ENFORCEMENT ACTIVITIES

FEDERAL COURT REFUSES MANDAMUS APPLICATION

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In a decision dated October 30, 1986, Mr. Justice Dubé of the Trial Division of the Federal Court refused an application for a writ of *mandamus* against the Minister of Consumer and Corporate Affairs. Robin Austin had asked the court to order the Minister to review a decision of the Director of Investigation and Research wherein the Director had discontinued an inquiry under section 8 of the *Combines Investigation Act*. The Director had discontinued the inquiry on June 16, 1986, pursuant to subsection 14(1) of the *Combines Act*.

According to the court decision, Austin had, through a solicitor, asked the Minister, by letter dated September 2, 1986, to review the Director's decision to discontinue under subsection 20(4) of the *Competition Act* as it now is.

Subsection 20(4) of the Act states:

> The Minister may, on the written request of applicants under section 7 or on his own motion, review any decision of the Director to discontinue an inquiry under section 8, and may, if in his opinion the circumstances warrant, instruct the Director to make further inquiry.

It is evident from the wording of subsection 20(4) that Mr. Austin must have been an applicant who had sworn an application under section 7 of the *Combines Act* seeking the initiation of an inquiry.

In dismissing the application Mr. Justice Dubé stated:

> It is well established that a *mandamus* ordering an authority to perform a certain act will not issue unless there is a legal duty on the part of that authority to perform and that it has clearly refused to perform.
>
> Such is not the case here. There is no indication that the Minister has refused to exercise his discretion to review the decision of the Director and no evidence that he intends to refuse to do so....It has not been established to my satisfaction that the period of some 55 days is unreasonable under the circumstances of this extremely complex problem. The matter under consideration is a nation wide inquiry concerning the conduct of all major Canadian sugar companies and their associates.
>
> I find therefore that the instant application is premature at this time. The court might very well favorably consider another such application at a later date.

The *Canadian Competition Policy Record* believes this is the first time that a *mandamus* has been sought with respect to the Minister's power to review a decision to discontinue by the Director. Because of the manner in which Mr. Justice Dubé disposed of the application, he did not deal with other issues raised by the respondent relating to the jurisdiction of the Court and whether the Minister in the context of the *Competition Act* is a "federal board, commission or other tribunal" as is required under section 18 of the *Federal Court Act*.

PALM DAIRIES LIMITED CASE CONCLUDES

The saga of the sale of Palm Dairies Limited, a Western Canadian dairy, concluded with the announcement by Unicorp on January 15, 1987, that it was discontinuing, for the time being, its efforts to sell Palm Dairies Limited.

The proposed purchase of Palm by other co-operative dairies in Western Canada had led to the first application to the Competition Tribunal under the amended *Competition Act*. In those proceedings, the Director and the acquirers sought to have the Tribunal sanction a negotiated consent order. The Tribunal refused the request.

Subsequent to the Tribunal's refusal in November of 1986, the Director announced that he was appealing the decision of the Tribunal to the Federal Court of Appeal. The initial notice of appeal had been filed within the ten day period prescribed under the Federal Court Rules of Procedure. At the time the notice of appeal was filed, a spokesman for the Director indicated that the notice was being filed, at least in part, to preserve the Director's right of appeal pending a closer examination of the decision. Subsequently, the Director announced in January that he was withdrawing the appeal.

A reason reportedly advanced by the Director for not pursuing the appeal was that the case turned, in large measure, on transitional provisions in the amended *Act* and, therefore, a decision of the Court of Appeal would have limited application to future situations. The Director has since informed the Tribunal that he will be making no further applications in the matter at this time.

Shortly after the Director announced he was withdrawing his appeal, Unicorp announced that it was ceasing its efforts to sell the dairy at this time.

The purchasing co-op dairies had filed notices of appeal as well. Those appeals will not be pursued in light of Unicorp's decision not to sell Palm.

The end result of this, the first merger case under the new law, is that the acquisition did not proceed. This result may, in part, be a consequence of the strongly worded manner in which the Tribunal criticized the consent order and expressed its concerns about the effect of the proposed acquisition on competition.

There is no doubt that the decision raises very real questions concerning the efficacy of consent proceedings under the new legislation. It is likely that, as is the case in the United States, private sector parties will wish to resolve merger issues in many instances without resorting to contested proceedings before the Tribunal. However, the Tribunal's refusal to sanction the consent order negotiated in this case, makes consent order procedures a less than risk-free proposition. One should be mindful, however, that the Palm Dairies case is the first and only case presented to the Tribunal as yet.

ILLEGALLY OBTAINED EVIDENCE ADMITTED

The Manitoba Court of Appeal in a judgment delivered on January 13, 1987 allowed the Crown to admit certain evidence which was obtained as a result of an unconstitutional and illegal search.

The court was sitting in appeal of a decision of Mr. Justice Wright of the Court of Queen's Bench of Manitoba. Mr. Justice Wright had acquitted the respondent, *Dairy Supplies Limited,* of charges laid against it under paragraph 38(1)(b) of the *Combines Investigation Act* dealing with resale price maintenance and refusal to deal. In the course of the trial, Mr. Justice Wright had ruled that certain documents were not admissible. He had so ruled because the documents had been seized under a section of the former *Combines Investigation Act* which had been declared unconstitutional by the Supreme Court of Canada in the *Hunter v. Southam* decision.

In coming to his conclusion regarding the inadmissibility of the documents, Mr. Justice Wright had relied on a decision of the Supreme Court of Canada in *R. Therens* (1985), C.C.C. (3d)4.

Mr. Justice Wright stated:

> In *Therens*, the police apprehended the driver of the car and obtained samples of his breath, the results of which were later set out in a document or certificate.

> The court found that neither of the two rights under section 10(b) of the Charter, namely to retain and instruct counsel without delay and to be informed of that right, were honoured at any time by the police. The Supreme Court, through the judgment of Mr. Justice Estey, in large measure, found that the police authority had flagrantly violated a Charter right without any statutory authority for so doing, and that such an overt violation must result in the rejection of the evidence thereby obtained....

Wright J. then found that the breach in the case before him was just as clear and obvious as in the *Therens* case. The court of appeal disagreed with the lower court. Mr. Justice O'Sullivan stated:

> In my opinion, there is a clear distinction that can be made between the type of evidence that was dealt with in *Therens,* supra, and the type of evidence that is dealt with in the case before us....In such cases the administration of justice may be brought into disrepute if evidence that would not exist but for illegality were admitted into evidence. On the other hand, we deal here with documents that were in existence before the illegality. They did not come into existence following an illegal and unconstitutional act. The illegal act did not in this case create or lead to self-incrimination. The documents existed before the illegal act. What the illegal act has done is to make police officers aware of what was already in existence.

The court of appeal then found that the trial judge had erred in rejecting the evidence tendered and ordered that there should be a new trial.

REGULATED CONDUCT EXEMPTION EXAMINED IN WATERLOO LAW ASSOCIATION CASE

In a judgment released December 19, 1986, Mr. Justice Eberle of the Supreme Court of Ontario refused an application by the Waterloo Law Association and certain of its officers seeking a declaration that the *Competition Act* does not apply to the activities of the Waterloo Law Association, members of the Association or any members of the Law Society of Upper Canada. It further sought a declaration that the *Competition Act* does not apply to the activities of the three named officers of the Waterloo Law Association, either in their capacity as members of the Law Association or as members of the Law Society of Upper Canada.

The facts of the case were that His Honour Judge Scullion of the Provincial Court had issued search warrants on February 18, 1986 authorizing searches of the files of the Waterloo Law Association in the law offices of three law firms in Kitchener and Waterloo. The warrants were issued on the information of Richard Taylor, a member of the staff of the Director of Investigation and Research, who had alleged that the members of the Waterloo Law Association had established a tariff for real estate legal services, and that the members of the Association had agreed to abide by the tariff contrary to paragraph 32(1)(c) of the *Competition Act* as it now is.

Searches of the three law offices were conducted on February 19, 1986. Claims of solicitor-client privilege were made and the seized material was sealed and deposited with the Sheriff in Kitchener pursuant to the procedures in the *Criminal Code.*

At the hearing before Mr. Justice Eberle, the applicants alleged that all of the activities alleged in the search warrant application to be contrary to the *Competition Act* were activities regulated by the Law Society of Upper Canada pursuant to the *Law Society Act* and hence were not subject to the provisions of the *Competition Act.*

The Attorney General of Canada argued that the application should be denied because it was premature and because there were material facts in dispute. The Attorney General also argued that the provisions of the *Competition Act* do apply to the activities of the applicants, at least for the purpose of the issuance of search warrants, since there was nothing disclosed on the record which would exempt lawyers from the *Competition Act,* and that the matters raised were controversial issues of fact or defence which should be determined only at trial.

Mr. Justice Eberle stated the issues as follows:

> [a]ssuming that the conduct of the applicants arguably comes within the prohibition in section 32 of the *Competition Act*, are the applicants subject to prosecution under that *Act*, or are they insulated from prosecution by the provisions of the *Law Society Act*, R.S.O. 1980, c. 233, and amendments thereto, creating the Law Society as the statutory governing body of the legal profession in Ontario?

The arguments of both parties centred principally on the so-called "regulated industries" cases such as *R. v. Canadian Breweries Limited,* [1960] 0.R. 601. The applicants argued that the Provincial Legislature in Ontario had established a regulatory scheme encompassing the conduct of all Ontario lawyers, including their activities with respect to charging fees to clients. They, therefore, argued that the members of the Society are protected from the reach of the federal *Competition Act.*

In advancing their argument for exemption, the applicants made reference to the rule-making and regulation-making powers contained in sections 62 and 63 of the *Law Society Act,* section 34 of the *Law Society Act* authorizing disbarment for professional misconduct, the *Professional Conduct Handbook* issued by the Law Society and rule 10 of the *Handbook* which deals with fees, the provisions of the *Solicitors Act*, R.S.O. 1980, c. 478, and the *Courts of Justice Act*, 1984, dealing with taxation and assessment of lawyers' bills.

Reference was also made by both the applicant and the respondent to policy statements or guidelines issued by the Law Society from time to time dealing with fees. The Law Society itself, although notified of the proceedings and appearing in the application, was not a party to the proceedings and took no position in front of the Court.

In setting out the legal and statutory provisions with respect to lawyers in Ontario, Mr. Justice Eberle observed that all lawyers in Ontario are required to be members of the Law Society, but that the county law associations are purely voluntary organizations.

In setting the stage for his decision, Mr. Justice Eberle stated certain basic principles of the law. They were:

a) the criminal law of Canada *prima facie* applies to everyone, including lawyers and county law associations;

b) the amendments made to the *Competition Act* in 1975 extended the conspiracy provision to the professions; and

c) the governance of the legal profession and its members by provincial legislation does not remove lawyers from the ambit of valid criminal law.

Having stated these principles, Mr. Justice Eberle recognized that lawyers or law associations could claim an exemption from prosecution under the *Competition Act* ... "where the activities which give rise to the prosecution are activities required by the governing body of the profession acting with powers delegated to it by a valid provincial statute." Mr. Justice Eberle went on to comment that an exemption might also be available where the activities were "merely authorized" but not actually required. He found that the issue before him did not require him to answer that question.

In seeking to determine whether the matter was ripe for a constitutional question to be answered, Mr. Justice Eberle stated:

> In the present matter, I do not think the situation has matured sufficiently for such a conclusion. It is not at all clear on the present material that the Law Society has put into effect a scheme requiring or authorizing lawyers to adhere to uniform fee schedules. The Law Society did not take the position before me that it had done so. On the material filed on this application, I would not be prepared to hold that it is sufficient merely that the Law Society have the power to require lawyers to adhere to a minimum fee schedule, without having exercised the power by imposing positive requirements to that effect, or at least by giving a clear authorization to do so.
>
> The county law associations do not appear to have been delegated any statutory authority to enforce a minimum fee schedule. At the same time, it is not

> clear on the material filed that any of the applicants have enforced, or attempted to enforce, minimum fee schedules. The applicants deny that they have; while the respondent says that there is ample evidence to the contrary.
>
> In these circumstances, I do not think that this is an appropriate case to deal with the constitutional aspects of the matter: I make no decision thereon, leaving the entire matter to be determined in whatever proceedings may ensue under the *Competition Act*.

After having reached this conclusion, Mr. Justice Eberle went on to make interpretive statements with respect to the Supreme Court of Canada decision in *Attorney General of Canada v. Law Society of British Columbia* (1982), 137 D.L.R. (3d) 1. That case, ordinarily referred to as the *Jabour* case, dealt with the activities of the Law Society of British Columbia in disciplining Mr. Jabour on grounds that his advertising was conduct unbecoming a barrister or solicitor. Mr. Justice Eberle found the facts in the Jabour case to be significantly different from those in the present case, principally because the case before him concerned the activities of individual lawyers acting through a voluntary law association. Mr. Justice Eberle commented:

> The question before the Court in *Jabour* was no doubt very carefully framed. It concerned the activities of 'the Law Society of British Columbia, its governing body or its members'. From the thrust of the reasons, it is clear that the final three words were regarded by the Court as referring only to members of the governing body, and not to all the members of the Law Society of British Columbia, i.e., all lawyers in the province. Thus, the Court was not called upon to address the activities of individual lawyers in their capacity simply as members of the Law Society of British Columbia.

Mr. Justice Eberle's decision deals with some important and interesting issues with respect to the extent of the regulated conduct exemption under the *Competition Act*. Three aspects of the judgment seem particularly significant:

1. He found that lawyers as individuals or members of county law associations, without more, enjoy no special treatment from the criminal provisions of the *Competition Act*. The same would presumably be true of members of other regulated professions;

2. He left open the interesting issue of whether mere authorization under a statutory scheme is sufficient to obtain an exemption from competition legislation; and

3. He specifically found the *Jabour* case to be a precedent only with respect to the activities of members of law societies when they are acting pursuant to statutory powers as members of governing bodies.

The decision is under appeal.

COMMODORE CASE RAISES VALIDITY OF POST CHARTER SEARCHES

In a decision released December 4, 1986, Mr. Justice Gray of the Supreme Court of Ontario dealt with certain charter issues raised concerning the validity of searches conducted by the Director of Investigation and Research after the *Charter* was proclaimed but prior to the decision of the Supreme Court of Canada in the *Southam* case.

The matter concerned a search and seizure carried out by officers of the Bureau of Competition Policy under the *Combines Investigation Act*, as it then was, in May of 1983. The searches were conducted pursuant to authorizations granted under section 10 of the *Combines Investigation Act*, which authorizations had been certified by a member of the Restrictive Trade Practices Commission pursuant to that *Act*. Charges were laid under the *Act* almost three years later on April 1, 1986 against Commodore Business Machines Limited alleging resale price maintenance, among other things.

Subsequent to the charges being laid, Commodore moved, relying on subsection 24(1) of the *Constitution Act, 1982*, to quash the searches and sought an order from the Court that the documents be returned.

The case raised two issues. The first was whether the authorizations were invalid as being contrary to section 8 of the *Charter* dealing with

unreasonable search or seizure; and the second, if the searches were invalid, whether the documents should be ordered returned to the applicant pursuant to subsection 24(1) of the *Charter*.

With respect to the first issue, the question was whether the fact that the authorizations were issued prior to the Supreme Court of Canada decision in *Hunter et al v. Southam Inc.*, [1984] 2 S.C.R. 145, protected their validity, since at the time the authorizations were issued, there was no definitive Supreme Court decision finding the statutory provisions invalid.

Mr. Justice Gray relied on the recent decision of Mr. Justice Tarnopolsky in *Regina v. James et al* (1986), 55 O.R. (2d) 609 in finding that where continuing violations of the *Charter* occur, it would not amount to an improper and retrospective application of the *Charter* to find the authorizations invalid. Mr. Justice Gray concluded:

> Viewed in the context of a continuing breach of Commodore's Charter right to be free from unreasonable search and seizure, it is appropriate to quash the search and seizure authorization dated May 4, 1983. As the law stands at the time of this application, those searches and seizures were unconstitutional and the continued retention of the seized material offends the *Charter*.

The second question raised in the judgment is the disposition of the seized material. The Court found that it had discretion to either order that the documents be returned to Commodore or be retained by the Director. In considering this discretionary power, the Court relied on the judgment of Mr. Justice Esson in the British Columbia case of *re Dobney Foundry Limited et al and the Queen, (No. 2)* (1985), 19 C.C.C. (3d) 465 (B.C.C.A.). In the *Dobney* decision, Mr. Justice Esson stated:

1. A review 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, under either a charge already laid or one intended to be laid in respect of a 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 subsection 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 on being kept out of possession.

Mr. Justice Gray then noted that the conduct of the Director's representatives was not challenged in the present application. In addition, the affidavit of one of the Director's staff stated that the material seized was required for the purpose of prosecution using the following language:

> The documents seized in the aforesaid search or some of them will afford evidence with respect to the above charges and are required therefore.

Mr. Justice Gray was critical of the equivocal statement contained in the affidavit since in his view it failed to satisfy the onus of proof that <u>all</u> of the seized materials are required for the purposes of the prosecution.

Nevertheless, Mr. Justice Gray found that, in light of the delays involved in ordering the documents to be returned, he would exercise his discretion in favour of allowing the Director to retain <u>necessary</u> materials. He, therefore, quashed the authorization to search Commodore's premises and ordered the return of only those documents and related copies or notes which the Director or his agent might deem to be unnecessary for the prosecution of the offences.

The result in this decision is consistent with other recent cases involving searches undertaken by the Director relying on section 10 of the old *Combines Investigation Act*, in that the most common result has been to quash the warrants but allow the Director or the Attorney General to retain necessary documents.

The decision is under appeal.

TELE-DIRECT CHALLENGES SCOPE OF SEARCH WARRANT

The Ontario Provincial Court case of *Director of Investigation and Research and Tele-Direct (Publications) Inc. et al* involves an investigation being undertaken by the Director into the activities of Tele-Direct alleging that it had acted contrary to the monopoly section of the *Combines Investigation Act*. The investigation deals with activity alleged to have taken place prior to the passage of the *Competition Act*.

In furtherance of the investigation, the Director had obtained a search warrant and seized certain documents pursuant to the provisions of the *Criminal Code*. The issue in the case arose when the Director applied, pursuant to the *Criminal Code* and the *Combines Investigation Act*, for an order to have the documents retained by the Director's staff. At that time, Tele-Direct challenged the granting of the retention order on the basis that certain of the documents had been improperly seized.

The principal basis on which it was alleged the documents had been improperly seized was that certain of the documents did not fall within the time period specified in the warrants. A typical manner in which classes of documents had been identified in the warrants was as follows:

> Books, papers, records, contracts, memoranda, internal correspondence, notes and communications (including letters, messages, telegrams and telexes) for the period May 1, 1984 to November 15, 1985 relating to the ownership, protection, use and restrictions placed on the use of the 'Yellow Pages' trademark and other related trademarks such as 'Walking Fingers.'

Counsel for Tele-Direct argued that, under proper search warrant law, the only documents which could be seized pursuant to such a provision would be documents actually dated between the specified times set out in the warrant.

Counsel for the Director argued that the broad and widely defined nature of the offence made it clear that documents relating to a time period prior to the actual formation of a monopoly were relevant. It was also argued by the Director's counsel that, in cases involving alleged economic crime, greater latitude should be given to show a progression of policy.

Having set out the arguments of both counsel, Provincial Court Judge Silverman reviewed briefly certain of the contested documents. He then put the question whether or not the language of the search warrants covered the seizure of the documents outlined in the judgment. In the course of his judgment, Provincial Court Judge Silverman quoted from the decision in *re Lubell and the Queen*, (1973), 11 C.C.C. (2d) 188. In that judgment, Mr. Justice Zuber stated:

> I think one has to remember that at this stage the authorities are still at an investigative stage in their procedure and by virtue of that fact are likely not able to name the things for which they are looking with precision. A search warrant is not intended to be a *carte blanche*, but at the same time the applicants must be afforded a reasonable latitude in describing the things that they have reasonable ground to believe they might find.

Provincial Court Judge Silverman also quoted from Mr. Justice Osler in *re Church of Scientology et al and the Queen, (No. 6)* (1985), 21 C.C.C. (3d) 147, where he stated:

> The things must be described in such a way as to guide the officer or officers carrying out the search and assist them in identifying the object. Classes of things, including documents, may be authorized to be seized, but such classes should normally be limited both with respect to time and with respect to their relationship to the crime or crimes with respect to which they are said to afford evidence. Each information and subsequent warrant should be viewed as a whole and should not stand or fall as a result of a minute or microscopic analysis of each of the parts. Each case must stand upon its own facts.

Silverman, P.C.J. then found that:

> [i]n view of the nature of the proposed charge in this case, the complexity of the background factual setting, the virtual impossibility of specifying each and every document pertaining, relating to and involved in the perpetration of this alleged combine activity which took place over a fairly lengthy period of time, and considering the whole language of the search warrants and that there could be no doubt in the minds of the persons searching as to what was to be searched for and seized, it appears that the descriptions in the search warrants of the documents to be seized are more than adequate.

Following Silverman, P.C.J.'s decision, Tele-Direct brought three applications before Mr. Justice O'Brien of the Ontario Supreme Court on January 30, 1987. All of the applications were disposed of by Mr. Justice O'Brien from the Bench.

The first application dealt with the determination of certain questions of solicitor-client privilege which had been raised during the search. Pursuant to subsection 145(2) of the *Courts of Justice Act* of Ontario, Mr. Justice O'Brien agreed to hear the matter *in camera.* He also dealt with the issue himself and not by a reference. In order that the matter was considered expeditiously, a special time had been set aside by counsel. The *Canadian Competition Policy Record* understands that the privilege issues were satisfactorily resolved at that time.

A second application dealt with a previous decision by Silverman, P.C.J. that he was not a court of competent jurisdiction under the *Charter of Rights and Freedoms.* This matter was disposed of on January 30, 1987 by the applicant consenting to having the appeal dismissed. It was dismissed without prejudice as the matter under consideration is being raised in other cases pending before the Court of Appeal in Ontario.

The third application dealt with the issues concerning the scope of the warrant decided in Provincial Court Judge Silverman's decision referred to previously in this article. Counsel for Tele-Direct argued that the lower court had not clearly answered the question whether only documents dated between the specified dates could be seized. Mr. Justice O'Brien disagreed, stating that the words in the warrant "for the period" were broad enough to include all documents pertaining or relevant to matters between the specified dates. He therefore dismissed the application.

Tele-Direct has appealed this last issue to the Ontario Court of Appeal.