

CANADA / JUDGMENT

Stelco Inc. v. Canada (Attorney General)

[1990] 1 SCR 617

COURT

Supreme Court of Canada

DECIDED

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Stelco Inc. v. Canada (Attorney General) Collection Supreme Court Judgments Date 1990-03-29
Report

[1990] 1 SCR 617 Case number 20656 Judges Lamer, Antonio; Wilson, Bertha; La Forest, Gérard V.; L'Heureux-Dubé, Claire; Sopinka, John On appeal from Federal Court of Appeal Subjects Competition law Constitutional law Evidence Notes SCC Case Information: 20656 Decision Content Stelco Inc. v. (Attorney General), [1990] 1 S.C.R. 617 Stelco Inc., Ramsay McDonald, Brian Arthur, Jean Ménard, Claude Veronneau, Douglas Woodward and Reginald Clayton Appellants v. The Attorney General of Canada, the Restrictive Trade Practices Commission, Richard B. Holden and Michael P. O'Farrell, the Director of Investigation and Research Respondents and The Attorney General for Ontario, the Attorney General of Quebec, the Attorney General for New Brunswick and the Attorney General for Alberta Intervenors indexed as: stelco inc. v. canada (attorney general) File No.: 20656. 1988: November 1, 2; 1990: March 29. Present: Lamer, Wilson, La Forest, L'Heureux-Dubé and Sopinka JJ. on appeal from the federal court of appeal Constitutional law -- Charter of Rights -- Fundamental justice -- Self-incrimination -- Right to remain silent -- Derivative evidence -- Combines investigation -- Corporation suspected of price discrimination -- Corporate officers ordered to testify under oath and to produce documents pursuant to s. 17 of the Combines Investigation Act -- Failure to comply with a s. 17 order subject to legal consequences -- Whether s. 7 of the Canadian Charter of Rights and Freedoms can be invoked -- Whether s. 17 infringes s. 7 of the Charter -- If so, whether s. 17 justifiable under s. 1 of the Charter -- Canadian Charter of Rights and Freedoms, ss. 1, 7, 11 (c), 13 . Combines -- Investigation -- Corporation suspected of price discrimination -- Corporate officers ordered to testify under oath and to produce documents pursuant to s. 17 of the Combines Investigation Act -- Whether s. 17 infringes the guarantee to fundamental justice in s. 7 of the Canadian Charter of Rights and Freedoms . Evidence -- Self-incrimination -- Derivative evidence -- Documentary evidence -- Real evidence -- Corporate officers ordered to testify under oath and to produce documents pursuant to s. 17 of the Combines Investigation Act -- Whether complete immunity against the use of derivative evidence required by the principles of fundamental justice -- Whether protection against self-incrimination under s. 7 of the Canadian Charter of Rights and

Freedoms limited to "testimonial evidence" -- Combines Investigation Act, R.S.C. 1970, c. C-23, ss. 17, 20(2) -- Canada Evidence Act, R.S.C. 1970, c. E-10, s. 5. The individual appellants are managers of Stelco Inc. They were ordered to appear, pursuant to s. 17 of the Combines Investigation Act, before the Restrictive Trade Practices Commission to give evidence under oath in connection with an inquiry to determine whether Stelco Inc. had committed the offence of price discrimination contrary to s. 34(1) of the Act. The appellants were advised that they were "persons whose conduct was the subject of an inquiry". They commenced an action in the Federal Court, Trial Division, seeking a declaration that s. 17 of the Act violates s. 7 of the Canadian Charter of Rights and Freedoms. The application was dismissed and the decision affirmed by the Federal Court of Appeal. Held (Wilson and Sopinka JJ. dissenting): The appeal should be dismissed. Per La Forest J.: For the reasons I gave in Thomson, s. 17 of the Act does not infringe s. 7 of the Charter. Per L'Heureux-Dubé J.: For the reasons I gave in Thomson, s. 17 of the Act does not infringe s. 7 of the Charter. Per Lamer J.: For the reasons I gave in Thomson, this Court should not pronounce upon the s. 7 issue. Per Wilson J. (dissenting): For the reasons I gave in Thomson, s. 17 of the Act is inconsistent with s. 7 of the Charter and is not justifiable under s. 1 of the Charter. Per Sopinka J. (dissenting): For the reasons I gave in Thomson, and subject to the limitation expressed there, s. 17 of the Act is inconsistent with s. 7 of the Charter and is not justifiable under s. 1 of the Charter. Cases Cited By La Forest J. Applied: Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 000. By L'Heureux-Dubé J. Applied: Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 000. By Lamer J. Referred to: Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 000. By Wilson J. (dissenting) Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 000, aff'g (1986), 57 O.R. (2d) 257; Hunter v. Southam Inc., [1984] 2 S.C.R. 145; Irvine v. Canada (Restrictive Trade Practices Commission), [1987] 1 S.C.R. 181. By Sopinka J. (dissenting) Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 000; R. v. McKinlay Transport Ltd., [1990] 1 S.C.R. 000. Statutes and Regulations Cited Canadian Charter of Rights and Freedoms, ss. 1, 7. Combines Investigation Act, R.S.C. 1970, c. C-23, ss. 8 [am. 1974-75-76, c. 76, s. 4], 17, 20(1), 34(1) [am. 1974-75-76, c. 76, s. 16]. APPEAL from a judgment of the Federal Court of Appeal (1987), 83 N.R. 193, 51 D.L.R. (4th) 637, 42 C.C.C. (3d) 190, 20 C.P.R. (3d) 422, affirming a judgment of the Trial Division, [1988] 1 F.C. 510, 42 D.L.R. (4th) 424, 13 F.T.R. 128, 19 C.P.R. (3d) 38. Appeal dismissed, Wilson and Sopinka JJ. dissenting. John W. Brown, Q.C., and Neil Finkelstein, for the appellants. John F. Rook, Q.C., and E. Peter Auvinen, for the respondents the Attorney General of Canada and Michael P. O'Farrell, the Director of Investigation and Research. Leah Price and Timothy Macklem, for the intervener the Attorney General for Ontario. Jean Bouchard and Gilles Laporte, for the intervener the Attorney General for Quebec. Bruce Judah, for the intervener the Attorney General for New Brunswick. Robert C. Maybank, for the

intervener the Attorney General for Alberta. //Lamer J.// The following are the reasons delivered by Lamer J. -- For the reasons I gave in Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 000, released concurrently, I would dismiss the appeal with costs. //Wilson J.// The following are the reasons delivered by Wilson J. (dissenting) -- The central issue in this appeal is whether s. 17 of the Combines Investigation Act, R.S.C. 1970, c. C-23, contravenes s. 7 of the Canadian Charter of Rights and Freedoms . A related question is whether or not s. 17 of the Act, if it does violate s. 7 of the Charter , can be upheld as a reasonable limit demonstrably justified in a free and democratic society under s. 1 of the Charter .

1. The Facts Stelco Inc. is a Canadian corporation which produces various types of steel which it sells domestically and internationally. The individual appellants held, at the time of this appeal, managerial or supervisory positions with Stelco. The individual appellants each received a letter from the respondent O'Farrell, Director of Investigation and Research. Attached to the letter was an Order To Appear issued under the authority of s. 17 of the Combines Investigation Act. The letter and the Order indicated that the Director had commenced an inquiry under s. 8 of the Act to determine whether Stelco had committed the indictable offence of price discrimination contrary to s. 34(1) of the Act. The individual appellants were advised that they were persons who were to be examined under oath pursuant to s. 17 and, additionally, that they were persons whose conduct was the subject of an inquiry. Stelco was also advised of the inquiry and the service of the Orders To Appear and that it was a person whose conduct was the subject of an inquiry. The appellants commenced an action in the Federal Court, Trial Division, claiming, inter alia, a declaration that s. 17 of the Act violates s. 7 of the Charter . The application was dismissed by Jerome A.C.J. in reasons reported at [1988] 1 F.C. 510. His decision was appealed to the Federal Court of Appeal. On October 22, 1987 the Federal Court of Appeal dismissed the appeal: see (1987), 83 N.R. 193. Leave to appeal to this Court was granted on January 25, 1988, [1988] 1 S.C.R. xiv.
2. The Issues The Chief Justice set the following constitutional questions: 1.Is s. 17 of the Combines Investigation Act, R.S.C. 1970, c. C-23, inconsistent with the provisions of ss. 7 and 8 of the Canadian Charter of Rights and Freedoms , and therefore of no force or effect? 2.If the answer to question No. 1 is affirmative, is s. 17 of the Combines Investigation Act, R.S.C. 1970, c. C-23, justified by s. 1 of the Charter and therefore not inconsistent with the Constitution Act, 1982 ? Written and oral argument before this Court was, however, confined to the s. 7 issue.
3. The Courts Below
 - (a) At Trial The appellants argued before Jerome A.C.J. that the Combines Investigation Act failed to provide certain "procedural" protections for those compelled to appear and testify and that this was inconsistent with the principles of fundamental justice. They suggested that the member of the Restrictive Trade Practices Commission who orders the examination and authorizes the Orders To Appear in not an impartial arbiter and is therefore not fit to perform this function. Jerome A.C.J. ruled that the acts of the Commission member in

ordering the examination were administrative and therefore not subject to the criteria enunciated by Dickson J. (as he then was) in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, and in particular the requirement of prior authorization for searches granted by an impartial arbiter capable of acting judicially. The appellants also argued that the right to counsel provided by s. 20(1) of the Act was not a sufficient safeguard of the appellants' rights during a s. 17 hearing. Jerome A.C.J. rejected this argument, relying on this Court's decision in *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181. He held that fundamental justice in the administrative context does not require as expansive a right to counsel as in the judicial context. Jerome A.C.J. arrived at this conclusion despite the fact that *Irvine* was not a Charter case. Jerome A.C.J. next directed his attention to the question whether s. 7 of the Charter contains a right against self-incrimination broader than that found in ss. 11 (c) or 13 of the Charter . He essentially adopted the position taken on this issue by the Ontario Court of Appeal in *Thomson Newspapers Ltd. v. Director of Investigation and Research* (1986), 57 O.R. (2d) 257 wherein it was held that s. 7 did not contain a general right against self-incrimination. To those reasons he added the following comments at pp. 524-25: These proceedings are not of a nature to require the protection against self-incrimination which is accorded a person charged with an offence. I have already determined that the investigative powers under attack here are part of an administrative procedure. No substantive determination of the parties' rights can be made at the investigative stage. Neither the Director nor the Commission has the authority under the Combines Investigation Act to institute criminal proceedings against the applicants based on information obtained during the inquiry. The Director's authority is limited to referring the evidence to the Attorney General of Canada (subsection 15(1)) or placing a statement of evidence before the Restrictive Trade Practices Commission pursuant to sections 18 and 47. In the latter case, notice is to be given to all persons against whom allegations are made. Those persons are then afforded full opportunity to be heard in person or by counsel. The Commission's report which reviews the evidence and contains recommendations is then transmitted to the Minister. Accordingly, the inquiry stage of the proceedings does not determine any rights of the applicants or impose any liabilities on them. It does not require, therefore, any additional protection against self-incrimination beyond that provided by subsection 20(2) of the Act. The privilege against self-incrimination, as it exists in Canada, does not permit these witnesses to refuse to answer questions during the course of an investigative hearing. It clearly cannot provide them the right to refuse to attend. They are fully protected against the subsequent use of any incriminating answers by the Canada Evidence Act and subsection 20(2) of the Combines Investigation Act, as well as section 13 of the Charter . When coupled with the right to counsel, these protections are more than adequate in the factual circumstances of this case. Jerome A.C.J. held that there was no breach of s. 7 and it was therefore unnecessary to consider s. 1 of the Charter .

- (b) The Federal Court of Appeal (Urie, Marceau and Desjardins JJ.) Urie J. gave a brief opinion on behalf of the court. He endorsed the findings of Jerome A.C.J. and the Ontario Court of Appeal in Thomson, on the issue of whether or not s. 7 of the Charter included rights broader than those contained in ss. 11 (c) and 13 . With regard to the "procedural" issues raised by the appellants, Urie J. agreed with Jerome A.C.J. that they were resolved by this Court's decision in Irvine.
4. Analysis This appeal was heard along with the appeal in Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 000, and this judgment is being delivered concurrently with the judgment in Thomson. The two appeals raise the same issue under s. 7 of the Charter and for the reasons I gave in Thomson on the s. 7 issue, I would answer the relevant constitutional question as follows: 1.Is s. 17 of the Combines Investigation Act, R.S.C. 1970, c. C-23, inconsistent with s. 7 of the Canadian Charter of Rights and Freedoms and, therefore of no force or effect? Answer: Yes. 2.If the answer to question No. 1 is affirmative, is s. 17 of the Combines Investigation Act, R.S.C. 1970, c. C-23, justified by s. 1 of the Charter and therefore not inconsistent with the Constitution Act, 1982 ? Answer: No.
5. Disposition I would allow the appeal, declare s. 17 of the Combines Investigation Act to be inconsistent with s. 7 of the Charter and of no force and effect to the extent of the inconsistency. I would declare the Orders to Appear made pursuant to the section likewise of no force and effect. I would award the appellants their costs both here and in the Court of Appeal. //La Forest J.// The following are the reasons delivered by La Forest J. -- For the reasons I gave in Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 000, released concurrently, I would dismiss the appeal with costs and answer the constitutional question as follows: 1.Is s. 17 of the Combines Investigation Act, R.S.C. 1970, c. C-23, inconsistent with the provisions of ss. 7 and 8 of the Canadian Charter of Rights and Freedoms , and therefore of no force or effect? Answer: No. //L'Heureux-Dubé J.// The following are the reasons delivered by L'Heureux-Dubé J. -- For the reasons set out in my opinion in the case of Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 000, released concurrently, I would dismiss the appeal with costs and answer the constitutional question as follows: 1.Is s. 17 of the Combines Investigation Act, R.S.C. 1970, c. C-23, inconsistent with the provisions of ss. 7 and 8 of the Canadian Charter of Rights and Freedoms , and therefore of no force or effect? Answer: No. //Sopinka J.// The following are the reasons delivered by Sopinka J. (dissenting) -- This appeal was heard together with Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 000 and R. v. McKinlay Transport Ltd., [1990] 1 S.C.R. 000. Judgments in these three appeals are being delivered concurrently. For the reasons that I gave in Thomson, and subject to the limitation which I expressed there, I agree with the disposition of this appeal in the manner proposed by my colleague Justice Wilson. I would answer the constitutional question as follows: 1.Is s. 17 of the Combines Investigation Act, R.S.C. 1970, c. C-23, inconsistent with the provisions of

ss. 7 and 8 of the Canadian Charter of Rights and Freedoms , and therefore of no force or effect? Answer: Yes it is inconsistent with s. 7 of the Charter to the extent only that it authorizes an order to be made for an examination under oath of a person. It is not otherwise inconsistent with either s. 7 or 8 of the Charter . Appeal dismissed with costs, Wilson and Sopinka JJ. dissenting. Solicitors for the appellants: Blake, Cassels & Graydon, Toronto. Solicitors for the respondents the Attorney General of Canada and Michael P. O'Farrell, the Director of Investigation and Research: Holden, Murdoch & Finlay, Toronto. Solicitors for the intervener the Attorney General for Ontario: Richard F. Chaloner, Toronto. Solicitors for the intervener the Attorney General of Quebec: Jean Bouchard and Gilles Laporte, Ste-Foy. Solicitors for the intervener the Attorney General for New Brunswick: The Department of Justice and Attorney General, Fredericton. Solicitors for the intervener the Attorney General for Alberta: The Department of the Attorney General, Edmonton.

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