CRIMINAL LAW — COMBINES INVESTIGATION ACT — INTERPRETATION

The recent decision of the British Columbia Court of Appeal in *Regina* v. *Morrey*[1] has thrown a great deal of confusion into the law in respect to the judicial interpretation of Section 2 (a) of the *Combines Investigation Act*.[2]

The charges against the defendants in this case were framed under clauses (iii), (iv) and (v) of Section 2 (a). At the trial the jury brought in a verdict of guilty under (iii) and (iv) and not guilty under (v). The relevant part of the section reads as follows:

> 2. In this act,
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> (a) "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
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> (i) limiting facilities for transporting, producing, manufacturing, supplying, storing or dealing, or
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> (ii) preventing, limiting or lessening manufacture or production, or
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> (iii) fixing a common price or a resale price, or a common rental, or a common cost of storage or transportation, or
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> (iv) enhancing the price, rental or cost of article, rental storage or transportation, or
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> (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, or
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> (vi) otherwise restraining or injuring trade or commerce, or a merger trust or monopoly which combination, merger, trust or monopoly has operated or is likely to operate to the detriment or against the interest of the public, whether consumers, producers or others;

The majority of the Court of Appeal (Sydney Smith J.A., Bird J.A. concurring) held that the Crown's case failed by reason of its failure to prove that the acts of the defendants resulted in detriment to the public and also on the basis of a misdirection to the jury occasioned by the failure of the trial judge to state that detriment applied to clauses (iii) and (iv) and the trial judge's comment that the jury could presume detriment if they found a lessening of competition. Accordingly the conviction was quashed.

Davey J.A. dissented on the ground that the conception that detriment to the public is an ingredient of the offences charged stemmed from an office consolidation of the statute in which an important departure from the punctuation and arrangement of Section 2(a) of the Act has caused a significant change in the meaning. The learned judge stated that in the office consolidation a semi-colon had been substituted for the comma which appears after the word "commerce" in clause (vi) and the remainder of the clause has been extracted from its setting and appended to the whole of sub-section (a), in a way that relates it to all the clauses of subsection (a) as well as to clause (vi). He also stated that this error was reproduced in *Eddy Match Co. v. Regina* and that the judgment proceeded on the error.

It would seem that Mr. Justice Davey's interpretation of the section is correct. Although his statement regarding the incorporation of the error in the

[1] (1956), 19 W.W.R. 299.

[2] R.S.C., 1952, c. 314.

report of the *Eddy Match Case* is correct if the report in the Criminal Reports is referred to, the reproduction of the section in the Canadian Criminal Cases[4] is correct. In any event the proper grammatical construction would indicate that words in a particular clause could not modify those of another clause of equal status unless specifically stated to do so. There is no such specification in Section 2(a).

Even the majority judge stated:

> counsel conceded that the essential ingredient of the offence comprised in the concluding words of subsection (clause) (vi) controlled with equal force the preceding subsections. Grammatically there would seem some doubt as to this. But I am prepared to accept the view of the Crown.

Crown counsel would seem to have made a rather ill-advised and fatal concession.

There is no doubt that *Eddy Match* v. *The Queen* is authority against the proposition that detriment to the public is not an element in clauses (i) to (v). The incorrect reproduction of the section in the Criminal Reports would seem to weaken its authority on this particular point. Casey J.[5] states: "The crown then can make its case by showing one or the other . . . [actual detriment or the likelihood of detriment accruing]." Similar statements are made in this case and the necessary inference from the decision is that detriment is applicable. However, the court there found actual detriment and thus did not need to consider what the situation would be had none been found. Nor does this case differentiate between the clauses of Section 2(a), the charge being framed in such a manner as to encompass nearly all of them.

It may not be too late for the courts to follow the reasoning of Davy J.A. in *Morrey* and give the section a rational interpretation. If it is too late, it would seem to be incumbent on Parliament to clarify the matter.

Even should detriment be an element of all clauses in the section, or even if it applies only to clause (vi), there is authority for the proposition that, once a lessening of competition is found, detriment will be presumed. In other words, a finding of lessening of competition will shift the onus to the defendant, forcing him to negative detriment in order to succeed. This proposition would not apply to *Regina* v. *Morrey* as the jury found the defendants not guilty under 2(a) (v) (preventing or lessening of competition). It may, however, be of relevance in future cases.

In the *Eddy Match* case Casey J. states at page 20:

> By enacting the *Combines Investigation Act*, Parliament has given evidence of its acceptance of the fundamental principle [of freedom of competition] . . . At the same time however, it has refused to label as an evil to be avoided, all encroachments on the public right. Only those which cause or are likely to cause detriment are forbidden. But Parliament has not enacted as a condition sine qua non that actual detriment be demonstrated. If it had intended to do so, it would not have added the words 'or is likely to'. These words broaden the field of forbidden encroachments by bringing within that class those whose very nature creates a presumption that they will prejudice the public right.

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[4](1954), 18 C.R. (Can.) 357.

[4](1954), 109 C.C. C. 1.

[5]*Ibid.*

The headnote states:

> . . . a combine which controls a given business by excluding the possibility of competition is prima facie a detriment to the public and must rebut the presumption . . .

Again Casey J. states at page 21:

> . . .[when there is control] that . . . excluded . . . the possibility of any competition Such a condition creates a presumption that the public is being deprived of all the benefits of free competition and this deprivation . . . is necessarily to the detriment or against the interest of the public.

In the case of *Wiedeman* v. *Shragge*[4] Idington J. states at page 750:

> The combination to remove competition means . . . the reaping of enormous wealth by the few, to the detriment of the many.

This approach seems to be quite rational. Surely any private combination which raises prices or shuts out competition is *prima facie* acting contrary to the interests of the public at large. It is submitted that this follows logically from the premise of the desirability of freedom of competition.

A case contra is *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Lines.*[7] Here the court found for the defence on the basis that the crown had not proven the company *intended* to act to the detriment of the public. However, in the Australian Act intent to cause detriment is specifically included, whereas in the *Combines Investigation Act* intent would seem to be irrelevant in a discussion of Section 2(a). There is a big difference between presuming intent to effect a certain result and presuming that the result in fact occurred.

Cases such as *Crown Milling* v. *Rex*[8] and *Rex* v. *Staples*[9] did not discuss the law relating to proof of detriment but merely held as a fact that there was none.

Thus it would seem open to the courts to decide, once a lessening of competition is found, that detriment will be presumed.

Should our first argument be correct, that detriment to the public is not an element of the offences under the *Combines Investigation* Act, with the exception of 2(a) (vi), then in view of the statement of the Judicial Committee in *Proprietory Articles Trade Association et al* v. *The Attorney-General for Cadana et al*[10] that detriment is a factor in bringing the combines legislation within the purview of the criminal law, the constitutionality of the Act may be open to re-examination. The *Proprietary Trade Case* was decided before Act was amended and the wording and position of the detriment phrase changed. However, we make no comment on this point.

Thus the court in *Regina* v. *Morrey* could have arrived, and perhaps should have arrived, at a different conclusion by proceeding along either of the aforementioned lines.

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Third Year Law

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[6] (1912), 2 D. L. R. 734.
[7] [1913] A.C. 781.
[8] [1927] A.C. 394.
[9] [1940] 2 W. W. R. 627, at p. 635.
[10] [1931] 1 W.W.R. 552, at p. 561.