THE CONSTITUTIONALITY OF CANADA'S NEW COMPETITION POLICY

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The purpose of this paper is to identify and analyze the major constitutional issues raised by the recent legislative initiatives of the Federal government designed to implement a new competition policy for Canada. The first phase of those initiatives was incorporated in major amendments[1] to the *Combines Investigation Act*[2] which came into force in 1976. The second phase was laid before Parliament, just as this paper was being written, on March 15, 1977, in the form of Bill C-42.[3] Hereinafter these two pieces of legislation will be referred to as the *Act* and the *Bill* respectively.

Brief Overview of the Legislation

The major elements of Canada's competition policy have traditionally been contained in the *Combines Investigation Act.* The previous focus of that policy is presently incorporated in Part V of the Act which sets out a series of offences in relation to business competition in Canada ranging from conspiracies to restrain competition to misleading advertising and provides the sanctions against them. Part IV provides further special remedies against those offences. The administrative arm of the statute is established and empowered by Parts I - III and Part VI ensures the enforceability of its processes and orders. The 1975 amendments made a marked innovation with the addition of Part IV.1. This part defines a series of trade practices which are not absolutely prohibited but which are made reviewable and subject to orders. Aside from this addition, the 1975 amendments and those proposed in the new Bill have maintained this basic structure in the Legislation. The changes they made or propose to make in the substance of the legislation which are constitutionally significant will be discussed below.

Present Constitutional Status of Federal Competition Legislation

Since the decision of the Privy Council in the case of *Proprietary Articles Trade Association v. A.-G. Canada*[4] in 1931, the accepted

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1 S.C. 1974-75, c. 76.

2 R.S.C. 1970, c. D-23, as previously amended by R.S.C. 1970 c. 10 (1st Supp.) s. 34 and R.S.C. 1970 c. 10 (2nd Supp.) s. 65.

3 Second Session, Thirtieth Parliament, 25-26 Elizabeth II, 1976-77.

4 [1931] A.C. 310.

constitutional basis for Federal legislation in this field has been the Dominion jurisdiction over criminal law and procedure granted by s. 91(27) of the *British North America Act.*[5] An earlier attempt by the Federal government to deal with these matters through a regulatory framework had been pronounced *ultra vires* by Viscount Haldane,[6] but in the P.A.T.A.[7] case Lord Atkin recognized that there was scope for the proper exercise of the criminal law power in this area. The Privy Council found that the purpose and effect of the *Combines Investigation Act* of that time was to denominate a series of crimes - such as combines and conspiracies to unduly lessen competition[8] - and to provide the machinery and the procedure necessary for the investigation, prosecution, and punishment of those crimes. Subsequent amendments and additions to the law in this area, whether by means of the *Criminal Code* or the *Combines Investigation Act*, which have been challenged constiutionally have been consistently upheld as being within Federal competence by virtue of the criminal law power. In 1937 the Privy Council approved an amendment to the *Criminal Code* outlawing price discrimination,[9] which proscription is now contained in s. 34[10] of the *Act.* In 1956, in the case of *Goodyear Tire and Rubber Co. of Canada Ltd. v. The Queen,*[11] the Supreme Court of Canada upheld a prohibition order against certain directors and officers of several companies convicted of conspiracy under s. 32(1) of the Act and thus gave approval to the constitutionality of that part of the present s. 30(1)[12] which provides for such orders. The Court said it was legislation going to the prevention of crime and as such it was within the grant of power under s. 91(27) of the Constitution. And in 1965, in the case of *R. v. Campbell,*[13] the Ontario Court of Appeal turned back a challenge to the ban on the practice of resale price maintenance, now set out in s. 38 of the *Act.* The Supreme Court of Canada affirmed their decision that this was a legitimate exercise of the criminal law power.[14]

Since so many of the longstanding provisions of the *Combines*

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5 1867, 30 & 31 Vict., c. 3, as am. (U.K.).

6 *Re Board of Commerce Act, 1919 and the Combines and Fair Prices Act, 1919.* [1922] 1 A.C. 191.

7 *Supra,* 4.

8 Now incorporated in s. 32(1) of the Act.

9 *A.-G. British Columbia v. A.-G. Canada.* [1937] A.C. 368.

10 s. 31 of the *Bill* proposes amendments to this section.

11 [1956] S.C.R. 303

12 See s. 21 of the *Bill* for proposed amendments.

13 58 D.L.R. (2d) 673.

14 46 D.L.R. (2d) 83.

Investigation Act have found a firm constitutional basis in the criminal law power, it is probably natural and worthwhile to first consider whether the recent and proposed amendments can find a place to stand on that grant of power as well. Such an analysis requires a brief review of the jurisprudence on s. 91(27).

Scope of the Criminal Law Power

It has been suggested by many commentators [15] that courts over the years gave a very broad scope to this power to compensate for the rather narrow limits placed upon other areas of Federal jurisdiction such as the regulation of trade and commerce. Whatever the reason, it is true that very few constitutional restrictions have been placed upon its exercise.

The leeway the courts have been prepared to allow Parliament in employing this power was given perhaps its widest enunciation by Lord Atkin in the P.A.T.A. [16] case. He refused to restrict the grant under s. 91(27) to the traditional domain of criminal jurisprudence, as Viscount Haldane had suggested in the *Board of Commerce* [17] case, but instead pronounced: "Criminal law means the criminal law in its widest sense .... The criminal quality of an act cannot be discerned by intention; nor can it be discerned by reference to any standard but one: Is the act prohibited with penal consequences?" [18]

Subsequent decisions have limited that wide view somewhat through the doctrine of colourability. A Federal statute will not automatically be upheld as being within the criminal law power merely because in form it prohibits an act with penal consequences. If its real and primary purpose, in the perception of the court, was to use the criminal law form as a guise for concealing what was in substance a direct legislative intervention into areas reserved to provincial jurisdiction, then it would be struck down as a colourable use of that power. The existence of this limitation was acknowledged by Lord Atkin a few years after the *P.A.T.A.* [19] case in his judgment in the *Reference Re: s. 498 of the Criminal Code:* "The only limitation on the plenary power of Parliament to determine what shall or shall not be criminal is the condition that Parliament shall not, in the guise of enacting criminal legislation, in truth and in substance encroach on any of the classes of subjects enumerated in s. 92" [20]

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15 e.g. Peter W. Hogg & Warren Grover, "The Constitutionality of the Competition Bill" (1976), 1 Canadian Business Law Journal 197 at 207.

16 *Supra*, 4.

17 *Supra*, 6.

18 *Supra*, 4 at p. 324.

19 *Supra*, 4.

20 *Supra*, 9 at p. 315.

However, it now seems settled that any evidence of any public detriment or public evil or public injury caused by the activity being proscribed will be sufficient to dispel any charge of colourability against what otherwise properly could be characterized as criminal law. The test of colourability was set out by Mr. Justice Rand in *Reference re Validity of Section 5[a] of the Dairy Industry Act:* [21]

> A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed.

The test was recently applied by Chief Justice Laskin in *R. v. Morgentaler.* [22]

When Viscount Simon, in an off-hand comment in *A.-G. Ontario v. Canada Temperance Federation,* [23] posited that "To legislate for prevention appears to be on the same basis as legislation for a cure" he perhaps unwittingly gave origin to another significant aspect of the criminal law power - the power to legislate for the prevention of crime. Normally, a court would feel free to disregard such judicial asides, even when sired by the Privy Council. In this instance, however, the Supreme Court of Canada transformed the proposition into a respectable doctrine of Canadian constitutional law and in the *Goodyear* [24] case it was advanced to support the Court's decision that prohibition orders enjoining certain future conduct by persons convicted under s. 32(1) of the *Act* were a legitimate incident of criminal law.

The guidelines the courts will use in characterizing legislation as going to the prevention of crime, and the degree of vigilance they will exercise in searching out improper constitutional puposes in Federal statutes relying on that doctrine, are far from clear. But one observation can be made. So far, to the writer's knowledge, the courts have applied the doctrine only to justify a Federal interest in situations subsequent to and connected with an initial criminal conviction. As Ronald Cohen and Jacob Ziegel have pointed out, [25] when Chief Justice Laskin was discussing the *Goodyear* [26] case in his judgment in *MacDonald v. Vapor Canada Ltd.,* [27] he emphasized the necessary connection of the prohibiting order with a conviction

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21 [1949] S.C.R. 1 at pp. 49-50.

22 [1976] 1 S.C.R. 616.

23 [1947] A.C. 193 at 207.

24 *Supra,* 11.

25 *The Political and Constitutional Basis for a New Trade Practices Act,* (Ottawa, 1976) p. 45.

26 *Supra,* 11.

27 (1976), 22 C.P.R. 1.

of a criminal offense. He described the case as illustrating "the preventive side of the Federal criminal law power to make convictions effective". [28]

With this background in the jurisprudence on s. 91(27) one is in a position to better appreciate the possibilities and the problems inherent in trying to fit the new competition legislation within the criminal law power.

The New Competition Policy as Criminal Law

While the Phase One amendments in the *Act*, and to an even greater degree the Phase Two proposals in the *Bill*, show a clear intention to give a more flexible and regulatory thrust to the government's competition policy, they also included a number of sections that look like, work like, and that undoubtedly were intended to be traditional criminal proscriptions. It seems almost certain that these new *per se* offences set out in Part V of the *Act*, such as bid rigging, [29] pyramid selling, [30] referral selling, [31] secondary boycott practices, [32] and misleading advertising, [33] as well as those proposed by the *Bill*, such as being party to an illegal monopoly [34] and systematic delivered pricing, [35] would be upheld as valid as criminal law regardless of the constitutional judgment on other elements of the legislation. In all cases the particular act, however tortuously defined, is forthrightly and absolutely prohibited with penal consequences. Since the courts have long recognized a public interest in free and honest competition [36] it would be difficult to argue that the proscription is not aimed at an acknowledged public evil. Furthermore, there seems to be nothing that would distinguish, for constitutional purposes, these enactments from the prohibitions on price discrimination and resale price maintenance which, as noted above, have already been approved by the Privy Council and the Supreme Court.

Attempts to justify other sections of the legislation under the criminal law power would raise more serious objections. Two areas of particular concern are Part IV and Part IV.1.

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28 *Ibid.*, p. 13 (emphasis added).

29 S. 32.2 of the *Act*.

30 s. 36.3 of the *Act*.

31 s. 36.4 of the *Act*.

32 s. 38(6) of the *Act*.

33 s. 36 of the *Act*.

34 s. 31 of the *Bill*.

35 s. 33 of the *Bill*.

36 See *Weidman v. Skragge* (1912), 46 S.C.R. 1.

Part IV.1 of the *Act* sets out a number of practices, including "refusal to supply",[37] "consignment selling",[38] and "tied selling",[39] which are usually considered to be inimicable to free competition but which occasionally can be justified as furthering or protecting legitimate economic interests. As a result, these practices are neither absolutely prohibited nor absolutely absolved by the *Act;* rather, they are made reviewable by a Restrictive Trade Practices Commission[40] which will determine, in the particular circumstances of the case before it, whether the practice is reconcilable with the policy objectives of the legislation.[41] The Bill continues the shift to a more flexible approach by expanding the number of reviewable practices to include such things as interlocking managements and price differentiation and by transferring some traditionally prohibited acts, such as mergers and some monopolies, into the merely reviewable category.[42] Extensive guidelines are laid down to assist the Commission in making its review and if an order does issue to stop or modify the practice it is backed up by severe sanctions against a refusal to obey.[43]

Given even the broad scope historically allowed to Parliament under s. 91(27), it is very difficult to characterize what is being done through Part IV.1 as the denomination of a crime. A similar scheme was disapproved as criminal law in the *Board of Commerce*[44] case, although admittedly on a rather narrow view of that head of power. Even the very general definition laid down in the *P.A.T.A.*[45] case is not satisfied, however, because no particular act or practice is absolutely prohibited with penal consequences. Rather, a certain practice is defined which, if found to exist, gives the Commission the discretion to issue an order. If certain facts can be proved there is not, *ipso facto,* a violation of the law, but only the creation of jurisdiction within the Commission to choose to designate this practice as one against which an order may issue. That type of discretionary power in an administrative body is clearly a species of regulation and not of criminal law and procedure as those concepts are understood in Canada. The fact that failure to obey one of the Commission's

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37 s. 31.2 of the *Act.*

38 s. 31.3 of the *Act.*

39 s. 31.4 of the *Act.*

40 In s. 3 of the *Bill* the name of this body is changed to the Competition Board.

41 These objectives are set out in a preamble to be added to the Act by s. 1 of the *Bill.*

42 These changes are all incorporated in s. 26 of the *Bill.*

43 See s. 46.1 of the Act, to be amended by s. 37 of the *Bill.*

44 *Supra,* 6.

45 *Supra,* 4.

orders is an indictable offence is not, of course, equivalent to the sanctions Provincial boards and agencies can call upon to enforce their directions. In neither case does this indicate that the proper constitutional source for the substance of those orders lies in s. 91(27).

It would be easier to argue that Part IV.1 is valid criminal law as legislation going to the prevention of crime. Many of the Practices reviewable under that part are closely connected with activities absolutely prohibited under Part V. "Consignment selling", which is reviewable under the *Act* is recognized by economists, and businesses, as a means of avoiding the ban on resale price maintenance while achieving essentially the same results. "Joint monopolization", known to economists as conscious parallelism, which would be reviewable under the *Bill*, was often raised as a defence to charges of conspiracy in restraint of competition under the *Act*.[46] And mergers and monopolies, also reviewable under the *Bill*, are difficult to distinguish from the "illegal monopoly" which would still be completely proscribed. Yet, as already noted, there are indications that the prevention of crime aspect of the criminal law power can only be invoked in connection with a conviction for some established crime. Under this legislation, however, that connection is not required either explicitly or implicitly. It is clear that a business is subject to an order to cease a practice of, for example, tied selling under Part IV.1 without ever having been convicted of one of the accepted crimes under Part V. Even if the prevention of crime aspect is not so limited to situations where a conviction has been obtained, it surely must be necessary to point to a recognized crime that is being prevented by the order. In many cases, however, an order to stop a practice such as tied selling will only prevent, and only be intended to prevent, further tied selling, which is nowhere established as a *per se* offense.

That these objections can be made to an argument that Part IV.1 is a valid exercise of the criminal law power is not surprising. The studies and recommendations on which the legislation is based were themselves premised on the belief that criminal law was an inappropriate means for securing the economic goals of the new policy.[47] It is fairly clear that Parliament adopted that premise and made no attempt, in either form or substance, to draft Part IV.1 as

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46 See e.g. *R. v. Armco Canada Ltd. et al.* (1975) 6 O.R. (2d) at 578 et seq.

47 See eg. *Dynamic Change and Accountalbility in a Canadian Market Economy*, Lawrence Skeoch and Bruce McDonald (Ottawa 1976).

criminal law. The assumption seems to have been made that a new constitutional basis will be found for these initiatives. [48]

The special remedies incorporated under Part IV of the Act [49] are another area of concern when the constitutionality of the legislation is examined under the head of the criminal law power. Aside from sections 28 and 29 (as they will be constituted under the *Bill*), these remedies are all related to activities that have been absolutely proscribed under Part V. [50] As pointed out earlier, the fundamental question as to whether Parliament could employ civil law types of remedies in the exercise of its criminal law responsibilities has already been affirmatively answered in the *Goodyear* [51] case, where the authority given under the present s. 30(1) to issue prohibition orders against persons convicted of offences under the Act was upheld. The Court in that case did leave open the question of whether the dissolution orders provided for under the same section would be justifiable.

Other remedies provided by this Part, and still open to challenge, are: interim injunctions pending prosecutions under Part V, [52] anticipatory prohibition and dissolution orders directed against conduct prohibited by Part V but available for issue independent of a prosecution or conviction, [53] and the private right of action to recover damages suffered as a result of illegal activities under the Act. [54]

Because of the availability of such a wide variety of "penal consequences" against acts prohibited under Part V, a criminal prosecution can be used almost as effectively as a review and an order under Part IV.1 to impose specifically tailored guidelines on

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48 Perhaps it should be noted at this point that if Part IV.1 was not upheld under any head of Federal power it would be severable. Following the standard test, it would be easy to demonstrate that Parliament would have passed the rest of the Act even if this part had not been included. It is not essential to the rest of the Act, nor is the rest of the Act to it. Its presence does not contaminate the remainder and its absence would not sterilize it.

49 To be amended by ss. 19-23 of the *Bill.*

50 s. 28, which provides for tariff adjustments to encourage competition probably has sufficient constitutional justification in the Dominion's absolute control over tariff policy implicit in s. 91(2) of the B.N.A. Act. S. 29, which would allow the Competition Board to issue interim injunctions incidental to its review process will undoubtedly stand or fall with Part IV.1 as a whole.

51 *Supra*, 11.

52 s. 29.1, to be amended by s. 20 of the *Bill.*

53 s. 30(2) to be amended by s. 21 of the *Bill.*

54 s. 31.1, to be amended by s. 23 of the *Bill.* This much heralded means of enforcing this right provided by Part V.1 of the *Bill* — the class of action — does not seem to raise any constitutional issues distinct from those already posed by s. 31.1 itself.

the structure and practices of individual businesses. That realization might lead some to raise the spectre of colourability against sections 29.1 and 30, arguing that the range and type of remedy connected with the particular crime demonstrates that the so-called crime is only a guise and the so-called punishment is the real, but improper purpose of the legislation. Yet once it is admitted that a series of crimes in the constitutional sense have been created in Part V, it becomes extremely difficult to challenge the sanctions provided against them. The natural extension of a broadly based criminal law power capable of supporting a wide variety of crimes is an equally broad power to attach a variety of types of punishment. This extension was recognized by Mr. Justice Rand in the *Goodyear* [55] case where he said "The evolving and transforming types and patterns of social and economic activities are constantly calling for new penal controls and limitations and that new modes of enforcement and punishment adapted to the changing conditions are not to be taken as being equally within the ambit of parliamentary power is, in my opinion, not seriously arguable." [56]

The provisions for dissolution orders on conviction of certain offences and for interim injunctions pending prosecutions seem particularly easy to defend in the light of this jurisprudence. Furthermore, in both cases there is a convenient analogy with a traditional incident of the criminal justice process. Specifically, a dissolution order certainly resembles a sort of capital punishment for corporate offenders, while interim injunctions are at least similar to the arrest and detention before trial of individuals charged with criminal offences and the undertakings on which their interim release is often conditional.

The anticipatory injunction and dissolution orders under s. 30(2) of the Act pose more of a problem since their issue is not dependent on a criminal conviction nor are they merely temporary measures incidental to a criminal prosecution. Thus the principles and analogies relied upon above are not available for support. However, a better argument can be made here on the basis of the prevention of crime doctrine than was available for orders under Part IV.1. Although there is still no necessary connection between these orders and any conviction or prosecution, at least in this case, they may only issue against conduct that clearly constitutes a criminal offence. For this reason, a constitutional challenge to an order under s. 31(2) might be the best means of forcing the courts to give more precision to the "prevention of crime" doctrine by identifying more exactly which elements are necessary for its application.

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55 *Supra*, 11.

56 *Ibid.*, p. 311.

If s. 30(2) was a bold constitutional step, s. 31.1 was even bolder. The intent is clearly to provide a private complement to the public enforcement of the criminal proscriptions under Part V and to help to ensure that any profit incurred from illegal activities is returned to those from whom it was taken. That intent is implemented by conferring on private persons the right to take private legal actions to recover damages they suffered as a result of conduct contrary to Part V, even if the defendant has not been convicted of, or even charged with, a violation. The effect is to incorporate the whole of Part V *holas bolus* into the field of actionable wrongs in civil law.

There has been a longstanding judicial debate, carried out by way of dicta as to where the authority over the civil consequences of a criminal action lay.[57] The recent decision of Chief Justice Laskin in the *Vapor Canada*[58] case seems to offer more substantial guidance. In that judgment he found that a provision in a Federal statute proscribing certain trade practices, coupled with a general provision in the Criminal Code setting out a standard sanction for the violation of any Federal act, did not provide a sufficient basis for the vesting of a civil remedy in anyone who suffered damage as a result of those practices. The situation under consideration is distinguishable in that the criminal proscription and the civil remedy are both set out in the same statute and the link between them is much more direct. However, it is still possible for that remedy to be enforced in "a situation unrelated to any criminal proceeding"[59] because a prior conviction or prosecution is not necessary.

Accepting even Rand's generous view of Federal power to improvise punishments to fit violations of otherwise legitimate criminal statutes, it does seem to be a significant and perhaps fatal step to go from taking away the rights and property of persons convicted of crimes through public prosecutions, with all the protections for the accused inherent in that process, to vesting in private persons the right to use the same law as the basis for a private action where the same procedural safeguards would not be available. This looks very much like a Federal intrusion into a Provincial field, property and civil rights, whose borders have always been jealously guarded by the courts.

There are, of course, various constitutional doctrines - double aspect, trenching, ancillary - that are sometimes used to justify

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57 See *Transport Oil Ltd. v. Imperial Oil Ltd. et al.* [1935] O.R. 215 at 219 per Middleton, J.S. (Ont. C.A.). *Direct Lumber Co. Ltd. v. Western Plywood Co. Ltd.*, [1962] S.C.R. 646 at pp. 649-50 per Judson, J. and *Ross v. Registrar of Motor Vehicles*, [1975] 1 S.C.R. 5 per Pigeon, J.

58 *Supra*, 27.

59 *Ibid.*, p. 13.

Federal intervention into normally Provincial areas. But does the direct creation of a civil right of action in a person merely "affect" property and civil rights in a province? Is s. 31.1 really necessarily incidental to the prohibitions and procedures set out in the *Act*? With the large fines, jail terms, and injunctions now arising from violations of Part V, is s. 31.1 really necessary to establish an effective level of sanctions? If the real aim of Part V is to protect the public interest in free and honest competition, is it really necessarily incidental to the scheme that private persons should be able to recover their particular damages? Can s. 31.1 truly be seen as going to the prevention of crime when the vesting of the right is not dependent on a conviction and the offender could easily settle with the complaining person while continuing the illegal activity? All of these questions reflect serious, although perhaps not insurmountable, hurdles to the establishment of the constitutionality of s. 31.1, at least under the criminal law power.

Other Bases of Jurisdiction

As indicated earlier, the real focus of the Federal competition policy is now found in Part IV.1 of the Act. It is a much more flexible and refined approach, concerned with the individual economic causes and effects of particular business structures and practices rather then with absolute principles of law. It is designed for economists and statisticians, not lawyers and prosecutors. As was also indicated above, there is considerable doubt whether it is possible, or indeed desirable, to attempt to justify this approach on the traditional constitutional basis for Federal initiatives in this area, the criminal law power. Thus a search has been underway for some time for a different constitutional head of power that would be more accommodating to the whole of the competition policy that has been proposed. Two solutions are usually advanced, either the general, "peace order and good government" power or the power over "the regulation of trade and commerce".

The New Competition Policy and the General Power

Most advocates of the position that the legislation implementing the new competition policy can be constitutionally supported as an exercise of the general power of Parliament to make laws for the peace, order and good government of Canada have proceeded on the basis of the "national dimensions" doctrine. That doctrine sprang from the words of Lord Watson in the *Local Prohibition* [60] case as he attempted to explain how matters normally

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60 *A.-G. Ontario v. A.-G. Canada*, [1896] A.C. 348 at 361.

within provincial competence might become susceptible to Federal legislative control under the general power in certain circumstances:

> Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion.

As a constitutional justification for Federal legislation in several fields, these words were often cited in argument but seldom followed in judgments during the supremacy of the Privy Council. Through the 1950's and 1960's, however, it became quite fashionable for the Supreme Court to rely on those words when upholding Federal legislation on the basis of the general power. As a result, those constitutional scholars who favoured a shift of legislative power to the centre became quite enamoured with the prospects of an unrestricted use of this doctrine. For almost every problem that was identified in the nation, including the problems provoking a new competition policy, they were quick to point out the national dimensions of the problem, the fact that its incidence in one part of the country affected the other parts because of the interconnectedness of the Canadian economy and the mobility of Canadian society, and then concluded that the problem was susceptible to rectification by Federal legislation on the basis of this doctrine. In some cases the reasoning went further to suggest that, since Parliament could legislate, it surely could legislate in the most effective and comprehensive manner even if that meant intrusion into traditional areas of provincial responsibility.

These were the magnificent pretensions of the national dimensions doctrine as it marched into the *Anti-Inflation Act Reference,*[61] the proud and confident champion of the Federal cause. Whether it survived that encounter it all is still not clear, but it is at least certain that it was badly bloodied. While the particular piece of legislation was upheld by a 7-2 vote, the majority of the Court's members clearly and specifically rejected all suggestions that it was supportable on the basis of a national dimensions doctrine and reaffirmed the more traditional limits of the general power. Those limits are that the general power has two, and only two aspects: a residual aspect for accommodating legitimate constitutional "matters" that could not be properly characterized as coming within any of the classes of subjects enumerated in s. 91 and s. 92, and an emergency aspect that supports Federal intervention in matters normally reserved to the Provinces in times of crisis.

Assuming there is no crisis of competition in the nation, one must still consider whether the competition policy expressed in the

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61 (1976), 68 D.L.R. (3d) 453.

legislation being examined is a constitutional matter that is appropriate for triggering the residual aspect of the general power. How can one test whether the subject of a piece of legislation is a matter that is residual under the constitution? To formulate a positive response to that question is perhaps the most difficult task that will face consitutional scholars in the next few years.[62] Certainly to claim the status of a distinct constitutional matter, a subject must have such a degree of natural or at least historical unity that to remove or alter any of its elements would be to substantially change its character. Aeronautics and telecommunications are often cited as examples.

While the necessary elements of a proper classification formula are not yet clear, a majority in the *Anti-Inflation Reference* did agree that it was not sufficient to merely gather up a collection of subjects, each properly within an enumerated class under the Constitution, place a single label on the collection, and then claim that it constituted a distinct matter that could not be accommodated by an enumerated class and must therefore be a residual matter exclusively reserved to Parliament. "Inflation" was not accepted as a constitutional matter within the exclusive jurisdiction of Parliament because to legislate with respect to inflation really meant to legislate with respect to monetary policy, taxation, labour relations, contracts, professions, government employees, etc. and each of these were already recognized, either by the constitution or jurisprudence as separate and distinct matters which had been alloted between the two levels of government.

It seems that a strong argument can be made that "competition policy" is such a collection with a convenient label rather than a distinct and residual matter with a natural and indivisible unity. Anti-competitive contracts, torts and crimes were actionable at law long before Confederation and were implicitly recognized as distinguishable constitutional matters when jurisdiction over civil and criminal law was separated in the *B.N.A. Act.* The importance of tariffs and patents in any overall competition policy was well understood in 1867 and yet, rather than being residual and linked, each was included in a separate enumerated head of power.[63] The power to grant monopolies was a traditional royal prerogative that was subsumed in the Provincial jurisdiction over the incorporation of companies with provincial objects.[64] Can it seriously be contended that our Constitution either explicitly or implicitly contemplates

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62 See "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation", W.R. Lederman (1975), 53 C.B.R. 597.

63 S. 91(2) and 91(22) of the *B.N.A. Act.*

64 S. 92(11) of the *B.N.A. Act.*

that "competition policy" should be a distinct and residual matter under the exclusive jurisdiction of the Federal Parliament when the essential elements of such a policy, which were recognizable as such in 1867, were so deliberately portioned out between the two levels of jurisdiction? This may be seen by some as a defect in our Constitution in the same way that many people see s.93 of the *B.N.A. Act* as a defect in that it precludes a national educational system. Those are political arguments for constitutional reform. As legal arguments they must fall before the plain meaning of and the established jurisprudence on our Constitution.[65]

The Last, Best Hope - The Regulation of Trade and Commerce

If it is accepted that the general power is of no assistance, the last hope of constitutional refuge for those parts of the new competition legislation which cannot stand as criminal law is s. 91(2) of the B.N.A. Act. It is natural that proponents of the legislation should look to this section for support. Most of the innovations in the competition law which are open to challenge are at least generally modeled after the processes of the American Federal Trade Commission which have found their constitutional support in that section of the American Constitution granting to the Federal government the power "to regulate commerce with foreign nations and among the several states and with Indian tribes". *Prima facie* the grant of power under our s. 91(2) is much broader and there is little doubt that if it were read and applied literally and in isolation, Parliament's authority to enact the whole of the new *Act* and the new *Bill* would not be open to question.

But constitutions are more than just a collection of words and the process of constitutional adjudication is more than a grammatical exercise. Constitutions are the codifications of bargains between particular peoples which attempt to accommodate their often conflicting histories and project their often conflicting hopes. They are interpreted not in the abstract, but in the course of events by men who have their own historical and political conceptions of the scope and purpose of those bargains. In that light it is not unusual that the same words in similar constitutions should entail different results. In that light, the expanded scope given to the Federal commerce power in the United States is not difficult to understand. But even in that light, the extent to which the Privy Council restricted the Trade and Commerce power in Canada has been impossible for many Canadian constitutional scholars to accept.

The litany of cases, beginning with *Citizens Insurance Co. v. Parsons*[66] that in their eyes eviscerated s. 91(2), is familiar. For the

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65 See Hogg and Grover, *supra*, 15 for the other side of this argument.

66 (1881), 7 App. Cas. 96.

purpose of this paper only the result is important. And that result was a Trade and Commerce power that was capable only of exercising authority over foreign trade, interprovincial trade and the "general regulation of trade and commerce in Canada". It did not include the power to regulate contracts or particular trade or businesses in a province and the jurisdiction over interprovincial trade did not extend to even the regulation of intraprovincial transactions incidental to such trade. The "general regulation" seemed to encompass little more than the incorporation of Dominion companies.

After appeals to the Privy Council were abolished in 1949, Canadian courts began to revitalize the Trade and Commerce power to a certain extent. They have given a generous interpretation to the power over foreign and inter-provincial trade so as to allow the regulation of particular trades in a province, [67] and even intra-provincial transactions, [68] as long as that regulation is necessarily incidental to a scheme of foreign or inter-provincial trade in various products such as wheat or oil. They have been almost as vigilant in protecting this Federal domain from Provincial interference as the Privy Council was against Federal encroachments on property and civil rights. [69] Although the Supreme Court has never strayed beyond the boundaries laid down in *Parsons,* [70] and although it has never claimed that Parliament could proceed into the direct regulation of intra-provincial transactions or contracts or businesses with no real connection to inter-provincial or foreign trade, it has indicated a willingness to seek out or at least recognize such a connection in cases where its significance might not be obvious to all observers.

The drafters of the new competition legislation could have taken direct advantage of this trend in the jurisprudence. In particular they could have set out in each section of Part IV.1 that the practice was not to be reviewable unless it was having, or would have, a significant effect on inter-provincial or foreign trade and commerce. This would have limited the purview of the legislation to some extent, of course, but it would probably not be difficult to show such an effect in most of the practices presently dealt with in Part IV.1. Meanwhile, the constitutionality of the legislation itself would be beyond reproach. However, as presently framed, Part IV.1 seems to contemplate a Federal jurisdiction over contracts and business

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67 *Murphy v. C.P.R. and A.-G. Can.*, [1958] S.C.R. 626; *Caloil Inc. v. A.-G. Canada,* [1971] S.C.R. 543.

68 *R. v. Klassen* (1959), 20 D.L.R. (2d) 406 (Man. C.A.).

69 *A.-G. Manitoba v. Manitoba Egg and Poultry Association* [1971] S.C.R. 689.

70 *Supra,* 66.

structures and business practices that are wholly intra-provincial, wholly local and private in nature, wholly to do with property and civil rights in the provinces. Simply stated, there is no precedent or authority for such a claim of jurisdiction by Parliament.

But while Parliament has presented a bold stand in Part IV.1, it has also prepared what might be seen as a convenient escape route in s. 39 of the *Bill* which would add the following section to the *Act:*

> Nothing in this Act shall be construed as authorizing the Board to make an order in respect of any matter that is not within the legislative authority of Parliament.

This provision would seem to insulate the powers granted to the Board in Part IV.1 from constitutional challenge except by means of a reference. If one were to convince a court that no Federal agency could possess the constitutional authority to issue any particular order being complained of, that would only go to show, because of this section, that the Board had acted outside the jurisdiction granted to it by the Act and not that Parliament had acted outside the jurisdiction granted it by the Constitution. Such a judicial finding would, of course, effectively preclude the Board from issuing similar orders in the future. In this way the substance of Part IV.1 is opened to an indirect and gradual constitutional refinement while being safely protected from any sudden or complete overturning through a direct constitutional attack. In the meantime, individual orders could be defended on the basis of any accepted head of Federal power, such as that over inter-provincial trade, again without the necessity of defending the vires of the substance of Part IV.1 as a whole.

If the Federal authorities were forced to defend the substance of their legislation, and not just the others issued thereunder, it seems that two avenues would be left to it under the trade and commerce power.

The first would be to argue that the guidelines and processes under Part IV.1 amount to a general regulation of trade in Canada as contemplated in the third aspect of the trade and commerce power set out in the *Parsons*[71] case. Indeed, that is the claim made in the long title that would be added to the Act by s. 1 of the Bill. At present there is no precedent for such a broad application of that third aspect. The scope suggested for it by the Federal Court of Appeal in the *Vapor Canada*[72] case would have been more than sufficient to uphold these provisions but that judgment was of course overruled by the Supreme Court of Canada.[73] In its decision, the

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71 *Supra*, 66.

72 (1972), 33 D.L.R. (3d) 434.

73 *Supra*, 27.

Court said that to codify existing economic torts in a Federal statute while leaving their enforcement to private civil actions did not amount to the "general regulation of trade in Canada". Chief Justice Laskin, who gave the Court's judgment, was careful to distinguish and leave open the issue of the constitutionality of a general scheme of regulation operated by a Federal agency under the third aspect of 91(2), so the decision is by no means fatal to Part IV.1. Not to destroy that hope, but only to qualify it, it should be noted that in the subsequent *Anti-Inflation Act Reference*[74] a majority of the Court was not prepared to find that a general scheme, administered by a Federal agency to regulate the prices and profits and collective agreements of businesses in Canada, was supportable under s. 91(2).

The second possible approach would be to ask the Court to overrule the longstanding dicta in the *Parsons*[75] case, and thus incidentally several leading decisions which have relied upon them, and move toward a more literal interpretation of the grant of power under 91(2). The aim would be to allow Parliament to directly and unabashedly regulate all trade and commerce, including that which is wholly intra-provincial and which has no effect at all on inter-provincial trade. To so decide would not be a case of the court pronouncing on a new constitutional issue, or clarifying an earlier decision whose proper interpretation was in doubt; rather it would be a conscious and substantial reversal of accepted constitutional doctrines which would carry with it a significant transfer to jurisdiction over legislative powers that have been employed for decades. It is not inconceivable that a court might take such a course. But given the current state of Federal-Provincial relations in the country. I frankly believe it would be an unlikely, because irresponsible, initiative.

Conclusions

The conclusions of this analysis can be briefly stated. It is my belief that a significant and severable portion of the new competition policy can be constitutionally justified on the basis of the criminal law power. However, those provisions which clearly reflect the new regulatory approach, particularly Part IV.1 and certain of the special remedies under Part III, may require a different head of constitutional power to support them. The general power is unlikely to satisfy that need so the best remaining prospect is the power to regulate trade and commerce. It is my submission that the present jurisprudence on s. 91(2) is not capable of supporting the entire purported scope of the legislation. However, the "general regulation of trade" aspect of that power might well prove sufficiently malleable in the hands of the Supreme Court to accommodate it.

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74 *Supra*, 61.

75 *Supra*, 66.