IN THE COURTS

LIMITING OF STORAGE FACILITIES BY B.C. FRUIT GROWERS WAS NOT UNDUE

Mr. Justice Davies of the Supreme Court of British Columbia, in reasons handed down on June 28, 1985, acquitted the British Columbia Fruit Growers Association (BCFGA) and others of conspiracy between 1975 and 1980 inclusive to unduly limit facilities for storing or dealing in tree fruits under s. 32(1)(a) of the Combines Investigation Act. An appeal has been filed by the Crown. The subsection prohibits conspiracies:

> "(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product"

Charges under s. 32(1)(a) have frequently been laid along with charges under other parts of s. 32(1). As a result, the jurisprudence under s. 32(1)(a) is limited, but one case did reach the Supreme Court of Canada (see below).

The facts of the case were complex. For many years prior to 1974 the grower members of B.C.F.G.A., operating under the authority of the B.C. Natural Products Marketing Act, marketed virtually all the tree fruit grown in B.C. through their own company, B.C. Tree Fruits Ltd. The principal exception was the produce of growers with crops valued at less than $2,000.00. Each member grower contracted with one of the fourteen packing houses to receive his crop and prepare and ship it according to instructions from B.C. Tree Fruits Ltd. The growers received the proceeds net of the costs of B.C. Tree Fruits Ltd. and the annually agreed margins for the packers. Many of the packers are grower co-operatives and all are members of the Okanagan Federated Shippers Association. The scheme was administered by the B.C. Tree Fruit Market Board composed of three members elected by the B.C.F.G.A.

By 1974 some growers had become dissatisfied with the scheme, alleging excessive administrative costs, and wanted the right to market independently. In response, the Board passed a regulation on June 25, 1974 to permit the existence of independent grower-marketers. The Order provided in part:

> "Any grower or other person marketing any regulated product other than in inter-provincial and export trade may elect not to market the same through B.C. Tree Fruits Limited, provided this section shall not impair or affect contractual obligations with shippers or others with respect to such regulated product or the marketing of it."

Partly in order to discourage growers from becoming independents, a government assistance program was instituted in 1974 and made available only for grower members of the B.C.F.G.A. Early in 1974, at a meeting of the

B.C. Minister of Agriculture, the Chairman of the fruit marketing board and the President of the B.C.F.G.A., agreements were reached for the establishment of the program which was to be administered by the B.C.F.G.A.. The latter undertook to allow those wishing to opt out of central selling to do so without interference. The assistance program took effect in August, 1974 and was retroactive to the 1973 crop year. To qualify, a grower had to be or become a member of the B.C.F.G.A. in good standing and abide by the rules. Some who had opted out subsequently returned, but in the period from 1975 through 1980 there were about 200 independent growers and 2,000 member growers.

A difficulty which was apparently not anticipated was that some member growers took advantage of the June, 1974 Order by selling some but not all their produce independently. Mr. Justice Davies stated:

> "Where an Association grower, under contract to a packing house, sold some of his crop on the fresh market, the Agency would have less crop to market than anticipated and the grower obtained a quick profit and at the same time avoided paying his share of the cost of running the industry and his packing house's overhead on that portion of his crop that he peddled. He also had the advantage of having the industry sell the rest of his fruit."

To meet that problem, a new industry contract was approved on the recommendation of the Industry Central Contract Committee which was composed of representatives of B.C. Tree Fruits Ltd., the B.C.F.G.A. and the Shippers Association. The contract, which was approved and signed by all packing houses in 1976, contained a clause which in effect prevented a packer from accepting or marketing fruit on behalf of a grower who was not a member in good standing of the B.C.F.G.A. Davies, J. found that "many" of the growers who had become independent returned to the Association in 1976 although "many" of those did so in order to become eligible for the income assistance program. He also found that from 1975 to 1980 there were no operating packing houses available to independent growers. There was, however, storage available, and there were several packing houses in the Okanagan Valley that had gone out of business and were available for purchase or lease.

The Crown contended that the 1976 agreement on the new industry contract was in violation of s. 32(1)(a) in that it unduly limited facilities for storing or dealing in fruit in the Okanagan. His Lordship summarized the Crown's case as follows:

> "The Crown contends that the 1976 industry agreement adopted by the B.C.F.G.A. and entered into by the B.C.T.F. and each of the Accused, is illegal - that is, that it unduly limits facilities for storing or dealing with fruit in the Okanagan. Further, that the packing houses are the life blood of the industry, supplying a number of services - bins, cold storage, controlled atmosphere storage and normal storage, washing, waxing, grading and packing.

> It argues that any grower who does not have access to cold storage or C.A., is left with two options, either to try to dispose of his fruit in 90 days, or to build some kind of storage facility of his own which would be costly. The theory of the Crown is that although the Board's order permitted an independent to market his fruit, he would in fact be driven back to the Associaiton because by the industry agreement of 1976, all operating packing houses were closed to an independent."

In the course of the trial proceedings, His Lordship dealt with the meaning of "to limit...the facilities" as it appears in s. 32(1)(a). The defence had moved for dismissal. They contended, inter alia, that the effect of the wording is to prohibit the reduction in size or the number of packing houses. On that interpretation it would be an offence to limit storage space for the public, and the defence argued that there was no evidence of an agreement to limit the size or number of packing houses. The Crown argued that the intent of the section is to prohibit the artificial removal of storage facilities from the reach of potential competitors, thus depriving them of the opportunity of storage. His Lordship could find no authority bearing directly on the question, but he cited Mr. Justice Laskin, as he then was, in J.W. Mills & Son, Limited et al. v. The Queen, (1971) S.C.R. at page 70. The case involved a conspiracy among frieght forwarders, and Laskin, J. stated:

> "In a broad sense, it may be said that Section 32(1)(a), which does not refer to any limitation of competition, is concerned with maintaining competitive access to 'facilities for transporting' goods. But it was the contention of the accused that only physical means of transport came within the term 'facilities' and that their service operations (even if brought within the ban of Section 32(1)(c)) had nothing to do with the availability of rail service for those who required it.
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> "I do not find at all helpful judicial interpretations of the word 'facilities' in the cases arising under different statutes, and especially when the word does not have the contextual connection in which it appears in the Combines Investigation Act.
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> "I agree with the trial judge that (whatever be the meaning of 'facilities') conspiring persons may be guilty under Section 32(1)(a) without owning or controlling 'facilities' for transporting goods as they may be under Section 32(1)(c) without owning or possessing or being associated with any transportation operation as agents thereof. If, as is uncontested, the accused dominated the channels of distribution to eastern Canada of the imported goods laid down at Vancouver, the Court cannot ignore the centrality of rail carriage in that distribution. It is no answer to a charge under Section 32(1)(a) to say that this hold on rail carriage was simply a consequence of the elimination of competition (in obtaining the authorizations of

> importers to see to the effective movement of their goods at the favourable mixed cargo rate) and that therefore it was not in itself culpable. In my opinion, the operations of the accused, to which the rail carriage was integral, are comprehended by the term 'facilities for transporting' goods. The physical means of transport were intimately involved, and even if they did not represent the entirety of the activities of the accused in their particular business, they are enough to bring the accused within the bite of the statute. It is evident that these accused limited to themselves (and unduly) facilities for transporting to eastern Canada the categories of imported goods covered by relevant tariffs."

Mr. Justice Davies then concluded:

> "In my view the intent of the wording of Section 32(1)(a) is an attempt to maintain competitive access to facilities for storage. I cannot accept the contention of the Defence that the word 'facility' should be interpreted in the narrow sense of referring only to the numbers of buildings available, surely the intent of the legislation is to protect against an agreement being made to limit the opportunity to use storage facilities."

The trial therefore continued. In his reasons for judgment, His Lordship summarized the facts of the case as follows:

> "There is no question that there was an agreement between the fourteen packing houses and B.C.T.F. in 1976 under which the packing houses were required to deal only with Association members. The fourteen packing houses were all of the packing houses that were offering full facilities or services at that time. As I have mentioned there were several facilities not tied to the industry with cold storage available and there were several packing houses with packing facilities that were available for sale or lease. But by the industry agreement, the packing houses available to an independent were limited. Therefore, the question to be considered is were the facilities for storing or dealing with fruit unduly limited?"

In considering the question of undueness, His Lordship rejected a defence argument that there was authorization for the agreement under the Natural Products Marketing Act. He stated:

> "Under the Act, the Board had the power to licence packing houses and did so by regulation. The wording of the Act may well have permitted the Board to further control the operation of packing houses but it did not do so. therefore, I have rejected the argument that was was done was done pursuant to validly enacted provincial legislation and therefore cannot be criminal."

In further considering the question of undueness, Davies, J. noted that the passage of the Natural Products Marketing Act many years ago reflected a conviction on the part of the government that central selling was essential to the tree fruit industry, and he found that the June, 1974 Order had left central selling in place, adding:

> "The Minister of Agriculture said he remained committed to central selling but felt obliged to permit those that wanted to be independent to be free to do so. If central selling was to remain, then there had to be discipline of the integrated system, that is to say, that it was anticipated that there would be controls for all growers who stayed in the industry similar to those that had existed through legislation prior to June of 1974. The Defence says that in the industry where all components are inter-related and inter-dependent, it was not possible for a grower to be partly in and partly out. This would create uncertainty in the system as the Agency would be unable to plan its marketing strategy with any certainty of inventory."

He accepted the evidence of defence witnesses that the Association had no objection to anyone electing to opt out of the industry. With regard to growers who did opt out, he stated:

> "Although there was not an operating packing house available for someone outside of the industry, I have concluded that anyone who became an independent did so by choice. They had to elect to be out and in doing so, be aware of the fact that they would sell their fruit in the fresh market or they would have to obtain storage and packing facilities. It is clear that the industry agreement did not stifle competition. Independents sold fruit during that period. Several growers built or leased their own storage facilities and marketed independently."

Mr. Justice Davies then reached his conclusion that he had a doubt as to whether the agreement was undue, stated:

> "This unique industry was owned and controlled by the growers who wished to participate. It is true that all packing houses were with two exceptions co-operatives. But the co-operatives were made up of the growers who provided the fruit to the co-operatives. Further, the marketing agency, B.C.T.F. was and is, wholly owned by the Growers Association. This unique integrated industry was effectively owned and controlled by the growers.
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> "They settled upon an agreement that they felt was required for the efficient operation of the industry. I do not consider that such an agreement has harmed the public interest.

"The proper interpretation of the word 'unduly' is a matter of law. I have therefore reviewed the decisions I have referred to for guidance on the interpretation I should place on the word in this case. Having done so, I find I have a doubt as to whether it can be said that the industry agreement 'unduly' limited the facilities for the storing or dealing in tree fruit. That doubt must be resolved in favour of the accused and I find the accused not guilty."

COURTS UPHOLD TWO CHALLENGES TO COMBINES SEARCH WARRANTS

There have been two recent decisions in which search warrants obtained by the Bureau of Competition Policy were quashed. In one case, the warrants had been issued under s. 10 of the Combines Investigation Act prior to the decison of the Supreme Court of Canada in Southam that s. 10 is inconsistent with the Charter of Rights and Freedoms, and the other case involved a warrant issued under s. 443 of the Criminal Code. The decisions were based upon particular circumstances, but they help to delineate the conditions under which the Bureau may now conduct searches. Other decisions respecting searches are analysed in Calvin S. Goldman's article in the December, 1984 issue of Canadian Competition Policy Record, and further developments are reported in the June, 1985 issue.

On March 27, 1985, Judge Zuraw of the Provincial Court (Criminal Division) in Hamilton ruled in favour of the applicant for a motion under s. 24 of the Charter to exclude evidence obtained under a s. 10 search (Her Majesty The Queen v. Alexanian & Sons Ltd.). He found that the admission in evidence of the seized documents would bring the administration of justice into disrepute contrary to s. 24 of the Charter, stating:

"In determining whether the evidence is admissible, the Court must have regard to all the circumstances. Evidence, although improperly obtained, is prima facie admissible and the onus is on the person who is seeking to exclude the evidence to establish that its admission would bring, or in the French version, is capable of bringing, the administration of justice into disrepute. The evidentiary burden is that of the balance of probabilities.

"In determining admissibility in this case, I found the following factors to be of some significance:

(1) The nature of the authorization itself, i.e. the fact that the documents to be seized were not particularized in the actual form of the authorization itself, and there is no indication of a sworn information.

(2) The circumstances of the search. Any failure by the accused or its officers to co-operate would result in an offence under s.40 to 42 of the Combines Investigation Act.

(3) The place of search. With only one address and one accused named in the authorization, in fact here documents of another corporation were the only documents seized at the specified address, and the only documents of the accused that were seized were seized at another not specified address in Hamilton. The officer had relied on the clause, "elsewhere in Canada".

(4) The good faith of the officer. I do not find that any bad faith can be imputed to the investigating officer, but the question is whether or not good faith can be imputed to the Director. The five man Court of Appeal in Alberta had already advised the same issuing officer, Mr. Aitken's superior, that this type of authorization was invalid. It would have appeared to the Court, in that kind of a situation, that some kind of information sharing to those who are in receipt or possession of a similar type of authorization would have resulted in authorization holders receiving some instructions, but it does not appear that this was done.

(5) The seriousness of the offence and the extent of the illegality allegedly committed by the accused. Here the accused are charged with false advertising as to the sale of carpeting and the Crown has elected to proceed summarily.

(6) The urgency of the matter. As the facts above indicate, there does not appear to have been any urgency in this case.

"We look then to see whether the administration of justice would be brought into disrepute, or is capable of being brought into disrepute, where an authorization invalid at law and already ruled as such by a five man Court of Appeal in Alberta, is relied on by the investigator to conduct a search at a place not specified in the authorization and a seizure of documents not named in the authorization; where the accused is forced to co-operate on pain of being charged with an offence; where the offence charged is proceeded with summarily and where there is no urgency.

"I must rule that the administration of justice would be brought into disrepute in this combination of circumstances, even though no single circumstance or combination of circumstances, short ot the totality here, would necessarily give rise to the same conclusion."

The other decision was by Mr. Justice Kaufman of the Quebec Court of Appeal on June 26, 1985. He ruled in favour of the applicants and quashed warrants which had been issued under s. 443 of the Criminal Code for searches of the premises of Canfarge Ltee and other companies. The judgment of the court of first instance is described on pp. 19-20 of Canadian Competition Policy Record, September, 1984. In that judgment, which was rendered on July 4, 1984, Madame Justice Chevalier of the Quebec Superior Court in Hull rejected arguments that a search warrant could not be issued under s. 443 in connection with investigations under the Combines Investigation Act,(1) but she ordered deletion of the phrase "and other documents" where it appeared in the warrants. The first point was not appealed, and Mr. Justice Kaufman agreed with the trial judge on the second point. However, he disagreed with a finding she had made that the Justice of the Peace had not exceeded her jurisdiction in issuing warrants in Hull which were designed to be executed in Montreal. In consequence, he quashed the warrants.

CONDOMINIUM DEVELOPER CONVICTED ON PRICE MAINTENANCE COUNT

Camrost Group Ltd. was convicted on one count of price maintenance under s. 38(1)(a) of the Combines Investigation Act in the District Court of Ontario in Toronto on May 10 and was acquitted on two other counts. A fine of $10,000.00 was imposed.

S. 38 provides in part:

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

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(1) In deciding that a search warrant could be issued under s. 443 in connection with combines investigations, she relied on the decision of Mr. Justice Galligan of the Supreme Court of Ontario on June 1, 1984. (Miles Laboratories Ltd. and Cole Book Stores Limited). Galligan, J.'s decision was upheld by the Ontario Court of Appeal on October 9, 1984.

> (3) For the purposes of this section, a suggestion by a producer or supplier of a product of a resale price or minimum resale price in respect thereof, however arrived at, is, in the absence of proof that the person making the suggestion, in so doing, also made it clear to the person to whom the suggestion was made that he was under no obligation to accept the suggestion and would in no way suffer in his business relations with the person making the suggestion, or with any other person if he failed to accept the suggestion, proof of an attempt to influence the person to whom the suggestion is made in accordance with the suggestion."

Camrost was the developer and owner of a condominium complex, units of which it was offering for sale. A number of parties contracted to acquire units with the object of reselling at a profit before closing date. Thriplow Investments Ltd. had seven of the units. The directors of Thriplow included at least two lawyers and a doctor. There was a clause in the agreement of purchase and sale that required the consent of Camrost to any resale, and Thriplow wanted clarification of the conditions under which it could resell, partly because the market was in decline. The solicitor for Thriplow wrote to Camrost proposing the following condition under which its trustee, Mr. Hands, could resell:

> "In the event that Hands wishes to sell the units or any of them at a price below market prior to January 1, 1982, he will advise Camrost of such sale."

Camrost proposed the following instead:

> "Hands acknowledges that in the event he wishes to sell the units or any of them, Camrost will agree to such sale providing that the selling price is not less than the price of the comparable units Camrost is selling in the development at the time of resale."

An understanding was finally reached between Camrost and Thriplow ("the Group") whereby:

> "The Group will not publicly advertise for sale any of the units at below list prices currently being quoted by the Camrost Group.
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> ....
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> This understanding will, however, not preclude the Group from offering the units for sale privately or negotiating any offer received through a public advertisement."

S. 38 requires both the seller and the reseller to be engaged in business. In his judgment, Judge Sheard concluded from the letters patent of Thriplow that it was engaged in the purchase and sale of real estate, and he also

noted evidence that this was well known to Camrost. Moreover, he had no doubt that real estate is encompassed by the word "product" in s. 38 because the Act defines "product" as including an "article", which in turn is defined as "real and personal property of every description..."

Judge Sheard rejected an argument by counsel for the defence that there were "no teeth" in the efforts that his client might appear to have made. He pointed out that the agreement of purchase and sale required consent by Camrost to a resale. He also noted that, by s. 38(3), a suggestion by a supplier of a minimum resale price becomes an offence unless it is made clear that the reseller is under no obligation to accept the suggestion.

The two counts that were dismissed involved different resellers, each of whom had bought one unit for speculative purposes. In one case it was a lawyer and an airline pilot and in the other case it was a marketing research consultant. Judge Sheard found that those parties were not engaged in the business of real estate. Moreover, neither had made it known to Camrost that they were so engaged. Regarding the latter point, Judge Sheard rejected an argument by counsel for the Crown that mens rea was not demanded to that extent by the section; He stated:

> "Although there is another section that Mr. Leising referred me to where the phrase 'knowingly' was included, it does not follow from that, in my view, that a person should be convicted of price-fixing relating to a person engaged in business in Canada if it was not known to the alleged price-fixer that the person with whom it was dealing was, in fact, 'engaged in business in Canada'."

MONTREAL AREA STEEL SUPPLIERS PLEAD GUILTY TO BID-RIGGING

Five steel suppliers were fined a total of $42,000.00 and subjected to Prohibition Orders in March after pleading guilty in Quebec Superior Court to bid-rigging under s. 32.2 of the Combines Investigation Act. Those fined were:

Acier d'Armature de Montreal	$ 2,000.00
Fertek Inc.	$15,000.00
Ferneuf G&S Inc.	$15,000.00
Acier Gendron Ltee	$10,000.00

The fifth supplier, Armature L&V Ltee, was subjected to the Prohibition Order but was not fined. The industry was in a precarious financial state, and Mr. Justice Greenberg made it clear that the fines would otherwise have been much higher. Acier d'Armature de Montreal is now in receivership.

Officials of the accused held two meetings in hotels in connection with tenders for the supply and installation of reinforcing steel which had been called by the Montreal Urban Community for a sewage treatment plant. At the first meeting, it was decided by cutting playing cards that Acier d'Armature and Gendron jointly would be the low bidder. At the second meeting, officials of the latter two companies advised the others what price they intended to bid. Their bid, which amounted to $11.2 millions, proved to be the lowest. However, the tender calling authority became aware of the scheme and called new tenders, thereby saving over $2 millions.

OUTSIDE THE COURTS

OTTAWA'S PLANS FOR TRANSPORT POLICY REFORM HERALD MORE COMPETITION AND LESS REGULATION

Transport Minister Don Mazankowski's position paper Freedom to Move, which was released on July 15, calls for a major shift from detailed regulation to more dependence upon competition in Canadian air, rail, highway and multi-modal transport as well as some pro-competitive changes in marine shipping policy. He plans to introduce implementing legislation by the end of this year after further consultations. The changes respecting highway transport also require provincial legislative changes, and these have been agreed upon although the legislative priorities of the new government of Ontario are unclear.

The changes proposed for air transport are summarized in a press release as follows:

> "Entry to any class of domestic commercial air service in Canada will be open to carriers meeting a 'fit, willing and able' requirement. It will no longer be necessary for the carrier to establish that its service is required by 'public convenience and necessity'. Any operator submitting evidence of adequate liability insurance, and in possession of a Department of Transport operating certificate attesting to the adequacy of its equipment and its ability to conduct a safe operation, shall be granted a licence.
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> "The new policy is expected to have particular impact on the encouragement of new local regional fixed-wing and rotating-wing carriers, in both charter and scheduled services.
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> "Discontinuance of services will require minimal notice - perhaps 60 days on monopoly routes, 30 days on others.