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Labor Relations and a Contract Beating In the Construction Industry

The contract beating of a Canadian construction union president was one result of a 1978 Ontario Labor Relations Board decision that allowed construction labor relations to be determined outside the regulatory sphere of collective bargaining. Another result, according to an association of contractors, is restricted competition and higher prices in government-sponsored housing.

The US-based building trades unions obtained an agreement in 1978 under which certain residential contractors, who had agreements with a Canadian union, were unable to work on government-sponsored housing. Although the agreement was obtained by illegal harrassment, it was upheld by the Ontario Labor Relations Board (OLRB), in a decision that reflected the political clout of the US-based unions. And a key figure in the harrassment, union official Clive Ballentine, was then appointed by the government to the OLRB.

The US-based unions had long been attempting to force Canadian residential builders to deal only with the US-based unions. It had been an ongoing, largely successful process, embodied in a series of so-called "master agreements" that started in 1969. The parties to the agreements were the Council of Building and Construction Trades Unions, being the US-based unions, and the Metro Toronto Apartment Builders Association, whose key members were Meridian Building Group, Greenwin Construction, and Cadillac.

A surprising decision

The major issue in the 1978 renewal of the master agreement was the bricklayers union. The Toronto local of the international union had a competitor, traditionally strong in the residential field, called Local 1, Bricklayers, Masons Independent Union of Canada. In 1977 and 1978, the Council began a campaign to force the use of the international bricklayers union for government-sponsored housing. Projects employing Local 1 members were picketed, and subcontractors employing Local 1 members found their contracts cancelled. In 1978 the Council wrote to the MTABA promising that if the exclusivity arrangement was adopted in the 1978 master agreement, it would permit the masonry work on certain current projects to be "completed without harrassment by the Council or its affiliated unions." The letter was signed by Council co-ordinator Clive Ballentine.

The pressure worked, and in April 1978 the MTABA agreed to give the US-based union the exclusivity the Council demanded.

The agreement was obtained by the pressure of illegal work stoppages, but the OLRB said: "The evidence does not establish to the satisfaction of the Board that these incidents were authorized by the Council or its officers." And so the OLRB rejected, in November 1978, an application by the Canadian union to declare the agreement illegal and obtained by illegal means; and two months later Ballentine was appointed to the OLRB.

Common control

One major subcontractor then did a company shuffle in order to get out from under an agreement with the Canadian union, to qualify for the government-sponsored work. With the new company in agreement with the US-based union, he obtained major masonry subcontracts, including one from an affiliate of the Meridian Building Group in the City of Toronto's CityHome project in the St Lawrence area. The Ontario Labor Relations Act provides that union relationships cannot be altered by such company shuffles, when the two companies are "under common direction and control." The Canadian union applied to the OLRB for such a ruling.

The contractor, Anthony DiDomizio, then paid $3000 to an associate to see that the Canadian union president, John Meiorin, was beaten seriously enough that he would decide to discontinue the OLRB application.

The beating, in March, 1979, hospitalization, and a subsequent death threat didn't deter Meiorin from pursuing the case. At the conclusion of the evidence, the contractor offered to concede the case to the union—in exchange for abandonment of some claims for money owing—and DiDomizio said in a conversation that he knew he had lost. But the union insisted the case be pursued to its conclusion.

But in spite of clear proof of the union's case, the OLRB dismissed the application. In effect, it upheld the validity of the company shuffle.

Rather difficult to see

Meanwhile, the union posted a reward for information leading to a conviction in the beating case, and an informant came forward who secretly recorded conversations with DiDomizio and his associate Rocco Morabito. Just before the OLRB issued its decision, DiDomizio and Morabito were arrested and charged with conspiracy to murder Meiorin. The charges were later reduced to conspiracy to assault and to wound. Then plea-bargaining with crown attorney Frank Armstrong resulted in guilty pleas to the relatively minor charge of assault causing bodily harm.

Evidence introduced by the crown on sentencing included some of the secretly recorded conversations.

These recordings disclose that DiDomizio told the informant, after the conclusion of the evidence in the OLRB "successor rights" case: "See what happened with me to John [Meiorin]. You can believe what happened he get it. He went all the way to the court [i.e., the OLRB]. I lost a case and I lost a business and I was doing masonry work and I can't do masonry work again."

The reason why DiDomizio "lost" the case was that the evidence was overwhelming. The predecessor company was controlled by himself, and the successor company supposedly by his young son. The two companies used the same office, the same construction equipment, employed the same men, and the elder DiDomizio was a signing officer for the bank account of the new company.

But the OLRB said these were two distinct companies.

Following that OLRB decision, in late 1979, the Ontario government appointed labor-relations expert Senator Carl Goldenberg to review complaints about the situation. The complaints came not only from Local 1, but also from the association of residential masonry contractors, who found themselves excluded from government-sponsored housing because of their agreement with Local 1. The contractors said the restricted competition produces higher contract-amounts in the government projects, and unfairly restricts their right to bid. The union, for its part, said that by allowing labor relations to be determined outside the regulatory framework of collective bargaining, the government is opening the door to various forms of corruption.

A source said Goldenberg "cautiously admitted" that it is rather difficult to see how the OLRB was able to come to the conclusions it did, but he said in effect: this is political, and you haven't enough clout in cabinet to effect any change.

Getting their business affairs in order

Meanwhile, the sentencing of DiDomizio and Morabito hasn't taken place yet. Evidence discloses DiDomizio told the informant that he had more jobs (not the building kind) to do, but that he lacked money for the time being.

The informant is a man who had originally been approached by Morabito to do the beating, but he hadn't done it—and it isn't known who actually did the beating. But the informant convinced DiDomizio that he had in fact done the beating; and he told DiDomizio that he wanted either more money or more jobs. His purpose was to gather evidence and collect the reward.

DiDomizio told him:

—I got some other jobs. Probably you can take them not like John or something.

—Good ones, eh?

—Yeah not too gentle like you know. I got some other bigs to fix up.

—No to John.

—No not now.

—Are you finished with him?

—I want to shoot him but that's a little danger now.

—While I give Rocco a price. Did Rocco tell you?

—Nothing.

—Rocco asked me if I wanted to finish it.

—I lost the case, it went to court. What's use now? On the other hand once I got a little money then we can finish off but right now....

—You can't tell I didn't do a bad job.

—No, you did 100%. I no complain about the job.

—No it was three weeks in the hospital.

—I think, I don't complain about the job, ah that's why I say $3000 I pay $3000 on top again, right now...

DiDomizio also told the informant: "So a few other friends that promised me they want a job done they got a problem too. They don't have the money. I can't say, 'Go and do the job,' and then if they don't got the money and don't pay I got to be responsible.... So I got to find other jobs myself but I can't right now because I don't have the money."

In order to allow time for DiDomizio and Morabito to get their business affairs in order, said crown attorney Frank Armstrong, he agreed to any "reasonable adjournments" of sentencing. He said he agreed to this as part of the plea-bargaining discussions, after defence counsel said they didn't want their clients sentenced until next September. Further evidence is scheduled for July, and sentencing is expected to take place in September.

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TSE Officials Testify In the Consumers Distributing Case

A recent court proceeding touched on various questions about the performance of the Toronto Stock Exchange in policing its own members.

The heads of the TSE divisions of Investigative Services and Market Surveillance testified at the preliminary inquiry into stock fraud charges relating to the stock of Consumers Distributing Ltd, which is traded on the TSE (Bimonthly Reports, Number 14). Consumers president Jack Stupp, promoter Alan Manus, and stockbroker Gordon Winthrope were charged with conspiting to manipulate the market price of Consumers stock after a Metro Toronto fraud squad investigation.

But TSE director of Investigative Services Kesley Merry testified he was told by two sources, before police came to him, that a TSE member firm, Standard Securities Ltd, was involved in questionable dealings with promoter Alan Manus. But Merry recalled doing nothing with this information, other than possibly asking that the stock be placed on "stock watch" by the Market Surveillance department. "There's not a great deal you can do with it [such information]," said Merry, "if the printouts don't indicate unusual trading activity." He was referring to the daily printout record of each TSE trade in a particular stock. But the TSE Market Surveillance director testified that no form of market surveillance was carried out.

Both Merry and Market Surveillance chief Neal Winchester said they later had discussions with the investigating police officers, and some were reported to their superiors. Defence counsel Clay Powell, referring to market selling that occurred before the January 1979 arrests, suggested that information obtained through official TSE channels "may have been in the possession of individuals who stood to gain by [knowledge of] the investigation and subsequent arrests." The stock traded around $17 on the day of the arrests, and re-opened several days later around $11. Powell wanted to know if the TSE had compiled a list of traders who had sold short prior to the arrests; the answer was no.

Another area of questioning was the activity of the so-called "registered traders" on the floor of the TSE, the handling of large "block trades," and so-called "pro trades," or trades by traders for their own account or their family. Market Surveillance head Neal Winchester agreed that "a large percentage" of the TSE volume is composed of such trades, and that the theory of a "continuous auction market," with prices set by public demand, doesn't hold true in such cases.

There is a great deal of vagueness and uncertainty about the TSE rules and practices in these areas, and professional observers in court weren't sure what some of the evidence meant.

"Registered traders" are floor traders who are assigned by the TSE to a particular group of stocks, in which they have privileges and responsibilities. They are supposed to offer to buy and sell so as to avoid wide fluctuations in the stock price, but how often they are expected to do so is something that is arranged by negotiation with the Exchange for each stock, and that information isn't public. An even more important piece of information isn't public. The TSE's daily record of trades indicates with a marker which trades were done by the registered trader, but when the Exchange provides these printouts to the public, these markers are removed, so as to make it impossible to determine the activity of the registered trader.

Orders to buy and sell can be originated directly from the TSE floor by registered traders, while all other trades have to be time-stamped at the brokerage firm's office. This enables the registered traders to act quickly. It is important because of a TSE rule that provides that the first trader to place a higher bid, or a lower offering, than the previous best bid or offer, can "take the floor" and transact up to 1000 shares, without having to give way to another trader.

TSE policy is that registered traders must make "stabilizing," as opposed to "destabilizing," trades at least 70% of the time. In other words, if they buy, it must be at a price lower than the last different-priced trade, and vice versa.

The effect of all this is supposed to be that in a falling market the registered trader will be able to act quickly to provide buying at certain prices so as to prevent a sudden price-drop, and similarly to provide selling in a rising market. How well the system works is something the Exchange keeps confidential by removing the markers from the printouts.

The issue arose in the Consumers case from certain wiretap recordings in which Manus appears to be complaining that the registered traders are either not performing their function, or are aggravating downward pressure on the market. Although TSE printouts with the markers were placed in evidence, they weren't the object of any questioning. However, Market Surveillance director Winchester admitted under questioning by Powell that more than one registered trader can trade in a given stock (only one of them has the "market maintainance" responsibility) and that the registered traders trade in stocks among themselves, without a client order on either side of the transaction, and that this can affect the market.

Part of the theory of the defence is that there are often trades on the TSE that have nothing to do with the "auction market" concept, and this has to be brought to bear on the crown's allegation that the accused conspired to manipulate the market price.

The Abacus Fraud Hearing

The possibly illegal nature of the $23 million takeover of Imperial General Properties Ltd by Abacus Cities Ltd, now the subject of fraud charges against former Abacus chairman Kenneth Rogers, was brought to the attention of the Ontario Minister of Consumer and Commercial Relations, Larry Grossman, two weeks after it occurred in 1978, but the government took no action.

On June 19, 1978, in a seven-hour closing at the Bay St law offices of Strauss and Associates, Abacus Cities paid $23 million for the 73% control block of Imperial General Properties, and on the same day $23 million flowed from Imperial General, purportedly as secured loans, through five companies, to Abacus Cities.

Imperial General director Bruce Deans, who wasn't at the closing, formally dissented from the transaction as contrary to a provision of the Business Corporations Act. And as provided for in the Act, he sent a copy of his dissent by registered mail to the Ontario Consumer Minister.

The Ontario Business Corporations Act prohibits a company from giving any financial assistance in connection with the purchase of its own stock, with certain exceptions. Deans said the interposition of the five companies between IGP and Abacus was merely contrived, and in fact IGP had made its $23 million available to Abacus to buy the IGP control block.

What happened to the letter Deans sent to the Minister is a mystery. An official who checked the correspondence register couldn't find any record of its receipt. Ontario Securities Commission vice-chairman and enforcement expert Harry Bray was asked in court testimony how the IGP takeover "first came to his attention." Bray answered by saying when he "first became sensitive to it," and it was some six months later. Bray wasn't specifically asked if he was aware of the Deans dissent, which wasn't made public until April 1979.

The RCMP started investigating the deal in May 1979, about a year after it was done, and charged Abacus chairman Kenneth Rogers with defrauding IGP and its minority shareholders. Two weeks of preliminary inquiry evidence was heard by Provincial Court Judge Joseph Addison earlier this month, and the proceedings were then adjourned to continue next November.

A circular takeover

The theory of the fraud case is that the security provided to IGP for its $23 million loans was worth far less than $23 million, that the money was paid by IGP through "deceit, falsehood or other fraudulent means," and that the deal's architect was Ken Rogers.

The issues in the case are similar to those in the case decided by the Supreme Court of Canada in 1978 involving Samuel Olan and others, since both involve the takeover of a company by allegedly using that company's own money, and substituting assets of less worth.

Imperial General Properties had been controlled by real estate "mystery man" R. John Prusac since 1972, through ownership of 73% of its stock, the rest being in the hands of the public and traded on the Toronto Stock Exchange. The company sold off its portfolio of residential apartment buildings during 1977-78. In the spring of 1978, Prusac wanted cash—for other Toronto company acquisitions, one witness said—and he concluded a deal with another real estate mystery man, Karsten von Wersebe, who owns a company called York-Hannover Developments Ltd. Prusac sold his 73% block of IGP stock to von Wersebe's company on May 18, 1978 for $1 million cash and a promissory note for $17.4 million, payable within 30 days. Following speedy negotiations, von Wersebe then flipped the stock to Abacus on June 19. On that day, at the seven-hour closing, Abacus paid: von Wersebe the $1 million he had paid Prusac; Prusac the $17.4 million on the note; and von Wersebe a $4.6 million profit. That was one part of the closing. The other part involved $23 million paid out by the Abacus-controlled IGP.

Ross Amos, Abacus vice-president finance, testified he negotiated the stock purchase with York-Hannover officials, according to instructions he received from Abacus chairman Ken Rogers. Amos said the agreement was signed on Saturday June 17 and closed on Monday June 19.

The "money companies"

Amos said Ken Rogers' concept was as follows. (1) The Bank of Montreal would provide a one-day overdraft of $23 million to Abacus to pay Prusac and von Wersebe; (2) the Abacus-controlled IGP would lend $23 million to a group of five so-called "money companies"; and (3) the money-companies, through loans and purchases, would pay $23 million to Abacus, and this would retire the "daylight overdraft." The Bank of Montreal, after consulting its lawyers Fraser and Beatty, had approved the overdraft on the 17th.

The same assets involved in the Abacus/money-companies transactions would be used to secure the loans of IGP to the money-companies. And what were those assets?

Abacus manager of corporate finance Tim Swinton testified he was given, on Sunday June 18, the task of finding, among the assets of Abacus, those that were not already encumbered, and to allocate them in certain specific amounts to the five money-companies. He found: accounts and notes receivable, mainly of Abacus em-

ployees who had purchased Abacus real estate or investments; mortgages on Ontario real estate; units in something called the Petro Can Oil and Gas Fund; and some real estate that was already mortgaged but in which there was further equity. Sunday evening or Monday morning he gave the list to Ken Rogers, but he didn't have time to check the assets before closing. He said he later found that some of the notes receivable were missing or "were not in place."

Swinton and Amos both said they knew the assets were ultimately to secure monies coming from IGP. Judge Addison asked both of them why the money-companies were in the transaction at all. Said Swinton: "My impression ...was the companies were interjected to give [the transaction] substance." Amos said the idea of the money-companies was that they were to be spread lenders. "Over the long run they were to work in concert with Abacus, but be independently profitable." In this transaction, they were borrowing from IGP at 12% and lending to Abacus at 13.5%. Amos said Rogers told him they were in this deal "to get them into the business of lending money."

Swinton said there were "twenty to fifty" such companies, and their management took direction from Ken Rogers. Only five of them were used in the IGP transaction.

Harvie Andre's role

Progressive Conservative MP Harvie Andre was a director of Abacus and several of the money-companies. He said he first heard of the IGP deal on the morning of the day it closed. He said he didn't hear it mentioned at all at an Abacus directors' meeting in Vancouver on June 16 (three days before closing, and the day Amos was in Toronto waiting for Bank of Montreal approval.)

Andre said he was in his Ottawa office the morning of the 19th when he received a call from the Abacus secretary urging him to attend a very important meeting in Toronto later that day. He said he thought it was to approve a joint real estate venture with another company. Then around noon, before he left for Toronto, he received another call originating from the Calgary head office of Abacus. It was a mass meeting by conference-call of the directors of the five money-companies to approve the transactions that were to occur later that day. "Very vaguely" was Andre's reply when asked if he could remember that call. As a director of money-company 108310 Investments Ltd, he voted to approve the transactions, and then flew to Toronto. "When I arrived," he said, "they were already in the midst of an active closing—several people around a table—transferring back and forth of paper." Andre said he was called upon to be one of the directors of IGP once Abacus controlled it. And as an IGP director he approved the $23 million loans to the money-companies, except that he abstained from voting on that portion of the loans that went to 108310 Investments Ltd, of which he was a director. He said he was concerned about a conflict of interest.

However, Andre wasn't asked about the issue of his responsibilities as an IGP director to the IGP minority shareholders, as against his interest as a director of Abacus. Even though he had only heard about the deal that morning, he said he considered the transactions to be in the best interests of IGP.

What was real

Chartered accountant Warren Paddon was retained by the crown to analyse the events of June 19. He challenged what Amos had called Rogers' concept of the deal. They may have intended to create a deal in which the money-companies borrowed and then re-lent to Abacus, Paddon said, but it didn't really happen that way. The $23 million cheques from IGP to the money-companies were never negotiated by those companies, but were immediately endorsed to Abacus by Ross Amos and another signer. (Amos said he received signing authority for those companies by phone from Ken Rogers that same day; he said Rogers told him this had been approved by the respective companies). "The cheques went straight into the Abacus Cities account—the same day. It's a direct transfer," said Paddon. "There are lots of stories about the money-companies, but the real effect was: upstairs and out [to pay von Wersebe and Prusac]....It's a straight manipulation of IGP funds [to pay the IGP acquisition]."

Paddon added that the security for the supposed loans to the money-companies wasn't available at closing. "Frankly, as a chartered accountant, I'm glad I wasn't a minority shareholder."

Mortgage Cases: Stein, Mintzer, Betel

William Stein, a veteran real estate dealer specializing in downtown Toronto houses, has fled Canada after being committed to trial on two counts of mortgage fraud. In the first case, he was said to have created a worthless mortgage in connection with a phony house-sale, and then sold that mortgage to an unsuspecting investor. In the second case, he and his lawyer, Norman Mintzer, were charged with defrauding wealthy Toronto investor Murray Sniderman of almost $1 million. Sniderman was told the money was to be invested in first mortgages, which was not the case.

The first case represents what fraud investigators call an "Oklahoma." Preliminary inquiry evidence was as follows.

A company controlled by Stein bought an east-end Toronto house for $32,500, subject to a first mortgage of $30,000. Stein then approached a handyman who had done some work for him, and who couldn't read. Stein gave the handyman $40 for attending at the law office of Robert H. Burke, who was acting for Stein in the deal, to

sign some papers. By virtue of these papers, which the handyman knew nothing about, Stein "sold" the house to him for $45,000. and the step-up in price was represented by a mortgage back to Stein's company for $12,000.

Mortgage broker Leslie Cherniak, who had sold other mortgages for Stein, then advertised in a newspaper that he had a $12,000 mortgage for sale, and it was sold, at a discount, to a man who thought he was buying a bona fide mortgage.

Stein had his handyman sign a series of post-dated cheques for the first year's mortgage payments, but only the first two cheques were honored.

Stein was committed to trial for fraud following the preliminary inquiry last September, but he has since left the country.

In a separate series of house purchases, Stein obtained from investor Murray Sniderman funds which were to be secured, Sniderman says, by first mortgages. Stein's lawyer in these transactions was Norman Mintzer. And in each case, Sniderman obtained from lawyer Mintzer a letter that these were in fact first mortgages, which they were not. Almost the entire amount was unrecovered when the houses were sold, because of prior mortgages Sniderman said he knew nothing about. Sniderman, who borrowed the money from the Bank of Montreal to reinvest in the mortgages, lost about $900,000 plus interest.

Stein and his lawyer Mintzer were both charged with defrauding Sniderman. Mintzer pleaded guilty to the charge in June and was sentenced to a reformatory term of two years less a day.

But there was more to the deals than meets the eye. Sniderman, the victim and complainant, himself pleaded guilty to perjury after he admitted he received $40,000 to $50,000 in secret kickbacks. Sniderman had sworn during the preliminary inquiry that he had received no such funds.

Mintzer—so his lawyer said—thought Sniderman was getting back a lot more money than that; in fact he thought Sniderman was "an accomplice for another purpose." What that other purpose might have been wasn't spelled out.

Crown attorney Michael Innes said the crown couldn't prove or disprove the return of large amounts of principal to Sniderman. But if lawyer Mintzer thought it was true, said Innes, that only made matters worse, because Mintzer would have had to know that in that case it was a scheme to defraud either the Bank of Montreal, where Sniderman borrowed, or Revenue Canada. Innes said it didn't help Mintzer to say he thought the victim of one fraud was an accomplice in another.

Following his plea to perjury, Sniderman was granted an absolute discharge.

The first of a pending series of civil actions by investors against lawyer/mortgage broker Myer Betel was tried last month. Retired garment industry businessman Lou Gotlib and his wife were awarded $21,500 plus substantial interest and costs because Betel exceeded his authority in dealing with their mortgage security on two properties. Claims based on other dealings were dismissed.

Supreme Court Justice Patrick Galligan said Betel served the Gotlibs reasonably well as their mortgage broker and mortgage lawyer in the early 1970s, but problems arose when the real estate market "went out to lunch" in the mid 1970s.

"I suppose from certain points of view," the judge said, "a certain amount of casualness in the handling of transactions was harmless enough when property values were ever increasing. The position that the lawyer is in when doing the business that Mr Betel was doing, is that he must also protect his client when the going gets tough. It seems to me that in many instances Mr Betel allowed himself to get into positions where his conflicts of interest became impossible of reconciliation."

The judge said the authority Betel had from Gotlib was to place the mortgage loans, collect on the loans, and if necessary enforce the security by foreclosure or power of sale. However, apart from trying to realize on the security, Betel didn't have any "implied authority" to restructure the mortgage security without Gotlib's consent. Situations where Betel acted for more than one lender, as well as for the borrower, created the type of conflict of interest the judge referred to.

The mortgages in question were syndicated, meaning that Betel pooled the funds of more than one investor, sometimes including himself. In one such mortgage, Gotlib contributed $20,000 of a $67,000 loan. The mortgagor defaulted, Betel sold the property under power of sale for no cash and a $50,000 mortgage back, which he held for his investors. And while the original mortgage had been a first mortgage, the $50,000 was to be a second mortgage, behind a new $35,000 first mortgage loan—from another Betel client—to complete construction. The transaction turned out to be a disaster, and the sale had been made without notice to Gotlib. However, Gotlib had only 20/67ths of the mortgage and Betel had the authority of the other 47/67ths to do what he did. Was Betel liable to Gotlib for breach of trust?

It was apparently a novel point, and the judge said he wrestled with it, and concluded: "Mr Gotlib went into the transaction knowing that he was a minority participant. It seems to me that anyone in such a position, by necessary implication, authorizes the agent to act in accordance with the instructions of the majority. As I said at the beginning of these reasons, I make no comment about how the authority given to Mr Betel was carried out by him. However, I do think... that having the authority to effect the sale, the minority was bound by the authority conferred by the majority."

Gotlib's lawyer, Moishe Reiter, complained that at the time of the transactions, and even during discovery in the lawsuit, his client was unable to find out who the other participants were. At trial, Betel said that in several cases, the other participants were himself, his family and companies.

Alfie Lewis says he Manipulated Stocks But the OSC can't find his File

Former top "speculative" stock salesman Alfred J. Lewis said he manipulated the stock-price of two companies controlled by then Member of Parliament Mark Smerchanski. Smerchanski was acquitted earlier this year of a charge of giving secret benefits to Lewis to push the stock. And Smerchanski has sued the Canadian Press for reporting that he was acquitted "on a technicality."

The case is filled with the most unusual situations.

Lewis, a major witness for the crown against Smerchanski, is being sued by Smerchanski for the return of stock and monies. Documents collected by the RCMP in their Smerchanski investigation have proved useful to Lewis in his defence.

But Ontario Securities Commission documents that Smerchanski wanted for his defence, and for his civil action, have been kept confidential by the OSC. In fact, the Commission said it has lost, or can't find, two of three volumes containing sworn evidence of Lewis in a 1972 OSC examination. And it refused to produce the third volume, which Smerchanski's lawyers wanted for the purpose of cross-examining Lewis. They suspect Lewis may have denied, before OSC investigators in 1972, some of the things he alleged in the 1980 prosecution of Smerchanski. They suggested perjury. (The same material the OSC refused to produce for Smerchanski's lawyers somehow fell into the hands of the RCMP officer investigating Smerchanski. An OSC lawyer didn't offer any explanation how this came about.)

Remember when

Smerchanski controlled—and still controls—a bona fide chemical manufacturer called Border Chemical Company. He had known securities lawyer W. Ralph Salter (the father of the present OSC staff director Charles Salter) since 1939, and Ralph Salter was an officer of Border Chemical. The firm of Salter, Reilly, Jamieson and Apple—now Salter and Apple—also acted for Lewis' Asta Securities Corp. One of the things Asta did was "sponsor" stocks, whatever that means. Salter recommended Lewis to Smerchanski, because, said Smerchanski, Border's then "sponsor," Davidson and Co., wasn't too active, and Asta "might be of some assistance to the market value of Border shares." And Lewis was given an option to buy Border shares at predetermined prices.

Lewis supported the crown's contention that this was a secret benefit to Lewis to push the stock. "The deal was very simple," Lewis said. "Mr Smerchanski said he would make available to me, or to Asta, or to anybody that I wanted to elect, the stock at below market prices....I was to create distribution of the stock, to increase the price and to develop a larger group of shareholders, rather than the small group that made up the Border Chemical shareholders list." And Lewis testified he manipulated the price of the stock through sales by his staff in Germany.

A major tool was his weekly mailing of "Astagrams," the Asta tipsheet. "Through our push, as it were," said Lewis, "or through our recommendation, or whatever you want to call it, we created a demand for the stock because we had control of the supply. ...Naturally the stock would go up in price because we would only make stock available at the prices you wanted to make the stock available at."

Salter and Apple

Smerchanski said in his civil suit that the deal was Lewis would get options from himself and other major shareholders in exchange for "sponsoring" the stock, which included "improving the market price," but he didn't know how Lewis proposed to do it. He said the deal was approved at a meeting of the Border Chemical board of directors in the law offices of the Salter firm. No minutes were made of the approval, he said, and it was done after the formal meeting had terminated, "because this is not usually that important a situation." His lawyers suggested that since other major shareholders, and the Salter firm, were aware of the deal, this supported its legality.

The RCMP investigating officer was asked if he had found out about the company's approval of the arrangement.

—I recall somebody mentioning that there was a meeting but we couldn't find any record of any such meeting through Salter and Apple's records and I can't recall who the person was that told us.

—...And did you talk to Mr Barney Apple [Salter's law partner Barnabas Apple]?

—Mr Apple was spoken to when we first took the searches. He relied on his records after that.

—Did you take an oral statement? He's alive and well on Bay St. Did you take a statement as to whether there was an arrangement to give Lewis and Asta an option on the shares?

—No.

Lewis had a recollection of the same meeting of the Border directors at "Mr Apple's office or Mr Salter's office." He was asked if it had to do with the option.

—I have no idea sir. As far as I was concerned, the optioned stock wasn't mentioned at the meeting. There was no reference. The only reference that was probably made at the meeting was the fact that I was going on the deal.

—In what way were you going on the deal?

—I was going to push the stock.

—Was anybody curious as to why?

—Well, they didn't seem to be. Everybody seemed to know what the story was, but that's a guess I'm hazarding.

"Rather frightening"

A US shareholder testified he was at a meeting in Pittsburgh attended by Smerchanski and Lewis, and Lewis told the meeting what was going to happen. "He said the stock was then trading in the low teens and that they were going to move the stock up to around $15, and in order to sell the stock, he was going to split the stock three for one and bring it back down to around $5 [the price did go to $15, and was split three for one], because that was the easiest way they could move the stock, and then they were going to proceed to run the stock back up.... The reference to [Smerchanski] was that he was a member of the Canadian Parliament and that having that type of reputation would be beneficial to the sale of the stock, and he—Mr Lewis—was going to trade upon his position within Parliament."

The shareholder was cross-examined:

—[Lewis] was suggesting, I take it, that the shares were under-valued and with proper promotion and marketing, the prices would be substantially improved?

—He didn't say they were under-valued. He said they were going to run them up.

The crown alleged a similar deal with respect to Fundy Chemical Company. "It was like shooting fish in a barrel," said Lewis. "The orders that came in, in a couple of days, were rather frightening because I had been in business for a number of years, and I hadn't really seen this kind of trading. But, because there was so much money involved, I took it in my stride."

Smerchanski's lawyers said the deals with Lewis were straight stock-options, unconnected with any alleged market manipulation.

The mechanics worked like this, according to trial evidence. An accountant named Clarence Schultz would deliver Border Chemical stock from Smerchanski to Lewis at the Asta office. He would receive cheques made out to himself in payment, which he would immediately cash, and then turn over the cash to Smerchanski. Smerchanski's lawyer asked Schultz whether, in certain of these transactions, Smerchanski was merely "an expensive messenger boy" for others; Schultz said he didn't know.

Asta, through its German arm, had sold stock to the Germans, and would then use this stock to make delivery, via a Liechtenstein company owned by Lewis called Candac SA. RCMP officer Agnew said Lewis told him he used Candac to avoid disclosure to Canadian authorities.

The crown said that the spread between Asta's payments for the stock and its sales in Germany totalled around $1 million.

The OSC crackdown

The Canadian Stock Exchange in Montreal, where Border was listed, became alarmed at the concentration of margined Border stock held by Asta, and the Exchange increased the margin requirement. Instead of allowing Asta to borrow 50% of the price—the customers paid the other 50%—it permitted Asta to borrow only 20%, and this created a cash problem for Asta. The Exchange also accused Asta of not telling clients they were buying stock from Asta itself rather than in the market, and made other allegations, all of which Lewis admitted.

Then the Ontario Securities Commission summonsed Lewis to explain these events in an examination under oath, pursuant to the investigation section of the Ontario Securities Act. Lewis was questioned on three days at the end of 1972, and these are the transcripts the OSC has either lost or won't produce. Then rather than submit to a public hearing, Lewis allowed his registration to be suspended.

The OSC said Asta's registration would be cancelled once its affairs were wound up, but it isn't clear exactly what happened. The OSC, which has raised bafflegab to an exact science, was able to confuse the trial judge in the civil action who said, "As a result of the investigation made in 1972, I was informed that Asta's licence was suspended for a year or was cancelled and reinstated after a year. (I am not sure which.)"

(In any event, Lewis is back in the stock business. He described himself as a "general manager of various junior exploration companies.")

Many German clients to whom Asta had sold stocks said they were defrauded, and this led to an RCMP investigation in the mid 1970s, which in turn led to some plea-bargaining sessions. As a result, Lewis pleaded guilty to the rather esoteric charge of conspiring to possess money knowing it had been obtained by acts which, if committed in Canada, would have been a crime. Lewis was fined $50,000 in 1976.