IN THE COURTS

AUTO BODY SHOPS ACQUITTED ON CONSPIRACY COUNTS

Four auto body repair shops in Fort Erie, Ontario were acquitted on price fixing charges under s.32(1)(c) of the Combines Investigation Act in a judgment by Mr. Justice Barr of the Supreme Court of Ontario on April 30, 1986 (Her Majesty The Queen And Dave Spear Limited, Climenhaga's Garage Ltd., Don Dean Chevrolet-Oldsmobile Limited and Erie Collission Limited). No appeal is planned.

The relevant provisions of the Act are:

> "32. (1) Every one who conspires, combines, agrees or arranges with another person
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> .....
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> (c) to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance upon persons or property, or ...
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> .....
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> is guilty of an indictable offence and is liable to imprisonment for five years or a fine of one million dollars or both.
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> .....
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> 1.1) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in violation of subsection (1), it shall not be necessary to prove that the conspiracy, combination, agreement or arrangement, if carried into effect, would or would be likely to eliminate, completely, or virtually, competition in the market to which it relates or that it was the object of any or all of the parties thereto to eliminate, completely or virtually, competition in that market."

His Lordship explained that in the majority of body repair jobs, the true customer is an insurance company; it authorizes the work based upon a cost appraisal. The body shop carries out the work for the estimated cost regardless of the actual cost, and the insurance company often insists on a discount from the appraised cost. Some body repair work is done directly for vehicle owners.

Evidence adduced at the trial ws to the effect that Dave Spear Ltd. decided to raise its hourly labour charges, and so informed the insurance companies. One of the insurance companies asked for the information in writing. An official of Spear testified that he then communicated with the thirteen other body shops in Fort Erie to find out if they wanted their names included in the letter, and they all responded in the affirmative. The following letter, addressed "To Whom It May Concern", signed by the official of Spear, and dated January 9, 1980, was then sent to insurance companies and other interested persons:

> "The Auto Body Shops of Greater Fort Erie have discussed the Labour Rate and feel that an increase is needed to compete with the rate of inflation. We feel that a 10% increase is justified. As overhead and operating expenses have shown a considerable rise in the past year, wages must also increase to prevent skiolled personnel from leaving the Trade and lowering the quality of the work. Effective January 10th, 1980 all estimates and bills will be written at $22.00 per hour labour. Any questions regarding this letter, please contact the undersigned. Thank you."

Below the signature of the official (Mr. Wilson) are typed the names of the thirteen other body shops in the Fort Erie area. A quite similar letter dated December 30, 1980 was sent about a year later announcing an increase in the labour rate to $25.00. Also, there was evidence that in both instances the body shops had all raised their rates to the announced levels at about the same time.

However, Mr. Justice Barr found that there were a number of weaknesses in the Crown's case. He was dissatisfied with tabulations of information from seized documents which had been presented to show that a substantial percentage of repair jobs had been done at the rates cited in the two letters mentioned above. He noted that in "many cases" the documents did not indicate a rate for labour, and many of those that did were appraisals. Also, in "a great many cases" the time allowed by the appraiser proved to be less than the time actually taken on the job, thus lowering the actual labour rate.

Moreover, Barr, J. was not satisfied that the two letters and the evidence that all the body shops had raised their prices at about the same time was proof beyond a reasonable doubt of a conspiracy. He stated:

> "...the letters are compatible both with an agreement on the one hand, and on the other hand, with the picture of a leading shop in a small town making a decision in ordinary business considerations to raise its rates and the other shops being told of the decision, agreeing with the reasons, and deciding to do likewise.

> "I am inclined to favour the second view in light of Mr. Wilson's evidence in which he speaks repeatedly of a decision of his employer and himself to raise rates and only telephoning the other shops when an insurance company asked him to put it in writing...
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> "...The same comments can be made with reference to the fact that all the body shops in Fort Erie raised their rates at about the same time. This is entirely compatible with there having been an agreement between them by which they all agreed in concert to raise their rates, but it is not inconsistent with the hypothesis that Dave Spear Limited led the way and the others followed."

While the Crown's failure to satisfy the Court that there had been a conspiracy was conclusive, his Lordship went on to consider whether the effect of such a conspiracy would have been to prevent or lessen competition unduly in the supply of auto body shop labour. At the outset, he stated:

> "I am satisfied that the alleged conspirators comprised almost all the auto body shop repair services in the Town of Fort Erie, and that this represented an accepted or recognized market from the rest of the Niagara Peninsular."

Mr. Justice Barr then noted some of the conditions that prevailed in the Fort Erie market in the periods following the sending of the two letters "to see whether it sheds light on what would have been the probable effect of making the agreement". The time taken on many jobs was greater than provided for in the appraisal; many if not all insurance companies insisted on a discount; some insurers categorized selected shops as "preferred shops" where the operator assumed certain responsibilities in return for the insurer steering work to him; individuals needing car body repairs were indifferent as to how an estimate was arrived at, price and quality of work being the factors of importance to them; rates in Fort Erie were not generally higher than elsewhere in the Niagara Peninsula.

Applying the evidence to the question whether competition would have been lessened unduly, his Lordship adopted what has come to be called the Cartright test (Howard Smith Paper Mills Limited v. The Queen (1957 S.C.R.). He cited Mr. Justice Cartright as follows:

> "In essence the decisions referred to appear to me to hold that an agreement to prevent or lessen competition in commercial activities of the sort described in the section becomes criminal when the prevention or lessening agreed upon reaches a point at which the participants to the agreement become free to carry on those activities virtually unaffected by the influence of competition..."

Mr. Justice Barr then concluded:

> "The evidence in this case does not establish that the result of price fixing alleged was such as to lessen competition to the point at which the participants in the agreement became free to carry on activities virtually unaffected by the influence of competition."

He made no mention of s.32(1.1), reproduced above, which was enacted in 1976.

ONTARIO SUPREME COURT HOLDS ORDER FOR PRODUCTION OF PAPERS UNDER S.17 OF COMBINES ACT INFRINGES CHARTER

Mr. Justice Holland of the Supreme Court of Ontario, in a judgment released on March 13, held that ss. 17(1) and 17(4) of the Combines Investigation Act "which operate to compel production of documents in a criminal proceeding under that section are unconstitutional in that they are inconsistent with the Charter right in s. 8 to protection from unreasonable seizure". However, he found that ss. 17(1), 17(2) and 17(8) as they relate to examination of witnesses are not inconsistent with s.7 of the Charter which guarantees the right to life, liberty and security of the person (Between Thomson Newspapers Limited et al., Applicants, and Director of Investigation and Research et al., Respondents).

S. 17(1) provides:

> "(1) on an 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 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 subpeonas to witnesses or punishment of disobedience thereof."

In reaching his conclusion that the provisions for compulsory production of documents are unconstitutional, Holland, J. held that they amount to seizure rather than being of the nature of subpeonas duces tecum. As such, and lacking the necessary safeguards, he found that the provisions are inconsistent with the right to be secure against unreasonable seizure in s. 8 of the Charter.

The Competition Act which has just been enacted repeals s. 17 and replaces it with provisions which take account of the Charter.

RTPC CRITICIZES WITHDRAWAL OF TIED SELLING APPLICATION BY DIRECTOR

The Restrictive Trade Practices Commission, in a decision on April 10 by Vice Chairman R.B. Holden, Q.C. and Member L.R. Wilson, concluded that the Director of Investigation and Research had the authority to withdraw an application that he had made for an Order related to tied selling (The Director of Investigation and Research, Applicant, And Broadcast News Limited, Respondent). The Commission said it reached its decision "reluctantly" because "fairness had been overlooked".

The decision involved an inquiry that the Director commenced in July, 1985 as a result of a six-resident application under s.7 of the Act. In October, 1985 the Director applied to the Commission for a remedial Order directed to Broadcast News Ltd. (BN), alleging that the firm was engaged in tied selling as defined in s.31.4 of the Act. Broadcast News is wholly owned by Canadian Press which operates on a cooperative basis for the benefit of its members. According to the application, BN supplies to broadcasters under contract a selection of news packages, rents the telecommunications equipment needed for reception of the packages and delivers the packages by variousmeans including satellite. The Director's complaint was that BN was refusing to sell its news packages separately from its delivery services. He stated that in 1983 members of the electronic media established Electronic News Group Inc. (EN) "for the purpose of providing a simple, flexble and low cost satellite communication facility to deliver Basic News Packages to the Canadian electronic media". At that time, BN had not yet established its own satellite delivery system. The Director alleged that BN refused to sell its new packages separately from its delivery services.

On March 21, 1986, shortly before hearings by the Commission were to commence, the Director informed the Commission by letter that BN had advised him it was in the process of changing its marketing policies, that he had reviewed the new policy, had concluded he had no basis to proceed further with the application, and was withdrawing it.

The Commission's decision of April 10 was made necessary by a Notice of Motion filed by EN requesting the Commission to declare the Director's unilateral discontinuance illegal and to reinstate the Director's application and proceed with the hearing. The Commission's decision was that under its interpretation of Rule 10(2) of its Rules Relating to Practice and Procedure (Canada Gazette, Part II, Vol. 110, No. 6) the Director may withdraw his application "until the actual proof and hearing commences before us". In the text of its decision the Commission criticized the apparent exclusion of EN from the negotiations with BN, and described BN's policy change as a "minor concession".

The decision is under appeal to the Federal Court by Electronic News.