

Ottawa
1967
Sept. 27
Oct. 30
—

BETWEEN:

HER MAJESTY THE QUEEN in right of Canada represented by the Attorney General of Canada

OF THE FIRST PART;

AND

CANADIAN WAREHOUSING ASSOCIATION, a company incorporated under the laws of Canada,

OF THE SECOND PART.

Combines—Transportation of household goods—Whether covered by Act—“Article”, meaning—Combines Investigation Act, R.S.C. 1952, c. 314, ss. 2(a), 32(1)(c), am. 1960, c. 45, ss. 1, 13.

On its proper construction s. 32(1)(c) of the *Combines Investigation Act* prohibits conspiracies to restrict competition unduly in the storage or transportation of household goods even though such is in a service industry. Household goods fall within the definition of “article” in s. 2(a) which must be interpreted to include all tangible articles or commodities whether or not they have left the stream of commerce.

ARGUMENT of question of law under s. 18(1)(g) of the *Exchequer Court Act*.

C. R. O. Munro, Q.C. and *S. M. Leikin* for H.M. the Queen.

K. E. Eaton for Canadian Warehousing Ass'n.

GIBSON J.:—This question of law comes before the Court pursuant to section 18(1)(g)¹ of the *Exchequer Court Act*, R.S.C. 1952, c. 98, by way of Agreement dated June 13, 1967 between the parties.

The operative parts of the said Agreement prescribing the question put to the Court, the evidence adduced, and the provision as to costs read as follows:

(1) The Exchequer Court of Canada shall determine the following question:

“Subject to section 32(2) of the *Combines Investigation Act* is a person who conspires, combines, agrees or arranges with another

¹ 18.(1) The Exchequer Court also has exclusive original jurisdiction to hear and determine the following matters:

...
(g) the amount to be paid where the Crown and any person have agreed in writing that the Crown or such person shall pay an amount of money to be determined by the Exchequer Court, or any question of law or fact as to which the Crown and any person have agreed in writing that any such question of law or fact shall be determined by the Exchequer Court;

person to prevent, or lessen, unduly, competition in the storage or transportation of household goods, guilty of an offence under section 32(1)(c) of the *Combines Investigation Act*?"

- (2) That question shall be determined on the facts set forth in the recitals to this agreement, the facts appearing in Exhibit "A" and any other facts of which the Court may take judicial notice.
- (3) The costs of the proceedings launched in the Exchequer Court by the submission of the above question, and of all appeals from any decision therein shall be in the discretion of the courts.

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"Household goods" referred to in the question are defined in the first recital of the said Agreement as follows:

being goods owned by householders and used in their households.

The party of the second part, Canadian Warehousing Association, (which represents approximately 300 firms who are engaged in the business of "transporting and storing household goods in Canada") takes the position with the Director of Investigation and Research under the *Combines Investigation Act* that "household goods" are not within the meaning of the word "article" in section 32(1)(c) of the *Combines Investigation Act* and that "therefore a conspiracy, combination, agreement or arrangement with another person to prevent or lessen unduly competition in the storage or transportation of household goods would not as a matter of law constitute an offence under the said section 32(1)(c)".

The full text of the Agreement is set out in Schedule "A" to these Reasons excepting therefrom Exhibit "A" being the Dominion Bureau of Statistics Report on *Moving and Storage Household Goods 1964*.

Section 32(1)(c) of the *Combines Investigation Act* reads as follows:

32. (1) Every one who conspires, combines, agrees or arranges with another person

...

(c) to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of an article, or in the price of insurance upon persons or property, or

The statutory definition of the word "article" in the said section 32(1)(c), is in section 2(a) of the Act, and reads as follows:

2. In this Act,

(a) "article" means an article or commodity that may be the subject of trade or commerce;

(Underlining is mine)

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The statutory definition of "business" in the Act is in section 2(aa) of the Act and reads as follows:

2. In this Act,

...

(aa) "business" means the business of manufacturing, producing, transporting, purchasing, supplying, selling, storing or dealing in articles;

The statutory definition of "trade or industry" is in section 2(h) of the Act and reads as follows:

2. In this Act,

...

(h) "trade or industry" includes any class, division or branch of a trade or industry.

A history and extracts of statutory provisions preceding section 2(a) and section 32(1)(a) of the *Combines Investigation Act* as enacted in 1960 is set out in Schedule "B" to these Reasons.

The submission of counsel for the Canadian Warehousing Association is that the question should be answered in the negative because: household goods are not within the meaning of the word "article" in section 32(1)(c) of the *Combines Investigation Act* which applies to storage and transportation only in the flow of goods from production to consumption or utilization; that the *Combines Investigation Act* is a penalty statute and must be construed strictly so that no cases are brought under it that do not fall within the reasonable meaning of its terms and within its spirit and scope; that paragraph (a) of section 2 of the *Combines Investigation Act* should be interpreted as not extending to household goods having regard to (a) the ordinary meaning of the words used in that paragraph, (b) the judicial interpretation of the language used there, and (c) the judicial interpretation of "trade and commerce" in section 91(2)² of the *British North America Act, 1867*;

²91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—

2. The Regulation of Trade and Commerce.

that unless interpreted as submitted the definition in section 2(a) would be unnecessary, which could not have been intended, since all personal property except royalties of the country and *ferae naturae* may be bought and sold; and that the interpretation of the word "article" as excluding household goods is consistent with the context in which that word appears in section 32 of the Act, which is directed primarily to economic availability of goods as opposed to services, and applies only incidentally to services, such as storage and transportation when they are related to the former.

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The submission of counsel for the Attorney General of Canada, among other things, is that the definition of the word "article" is a necessary part of the statute in order to complete the sense of section 32(1)(c) and those other sections of the *Combines Investigation Act* in which the word "article" is used; that the use of the word "article" in section 32(1)(c) is grammatically an ellipsis leaving unstated the kind of article intended; that the definition of the kind of article is left unstated in section 32(1)(c); that the kind of article defined by the definition is one that may be subject of trade and commerce and therefore section 32(1)(c) includes within its purview articles of a kind that can be bought or sold; and that because household goods consist of many articles all of which are of a kind that can be bought and sold etc., and all are commodities, therefore household goods come within the meaning of the word "article" as used in section 32(1)(c) of the *Combines Investigation Act*.

Firstly, in my view, the judicial interpretation of the words "trade and commerce" as used in section 91(2) of the *British North America Act, 1867* are not of assistance in interpreting the meaning and application of those same words in the *Combines Investigation Act* in that this Act has been judicially held to be criminal law legislation.

Secondly, from a consideration of the relevant statutory provisions of the *Combines Investigation Act* and the case law in respect thereto, as I understand it, the general purpose of this legislation is to put a particular limit (*viz.*, not to "conspire, combine, agree or arrange with another person . . . to prevent, or lessen, unduly, competition in the production . . ." etc.) on a party's right to contract in so far as it affects competition (that is "the public interest

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in free competition” as understood by the Courts—see Duff C.J. in *Container Materials, Limited et al v. His Majesty The King*³—“in the business of manufacturing, producing, transporting, purchasing, supplying, selling, storing or dealing in articles”⁴, “that may be the subject of trade or commerce”⁵, but that it does not limit in this said respect any party’s right to contract in so far as it affects competition (in the manner described) in businesses in those service industries not specifically included in section 32(1)(c) of the Act; and further, in elaboration of this latter premise, that, except for “the price of insurance upon persons or property”, section 32(1)(c) of the Act puts such a limit only on contracts in the businesses listed in section 32(1)(c) of the Act in the service industries which touch or concern tangible things, i.e., “articles” “that may be the subject of trade or commerce”⁶ and not on contracts in other businesses in the service industries which relate solely to the provision of services.

It follows, in my view, that in interpreting the meaning of the word “article”—“that may be the subject of trade or commerce”, the widest meaning of “may be” should be employed so as to include all articles or commodities which are tangible things, generally, whether or not they have left the stream of commerce, so to speak, such as “household goods” in this case, which normally would be in private ownership and not for sale.

In the case of “rental” contracts, as another example, as that word is used in section 32(1)(c) of the Act, the articles rented also would normally be out of the stream of commerce in the sense stated.

Therefore, in my view, the business⁷ of “transporting and storing household goods in Canada” carried on by the

³ [1942] S.C.R. 147 at 152.

⁴ See section 2(1)(aa) of the Act.

⁵ See section 2(1)(a) of the Act.

⁶ From the decisions in some cases, however, it is sometimes submitted that there is a possible inference that the Court may find that the evidence in a given case establishes only a conspiracy to prevent or lessen unduly competition in the performance of work and labour and not in, for example, the sale, supply, or transportation, etc., of the “article” which is made up of both materials and work and labour. This submission is usually made in cases where there is a very large and predominant element of work and labour. See *Rex v. Alexander Ltd. et al* [1932] 2 D.L.R. 109 at 124; *Regina v. Electrical Contractors Association of Ontario and Dent* [1961] O.R. 265 at 278; and *Rex v. Singer et al* [1931] O.R. 202 at 216.

⁷ (cf., “business” in sections 2(1)(aa) and 32(3) of the Act).

member firms of the party of the second part, Canadian Warehousing Association is a business in a service industry within the purview of section 32(1)(c) of the *Combines Investigation Act*; and the question put therefore is answered in the affirmative.

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The Attorney General of Canada is entitled to the costs of these proceedings.

Gibson J.

SCHEDULE "A" TO REASONS FOR JUDGMENT in
HER MAJESTY THE QUEEN and
CANADIAN WAREHOUSING ASSOCIATION.

THIS AGREEMENT made this 13th day of June, A.D. 1967.

BETWEEN :

HER MAJESTY THE QUEEN, in right of Canada, represented herein by the Attorney General of Canada (hereinafter referred to as "Her Majesty")

OF THE FIRST PART

—AND—

CANADIAN WAREHOUSING ASSOCIATION, a company incorporated under the laws of Canada, (hereinafter referred to as "the Association")

OF THE SECOND PART

WITNESSETH THAT, whereas the transportation and storage of goods commonly described as household goods, "being goods owned by householders and used in their households", is a substantial business in Canada, as evidenced by the Dominion Bureau of Statistics' report on "Moving and Storage Household Goods 1964", a copy of which is Exhibit "A" hereto.

AND WHEREAS the Association represents, *inter alia*, approximately three hundred firms engaged in the business of "transporting and storing household goods in Canada".

AND WHEREAS section 8 of the *Combines Investigation Act* authorizes the Director of Investigation and Research (hereinafter called "the Director"), whenever he has reason to believe that any provision in Part V of that Statute has been or is about to be violated, to cause an inquiry to be made into all such matters as he considers necessary to inquire into with a view of determining the facts.

AND WHEREAS section 32(1)(c) of the *Combines Investigation Act* which is contained in Part V thereof, makes it an offence to conspire, combine, agree, or arrange with another person to prevent, or lessen, unduly, competition in the storage or transportation of an article.

AND WHEREAS the Director purported to cause an inquiry to be commenced with a view of determining the facts as to whether anyone had conspired, combined, agreed or arranged with another person to prevent, or lessen, unduly, competition in the storage or transportation of household goods.

AND WHEREAS the Chairman of the Restrictive Trade Practices Commission, pursuant to section 10(3) of the *Combines Investigation Act*, purported to authorize

representatives of the Director to exercise the powers conferred by section 10(1) of the said Statute in relation to premises of the Association and of eight of the principal companies engaged in the business of transporting and storing household goods.

AND WHEREAS the Association has taken the position with the Director that household goods are not within the meaning of the word "article" in section 32(1)(c) of the *Combines Investigation Act*, and that therefore a conspiracy, combination, agreement, or arrangement with another person to prevent, or lessen, unduly, competition in the storage or transportation of household goods would not as a matter of law constitute an offence under the said section 32(1)(c).

AND WHEREAS pursuant to section 18(1)(g) of the *Exchequer Court Act*, Revised Statutes of Canada, 1952, Chapter 98, the Exchequer Court has exclusive original jurisdiction to hear and determine any question of law or fact as to which the Crown and any person have agreed in writing that any such question of law or fact shall be determined by the Exchequer Court.

NOW THEREFORE Her Majesty and the Association agree that:

(1) The Exchequer Court of Canada shall determine the following question:

"Subject to section 32(2) of the *Combines Investigation Act* is a person who conspires, combines, agrees or arranges with another person to prevent, or lessen, unduly, competition in the storage or transportation of household goods, guilty of an offence under section 32(1)(c) of the *Combines Investigation Act*?"

(2) That question shall be determined on the facts set forth in the recitals to this agreement, the facts appearing in Exhibit "A" and any other facts of which the Court may take judicial notice.

(3) The costs of the proceedings launched in the Exchequer Court by the submission of the above question, and of all appeals from any decision thereon shall be in the discretion of the courts.

IN WITNESS WHEREOF the parties hereto have executed these presents the day, month and year first above written.

Executed in the presence of:

(J. R. Geoffron)

(P. E Trudeau)

Attorney General of Canada

(Y C Rhode)

Executive Vice President

SCHEDULE "B" to REASONS FOR JUDGMENT in
HER MAJESTY THE QUEEN and
CANADIAN WAREHOUSING ASSOCIATION.

History and extracts of statutory provisions preceding paragraph (a) of section 2 and paragraph (c) of subsection (1) of section 32 of the *Combines Investigation Act* as enacted in 1960.

1889 *An Act for the Prevention and Suppression of Combinations formed in restraint of Trade. 52 Vict., Chap. 41.*

"1. Every person who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company, unlawfully,

- (a) To unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in "any article or commodity which may be a subject of trade or commerce;" or—
- (b) To restrain or injure trade or commerce in relation to any such article or commodity; or—
- (c) To unduly prevent, limit or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or—
- (d) To unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property,—

Is guilty of a misdemeanor and liable, on conviction, to a penalty not exceeding \$4,000 and not less than \$200, or to imprisonment for any term not exceeding 2 years; and, if a corporation, is liable on conviction to a penalty not exceeding \$10,000 and not less than \$1,000."

1892 *The Criminal Code, 1892. 55-56 Vict., Chap. 29.*

"520. Everyone is guilty of an indictable offence and liable to a penalty not exceeding \$4,000 and not less than \$200, or to 2 years' imprisonment, and if a corporation to a penalty not exceeding \$10,000 and not less than \$1,000 who conspires, combines, agrees, or arranges with any other person, or with any railway, steamship, steamboat or transportation company, unlawfully—

- (a) To unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce, or
- (b) To restrain or injure trade or commerce in relation to any such article or commodity; or
- (c) To unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or
- (d) To unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property."

N.B. Section 1 of the Act of 1889 was repealed by this statute.

1897 *The Customs Tariff, 1897. 60-61 Vict., Chap. 16.*

"18. Whenever the Governor in Council has reason to believe that with regard to any article of commerce there exists any trust, combination, association or agreement of any kind

N.B. This statute contained no definition of "article of commerce".

1899 *62-63 Vict., Chap. 46.*

"1. Section 520 of *The Criminal Code, 1892* is hereby amended by striking out the word 'unduly' in paragraphs (a), (c) and (d) and by striking out the word 'unreasonably' in paragraph (c)."

1900 *63-64 Vict., Chap. 46.*

This statute re-enacted section 520 of *The Criminal Code, 1892*, so that it read in the same way as before the 1899 amendment.

1906 *R.S.C., 1906, Chap. 146.*

Section 520 of *The Criminal Code, 1892* was re-enacted as section 498 with the same wording.

1910 *The Combines Investigation Act, 9-10 Edw. VII, Chap. 9.*

“(c) ‘combine’ means any contract, agreement, arrangement or combination which has, or is designed to have, the effect of increasing or fixing the price or rental of any article of trade or commerce or the cost of the storage or transportation thereof, or of restricting competition in or of controlling the production, manufacture, transportation, storage, sale or supply thereof, to the detriment of consumers or producers of such article of trade or commerce, and includes the acquisition leasing or otherwise taking over or obtaining by any person to the end aforesaid, of any control over or interest in the business, or any portion of the business, of any other person, and also includes what is known as a trust, monopoly or merger.”

1919 *The Combines and Fair Prices Act, 1919. 9-10 Geo. V, Chap. 45.*

“2. The expression ‘combine’ is used in this Act with intended relation to “articles of commerce” and . . . shall be deemed to include

.....

(c) any actual or tacit contract, agreement, arrangement or combination which has or is designed to have the effect of (1) limiting facilities for transporting, producing, manufacturing, supplying, storing or dealing; or (2) preventing, limiting or lessening manufacture or production; or (3) fixing a common price, or a resale price, or a common rental, or a common cost of storage or transportation, or enhancing the price, rental or cost of an article, rental storage or transportation; or (4) preventing or lessening competition in, or substantially controlling, within any particular district, or generally, production, manufacture, purchase, barter, sale, transportation, insurance or supply; or (5) otherwise restraining or injuring commerce.”

1923 *The Combines Investigation Act, 1923. 13-14 Geo. V. Chap. 9.*

“2. In this Act, unless the context otherwise requires,—

(a) the expression ‘combine’ in this Act shall be deemed to have reference to such combines immediately hereinafter defined as have operated or are likely to operate to the detriment of or against the interest of the public, whether consumers, producers or others; and limited as aforesaid, the expression as used in this Act shall be deemed to include

...

(3) any actual or tacit contract, agreement, arrangement or combination which has or is designed to have the effect of

...

(v) preventing or lessening competition in, or substantially controlling within any particular area or district, or generally, production, manufacture, purchase, barter, sale, storage, transportation, insurance or supply;

1927 *The Criminal Code, R.S.C., 1927, Chap. 36.*

Section 498 of the Revised Statutes of 1906 was re-enacted without change.

1927 *Combines Investigation Act. R.S.C., 1927, Chap. 26.*

“2. In this Act, unless the context otherwise requires,

(1) combines which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers or others and which

...

(c) result from any actual or tacit, contract, agreement, arrangement, or combination which has or is designed to have the effect of

...

(v) preventing or lessening competition in, or substantially controlling within any particular area or district or generally, production, manufacture, purchase, barter, sale, storage, transportation, insurance or supply,

...

are described by the word 'combine'."

1935 *The Combines Investigation Act Amendment Act, 1935. 25-26 Geo. V, Chap. 54.*

"2. In this Act, unless the context otherwise requires,

(1) 'combine' means a combination having relation to any commodity which may be the subject of trade or commerce, of two or more persons by way of actual or tacit contract, agreement or arrangement having or designed to have the effect of

...

(e) preventing or lessening competition in, or substantially controlling within any particular area or district or generally, production, manufacture, purchase, barter, sale, storage, transportation, insurance or supply; or"

1952 *Combines Investigation Act, R.S.C., 1952, Chap. 314.*

Paragraph (a) of section 2 of this statute contained the same definition of "combine" as appeared in subsection (1) of section 2 of the 1935 Act.

1954 *The Criminal Code 2-3 Eliz., Chap. 51.*

"411 (1). Everyone who conspires, combines, agrees or arranges with another person

(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article,

(b) to restrain or injure trade or commerce in relation to any article,

(c) to prevent, limit, or lessen, unduly, the manufacture or production of an article, or to enhance unreasonably the price thereof, or

(d) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, transportation, or supply of an article, or in the price of insurance upon persons or property,

is guilty of an indictable offence and is liable to imprisonment for two years.

(2) For the purposes of this section, 'article' means an article or commodity that may be a subject of trade or commerce."

1960 *Statutes of 1960, 8-9 Eliz., Chap. 45.*

I. Section 1 enacted a new paragraph (a) of section 2 of the *Combines Investigation Act*, R.S.C., 1952, Chap. 314, reading:

"(a) 'article' means an article or commodity that may be the subject of trade or commerce."

II. Section 13 enacted a new section 32 of the *Combines Investigation Act*, reading:

"32. (1) Every one who conspires, combines, agrees or arranges with another person

(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article,

(b) to prevent, limit or lessen, unduly, the manufacture or production of an article, or to enhance unreasonably the price thereof,

(c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of an article, or in the price of insurance upon persons or property, or

(d) to restrain or injure trade or commerce in relation to any article,
is guilty of an indictable offence and is liable to imprisonment for two years.”

III. Section 21 repealed section 411 of *The Criminal Code*, and section 22 provided as follows:

“22. Except to the extent that subsection (1) of section 32 of the *Combines Investigation Act* as enacted by this Act is not/in substance the same as section 411 of *The Criminal Code* as in force immediately before the coming into force of this Act, the said subsection (1) of section 32 of the *Combines Investigation Act* shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the said section 411 of *The Criminal Code*.”