IN THE COURTS*

FEDERAL COURT OF APPEAL HOLDS SECTION 31.1 CONSTITUTIONALLY VALID

In a unanimous judgment dated November 21, 1985 the Federal Court of Appeal found s. 31.1 (1)(a) and s. 31.1 (3) of the Combines Investigation Act constitutionally valid pursuant to Parliament's power to regulate trade and commerce. Leave to appeal to the Supreme Court of Canada has been granted. The Court of Appeal was considering the "long-delayed" appeal in the action between Rocois Construction Inc. v. Quebec Ready Mix Inc. et al. In that action, brought in the Trial Division of the Federal Court, Rocois claimed damages allegedly caused by an agreement amongst the defendants which agreement it was alleged contravened s. 32(1)(c) of the Combines Investigation Act. In a preliminary ruling on December 4, 1979 Mr. Justice Louis Marceau of the Trial Division concluded that both s. 31.1(1)(a) and s. 31.1(3) were ultra vires the powers of Parliament and could not be upheld under the federal criminal law power, the trade and commerce power or Parliament's general power to make laws for the peace, order and good government of Canada (see: (1980) 1 F.C. 184, (1979), 105 D.L.R. (3d) and Canadian Competition Policy Record, June 1980).

The two sections in question read as follows:

"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,

. . .

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct...an amount equal to the loss of 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."

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Before the Federal Court of Appeal, the appellant, the Attorney General of Canada, who was an intervenor in the proceedings before the Trial Division, addressed all argements to federal jurisdiction based on the regulation of trade and commerce. Consequently, Mr. Justice Mark R. MacGuigan, who delivered the main reasons for judgment for the Court of Appeal was able to state that

> "The principal question for decision in this case is whether the Parliament of Canada has the constitutional power under its jurisdiction respecting the regulation of trade and commerce to give a civil right of action to a person who has suffered loss or damage as a result of an offence in relation to competition."

After citing extensively from the judgment of Mr. Justice Dickson (as he then was) in the case of Attorney General of Canada v. Canadian National Transportation, Limited et al., (1983) 2 S.C.R. 206 (see too Canadian Competition Policy Record, December, 1983), Mr. Justice MacGuigan referred to the indicia for the valid exercise of the general trade and commerce power articulated by Mr. Justice Dickson and subsequently summarized by Mr. Justice Urie of the Federal Court of Appeal in the BBM Bureau of Measurement v. Director of Investigation and Research case (see (1984), 52 N.R. 137 and Canadian Competition Policy Record, June, 1984). Mr. Justice Urie's summary sets out five factors:

> "(a) The presence of a national regulatory scheme;
>
> (b) the oversight of a regulatory agency;
>
> (c) a concern with trade in general rather than with an aspect of a particular business;
>
> (d) the provinces jointly and severally would be constitutionally incapable of passing such an enactment; and
>
> (e) the failure to include one or more provinces or localities would jeopardize successful operation in other parts of the country."

Mr. Justice MacGuigan proceeded to apply these five factors to s. 31.1 and found that

> "...four of the five indicia...are clearly present: the presence of a national regulatory scheme; a concern with trade in general rather than with an aspect of a particular business; the constitutional incapacity of the provinces taken jointly and severally; the necessity for nation-wide coverage to ensure successful operation everywhere. In fact, I would see only one possible difference between the legislation upheld in the Canadian National Transportation and BBM cases (s. 32(1) (c) and s. 31.4 respectively of the

> Combines Investigation Act) and that in section 31.1, i.e., with respect to the oversight of the regulatory agency, which here is less complete in that it is supplemented by the initiatory rights of private complainants."

Mr. Justice MacGuigan did not consider this difference sufficient to alter the regulatory scheme as constituting the general regulation of trade and commerce. Section 31.1(1)(a) clearly had, he said, a rational, functional connection with the overall federal economic plan in relation to competition manifested by the provisions of the Combines Investigation Act. In support of this "rational, functional connection" test he referred to the Multiple Access Ltd. v. McCutcheon case in the Supreme Court of Canada ((1982) 2 S.C.R. 161) where Mr. Justice Dickson, for the majority, had upheld the validity of a section of the Canada Corporations Act that imposed a civil liability upon insiders of a company for loss suffered by companies and shareholders as a result of injurious practices.

Having found s. 31.1(1)(a) to be valid, federal legislation, Mr. Justice MacGuigan had no difficulty in finding that the prerequisite to the validity of s. 31.1(3) was satisfied, namely, existing and applicable federal law that can support proceedings before the Federal Court.

In concurring reasons for judgment, Mr. Justice Louis Pratte stated that he had no problem with the question posed to the Court. It was his opinion that

> "...when the Constitution gives Parliament the power to enact a prohibition it impliedly also gives it, as a rule, the power to determine the consequences of the violation of that prohibition, whether those consequences be of a civil or penal nature".

Also delivering concurring reasons for judgment was Mr. Justice William F. Ryan. He too referred to Mr. Justice Dickson's reasons in both the Canadian National Transportation and the Multiple Access cases and found "a rational, functional connection" between s. 31.1 and s. 32(1)(c) because of the specific reference in s. 31.1 to Part V. He stated that:

> "...the civil remedy made available by section 31.1 to persons injured by conduct prescribed by subsection 32(1) would provide a motive for avoiding the prohibited conduct, a motive in addition to that provided by the prescribed penalty. It would also provide a means of redressing at least some of the harmful consequences resulting from the proscribed conduct. This link between the remedial section 31.1 and the substantive subsection 32(1), the subsection describing the prohibited conduct, is, in my opinion, enough to warrant concluding that section 31.1 is at the very least incidental to the regulation of trade and commerce."

SEARCH WARRANT SUCCESSFULLY CHALLENGED

Following a complaint to the Director of Investigation and Research of an alleged breach of s. 38(1)(a) of the Combines Investigation Act (price maintenance), the Director obtained a search warrant pursuant to s. 443 of the Criminal Code from a Justice of the Peace for the District of Hull in the Province of Quebec. Pursuant to that warrant, the premises of Raymond Lanctot (1982) Ltee were searched and documents seized.

Raymond Lanctot (1982) Ltee, a wholesaler of Vuarnet ski glasses, brought an appliction by way of certiorari against the Justice of the Peace who granted the search warrant, certain employees of Consumer and Corporate Affairs who carried out the search and seizure and the former and present Directors appointed under the Act, seeking to have the search warrant declared null and void for:

(a) vagueness in the description of the material to be seized;

(b) illegal delegation by the Justice of the Peace of his duties and powers to employees of Consumer and Corporate Affairs; and

(c) want of jurisdiction.

In finding for the applicant in a judgment dated November 7, 1985, Mr. Justice Orville Frenette of the Quebec Superior Court held that the Justice of the Peace who issued the warrant was without jurisdiction because neither the materials to be seized nor the place where the alleged illegality took place were located in the district in which the warrant was issued and, as a result, the warrant had not been certified by a Justice having jurisdiction.

Mr. Justice Frenette then considered whether the materials that had been seized must necessarily be returned to their owner. After reviewing a number of authorities, he indicated that there were basically three schools of juidicial thought, the first being that even though the search may have been illegal, objects or documents need not be returned if a judge, in his discretion, is convinced that the documents are part of the proof of the commission of a crime and their presence is necessary to prove the crime. The second school of thought concluding that documentation illegally seized must be returned, and the third school of thought holding that documents illegally obtained must be returned while at the same time permitting copies to be made and retained if necessary to prove the commission of an infraction of a criminal statute.

The Court indicated that it is necessary to make distinctions between an illegal search warrant issued pursuant to s. 443 of the Criminal Code and abusive seizures dealt with in s. 8 of the Charter of Rights and the sanctions contemplated in s. 24(2) of the Charter whereby a Court can exclude proof obtained in circumstances which discredit the administration of justice.

Mr. Justice Frenette concluded that individual rights protected by the Charter are equal to, if not more important than, the interests of protecting against commercial monopolies, legitimate as such interests might be.

In the circumstances and having regard to the illegality of the search warrant as opposed to its reasonableness and the protection of the rights and liberties accorded under the Charter, the Court ordered the return of all documents and other items seized, as well as all copies and extracts made therefrom.

THE DETENTION OF DOCUMENTS SEIZED UNDER A CRIMINAL CODE WARRANT WHERE NO CHARGE IS LAID

On the basis of search warrants obtained pursuant to s. 443 of the Criminal Code and executed between June 18, 1985, and June 21, 1985, certain premises of Famous Players Limited, Empire Theatres Limited and Atlantic Theatres Limited located in Toronto, Halifax and Stellarton, Nova Scotia were entered and searched. The Director of Investigation and Research under the Combines Investigation Act applied to detain certain documents seized as a result.

The documents seized were of three different types: (1) those which were immediately recognized by the Crown as being of no use and were returned, (2) those which the respondents agreed were within the scope of the search and seizure and hence could be retained without objection, and (3) documents in contention.

At the detention hearing on October 28, 1985 the respondents argued that the documents at issue fell outside the terms of the warrant, fell outside the time period set out in the information or did not relate to the geographic or market area specified in the warrant. Some documents were argued to be lacking in any demonstrable nexus to the alleged offence. The respondents also relied on ss. 8 and 24 of the Canadian Charter of Rights and Freedoms.

The Crown, as applicant, countered by arguing that the matter in question was still in the investigatory phase, that the documents were within the scope of the warrant and that it had been impossible at such an early stage to ascertain whether the documents would afford any evidence or whether a nexus existed with the offence. The Crown also relied on s. 17(5) of the Combines Investigation Act pursuant to which a justice could order delivery of documents to the Director.

Judge J.A. Fontana of the Provincial Court of the Judicial District of Ottawa-Carleton remarked that, in the face of the soon-to-be-proclaimed Bill C-18 (the Criminal Code Amendment Bill subsequently proclaimed on December 4, 1985) it would be unnecessary to address a number of otherwise pertinent and ancillary questions.

He reviewed the test contained in clause 74 of that Bill to the effect that a prosecutor must satisfy the presiding justice that the detention of the things seized is required for the purposes of an investigation, preliminary inquiry or trial. This was stated by the Court to be a test on the balance of probabilities.

The Court rejected the respondents' argument with regard to the significance of some documents having been prepared outside the dates on which the offence was alleged to have occurred. The applicable test was whether the document was potentially relevant to the offence alleged rather than whether it was dated within the time frame of such offence. It was found that the contentious documents did fit within the "business records" description contained in the warrants, contrary to the respondents' argument. Their argument with regard to certain documents referring to markets other than those specifically noted in the warrants was also rejected. The proper test in the case of both time and geography was held to be one of potential relevancy.

Where, as in the instant case, no charge had been laid at the time of application, the test applied by the presiding justice should be a broad one. The Crown would not yet have had the opportunity to review the documents and determine whether they constituted evidence of the offence.

The application for a remedy under ss. 8 and 24 of the Charter was held to be premature and the Court questioned whether a justice hearing a detention application constituted a court of competent jurisdiction.

The Court held that the Crown was entitled and should be permitted to detain all of the contentious documents during its investigation. A s. 17(5) order under the Combines Investigation Act calling for their delivery to the Director was also issued.

Judge Fontana remarked that the three month limit on detention after the seizure of documents in s. 446(1) of the Criminal Code failed to take adequately into consideration the possible delays in bringing on detention hearings. He noted the need for further legislative amendment to address this problem.

PREFERRED INDICTMENT CHALLENGED IN CIVIL PROCEEDINGS IN ALBERTA

Following a preliminary inquiry in which Canada Packers Inc. was discharged on one count and ordered to stand trial on another, the Attorney General of Canada preferred an indictment pursuant to s. 507 of the Criminal Code charging Canada Packers and another accused with five counts under s. 32(1)(c) of the Combines Investigation Act.

Canada Packers then commenced a civil action in the Alberta Court of Queen's Bench against the Attorney General alleging that the judge at the preliminary inquiry had deprived the Crown of the opportunity to proceed on an included offence which was now part of the preferred indictment and, further,

that the Attorney General had not acted in accordance with the rules of natural justice when he preferred the indictment thereby infringing Canada Packers' rights under s. 7 of the Charter of Rights and Freedoms (the right to life, liberty and security of the person). Canada Packers claimed a declaration that portions of the preferred indictment were invalid and of no force and effect, that the provisions of the Criminal Code permitting the Attorney General of Canada to prefer an indictment following a preliminary inquiry were inconsistent with the Charter, and an injunction restraining the Attorney General from prosecuting certain counts in the preferred indictment.

The Attorney General for Canada, supported by the Attorney General of Alberta, applied for an order to strike out Canada Packers' action on the grounds that the remedy sought in the action was not available from the Alberta Court exercising its civil jurisdiction.

Mr. Justice M.E. Lomas of the Court of Queen's Bench allowed the application of the Attorney General of Canada and struck out Canada Packers' action in a judgment delivered orally on September 30, 1985. He held, first, that the authorities were clear that the preferring of a direct indictment by the Attorney General for Canada was "...specifically and unambiguously prescribed in Section 507(3) of the Criminal Code, that the Attorney General is not obligated to afford an accused a hearing before preferring a direct indictment pursuant to Section 507(3) and that the use of the direct indictment under the circumstances did not infringe the provisions of Section 7 of the Charter". He stated that the remaining question before him was whether the Court of Queen's Bench of Alberta, admittedly a Court of competent jurisdiction under s. 24(1) of the Charter, "...must act within its criminal jurisdiction when criminal proceedings have been instigated and the accused is challenging those proceedings, or whether the accused can apply to that court as a court of civil jurisdiction to determine the validity of legislation under which the accused has been charged".

After reviewing a number of authorities, Mr. Justice Lomas stated that it was clear that exclusive legislative authority in the field of criminal law, including procedure, lay with the Parliament of Canada. Section 31 of the Charter, which states that "nothing in the Charter extends the legislative powers of any body or authority", would not permit courts exercising their civil jurisdiction to effect a remedy in criminal matters. Criminal proceedings were in process against Canada Packers, a preliminary inquiry had been held and an indictment preferred by the Attorney General for Canada. Mr. Justice Lomas held that Canada Packers could not, in those circumstances, resort to the Court in its civil jurisdiction for the remedies it was seeking.

SUPERMARKET FOUND GUILTY OF MISREPRESENTING PRICES OF COMPETITORS

On an appeal from the dismissal of an information by the Provincial Court of New Brunswick, Mr. Justice R.C. Stevenson of the Court of Queen's Bench (Trial Division), found the respondent, Dominion Stores Limited - Les Supermarchés Dominion Limitée (carrying on business under the name of Best for

Less), guilty on nine counts of misleading advertising under ss. 36(1)(a) and 36(5)(b) of the Combines Investigation Act. The charges related to ten different items offered for sale to the public in the respondent's supermarket in Douglastown, New Brunswick. Dominion Stores made representations to the public by means of signs displayed in its store which gave the name and size of the particular item for sale as well as figures printed under the following headings: "PRICE", "WHY PAY UP TO" and "SAVE UP TO".

An investigator with the Department of Consumer and Corporate Affairs, having collected information regarding a number of items and their prices, visited several supermarkets in the vicinity of the offending store and found that with regard to the ten items none of the other stores charged a price as high as that noted under the "WHY PAY UP TO" signage. The respondent did not dispute the fact that no supermarket competitor was charging the noted prices or that it had made representations in order to promote the supply or use of products.

At trial, the judge rejected the proposition that the Crown was bound to canvass stores in communities in a 40 to 50 mile radius even though the offending store might have drawn some of its clientele from that area. The trial judge had, however, accepted that the failure of the Crown to collect evidence regarding convenience stores in the vicinity of the respondent's store undercut its case that the signs in question were incorrect and thus false or misleading.

Mr. Justice Stevenson remarked on the distinction to be drawn between ss. 36(1)(a) and 36(1)(d) of the Combines Investigation Act. The charges in the present case did not allege misrepresentations concerning prices at which products were ordinarily sold (as required in s. 36(1)(d). Rather they alleged that certain representations were false or misleading in a material respect (as required in s. 36(1)(a)). The general impression conveyed by a representation, as well as its literal meaning, were to be taken into account.

The Court held that the general impression of persons entering the supermarket to shop would be that prices in other supermarkets were as high as the prices listed under the heading "WHY PAY UP TO". Such persons would not gain the impression that the prices being compared were those available in other types of stores such as convenience stores. The Court also considered the message the respondent intended to convey by the signs it used. As the evidence indicated that the respondent itself had only canvassed competitor supermarkets, it could not argue that an impression different from that alleged would be gained by consumers to whom the representations was being made.

With regard to one of the ten products, the Court found that it was not available at the offending store and therefore the respondent could not be convicted for a representation promoting its supply or use.

The case was remitted to the Provincial Court for the imposition of sentence.