## IN THE COURTS

### FEDERAL COURT CLARIFIES RIGHTS OF PARTIES IN COMBINES INQUIRY EXAMINATION OF WITNESSES

A judgment in Toronto by Mr. Justice Collier of the Federal Court of Canada will, if sustained on appeal, broaden the rights which have heretofore been accorded interested parties and their counsel during examination of witnesses in the course of inquiries under the Combines Investigation Act (Harold Irvine et al. v Restrictive Trade Practices Commission et al., March 12, 1981). The Court rules, inter alia, that counsel for interested parties have the right to cross-examine witnesses and that interested parties may be present along with their counsel throughout the examinations. Both sides have appealed.

The case involved an inquiry which the Director of Investigation and Research was conducting under the Act. Persons had been summoned for oral examination under s. 17 and a Member of the Restrictive Trade Practices Commission had designated a Mr. Griffin to preside as Hearing Officer. Arising out of certain rulings made by the Hearing Officer, the Applicants sought, pursuant to s. 18 of the Federal Court Act, writs of certiorari, prohibition and mandamus. The following were among the rulings of the Hearing Officer which were successfully challenged in the Federal Court:

(a) a refusal to permit persons whose conduct is being inquired into and persons who are being examined to be present throughout the whole of the Inquiry;

(b) a refusal to permit counsel for the Applicants to examine or cross-examine witnesses in the said Inquiry;

(c) a refusal to permit counsel for the witness to ask questions of the witness except to clarify or explain evidence already given by the witness;

Collier, J. emphasized the presence in the Act of s. 20(1) which provides:

"20(1) A member of the Commission may allow any person whose conduct is being inquired into and shall permit any person who is being himself examined under oath to be represented by counsel."

Counsel for the Respondents conceded that the Hearing Officer was wrong in considering that he had the right to permit a witness or a person whose

conduct was being inquired into to be represented by counsel. As Mr.Justice Collier pointed out:

> "Only a Commissioner may allow a person whose conduct is being inquired into to be represented by counsel... Again, only a Commissioner can give the mandatory permission for a witness to be represented by counsel."

His Lordship also stated:

> "If subsection 20(1) did not appear in this legislation, the respondents' argument that there was no right in anyone to be present at the examinations, no right to examine or cross-examine the witnesses summoned, or others, would, to my mind, be a strong one. Counsel relied on the well-known cases dealing with the rules of natural justice where quasi-judicial decisions are involved, and rules of fairness where only administrative decisions are involved.
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> "I interpolate here that I am not convinced there is any hard and fast disinction or any such dichotomy. Depending upon the particular statutory scheme, and the particular circumstances, the rules of natural justice, as well as the fairness rules, may equally apply to bodies making purely administrative decisions.
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> "The well-known cases cited by the respondents' counsel, with very few exceptions, all dealt with situations where the statute was silent as to the right to a hearing, the right to know the case to be met, the right to be represented by counsel, the right to cross-examine, et cetera.
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> "This statute is not silent as to the right to be represented by counsel. The legislators obviously felt tbe procedures under this section required that right to be spelt out in plain words. What did they mean by 'represented by counsel'?
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> "The respondents say they meant that right to be confined to the right of counsel to be present when their client was being examined as a witness; to advise him as to his compellability to answer and perhaps his right to object to answering on grounds of incrimination. But not to elicit evidence from him, except to clarify some point in his testimony. In the case of the person whose conduct is being inquired into, the only right, it is said, is to represent him as an alter ego; to sit and listen.
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> "I cannot believe the legislators intended any such restricted role for counsel... Parliament, to my mind, intended certain safeguards. One safeguard is the right of persons whose conduct is being investigated, and witnesses who are being examined under oath, to

be represented by counsel. That right is to examine and cross-examine on behalf of their client, in the normal way one associates the role of counsel representing a client in similar proceedings such as inquiries under the Inquiries Act of Canada and the province.

"In my view, where the Commissioners allow persons to have counsel, and in the cases of witnesses whom they must, on request, permit counsel, these consequences flow. Their counsel have the right to question their own so-called clients or witnesses, and other witnesses who are being examined. Obviously, the right of cross-examination or examination cannot be without limit. It can only go to those areas where their own clients are or may be affected by the testimony being elicited by the Hearing Officer."

"...Mr. Griffin refused to permit persons whose conduct is being inquired into, and the witnesses, to be present during the whole of the examinations. In my opinion, counsel for the various clients have the right to be present during all of the examinations. The right to be represented by counsel cannot, as I see it, be effectively excercised if the client is not also present with his counsel to provide instructions and information."

The judgment, if sustained on appeal, will provide counsel for interested parties with considerably more scope for intervention in the interests of their clients during examinations of witnesses. It will, at the same time, make the proceedings more difficult for the Director and longer. Witnesses will be more reluctant to disclose confidential information with competitors and their counsel present and the proceedings will become more difficult for them.

Collier, J. was critical of the Commission for failure to notify persons specifically that their conduct was under investigation. He stated:

"It was common ground before me that the Commission and its members at no time specifically gave notice to anyone that a certain person's conduct was being inquired into. Notices that the examination of witnesses was being held were sent to persons, including corporations, not named as persons to be examined. As I understand it, no notice was given to a witness that he might be, as well, a person whose conduct was being inquired into. I mention these points at this stage because the failure of the Commission to specify clearly the category or categories in which various persons may fall, puts, to my mind, an unnecessary burden on tax-payers and citizens to try and guess what is in the collective mind of the Commission. Surely a citizen is entitled to know if his conduct is being inquired into. He can then apply to be represented by counsel. And not merely at examinations of witnesses. He should not have to assume or speculate as to his status on the basis of some notice advising of a date and place where witnesses are to be examined."

While the point does not appear to have been argued, it is not clear on what basis the Commission was named as a party to the proceedings. Orders under s. 17 are issued only by a Member, not by the Commission as such, and at the stage reached in the inquiry a statement of evidence had not been submitted to the Commission pursuant to s. 18 nor did it involve an application to the Commission under Part IV.1. Therefore, the Commission as such does not appear to have been seized of the case.

## CANADIAN PACIFIC FAILS TO UPSET TELESAT LINK WITH TRANS-CANADA TELEPHONE SYSTEM

The Supreme Court of Ontario, in a judgment by Mr. Justice Dupont on March 9, 1981, dismissed an action by Canadian Pacific Limited seeking a declaration that a 1976 agreement between Telesat Canada and the member companies of the Trans-Canada Telephone System (TCTS) is in contravention of the Telesat Canada Act. The decision is being appealed.

The TCTS was, until the 1976 agreement, composed entirely of telephone companies. It provides telecommunications services on an inter-provincial and national basis. Telesat was created by the Telesat Canada Act of 1970 to establish satellite telecommunications systems with which to provide telecommunications services on a commercial basis. Its customers include members of the TCTS, CN/CP Telecommunications and the Canada Broad-casting Corporation. Shares of Telesat are owned by the federal government, by telecommunications common carriers including Canadian Pacific, and the general public.

Telesat became a member of the TCTS by virtue of the 1976 agreement, one effect of which was to transfer much of the control over satellite channel services from Telesat to the Board of Management of the TCTS. In 1977 the Canadian Radio-Television Commission turned down an application for approval of the agreement, partly on grounds of competition policy. However, its decision was reversed by Order-in-Council.

The Director of Investigation and Research, Combines Investigation Act, intervened in the 1977 hearings before the CRTC. He argued that the agreement would constrain competition between competing technologies, that it contained clauses specifically restricting competition and that it would impair the regulatory process. However, in her statement announcing Cabinet approval of the agreement, then Minister of Communications Jeanne Sauvé stated:

> "The Government continues to hold the view -- as it always has -- that Telesat is a complement to, not a competitor with, existing