

**FIRST CASE UNDER COMBINES LAW
BID-RIGGING BAN BRINGS CONVICTION**

The Supreme Court of Ontario, in a judgment delivered orally by Mr. Justice Dupont on May 25, 1981, convicted four school bus operators of bid-rigging under s. 32.2 of the Combines Investigation Act. It is the first case to be decided under the section, which was enacted in 1976. Those convicted were:

Charterways Transportation Limited

Travelways School Transit Limited

Lorne Wilson Transportation Limited

Arthur James Elen

Fines totalling \$52,000.00 were imposed.

S. 32.2(1) defines bid-rigging as:

- "(a) an agreement or arrangement between or among two or more persons whereby one or more of such persons agrees or undertakes not to submit a bid in response to a call or request for bids or tenders, and
- (b) the submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by agreement or arrangement between or among two or more bidders or tenders, where the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is made by any person who is a party to the agreement or arrangement."

The case involved bids submitted by the accused in response to a tender call by the regional business officer of the Peel Board of Education for the supply of school bus transportation services. It was the practice of the regional business officer, following receipt of the bids, to negotiate tentative contracts with the successful bidders after which the Board would determine the award based on her recommendations. The final price agreed upon was generally lower than some or all of the bids. The accused disliked that procedure and some of them had complained about it to the regional business officer in the past.

Following the call for tenders in February, 1977, the accused met and agreed upon a number of matters, one of which was to submit identical bids in an effort to counteract the negotiating procedures. That agreement was

carried out. Moreover, the Court found that in subsequent negotiations the accused succeeded in persuading the regional business officer to recommend to the Board the altering of contract award procedure from the tender to the straight negotiating method, which recommendation was subsequently adopted by the Board. The Court also noted that the accused provided about 73 per cent of the school bus service in Peel County.

At an early stage in the trial, one of the defence counsel argued that the section was unconstitutional, *inter alia* because the latter part of the provision beginning with the words "where the agreement or arrangement..." constituted an intrusion into provincial legislative authority as it relates to property and civil rights. Mr. Justice Dupont rejected that argument, stating:

"It cannot be said that the enactment is in substance an encroachment on any of the classes of subjects enumerated in Section 92, but is, if anything, an exercise of Federal legislative authority pursuant to Section 91(27) of the British North America Act related to criminal law..."

"I cannot accept the argument... that the notice or make known provisions of section 32.2 renders it any less competent of the Federal legislature. The Federal government's decision to exclude from the provision, tenders arrived at, otherwise in contravention of the section, where the 'notice' or 'make known' provisions are complied with, is within the legislative competence of the Federal government to define criminal offences."

In his judgment, his Lordship made a number of significant findings in respect of S. 32.2. He found that the word "and" which exists between paragraphs 32.2(1)(a) and (b) should be read as "or" making the two parts disjunctive rather than conjunctive. Otherwise, he said that the section would be rendered "completely inoperative and therefore absurd".

It was strenuously argued that the submission of four substantially identical tenders to the Board constituted compliance with the requirement of the section of making the agreement or arrangement known to the Board, at or before the time when any bid or tender is made by any person who is a party to the agreement or arrangement. This argument was based upon evidence by the regional business officer of the Board that at the tender opening she was led to the conclusion that the tenders were the product of an agreement among the bidders. Dupont, J. stated that this did not amount to making known as required by the section and found "the time when any bid or tender is made" in the concluding part of the section to be the moment the contents of the tender were communicated to the regional business officer, which was at the time of the tenders opening on March 26, 1977 at 3 p.m.

Also, since the tolls charged by school bus operators for services rendered pursuant to an operating licence are by virtue of the Ontario Public

Vehicles Act subject to approval of the responsible Minister, the defence argued on the basis of the Container Materials and Canadian Breweries cases that there is a presumption that the power to fix rates was exercised in the public interest. It was contended therefore that to succeed in the prosecution the Crown must show that the alleged combine must or would operate so as to hinder the provincial body, in this case the responsible Minister, from effectively exercising the authority therein vested for the protection of the public interest.

In response to this argument, Dupont, J. stated:

"... unlike the Canadian Breweries Limited case, the bus rates in this case, which are submitted for ministerial approval, are firstly, and unknown to the ministry, subject to and the product of bidrigging. An affirmative finding of such bidrigging, as defined in Section 32.2 would be evidence from which an inference could be drawn that such conduct has operated, or is likely to operate, so as to hinder or prevent the Provincial Authority from effectively exercising the power given to protect the public interest.

"I find the distinction, therefore, between the facts of the present case and those considered by the Court in the Canadian Breweries Limited case to be significant."

URANIUM FIRMS CHARGED

An Information was laid in Provincial Court Toronto on July 8, 1981 charging six uranium firms with conspiracy under s. 32(1)(c) of the Combines Investigation Act during the period September 1, 1970 and April 1, 1978. Those charged are:

Denison Mines Limited
Eldorado Nuclear Limited
Gulf Mineral Canada Limited
Rio Algom Limited
Uranerz Canada Limited
Uranium Canada Limited

Twenty-one co-conspirators were named.

Those charged were to appear in court on September 24, at which time a date for a preliminary hearing was expected to be fixed.