

"It is no doubt for the sake of protecting the legitimate privacy of the corporations involved that Parliament has required

that as a rule all inquiries under the Act be conducted in private (s.27). But the legitimate interest of corporations to keep private some information relative to their activities has never given rise, in my understanding, to the acknowledgement of a zone of secrecy and confidentiality effective against an investigator called upon by law to probe into possible prohibited behaviour."

Referring to s. 17 which provides, inter alia, that a member of the Commission may order that any person make production of documents, as said:

"I see no limitations there based on privacy. The only justifiable limitations would be that the documents be germane to the issues and not subject to privilege. There is no law to support the existence of a general zone of privacy or confidentiality which would preclude the Director from requiring the production of documents relevant to his inquiry."

His Lordship inserted the following footnote in his reasons:

"There may be some question as to the reviewability of the decision of the Commission under section 28 of the Federal Court Act (and not section 18) as there is clearly some difficulty as to the exact nature of that decision and even as to the power of the Commissioner to make it: the Court was informed, however, that the parties had agreed not to raise any point of procedural or jurisdictional nature insofar as it was not necessary to do so."