IN THE COURTS*

ORDERS UNDER SECTION 17 OF COMBINES ACT WITHSTAND CHARTER CHALLENGE IN BRITISH COLUMBIA

After three days of hearing, Mr. Justice K.M. Lysyk of the British Columbia Supreme Court dismissed applications seeking to declare s. 17 of the Combines Investigation Act inconsistent with s.7 of the Charter of Rights and Freedoms. The applications by Transpacific Tours Limited (CP Air Holidays), Pacific Western Holidays, Silver Wing Holidays Ltd. and one officer of each of these companies arose out of an inquiry by the Director of Investigation and Research to determine whether evidence existed of the commission of a s. 32 offence in respect to commissions the Companies would pay to travel agencies. Orders had been issued under s. 17 requiring the individual officers to attend, give evidence and produce a detailed list of documents.

In Reasons for Judgment issued on November 14, 1985, Mr. Justice Lysyk rejected the applicants argument that s. 7 of the Charter incorporates a right or privilege against self-incrimination by a person under investigation. Section 7 provides:

> "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

The challenge to s.17 of the Act centred on subsections (1) and (2):

> "(1) On ex parte application of the Director, or on his own motion, a member of the Commission may order that any person resident or present in Canada be examined upon oath before, or make production of books, papers, records or other documents to such member or before or to any other person named for the purpose by the order of such member and may make such orders as seem to him to be proper for securing the attendance of such witness and his examination, and the production by him of books, papers, records or other documents and may otherwise exercise, for the enforcement of such orders or punishment for disobedience thereof, all powers that are exercised by any superior court in Canada for the enforcement of subpoenas to witness or punishment of disobedience thereof.
>
> (2) Any person summoned under subsection (1) is competent and may be compelled to give evidence as a witness."

*Prepared by Fasken & Calvin, Toronto

After citing s. 20(2) of the Combines Investigation Act as well as s. 5 of the Canada Evidence Act both of which require a witness to answer questions if it is alleged that self-incrimination may result but both of which protect the witness against the use of the answers in subsequent criminal proceedings, Mr. Justice Lysyk held that ss. 11(c) and 13 of the Charter "fully covered the field of guaranteed legal rights relating to compellability and self-incrimination" and that s. 7 of the Charter contained no residual protection beyond the rights guaranteed in ss. 11(c) and 13. Sections 11(c) and 13 of the Charter read as follows:

> "11 Any person charged with an offence has the right ...
>
> (c) not to be compelled to be a witness in proceedings against that person in respect of the offence; ...."
>
> "13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence."

The Court concluded that since the Applicants before it had not been charged with an offence, s. 11 of the Charter could not be relied upon and that s. 20(2) of the Combines Investigation Act provided the same protection as both s. 13 of the Charter and s. 5(2) of the Canada Evidence Act.

In dismissing these applications, Mr. Justice Lysyk specifically disapproved of the reasoning of Mr. Justice Scheibel of the Saskatchewan Court of Queen's Bench in R.L. Crain et al. v. Couture and Restrictive Trade Practices Commission et al. (1983), 6 D.L.R. (4th) 478 in which it was held that s. 7 of the Charter included a residual privilege against self-incrimination with the result that s. 17 of the Combines Investigation Act was held invalid. He preferred instead the reasoning of Mr. Justice Marceau of the Federal Court of Appeal in Re Ziegler and Hunter (1983), 8 D.L.R. (4th) 648 and the analysis of the Supreme Court of Canada in Curr v. The Queen, (1972) S.C.R. 889 regarding construction of enactments of constitutional or quasi-constitutional stature.

VANCOUVER TOUR OPERATOR SUBJECT TO STIFF PROHIBITION ORDER

Pacific Northwest Bus Company Ltd. consented to a Prohibition Order in the Federal Court of Canada on July 16, 1985 prohibiting it from conduct "directed to or constituting an offence under section 33" of the Combines Investigation Act. The Order granted by Mr. Justice Barry Strayer is reminiscent of the stringent terms imposed on the household goods movers in December, 1983 (see Canadian Competition Policy Record of March, 1984).

The stated purpose of the Order against Pacific Northwest is to deal with its control or substantial control of the "Fully Independent Traveller bus sigh-seeing tour market in the Greater Vancouver Area". A "Fully Independent Traveller" is defined in the Order as a non-resident, traveller or visitor to the Greater Vancouver Area who is not part of any group that has had sight-seeing tours arranged in advance.

The Order contains a number of specific prohibitions against Pacific Northwest, among them:

- a prohibition against being a party to any agreement with any hotel or tourist attraction for the sale of articles or services or the display of advertising material if that agreement would restrict the hotel or tourist attraction from entering into arrangements with competitors of Pacific Northwest;

- restrictions upon removing or interfering with advertising material of competitors and from offering articles or services at unreasonably low prices;

- restrictions against taking steps that would prohibit potential competitors from entering into the market or expanding in the market;

- a two-year prohibition against amalgamating with or acquiring control in some other way over any competitor in the market including the acquisition of licences of others to operate sight-seeing tours or the acquisition of substantially all of their assets.

As in the case of the 1983 Prohibition Order against the household movers, the Pacific Northwest Order briefly addressed the question of what the Company can do but it does so in a much more limited fashion. One unique provision of the Pacific Northwest Order is the requirement that the Company advise the Director of Investigation and Research of any applications, objections or interventions it intends to make to the British Columbia Motor Carrier Commission. This particular provision goes on to provide that Pacific Northwest "shall not object to any requests by the said Director for status to make representations or to call evidence before the Motor Carrier Commission...."

The Order is to terminate seven years after its date. However, should there be a material change in circumstances or should Pacific Northwest cease to either substantially or completely control the relevant market that period could be retracted by order of the Court.

SECTION 45(2)(c)(ii) OF COMBINES ACT HELD UNCONSTITUTIONAL

At the preliminary inquiry in The Queen v. Dave Spear Limited, Don Dean Chevrolet-Oldsmobile Limited and Ted Lloyd Pontiac-Buick Ltd., His Honour Judge S.M. Harris of the Provincial Court (Criminal Division) at Niagara Falls, Ontario, held s. 45 (2)(c)(ii) of the Combines Investigation Act unconstitutional. The accused were charged with contravening s. 32(1)(c) of the Combines Investigation Act. The Crown was permitted to introduce into evidence documents seized in searches conducted before proclamation of the Charter of Rights and Freedoms.

Two of the accused Companies, Dave Spear Limited and Don Dean Chevrolet-Oldsmobile Limited attacked s. 45(2)(c)(ii) of the Act which provides that a document proven to be in the possession of an accused shall be admitted into evidence as prima facie proof that anything recorded therein as having been done, said or agreed to by any accused was, in fact, so done, said or agreed to. Judge Harris, in oral Reasons for Judgment delivered on August 23, 1985 characterized s. 45(2)(c)(ii) as a reverse onus provision for purposes of s. 11(d) of the Charter ("Any person charged with an offence has the right...to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal").

Applying the "rational nexus" test found in authorities such as The Queen v. Oakes (1983), 2 C.C.C. (3d) 339, Judge Harris inquired as to whether a rational connection existed between the fact that documents were found in the possession of an accused and the presumed fact that what was recited in the documents had actually occurred. He held that it would not be rational to conclude that documents in the possession of accused persons were proof of the truth of their contents rather than merely some evidence thereof. The fact that s. 45 (2)(c)(ii) cast upon the accused the burden of adducing evidence displacing the onus in s. 45(2)(c)(ii) led Judge Harris to hold that the prima facie provisions of that section were unconstitutional.

Nothwithstanding his finding in respect to s. 45 (2)(c)(ii), Judge Harris held that the documents were evidence "in the ordinary course" against those accused in whose possession they were found and hence there was sufficient evidence upon which to commit the accused for trial.

AGENT'S THREAT AMOUNTS TO ATTEMPTED PRICE INFLUENCING

In written reasons dated September 6, 1985 His Honour Judge Fitzgerald of the Provincial Court of Prince Edward Island found the Rainbow Jean Company Limited guilty of one count of attempted price influencing pursuant to section 38(1)(a) of the Combines Investigation Act. By written reasons dated October 8, 1985 Rainbow was fined the amount of $2,500.00.

Rainbow's sales agent for the Atlantic provinces, Smiley, was responsible for supplying Rainbow jeans to the wholesale and retail market of Prince Edward Island. Among his customers, were Henderson & Cudmore (which represented approximately 50% of the Rainbow jean market in Prince Edward Island) and Dandy Duds Limited (which represented approximately 25% of the market). Dandy Duds was operated by Mr. Frank Dow.

The charge stated that on or about March 19, 1980 Rainbow directly or indirectly by agreement, threat, promise or any like means, attempted to influence upwards or to discourage the reduction of the price at which Dandy Duds Ltd. supplied or offered to supply or advertised Rainbow jeans. In essence, the charge tracked the language contained in s. 38(1)(a) of the Act.

The attempted price influencing arose from a conversation on or about March 19, 1980 between Smiley, Rainbow's agent and Mr. Dow. although there were discrepancies between the evidence given by Smiley and that given by Dow, the Court was satisfied beyond a reasonable doubt that the conversation had taken place.

The conversation occurred during a meeting between Dow and Smiley arranged for the purpose of reviewing samples and placing orders for the July delivery. Smiley told Mr. Dow that he had received complaints from Henderson & Cudmore that Dow was discounting jeans and that he had been requested by Henderson & Cudmore not to sell any more jeans to Dow. In his evidence Cow stated that Smiley told him that "instead of not selling you any more (jeans), I'm warning you not to discount them." If Dow continued to discount the jeans, Mr. Smiley said "I'll have to cut you off and that's it". Dow agreed not to discount the jeans and Smiley then took Dow's July order, which was delivered in due course. In spite of his agreement with Smiley, Dow continued his practice of marking down the jeans below the prices for the same type of jean in other local stores.

Smiley denied the conversation and denied that he threatened to stop doing business with Dow. However, he said that at the material time, Henderson & Cudmore had complained to him about Dow's discounting practices, and had asked Smiley not to sell Rainbow jeans to Dow or to anyone else on Prince Edward Island for that matter. The Court rejected Smiley's denial of the conversation and noted that on Smiley's own evidence almost all of the elements of the conversation had been confirmed, namely, that Henderson & Cudmore was the complaining firm, that Dandy Duds was the firm about whom the complaint was made, and that the reason for the complaint was Dow's practice of discounting jeans.

The Court reviewed the evidence of Smiley and Dow in detail and held that the Crown had proved beyond a reasonable doubt that the contents of the conversation contained the actus of the offence, and that Rainbow, through Smiley, by a threat to discontinue supplying jeans to Dandy Duds, attempted to influence upward or discourage the reduction of the price at which Dandy Duds would sell Rainbow's jeans.

Sentence and Reasons for Sentence

Judge Fitzgerald reviewed the purpose of s. 38 of the Act in considerable detail with reference to the following case law:

> R v. H.D. Lee of Canada Limited, unreported 1981 decision of Provincial Court of Quebec
>
> R v. Campbell, (1964) 2 O.R. 487 at p. 521 (O.C.A.)
>
> R v. Browning Arms Company of Canada Ltd. (1974), 18 C.C.C. (2d) 298 at p. 303 (O.C.A.)

At page 2 of his written reasons, His Honour Judge Fitzgerald stated:

> "The legislation is based on the conviction that open competition in the market place means lower prices to consumers for whose benefit the legislation was enacted. This legislation is intended to discourage actions by manufacturers, wholesalers and retailers which would tend to reduce or eliminate competition among the sellers of goods in the market place. The main purpose of sentencing for a violation of this section is to ensure that the public is protected from the kind of unlawful activity complained of. This purpose can perhaps be best achieved by the imposition of a sentence that will deter not only the accused company, but also other accused whether corporate or individual. The sentence must not be seen to be a mere license fee that a company would be willing to pay, perhaps even regularly, in order to carry on an illegal but lucrative business. (See R v. Browning Arms Company of Canada Ltd. (1974), 18 C.C.C. (2d) 298 at p. 303 per Arnup, J.A. for the majority.)"

The Court found that in this case there was no evidence that the incident was part of a "larger company scheme to influence the price of the company's product at the retail level." In fact it was an isolated incident, created by the action of the company's sales agent and there was no evidence that the company's management was even aware of the agent's action. However, the company could not escape liability for that reason since it had "given wide latitude of authority to the agent so that his actions became the actions of the company, perhaps through default or neglect." Furthermore, there was no evidence that the company had profited or could have profited in any way from the agent's actions, nor was there any evidence that the public in any way paid higher prices for the jeans as a result of the incident.

The offence was an indictable one carrying a maximum sentence of five years imprisonment plus a fine of unlimited quantum. In this case the sentence was restricted to a fine because the accused was a corporation.

The Court considered the company's attitude subsequent to the commission of the offence and noted that it was generally positive in that Rainbow continued to do business with the complaining company, Dandy Duds, and no further violations of the Act or any other statute had been suggested.

The company's profit figures for the year in which the offence occurred were adduced by the Crown, but the Court found them to be irrelevant in a case such as this where there was no evidence to show that the company had in any way profited or that it stood to profit from the crime. The principle ennunciated in R v. Levi Strauss of Canada Inc., unreported, a 1979 decision of the Ontario High Court, wherein Mr. Justice Locke held that there "should be some reasonable relationship between the quantum of penalty and the quantum of profit garnered by the accused during the period in question" was found to apply only in cases where the company had profited from its unlawful act and therefore was not applicable to this case. The Court also stated that the ennunciated principle, in any event, was too broadly stated, and the profit considered should be restricted to that garnered by the accused as a result of the commission of the offence.

The Court reviewed the facts and sentences given in Levi Strauss, Browning Arms, and H.D. Lee, supra, and concluded that the case at Bar was vastly different from those cases for the following reasons:

(a) There was no company policy of price fixing or price maintenance;

(b) There was therefore no machinery to enforce such a policy;

(c) There was no profit to the company nor was it intended that the company would profit from its unlawful act;

(d) There was no detriment to the public, although the potential for such detriment existed;

(e) The company's management was unaware of the incident that gave rise to the charge; and

(f) The offence was a single isolated incident.

Accordingly the Court found the incident to represent one of the least culpable situations of price influencing or attempted price influencing to its knowledge and held that the principle of both general and specific deference would be satisfied by the imposition of a fine of $2,500.00.

SENTENCING - BID-RIGGING

The Canadian Competition Policy Record of March, 1985 reported on the case of The Queen v. Coastal Glass & Aluminum Ltd. et al. in the British Columbia Supreme Court. Coastal was convicted on one count of bid-rigging.

On January 24, 1985, Mr. Justice C.R. Lander of the B.C.S.C. imposed a fine of $85,000 on Coastal. The Court was advised that Coastal was either in receivership or was bankrupt and had no assets with which to pay any fine. However, Mr. Justice Lander was of the view that he should not consider the ability of Coastal to pay in determining the amount of the fine. The two principal considerations in sentencing are punishment and deterrence. In this case, because of the insolvency of Coastal, deterrence was the only factor.

Mr. Justice Lander observed that courts have repeatedly said that the amount of the fine must be large enough to deter others from engaging in illegal conduct. It cannot be treated as a mere licence fee. A message must be sent to people in industry and business that bid-rigging is reprehensible conduct and unlawful. Accordingly, Mr. Justice Lander was of the opinion that a fine must be imposed that was large enough to effect deterrence, without regard to the ability of the defendant to pay.