IN THE COURTS

SUPREME COURT OF CANADA CONFIRMS ACQUITTAL OF PHILIPS ELECTRONICS ON PRICE MAINTENANCE CHARGES

The Supreme Court of Canada, in a decision delivered orally on November 24, dismissed an appeal by the Crown against the judgement of the Ontario Court of Appeal in R.V. Philips Electronics Ltd., (1981) 30 O.R. (2d) 129, thus confirming the acquittal of Philips on two counts of price maintenance under s. 38(1)(a) of the Combines Investigation Act. The Ontario Court of Appeal held that advertisements by a manufacturer showing a retail price for a product do not violate the prohibition of price maintenance unless an attempt to influence the price upward by agreement, threat or promise is proven (See also Canadian Competition Policy Record, December 1980).

ONTARIO APPEAL COURT CONFIRMS PREDATORY PRICING CONVICTION OF HOFFMAN-LAROCHE AND CONSTITUTIONALITY OF COMBINES LAW

The Ontario Court of Appeal, in a judgement delivered by Mr. Justice Martin on October 6, confirmed the conviction of Hoffman-LaRoche Limited on a charge of predatory pricing under s. 34(1)(c) of the Combines Investigation Act. It is also confirmed the findings of the trial court (R.V. Hoffman-Laroche Limited) (1980) 28 O.R. (2d) 164) that the Act can be supported under the federal powers to make laws for the peace, order and good government of Canada and for the regulation of trade and commerce as well as under the federal power over criminal law. The Crown's cross appeal against the sentence of a fine of $50,000.00 was dismissed.

S.34(1)(c) makes it an indictable offence for everyone engaged in a business to engage "in a policy of selling articles at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have such an effect".

Faced with competition from Frank Horner Ltd. and others, Hoffman-LaRoche in the period 1970-71 supplied Valium free to hospitals for a year and supplied it to all governments in Canada for one dollar per tender call. The trial court found that the policy was designed to eliminate competitors and

to substantially limit competition in the hospital market. The charge contained a similar count in respect of Librium but the trial judge held it had not been proven. He permitted the indictment to be amended by deleting the references to Librium, and convicted the accused of the amended indictment.

Mr. Justice Martin rejected arguments by counsel for the appellants concerning the definition of the relevant market, the question of "design" and whether the provision of free valium to hospitals constituted "selling" at unreasonably low prices. On the question of relevant market, in reviewing the evidence he pointed out that not only did the appellant itself treat the hospital market as a separate market but that on the evidence the trial judge was entitled to find that it was a relevant market. On the matter of "design" he emphasized, as the trial judge found, that the appellant's conduct was not a mere defence of its market and said that on the evidence he would not have drawn any different conclusion from that of the trial judge who found that by its program of providing free valium to hospitals the appellant intended to substantially lessen competition or to eliminate a competitor. With regard to the question of whether the supplying of valium free to hospitals amounted to selling at unreasonably low prices, in agreeing with the conclusion of the trial judge he pointed out that this aspect could not be divorced from the selling policy of which it was an integral part.

Counsel for the Appellant also challenged the action of the trial judge in permitting the indictment to be amended and argued that the Crown had failed to prove the charge particularized in the original indictment. The trial judge held that, without an amendment, the accused must be acquitted. He held that there was a variance between the count and the evidence, that s. 592(2) of the Criminal Code was accordingly applicable and that an amendment to the indictment could be made without injustice to the accused, as contemplated by s. 529(4) of the Code. S. 529(2) empowers a court to amend an indictment or a count thereof where there appears to be a variance between the evidence and the charge in a count in the indictment as found.

Mr. Justice Martin held that there was not a variance between the evidence and the count, but rather a failure to prove the allegation contained in the count with respect to librium. However, he stated:

> "...a conviction could have been made on the original indictment of the offence charged under s. 34(1)(c), restricted to valium only. Although ... it was not necessary to amend the indictment to enable the court to convict the appellant on that part of the indictment which related to valium, I am satisfied that the amendment did not amount to a substantial wrong to the appellant or result in a miscarriage of justice. I would not, therefore give effect to this ground of appeal."

The judgement dealt at length with constitutional issues which had been raised at the trial. The defence challenged the constitutional authority of the Attorney General of Canada to institute and conduct the prosecution of an offence under s. 34(1)(c) although s. 15(2) of the Combines Investigation Act and s.2 of the Criminal Code both endow the Attorney General of Canada with such powers. The defence argued that s. 34(1)(c) is based exclusively upon the federal power over criminal law and, primarily on the basis of Regina v. Hauser, (1979) 1 S.C.R. 984, that the powers to institute and conduct prosecutions of criminal offences belong exclusively to the Provinces. In that case, which involved the Narcotic Control Act, the Supreme Court of Canada held that the Attorney General of Canada could institute and conduct proceedings in respect of a violation or conspiracy to violate any act of Parliament the constitutional validity of which does not depend upon the federal criminal law power in s. 91(27) of the British North America Act. The majority judgement left open the question whether the power extends to proceedings respecting the violation of an Act of Parliament the constitutional validity of which does rest entirely upon the federal power over criminal law. In a dissenting opinion which was concurred in by Pratte, J. Mr. Justice Dickson stated that the Attorney General of the Province "would have exclusive authority in respect of federal statutes, the pith and substance of which is criminal law". The trial judge in Hoffman-LaRoche rejected the defence challenge, holding that both s.2 of the Criminal Code and s. 15(2) of the Combines Investigation Act are within the legislative competence of Parliament. He stated:

> "The power granted to the federal Parliament in section 91(27) to make laws in relation to criminal law and procedure in criminal matters includes, in my view, the authority to determine the manner in which criminal law will be enforced. This involves, in my opinion, not only the authority to prescribe the rules for the enforcement of the law, but also who should conduct it."

He also held that s. 34(1)(c) of the Combines Investigation Act may be constitutionally supported, not only as criminal law but also under the federal residual power over peace order and good government and over the regulation of trade and commerce.

Martin, J.A. fully confirmed the Trial Court's position on the constitutional issues. Dealing first with the Combines Investigation Act as criminal law, he stated:

> "It is not necessary in this case to decide whether Parliament has concurrent jurisdiction with the Provinces with respect to the enforcement of all federal enactments creating criminal offences.
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> "I am satisfied that, at the least, Parliament has concurrent jurisdiction with the Provinces to enforce federal legislation validly

> enacted under Head 27 of s. 91 which, like the Combines Investigation Act, is mainly directed at suppressing in the national interest, conduct which is essentially trans-provincial in its nature, operation and effects, and in respect of which the investigative function is performed by federal officials pursuant to powers validly conferred on them and using procedures which only Parliament can constitutionally provide."

Counsel for the appellant argued that before Confederation the Attorneys General of the Colonies had complete supervisory powers over the institution and conduct of criminal prosecutions, and the B.N.A. Act, by assigning legislative jurisdiction over the administration of justice to the Provinces, made it clear that the Provincial Attorneys General were to continue to exercise those powers. His Lordship pointed out that while crime at the time of Confederation was local in nature and continues for the most part to be so, the "nature, subject matter, pattern and scope of crime were not, however, frozen at the time of Confederation". He stated:

> "Where a federal enactment, like the Combines Investigation Act, is mainly directed to the suppression as criminal of activities which are essentially trans-provincial in nature, as distinct from being merely local or provincial in nature, and in respect of which the investigative function is performed by federal officers, Parliament, in my view, has concurrent jurisdiction with the provinces to enforce such legislation, even though in a particular case the activities giving rise to the charge occur within a single province..."
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> "...As Mr. Robinette aptly put it, it would be startling if the Attorney General of Canada can have the conduct of prosecutions under the Narcotic Control Act because that Act is not criminal law and cannot have the conduct of prosecutions under the Combines Investigation Act because it is criminal law...
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> "The provisions of the Combines Investigation Act empowering federal officials charged with the enforcement of the Act to compel any person resident or present in Canada to give evidence under oath has...been a characteristic feature of the Act since its enactment. Two things are obvious: the first is that Parliament evidently considered that ordinary police investigation by the Province would not be effective to investigate the kinds of conduct at which the Combines Investigation Act strikes, and which seldom respects provincial boundaries. The second is that it would not be competent for a provincial legislature to vest those powers in provincial or federal officials for the purpose of investigating offences under the Act."

> "...The investigative provisions of the Combines Investigation Act have never been successfully challenged and indeed neither counsel for the appellant nor counsel for the Attorney General of Ontario before us have challenged their validity."

His Lordship also stated:

> "Since the investigative function is validly vested in federal officers, the authority of Parliament to empower the Attorney General of Canada to initiate and conduct prosecutions under the Act is necessarily incidental or ancillary to the scheme of the legislation, or to use the language of Laskin J.A. (as he then was) in Papp v. Papp, 1970 1 O.R. 331, at pp. 335-36, 'there is a rational, functional connection' between the investigative procedures provided for in the Act and the vesting of prosecutorial power in the Attorney General of Canada under s. 15(2) of the Act."

> "In my view, the vesting of prosecutorial powers in the Attorney General of Canada in respect of violations of the Combines Investigation Act does not offend any constitutional principle or any understanding that may have existed in the time of Confederation with respect to the enforcement of the criminal law."

While not strictly required to so in view of the foregoing, Mr. Justice Martin also dealt with the peace, order and good government power and the trade and commerce power, stating that since the trial judge had given comprehensive reasons in considering these questions and because of conspicuously able arguments from all counsel he considered it appropriate to express his views and also because of a definite relationship between the criminal law and general powers. He then explained his reasons for holding that the Combines Investigation Act could also be supported under each of these powers. Regarding peace, order and good government, he stated:

> "The fact that legislation creating offences which have a national aspect or dimension may properly be characterized as criminal law, does not, in my view, preclude the legislation from also being supported under Parliament's general power to make laws for the peace, order and good government of Canada. On the contrary, where the subject matter of the legislation has a national dimension, the residual power and the criminal law power are mutually supportive. In some cases the line between criminal legislation enacted under s. 91(27) to protect the national interest by suppressing conduct as criminal, and legislation enacted under the general power to protect the national interest, may be so fine as to be scarcely discernible, if discernible at all."

Turning to The Queen v. Hauser, supra in which it was decided that the Narcotic Control Act can be supported by the federal peace, order and good government power, Martin, J.A. described the approach of the Supreme Court of Canada in that case as follows in part:

> "...Mr. Justice Pigeon concluded from his analysis of the history of the Narcotic Control Act and its general scheme, that it was an act for the control of narcotic drugs, and that the more important consideration for classifying the Act as legislation under the federal residual power, was that it was legislation adopted to deal with a genuinely new problem which did not exist at the time of Confederation and clearly could not be put in the class of 'matters of a merely local or private nature'...He did not say that the Act or, at least parts of it, could not also have been supported under Parliament's criminal law power. Nor did he say that the offences under ss. 3 and 4 of the Act were not crimes, and could not have been created by legislation enacted under Parliament's criminal law power."

He cited Viscount Simon in Attorney General for Ontario v. Canadian Temperance Federation, 1946 A.C. 193 as follows:

> "In their Lordships' opinion, the true test must be found in the real subject matter of the legislation; if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the Aeronautics case (1932 A.C. 54) and the Radio case (1932 A.C. 304), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures. War and pestilence do doubt are instances; so, too, may be the drink or drug traffic, or the carrying of arms."

After which, Martin, J.A., stated:

> "If the trade in drugs may, as a matter of general concern, invoke the peace, order and good government general power, it is difficult to think that the protection of free competition which affects the entire Canadian community is not equally the concern of Canada as a whole. I observe that there is support in the legal literature for the view that the problem and significance of regulating competition have attained the dimension described by Viscount Simon in the Canada Temperance Act case."

With regard to the federal power over the regulatiuon of trade and commerce in s.91(2) of the B.N.A. Act, Mr. Justic Martin cited chief Justice Laskin in Re Anti-Inflation Act, (1976) 2 S.C.R. 373, as follows:

> "Since no argument was addressed to the trade and commerce power I content myself with observing only that it provides the Parliament of Canada with a foothold in respect of 'the general regulation of trade affecting the whole Dominion', to use the words of the Privy Council in Citizens Insurance Co. v. Parsons at p. 113. The Anti-Inflation Act is not directed to any particular trade. It is directed to suppliers of commodities and services in general and to the public services of governments, and to the relationship of those suppliers and of the public services to those employed by and in them, and to their overall relationship to the public."

Martin, J.A. drew a distinction between s. 34(1)(c) of the Combines Investigation Act and s. 7(e) of the Trade Marks Act which was held to be ultra vires of Parliament in MacDonald v. Vapor Canada Limited, 1977 2 S.C.R. 124. Section 7(e) provides that no person shall "do any other act or adopt any other business practice contrary to honest industrial or commercial usage in Canada", and authorizes the granting of civil relief for breaches of the Act. Martin, J.A. stated:

> "It is obvious, however, that s.7 of the Trade Marks Act was not regulatory in character at all. It did not establish a regulatory scheme administred by a public official. On the contrary, it simply extended or intensified existing common and civil law delictual liability and at the same time prescribed the usual civil remedies open to an aggrieved person."

Counsel for the Appellant and counsel for the Attorney General of Ontario, in arguing that the constitutional validity of s. 34(1)(c) of the Combines Investigation Act depends entirely upon the federal power over criminal law, stressed that the section had originally been enacted as a section of the Criminal Code and had been upheld as criminal law in Reference re Section 498A of the Criminal Code (1937) A.C. 688. However, Mr. Justice Martin disagreed, stating:

> "I am, with deference, of the view that this is not the correct approach, and in my opinion, it was not the approach of the Supreme Court of Canada in The Queen v. Hauser, supra. The legislation in question must be viewed as a whole and classified, and if viewed as a whole, it may be constitutionally supported under s. 91(2) as the regulation of trade affecting the whole country, then on the principle enunciated in Hauser, supra, as I understand it, it is not material to the constitutional question here raised that a particular

offence created by the enactment may properly be classified as criminal law, or could have been enacted under the criminal law power. The learned trial judge concluded, rightly in my view, that the Combines Investigation Act could also be supported under the trade and commerce power as well as under s. 91(27)."

RTPC FINDING OF TIED SELLING BRINGS FIRST REMEDIAL ORDER

The Restrictive Trade Practices Commission, in a decision on October 30, found BBM Bureau of Measurement to be engaged in tied selling within the meaning of s.31.4 of the Combines Investigation Act with the result that competition was likely to be lessened substantially and decided to make an order prohibiting BBM from continuing to engage in the practice. (Director of Investigation and Research v. BBM Bureau of Measurement (Oct. 30, 1981) R.T.P.C. No. 3).

It is the second substantive decision under the 1976 amendments which empowered the RTPC to issue remedial orders in respect of specified kinds of restrictive practices. The first was in Director of Investigation and Research v. Bombardier Limitée (October 14, 1980) R.T.P.C. No. 1 in which an application by the Director for an order in respect of exclusive dealing was dismissed. A number of applications by the Director have been withdrawn following settlement of the issues with the parties before completion of the proceedings before the Commission.

The relevant provisions of s. 31.4 are:

"31.4 (4) For the purposes of this section, ... 'tied selling' means

(a) any practice whereby a supplier of a product, as a condition of supplying the product (the 'tying' product) to a customer, requires that customer to

(i) acquire some other product from the supplier or his nominee, or
(ii) refrain from using or distributing, in conjunction with the typing product, another product that is not of a brand or manufacture designated by the supplier or his nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in sub-paragraph (a)(i) or