Supreme Court of Canada
Hunter et al. v. Southam Inc., [1984] 2 S.C.R. 145
Date: 1984-09-17

Lawson A.W. Hunter, Director of Investigation and Research of the Combines Investigation Branch, Michael J. Milton, Michael L. Murphy, J. Andrew McAlpine, and Antonio P. Marrocco, also known as Anthony P. Marroco *Appellants;*

and

Southam Inc. *Respondent.*

File No.: 17569.

1983: November 22; 1984: September 17.

Present: Laskin C.J.[1] and Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard, Lamer and Wilson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Constitutional law—Canadian Charter of Rights and Freedoms—Unreasonable search and seizure—Combines Investigation Act search and seizure powers—Standards required for issuance of warrant—Standards not specified—Neutrality of arbiter issuing warrant—Whether search and seizure powers of Combines Investigation Act inconsistent with s. 8 of Charter and therefore of no force or effect—Canadian Charter of Rights and Freedoms, s. 8—Combines Investigation Act, R.S.C 1970, c. C-23, ss. 10(1), (3).

Pursuant to s. 10(1) of the *Combines Investigation Act,* the Director of Investigation and Research of the - Combines Investigation Branch authorized several Combines Investigation officers to enter and examine documents and other things at a respondent's business premises in Edmonton "and elsewhere in Canada". The authorization was certified by a member of the Restrictive Trade Practices Commission pursuant to s. 10(3) of the Act. The *Canadian Charter of Rights and Freedoms* was proclaimed after the authorization was made but before the actual search had begun. Respondent unsuccessfully sought an interim injunction pending trial of the question whether the search was in violation of s. 8 of the *Charter*—the unreasonable search and seizure provision. The Alberta Court of Appeal ordered all documents taken from the respondent's premises sealed as an interim measure and proceeded with the appeal on the basis that the issue of whether s. 10 was inconsistent

[Page 146]

with the Constitution could have been properly dealt with as an application for summary judgment at first instance. Appellants appeal from that Court's finding that s. 10(3), and, by implication, s. 10(1) of the Act, were inconsistent with the *Charter* and therefore of no force or effect.

Held: The appeal should be dismissed.

The *Canadian Charter of Rights and Freedoms* is a purposive document, the provisions of which must be subjected to a purposive analysis. Section 8 of the *Charter* guarantees a broad and general right to be secure from unreasonable searches and seizures which extends at least so far as to protect the right of privacy from unjustified state intrusion. Its purpose requires that unjustified searches be prevented. It is not enough that a determination be made, after the fact, that the search should not have been conducted. This can only be accomplished by a requirement of prior authorization. Accordingly, prior authorization, where feasible, is a precondition for a valid search and seizure. It follows that warrantless searches are *prima facie* unreasonable under s. 8. The party seeking to justify a warrantless search bears the onus of rebutting the presumption of unreasonableness.

Section 10(3) of the *Combines Investigation Act* provides for prior authorization of searches by a member of the Restrictive Trade Practices Commission. The procedures established by s. 10(3), however, are constitutionally defective in two respects.

First, for the authorization procedure to be meaningful, it is necessary for the person authorizing the search to be able to assess the conflicting interests of the state and the individual in an entirely neutral and impartial manner. This means that while the person considering the prior authorization need not be a judge, he must nevertheless, at a minimum, be capable of acting judicially. *Inter alia,* he must not be someone charged with investigative or prosecutorial functions under the relevant statutory scheme. The significant investigatory functions bestowed upon the Restrictive Trade Practices Commission and its members by the Act vitiated a member's ability to act in a judicial capacity in authorizing a s. 10(3) search and seizure and do not accord

[Page 147]

with the neutrality and detachment necessary to balance the interests involved.

Second, reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search, constitutes the minimum standard consistent with s. 8 of the *Charter* for authorizing searches and seizures. Subsections 10(1) and 10(3) of the Act do not embody such a requirement. They do not, therefore, measure up to the standard imposed by s. 8 of the *Charter.* The Court will not attempt to save the Act by reading into it the appropriate standards for issuing a warrant. It should not fall to the courts to fill in the details necessary to render legislative lacunae constitutional.

In the result, subss. 10(1) and 10(3) of the *Combines Investigation Act* are inconsistent with the *Charter* and of no force or effect because they fail to specify an appropriate standard for the issuance of warrants and designate an improper arbiter to issue them.

Attorney General of Canada v. Law Society of British Columbia, 1982 CanLII 29 (SCC), [1982] 2 S.C.R. 307, followed; *Petrofina Canada Ltd. v. Chairman, Restrictive Trade Practices Commission (No. 2),* [1980] 2 F.C. 386, applied; *Katz v. United States,* 389 U.S. 347 (1967), adopted; *Entick v. Carrington* (1765), 19 St. Tr. 1029, 1 Wils. K.B. 275; *The Queen v. Metropolitan Toronto Pharmacists' Association* (unreported, Ont. H.C., May 4, 1983); *Edwards v. Attorney-General for Canada,* [1930] A.C. 124; *Minister of Home Affairs v. Fisher,* [1980] A.C. 319; *M'Culloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819); *United States v. Rabinowitz,* 339 U.S. 56 (1950); *Inland Revenue Commissioners v. Rossminster Ltd.,* [1980] 1 All E.R. 80; *Minister of National Revenue v. Coopers and Lybrand,* 1978 CanLII 13 (SCC), [1979] 1 S.C.R. 495; *McKay v. The Queen,* 1965 CanLII 3 (SCC), [1965] S.C.R. 798, referred to.

APPEAL from a judgment of the Alberta Court of Appeal reflex, [1983] 3 W.W.R. 385, 147 D.L.R. (3d) 420, 24 Alta. L.R. (2d) 307, 42 A.R. 93, allowing an appeal (heard as a proper case to have been treated at first instance as an application for summary judgment) from a judgment of Cavanagh J. dismissing an application for an interim injunction pending trial of the matter in issue. Appeal dismissed.

[Page 148]

Eric A. Bowie, Q.C., and Ingrid C Hutton, Q.C., for the appellants.

A.H. Lefever and F.S. Kozak, for the respondent.

The judgment of the Court was delivered by

DICKSON J.—The Constitution of Canada, which includes the *Canadian Charter of Rights and Freedoms,* is the supreme law of Canada. Any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. Section 52(1) of the *Constitution Act, 1982* so mandates. The constitutional question posed in this appeal is whether s. 10(3), and by implication s. 10(1), of the *Combines Investigation Act,* R.S.C. 1970, c. C-23, (the "Act") are inconsistent with s. 8 of the *Charter* by reason of authorizing unreasonable searches and seizures and are therefore of no force and effect.

I Background

Subsections 10(1) and 10(3) of the *Combines Investigation Act* provide:

> **10.** (1) Subject to subsection (3), in any inquiry under this Act the Director [of Investigation and Research of the Combines Investigation Branch] or any representative authorized by him may enter any premises on which the Director believes there may be evidence relevant to the matters being inquired into and may examine any thing on the premises and may copy or take away for further examination or copying any book, paper, record of other document that in the

> opinion of the Director or his authorized representative, as the case may be, may afford such evidence.
>
> …
>
> (3) Before exercising the power conferred by subsection (1), the Director or his representative shall produce a certificate from a member of the [Restrictive Trade Practices] Commission, which may be granted on the *ex parte* application of the Director, authorizing the exercise of such power.

On April 13, 1982, in the course of an inquiry under the Act, the appellant Lawson A.W. Hunter, Director of Investigation and Research of the Combines Investigation Branch, authorized the

[Page 149]

other appellants, Messrs. Milton, Murphy, McAlpine and Marroco, all Combines Investigation officers, to exercise his authority under s. 10 of the Act to enter and examine documents and other things at the business premises of the *Edmonton Journal,* a division of the respondent corporation, Southam Inc.

On April 16, 1982, in fulfilment of the requirement in s. 10(3) of the Act, Dr. Frank Roseman, a member of the Restrictive Trade Practices Commission, (the "R.T.P.C.") certified his authorization of this exercise of the Director's powers.

On April 17, 1982, the *Constitution Act, 1982,* incorporating the *Canadian Charter of Rights and Freedoms* was proclaimed. Section 8 of the *Charter* provides:

> **8.** Everyone has the right to be secure against unreasonable search or seizure.

On April 19, 1982 the officers presented their certified authorization at the premises of the *Edmonton Journal.* The English version of this certificate reads as follows:

> In the matter of the Combines Investigation Act and section 33 and section 34(1)(c) thereof
>
> and
>
> in the matter of an Inquiry relating to the Production, Distribution and Supply of Newspapers and Related Products in Edmonton
>
> TO:
>
> M.J. Milton
>
> M.L. Murphy

J.A. McAlpine

A.P. Marrocco

being my representatives under section 10 of the Combines Investigation Act

You are hereby authorized to enter upon the premises hereinafter mentioned, on which I believe there may be evidence relevant to this inquiry, and examine anything thereon and copy or take away for copying any book, paper, record or other document that in your opinion may afford such evidence.

The premises referred to herein are those occupied by or on behalf of

Southam Inc.
10006-101 Street
Edmonton, Alberta

[Page 150]

and elsewhere in Canada

This authorization is not valid after May 31, 1982.

Dated in Hull, in the Province of Quebec this 13th day of April 1982.

Lawson A.W. Hunter

Director of Investigation and Research

Combines Investigation Act

I hereby certify that the above exercise of powers is authorized pursuant to Section 10 of the Combines Investigation Act.

Dated in Ottawa, in the Province of Ontario, this 16th day of April, 1982.

Frank Roseman, Member,

Restrictive Trade Practices Commission

The authorization has a breathtaking sweep; it is tantamount to a licence to roam at large on the premises of Southam Inc. at the stated address “and elsewhere in Canada”.

On April 20 the officers commenced the search. They said they wished to search every file of Southam Inc. at 10006 - 101 Street, Edmonton, except files in the news room but

including all files of J. Patrick O'Callaghan, publisher of the *Edmonton Journal.* They declined to give the name of any person whose complaint had initiated the inquiry, or to say under which section of the Act the inquiry had been begun. They also declined to give more specific information as to the subject matter of the inquiry than that contained in the authorization to search.

At noon of April 20, Southam Inc. served upon the officers of the Combines Investigation Branch a notice of motion for an interim injunction. The application was heard by Cavanagh J. who held that although Southam had raised a serious question as to whether the search was in violation of s. 8 of the *Charter,* the balance of convenience militated in favour of denying the interlocutory injunction pending trial of the matter. At the hearing, the appellants maintained, unsuccessfully, that the Director of Investigation and Research, and his authorized representatives, acting pursuant to s. 10 of the Act were a "federal board, commission or other tribunal" within s. 2 of the *Federal Court*

[Page 151]

Act and that the Federal Court, not the provincial courts of Alberta, had jurisdiction.

Southam appealed to the Alberta Court of Appeal. The appellants also appealed, from that part of the judgment which held that the Alberta Court of Queen's Bench had jurisdiction. As an interim provision the Court of Appeal ordered that the documents taken from the premises of the *Edmonton Journal* be sealed pending resolution of the appeal. After hearing the parties, the Court held that the case was a proper one to have been treated at first instance as an application for summary judgment on the issues of (1) whether the Alberta courts or the Federal Court had jurisdiction to make the orders requested and (2) whether s. 10 of the Act was in whole or in part inconsistent with the provisions of the Constitution. The Court therefore directed that the appeal itself be heard on this basis. At the subsequent hearing, the judgment of this Court in *Attorney General of Canada v. Law Society of British Columbia,* 1982 CanLII 29 (SCC), [1982] 2 S.C.R. 307, having by then been delivered, the present appellants abandoned their challenge to the jurisdiction of the Alberta courts and addressed their arguments solely to the substantive issue of the constitutionality of s. 10 of the Act. A unanimous five-judge panel of the Alberta Court of Appeal, speaking through Prowse J.A., held that s. 10(3) and by implication s. 10(1), of the Act were inconsistent with the provisions of s. 8 of the *Charter* and therefore of no force or effect. It is from this ruling that the present appellants bring their appeal before this Court.

II The Positions of the Parties

A) The Respondent, Southam Inc.

In alleging that subss. 10(1) and 10(3) of the *Combines Investigation Act* are inconsistent with the right to be secure against unreasonable search and seizure, Southam Inc. relies heavily on the historic protections afforded by common law and by

statute as defining the correct standard of reasonableness for purposes of s. 8 of the *Charter.* This was essentially the approach taken by Prowse J.A. when he said:

[Page 152]

> The roots of the right to be so secure are embedded in the common law and the safeguards according that right are found in common law, in statutes subsequently enacted, and in decisions of the courts made as the society in which we live has evolved. The expression of the right in a constitutional document reminds us of those roots and the tradition associated with the right. One would be presumptuous to assume that we have attained the zenith of our development as a civilization and that the right accorded an individual is frozen for eternity. Section 8, however, requires us to be ever mindful of some of the criteria that have been applied in the past in securing the right.

Applying this approach, Prowse J.A. concluded—correctly in Southam Inc.'s submission—that, absent exceptional circumstances, the provisions of s. 443 of the *Criminal Code,* which extends to investigations of *Criminal Code* offences the procedural safeguards the common law required for entries and searches for stolen goods, constitute the minimal prerequisites for reasonable searches and seizures in connection with the investigation of any criminal offence, including possible violations of the *Combines Investigation Act.* Prowse J.A. summarized these procedural safeguards in the following propositions:

> (a) the power to authorize a search and seizure is given to an impartial and independent person (at common law a justice) who is bound to act judicially in discharging that function,
>
> (b) that evidence must satisfy the justice that the person seeking the authority has reasonable ground to suspect that an offence had been committed,
>
> (c) that evidence must satisfy the justice that the person seeking the authority has reasonable grounds to believe, at common law, that stolen property may be on the premises or, under s. 443(1)(b), that something will afford evidence of an offence may be recovered, and
>
> (d) there must be evidence on oath before him.

Southam Inc. contends that subss. 10(1) and 10(3) fail to provide any of these safeguards. In its submission, the approval by a member of the

[Page 153]

R.T.P.C. of the Director's decision to authorize search and seizure is not approval by an independent arbiter or neutral and impartial person. It argues further that subss. 10(1) and 10(3) do not require that the R.T.P.C. member be satisfied that the Director has reasonable grounds to suspect an offence has been committed or to believe there may

be evidence at the place at which the Director wishes to search, nor does it require evidence under oath about these matters. In fact, Southam Inc. contends, as these subsections have been judicially interpreted in cases such as *Petrofina Canada Ltd. v. Chairman, Restrictive Trade Practices Commission (No. 2),* [1980] 2 F.C. 386, they prevent the R.T.P.C. member from ascertaining or passing judgment on anything except that there is, *de facto,* an inquiry in progress under the Act, an interpretation which, in Southam's submission, constitutes the R.T.P.C. member as merely a "rubber stamp" for the Director's decision to authorize a search. For all these reasons, Southam submits, giving effect to subss. 10(1) and 10(3) could yield no other result than an unreasonable search and seizure.

B) The Appellants

The appellants take a different view. In their submission the constitutionality of s. 10 ought to be considered on the basis of whether its provisions could be applied consistently with the *Charter.* It is their contention that they can. In their view, approval by the R.T.P.C. member does constitute authorization by a neutral and impartial arbiter. They deny there is any reasonable apprehension of bias attaching to him or to his function in approving the Director's authorizations to enter and search premises. As to the further requirements cited by Prowse J.A. and amplified on by Southam Inc., the appellants implicitly deny that an easy parallel can be drawn between the offences set out in the *Criminal Code* and those created by the *Combines Investigation Act* so as to justify invoking the procedural safeguards in s. 443 as the proper standard of reasonableness for searches and seizures by the authorities in connection with these latter offences. In their submission combines

[Page 154]

offences require specialized techniques for their detection and suppression. They say that for such offences, as compared to most other criminal offences, there is inherently less basis for certainty and specificity, both as to the commission of an offence and as to the existence of specific physical evidence in relation to such offence. In this context, they contend, s. 10 does not authorize "unreasonable" search or seizure. Further, the appellants argue, the wording of s. 10 does not prevent the R.T.P.C. member in appropriate cases from requiring, for instance, evidence under oath before he approves the Director's authorization. In any event, they maintain, it cannot be said that s. 10 is incapable of being applied in a manner which does not offend the Constitution, and it ought not, therefore, to be struck down. At most it ought to be read down so as to include any necessary procedural safeguards. In support, they cite the decision of Van Camp J. in *The Queen v. Metropolitan Toronto Pharmacists' Association* (unreported, Ont. H.C., May 4, 1983).

III "Unreasonable" Search or Seizure

At the outset it is important to note that the issue in this appeal concerns the constitutional validity of a statute authorizing a search and seizure. It does not concern the reasonableness or otherwise of the manner in which the appellants carried out their

statutory authority. It is not the conduct of the appellants, but rather the legislation under which they acted, to which attention must be directed.

As is clear from the arguments of the parties as well as from the judgment of Prowse J.A., the crux of this case is the meaning to be given to the term “unreasonable” in the s. 8 guarantee of freedom from unreasonable search or seizure. The guarantee is vague and open. The American courts have had the advantage of a number of specific prerequisites articulated in the Fourth Amendment to the United States Constitution, as well as a history

[Page 155]

of colonial opposition to certain Crown investigatory practices from which to draw out the nature of the interests protected by that Amendment and the kinds of conduct it proscribes. There is none of this in s. 8. There is no specificity in the section beyond the bare guarantee of freedom from “unreasonable” search and seizure; nor is there any particular historical, political or philosophic context capable of providing an obvious gloss on the meaning of the guarantee.

It is clear that the meaning of “unreasonable” cannot be determined by recourse to a dictionary, nor for that matter, by reference to the rules of statutory construction. The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights,* for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts “not to read the provisions of the Constitution like a last will and testament lest it become one”.

The need for a broad perspective in approaching constitutional documents is a familiar theme in Canadian constitutional jurisprudence. It is contained in Viscount Sankey’s classic formulation in *Edwards v. Attorney-General for Canada,* [1930] A.C. 124, at p. 136, cited and applied in countless Canadian cases:

[Page 156]

> The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada… Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation.

More recently, in *Minister of Home Affairs v. Fisher,* [1980] A.C. 319, dealing with the Bermudian Constitution, Lord Wilberforce reiterated at p. 328 that a constitution is a document "sui generis, calling for principles of interpretation of its own, suitable to its character", and that as such, a constitution incorporating a *Bill of Rights* calls for:

> …a generous interpretation avoiding what has been called "the austerity of tabulated legalism," suitable to give individuals the full measure of the fundamental rights and freedoms referred to.

Such a broad, purposive analysis, which interprets specific provisions of a constitutional document in the light of its larger objects is also consonant with the classical principles of American constitutional construction enunciated by Chief Justice Marshall in *M'Culloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819). It is, as well, the approach I intend to take in the present case.

I begin with the obvious. The *Canadian Charter of Rights and Freedoms* is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action. In the present case this means, as Prowse J.A. pointed out, that in guaranteeing the right to be secure from unreasonable searches and seizures, s. 8 acts as a limitation on whatever powers of search and seizure the federal or provincial governments already and otherwise possess. It does not in itself confer any powers, even of "reasonable" search and seizure,

[Page 157]

on these governments. This leads, in my view, to the further conclusion that an assessment of the constitutionality of a search and seizure, or of a statute authorizing a search or seizure, must focus on its "reasonable" or "unreasonable" impact on the subject of the search or the seizure, and not simply on its rationality in furthering some valid government objective.

Since the proper approach to the interpretation of the *Charter of Rights and Freedoms* is a purposive one, before it is possible to assess the reasonableness or unreasonableness of the impact of a search or of a statute authorizing a search, it is first necessary to specify the purpose underlying s. 8: in other words, to delineate the nature of the interests it is meant to protect.

Historically, the common law protections with regard to governmental searches and seizures were based on the right to enjoy property and were linked to the law of trespass. It was on this basis that in the great case of *Entick v. Carrington* (1765), 19 St. Tr. 1029, 1 Wils. K.B. 275, the Court refused to countenance a search purportedly authorized by the executive, to discover evidence that might link the plaintiff to certain seditious libels. Lord Camden prefaced his discussion of the rights in question by saying, at p. 1066 [19 St. Tr. 1029]:

> The great end, for which men entered into society, was to preserve their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole.

The defendants argued that their oaths as King's messengers required them to conduct the search in question and ought to prevail over the plaintiff's property rights. Lord Camden rejected this contention, at p. 291 [1 Wils. K.B. 275]:

[Page 158]

> …our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave: if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law.

Lord Camden could find no exception from this principle for the benefit of King's messengers. He held that neither the instrusions nor the purported authorizations were supportable on the basis of the existing law. That law would only have countenanced such an entry if the search were for stolen goods and if authorized by a justice on the basis of evidence upon oath that there was "strong cause" to believe the goods were concealed in the place sought to be searched. In view of the lack of proper legal authorization for the governmental intrusion, the plaintiff was protected from the intended search and seizure by the ordinary law of trespass.

In my view the interests protected by s. 8 are of a wider ambit than those enunciated in *Entick v. Carrington.* Section 8 is an entrenched constitutional provision. It is not therefore vulnerable to encroachment by legislative enactments in the same way as common law protections. There is, further, nothing in the language of the section to restrict it to the protection of property or to associate it with the law of trespass. It guarantees a broad and general right to be secure from unreasonable search and seizure.

The Fourth Amendment of the United States Constitution, also guarantees a broad right. It provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Construing this provision in *Katz v. United States,* 389 U.S. 347 (1967), Stewart J. delivering the

[Page 159]

majority opinion of the United States Supreme Court declared at p. 351 that "the Fourth Amendment protects people, not places". Justice Stewart rejected any necessary connection between that Amendment and the notion of trespass. With respect, I believe this approach is equally appropriate in construing the protections in s. 8 of the *Charter of Rights and Freedoms.*

In *Katz,* Stewart J. discussed the notion of a right to privacy, which he described at p. 350 as "his right to be let alone by other people". Although Stewart J. was careful not to identify the Fourth Amendment exclusively with the protection of this right, nor to see the Amendment as the only provision in the Bill of Rights relevant to its interpretation, it is clear that this notion played a prominent role in his construction of the nature and the limits of the American constitutional protection against unreasonable search and seizure. In the Alberta Court of Appeal, Prowse J.A. took a similar approach to s. 8, which he described as dealing "with one aspect of what has been referred to as the right of privacy, which is the right to be secure against encroachment upon the citizens' reasonable expectation of privacy in a free and democratic society".

Like the Supreme Court of the United States, I would be wary of foreclosing the possibility that the right to be secure against unreasonable search and seizure might protect interests beyond the right of privacy, but for purposes of the present appeal I am satisfied that its protections go at least that far. The guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in

[Page 160]

order to advance its goals, notably those of law enforcement.

The question that remains, and the one upon which the present appeal hinges, is how this assessment is to be made. When is it to be made, by whom and on what basis? Here again, I think the proper approach is a purposive one.

A) When is the Balance of Interests to be Assessed?

If the issue to be resolved in assessing the constitutionality of searches under s. 10 were in fact the governmental interest in carrying out a given search outweighed that of the individual in resisting the governmental intrusion upon his privacy, then it would be appropriate to determine the balance of the competing interests after the search had been conducted. Such a *post facto* analysis would, however, be seriously at odds with the purpose of s. 8. That purpose is, as I have said, to protect individuals from unjustified state intrusions upon their privacy. That purpose requires a means of preventing unjustified searches before they happen, not simply of determining, after the

fact, whether they ought to have occurred in the first place. This, in my view, can only be accomplished by a system of prior authorization, not one of subsequent validation.

A requirement of prior authorization, usually in the form of a valid warrant, has been a consistent prerequisite for a valid search and seizure both at common law and under most statutes. Such a requirement puts the onus on the state to demonstrate the superiority of its interest to that of the individual. As such it accords with the apparent intention of the *Charter* to prefer, where feasible, the right of the individual to be free from state interference to the interests of the state in advancing its purposes through such interference.

[Page 161]

I recognize that it may not be reasonable in every instance to insist on prior authorization in order to validate governmental intrusions upon individuals' expectations of privacy. Nevertheless, where it is feasible to obtain prior authorization, I would hold that such authorization is a precondition for a valid search and seizure.

Here also, the decision in *Katz, supra,* is relevant. In *United States v. Rabinowitz,* 339 U.S. 56 (1950), the Supreme Court of the United States had held that a search without warrant was not *ipso facto* unreasonable. Seventeen years later, however, in *Katz,* Stewart J. concluded that a warrantless search was *prima facie* "unreasonable" under the Fourth Amendment. The terms of the Fourth Amendment are not identical to those of s. 8 and American decisions can be transplanted to the Canadian context only with the greatest caution. Nevertheless, I would in the present instance respectfully adopt Stewart J.'s formulation as equally applicable to the concept of "unreasonableness" under s. 8, and would require the party seeking to justify a warrantless search to rebut this presumption of unreasonableness.

In the present case the appellants make no argument that it is unfeasible or unnecessary to obtain prior authorization for the searches contemplated by the. *Combines Investigation Act* and, in my view, no such argument could be made. I would therefore conclude that in the absence of a valid procedure for prior authorization searches conducted under the Act would be unreasonable. In the event, s. 10(3) does purport to establish a requirement for prior authorization, specifying, as it does, that searches and seizures conducted under s. 10(1) must be authorized by a member of the R.T.P.C. The question then becomes whether s. 10(3) provides for an acceptable prior authorization procedure.

B) Who Must Grant the Authorization?

The purpose of a requirement of prior authorization is to provide an opportunity, before the event, for the conflicting interests of the state and the individual to be assessed, so that the individu-

[Page 162]

al's right to privacy will be breached only where the appropriate standard has been met, and the interests of the state are thus demonstrably superior. For such an authorization procedure to be meaningful it is necessary for the person authorizing the search to be able to assess the evidence as to whether that standard has been met, in an entirely neutral and impartial manner. At common law the power to issue a search warrant was reserved for a justice. In the recent English case of *Inland Revenue Commissioners v. Rossminster Ltd.,* [1980] 1 All E.R. 80, Viscount Dilhorne suggested at p. 87 that the power to authorize administrative searches and seizures be given to "a more senior judge". While it may be wise, in view of the sensitivity of the task, to assign the decision whether an authorization should be issued to a judicial officer, I agree with Prowse J.A. that this is not a necessary precondition for safeguarding the right enshrined in s. 8. The person performing this function need not be a judge, but he must at a minimum be capable of acting judicially.

In *Minister of National Revenue v. Coopers and Lybrand,* 1978 CanLII 13 (SCC), [1979] 1 S.C.R. 495, this Court had occasion to discuss the difference between an administrative and a judicial function in the authorization of a search and seizure. The *Income Tax Act,* 1970-71-72 (Can.), c. 63, as amended, confers upon the Minister a number of powers including, in s. 231(4), the power under certain conditions to authorize the entry and search of buildings. At p. 507 the Court described the Minister's powers as "fundamentally administrative", going on to explain:

> The power he exercises under s. 231(4) is properly characterized as investigatory, rather than adjudicatory. He will collect material and advice from many sources. In deciding whether to exercise the right… [to authorize entry and search], he will be governed by many considerations, dominant among which is the public interest and his duty as an executive officer of the government to administer the Act to the best of his ability. The decision to seek authority to enter and

[Page 163]

> search will be guided by public policy and expediency, having regard to all the circumstances.

The Court contrasted these powers with the judicial powers which s. 231(4) conferred on a judge of the superior or county court to approve the Minister's authorization.

Under the scheme envisaged by s. 10 of the *Combines Investigation Act* it is clear that the Director exercises administrative powers analogous to those of the Minister under s. 231(4) of the *Income Tax Act.* They too are investigatory rather than adjudicatory, with his decision to seek approval for an authorization to enter and search premises equally guided by considerations of expediency and public policy. But what of the member of the R.T.P.C. whom s. 10(3) empowers to approve the Director's authorization? Is his function investigatory or adjudicatory? In the Alberta Court of Appeal Prowse J.A. carefully reviewed the respective powers of the Director and the Commission and concluded that the Act was not entirely successful in separating the role of the Director as investigator and prosecutor from that of the Commission as

adjudicator. In his view circumstances may arise under the Act where "the Director is acting as investigator and prosecutor and the Commission is acting as investigator and judge with respect to breaches of the Act". Southam Inc. summarizes and enlarges upon Prowse J.A.'s analysis, producing the following list of investigatory functions bestowed upon the Commission or one of its members by the Act:

(i) the power in s. 47 to instruct the Director to commence a s. 8 inquiry;

(ii) the power to cause evidence to be gathered pursuant to ss. 9, 10, 12 and 17;

(iii) the power to issue a s. 17 order;

(iv) the power under ss. 17, 22(2)(*b*) to seek further or better evidence after the Commission has commenced a hearing;

[Page 164]

(v) the power under s. 22(2)(*b*) after commencing a hearing and receiving evidence to direct the Director to make further inquiry and, in effect, to go back to the investigatory stage;

(vi) the power under s. 22(2)(*c*) to compel the Director to turn over to the R.T.P.C. copies of all books, papers, records or other documents obtained by the Director in such further inquiry;

(vii) the power under s. 27.1 to order the Director to give evidence before any other federal board, commission or other tribunal;

(viii) the power under s. 45.1 to seek production of statistics for evidence in an inquiry;

(ix) the power to deliver to the Director all books, papers, records or other documents produced on a s. 17 hearing;

(x) the power under s. 13 to request the appointment and instruction of counsel to assist in the inquiry.

In my view, investing the Commission or its members with significant investigatory functions has the result of vitiating the ability of a member of the Commission to act in a judicial capacity when authorizing a search or seizure under s. 10(3). This is not, of course, a matter of impugning the honesty or good faith of the Commission or its members. It is rather a conclusion that the administrative nature of the Commission's investigatory duties (with its quite proper reference points in considerations of public policy and effective enforcement of the Act) ill-accords with the neutrality and detachment necessary to assess whether the evidence reveals that the point has been reached where the interests of the individual must constitutionally give way to those of the state. A member of the R.T.P.C. passing on the appropriateness of a proposed

search under the *Combines Investigation Act* is caught by the maxim *nemo judex in sua causa.* He simply cannot be the impartial arbiter necessary to grant an effective authorization.

On this basis alone I would conclude that the prior authorization mandated by s. 10(3) of the

[Page 165]

Combines Investigation Act is inadequate to satisfy the requirement of s. 8 of the *Charter* and consequently a search carried out under the authority of subss. 10(1) and 10(3) is an unreasonable one. Since, however, the Alberta Court of Appeal found other, perhaps even more serious defects in these provisions I pass on to consider whether even if s. 10(3) did specify a truly neutral and detached arbiter to authorize searches it would nevertheless remain inconsistent with s. 8 of the *Charter.*

C) On What Basis must the Balance of Interests be Assessed?

Section 10 is terse in the extreme on the subject of criteria for issuing an authorization for entry, search and seizure. Section 10(3) merely states that an R.T.P.C. member may grant an authorization *ex parte.* The only explicit criteria for granting such an authorization are those mentioned in s. 10(1), namely: (1) that an inquiry under the Act must be in progress, and (2) that the Director must believe that the premises may contain relevant evidence.

In cases argued before passage of the *Charter of Rights and Freedoms* the courts took a narrow view of what s. 10 required or permitted the R.T.P.C. member to consider when asked to authorize search and seizure. In *Petrofina Canada Ltd. v. Chairman, Restrictive Trade Practices Commission (No. 2), supra,* the applicant challenged authorizations under ss. 9(2) and 10(3) of the Act on the grounds, *inter alia,* that the members who gave their authorizations did not show that they had before them sufficient information to enable them to determine the legality of the inquiry then in progress or the reasonableness of the Director's belief that circumstances warranted the exercise of his powers. The Federal Court of Appeal rejected the relevance of such considerations to the members' decisions, at p. 391:

> In making the decisions that sections 9 and 10 require them to make, the Members must act judicially…

[Page 166]

> However, that duty to act judicially applies only to the decisions that the Members are required to make under sections 9(2) and 10(3). Under those provisions, the Members are neither required nor authorized to determine the legality of the Director's decision to hold an inquiry; they are merely required to ascertain that there is, *de facto,* an inquiry in progress under the Act. The Members are not required or authorized, either, to pass judgment on the reasonableness of the

> motives prompting the Director to exercise his powers under sections 9 and 10. As the Members did not have to make decisions on those two points, they cannot, in my opinion, be blamed for not having required information on those points.

As Prowse J.A. pointed out, if the powers of a Commission member are as the Federal Court of Appeal found them to be, then it follows that the decision of the Director in the course of an inquiry to exercise his powers of entry, search and seizure is effectively unreviewable. The extent of the privacy of the individual would be left to the discretion of the Director. A provision authorizing such an unreviewable power would clearly be inconsistent with s. 8 of the *Charter.*

Assuming, *arguendo,* that the Federal Court of Appeal was wrong, and the member is authorized, or even required, to satisfy himself as to (1) the legality of the inquiry and (2) the reasonableness of the Director's belief that there may be evidence relevant to the matters being inquired into, would that remove the inconsistency with s. 8?

To read subss. 10(1) and 10(3) as simply allowing the authorizing party to satisfy himself on these questions, without requiring him to do so, would in my view be clearly inadequate. Such an amorphous standard cannot provide a meaningful criterion for securing the right guaranteed by s. 8. The location of the constitutional balance between a justifiable expectation of privacy and the legitimate needs of the state cannot depend on the subjective appreciation of individual adjudicators. Some objective standard must be established.

Requiring the authorizing party to satisfy himself as to the legality of the inquiry and the

[Page 167]

reasonableness of the Director's belief in the possible existence of relevant evidence, would have the advantage of substituting an objective standard for an amorphous one, but would, in my view, still be inadequate. The problem is with the stipulation of a reasonable belief that evidence may be uncovered in the search. Here again it is useful, in my view, to adopt a purposive approach. The purpose of an objective criterion for granting prior authorization to conduct a search or seizure is to provide a consistent standard for identifying the point at which the interests of the state in such intrusions come to prevail over the interests of the individual in resisting them. To associate it with an applicant's reasonable belief that relevant evidence may be uncovered by the search, would be to define the proper standard as the possibility of finding evidence. This is a very low standard which would validate intrusion on the basis of suspicion, and authorize fishing expeditions of considerable latitude. It would tip the balance strongly in favour of the state and limit the right of the individual to resist, to only the most egregious intrusions. I do not believe that this is a proper standard for securing the right to be free from unreasonable search and seizure.

Anglo-Canadian legal and political traditions point to a higher standard. The common law required evidence on oath which gave "strong reason to believe" that stolen goods were concealed in the place to be searched before a warrant would issue. Section 443

of the *Criminal Code* authorizes a warrant only where there has been information upon oath that there is "reasonable ground to believe" that there is evidence of an offence in the place to be searched. The American *Bill of Rights* provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation…" The phrasing is slightly different but the standard in each of these formulations is identical. The state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion. History has confirmed the appropriateness of this requirement

[Page 168]

as the threshold for subordinating the expectation of privacy to the needs of law enforcement. Where the state's interest is not simply law enforcement as, for instance, where state security is involved, or where the individual's interest is not simply his expectation of privacy as, for instance, when the search threatens his bodily integrity, the relevant standard might well be a different one. That is not the situation in the present case. In cases like the present, reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search, constitutes the minimum standard, consistent with s. 8 of the *Charter,* for authorizing search and seizure. In so far as subss. 10(1) and 10(3) of the *Combines Investigation Act* do not embody such a requirement, I would hold them to be further inconsistent with s. 8.

D) Reading In and Reading Down

The appellants submit that even if subss. 10(1) and 10(3) do not specify a standard consistent with s. 8 for authorizing entry, search and seizure, they should not be struck down as inconsistent with the *Charter,* but rather that the appropriate standard should be read into these provisions. An analogy is drawn to the case of *McKay v. The Queen,* 1965 CanLII 3 (SCC), [1965] S.C.R. 798, in which this Court held that a local ordinance regulating the use of property by prohibiting the erection of unauthorized signs, though apparently without limits, could not have been intended unconstitutionally to encroach on federal competence over elections, and should therefore be "read down" so as not to apply to election signs. In the present case, the overt inconsistency with s. 8 manifested by the lack of a neutral and detached arbiter renders the appellants' submissions on reading in appropriate standards for issuing a warrant purely academic. Even if this were not the case, however, I would be disin-

[Page 169]

clined to give effect to these submissions. While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional. Without appropriate safeguards legislation authorizing search and seizure is inconsistent with s. 8 of the *Charter.* As I have said, any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force

or effect. I would hold subss. 10(1) and 10(3) of the *Combines Investigation Act* to be inconsistent with the *Charter* and of no force and effect, as much for their failure to specify an appropriate standard for the issuance of warrants as for their designation of an improper arbiter to issue them.

IV Section 1

Section 1 of the *Charter* provides:

> **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The phrase "demonstrably justified" puts the onus of justifying a limitation on a right or freedom set out in the *Charter* on the party seeking to limit. In the present case the appellants have made no submissions capable of supporting a claim that even if searches under subss. 10(1) and 10(3) are "unreasonable" within the meaning of s. 8, they are nevertheless a reasonable limit, demonstrably justified in a free and democratic society, on the right set out in s. 8. It is, therefore, not necessary in this case to consider the relationship between s. 8 and s. 1. I leave to another day the difficult question of the relationship between those two sections and, more particularly, what further

[Page 170]

balancing of interests, if any, may be contemplated by s. 1, beyond that envisaged by s. 8.

Conclusion

By order of Chief Justice Laskin the constitutional question was stated as follows:

> Did the Alberta Court of Appeal err in holding that subsection 10(3), and by implication subsection 10(1), of the *Combines Investigation Act,* R.S.C. 1970, c. C-23 are inconsistent with the provisions of Section 8 of the *Canadian Charter of Rights and Freedoms* and that they are therefore of no force or effect?

I would answer that question in the negative. I would dismiss the appeal with costs to the respondent.

Appeal dismissed with costs.

Solicitor for the appellants: R. Tassé, Ottawa.

Solicitors for the respondent: Reynolds, Mirth & Côté, Edmonton.