View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by York University, Osgoode Hall Law School

Osgoode Hall Law School of York University
Osgoode Digital Commons

Articles & Book Chapters

Faculty Scholarship

1976

The Constitutionality of the Competition Bill

Peter W. Hogg
Osgoode Hall Law School of York University

Warren Grover
Osgoode Hall Law School of York University

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/scholarly_works

This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License.

Recommended Citation

Hogg, Peter W., and Warren Grover. "The Constitutionality of the Competition Bill." *Canadian Business Law Journal* 1.2 (1976): 197-228.

This Article is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.

THE CONSTITUTIONALITY OF THE COMPETITION BILL

*Peter W. Hogg and Warren Grover**

The Competition Bill

Description

The proposed amendments to the Combines Investigation Act which are now (in December, 1975) before the federal Parliament are the result of a long history of study and debate.[1] On July 22, 1966, the Economic Council of Canada was requested to advise the federal Government regarding combines, mergers, monopolies and restraint of trade. In July 1969, in the *Interim Report on Competition Policy* (which is, despite its title, the final report) the Economic Council proposed a new approach to competition policy in Canada. In June 1971, that approach was introduced in legislative form, as Bill C-256 in the House of Commons. After two full years of discussion with all interested parties it was decided to introduce the new policies in two phases. The first phase, which proceeded by way of amendment to the existing Combines Investigation Act, was introduced into the federal Parliament in November 1973 as Bill C-227. In March 1974, the Bill was reintroduced, unchanged, as Bill C-7 and again in October 1974 as Bill C-2. Hereafter we refer to Bill C-2 as the Competition Bill.

The Competition Bill can be divided into six major areas:

(1) The extension of the existing Combines Investigation Act to embrace the service industries.

(2) The extension of the powers of the Restrictive Trade Practices Commission to include the issue of both positive and negative orders where certain specified trade practices or foreign decrees are found to interfere with the competitive process.

(3) The extension of the prohibited practices set forth in the Combines

* The Authors are Professors of Law at the Osgoode Hall Law School of York University. This article is an abridged version of a paper written for the federal Government's Department of Consumer and Corporate Affairs in May, 1975.

[1] Since this article was written, the Bill has received Royal Assent (December 15, 1975) as 1974-75-76, c. 76. The amendments were proclaimed to come into force on January 1, 1976, with the exception of the prohibition on price-fixing in the service sector which was proclaimed to come into force on July 1, 1976.

Investigation Act to include bid-rigging and combinations in the field of professional sports.

(4) The extension of the misleading advertising offences to a wider panoply of consumer related practices, such as double ticketing, lotteries, warranties, pyramid selling, referral selling and bait and switch selling.

(5) The introduction of new forms of relief, including a civil action for damages and the issue of an interim injunction in certain cases.

(6) Procedural changes, including new rules as to the admissibility of evidence, but particularly the granting to the Federal Court of Canada of jurisdiction to try offences alleged to be committed by corporations under the statute, whether or not the accused agrees.

Purpose

The economic and social policies of the Competition Bill are set out in The Economic Council of Canada's *Interim Report on Competition Policy* (1969) which, as explained, is the genesis of the present Bill. The objective of the Bill is to maximize competition within the private sectors in the Canadian economy. The Economic Council summed up the argument by saying that competition policy in Canada reflects a belief that, "over the greater part of the economy, competitive market forces are potentially capable of allocating resources better and more cheaply, with a less cumbersome administrative overhead, than any alternative arrangements such as wholesale public ownership and control, detailed government regulation of enterprise, or self-regulation by large industrial units within a corporate state". (*Interim Report on Competition Policy* (1969), 8).

This view represents, of course, a particular political and economic point of view, and one which does not command universal acceptance even within the Western capitalist countries. But the point is that this is the policy foundation upon which the Competition Bill is built. No Canadian court would be so bold as to reject the policy of the elected Government on the ground that it was mistaken or unwise. We think we may safely assume that the Supreme Court of Canada would feel obliged to accept the assumptions of Government policy which underlie the Competition Bill. In the event of a challenge, it will be vital for the Government to ensure that the policies underlying the Bill are clearly communicated to the court, either through evidence, argument or an extended factum.

National character

It is surely obvious that major regulation of the Canadian economy has to be national. Goods and services, and the cash or credit which purchases them, flow freely from one part of the country to another without regard for provincial boundaries. Indeed, a basic concept of the federation is that it must be an economic union. An over-all national policy is the key to efficiency in the production of goods and services. Each province of the country is differently endowed with natural resources, capital, labour and access to consumers. The result is that each province will be able to produce some products or services more efficiently than others. The introduction of an effective competition policy can be seen as one method to ensure that these differing regional advantages will accrue to the nation as a whole in terms of lower prices, better quality and variety, and increased opportunities for Canadians. Any attempt to achieve an optimal distribution of economic activity must transcend provincial boundaries, for, in many respects, Canada is one huge marketplace. To some extent the marketplace is even international because of the flow of goods, services, cash and credit across international boundaries. But the degree to which Canada remains open to the rest of the world is constitutionally within the legislative power of the federal Parliament. Of course in recent years there has been a general lowering of national trade barriers and an increasing number of international trade agreements. In real terms Canada has become increasingly interdependent with other countries, and even the federal Government's capacity to act is often circumscribed. But the provinces cannot possibly exercise significant control over conditions created by international or national economic forces. (See generally Safarian, *Canadian Federalism and Economic Integration* (Information Canada, 1973)).

The relative unimportance of provincial boundaries has become progressively more obvious as industry has tended to become more concentrated. Improved communications and transportation have increased the mobility of labour, capital and technology, as well as raw materials and the finished product. This mobility has enabled larger business units to develop in order to take advantage of the economies of mass production, mass distribution, and mass advertising. Increasingly, industry is organized on a national or even multi-national basis. Labour tends to be organized on a national or international basis too. These developments carry serious risks that the participants in an industry will

be in a position to control the market for that industry's products and avoid both the bracing wind of competition and effective governmental regulation. With respect to international businesses, it is difficult for even a national Government to exert effective control over an organization which crosses national boundaries and is able to order its affairs in ways which minimize the impact of any one country's laws. It is even more difficult for a province to do so.

With respect to businesses which are confined to Canada, with few exceptions, any individual or corporation, including a provincially incorporated corporation, has the capacity to "walk across" provincial boundaries in order to buy or sell, lend or borrow, hire or fire. In the absence of artificial impediments, therefore, the market for goods and services is competitive on a national basis, and provincial legislation cannot be an effective regulator. Indeed, even a purely local business, such as a corner store or a hairdresser, is within the national or international flow of trade in that the proprietor is in competition with businesses which do extend beyond the locality, and his ability to enter the field in the first place, and to remain in it, may depend upon the control of anti-competitive practices on a national scale. The products he uses in his business will be largely produced and sold to him by corporations which trade nationally and internationally. Even his capacity to move to a different province helps to sustain competition in the market for his goods and services on a national basis, and makes it apparent that local legislation might have unanticipated effects. Competition policy must be national, even in its application to local businesses.

In summary, we believe that the regulation of the competitive sector of the economy can be effectively accomplished only by federal action. If there is no federal power to enact a competition policy, then Canada cannot have a competition policy. The consequence of a denial of federal constitutional power is therefore, in practical effect, a gap in the distribution of legislative powers. We believe that the Supreme Court of Canada would be anxious to avoid the drastic consequence of denying the existence of federal power in light of current economic and social realities.

Constitutional Power

The major provisions of the British North America Act, 1867 which are relevant to this paper are set out below:

> 91. It shall be lawful for the [federal Parliament] to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing . . . the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming with the Classes of Subjects next herein-after enumerated; that is to say,—
>
> . . . . .
>
> 2. The Regulation of Trade and Commerce.
>
> . . . . .
>
> 27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
>
> . . . . .
>
> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,—
>
> . . . . .
>
> 13. Property and Civil Rights in the Province.
>
> . . . . .
>
> 16. Generally all Matters of a merely local or private Nature in the Province.

In order to support the Competition Bill three heads of federal power could be invoked: first, the "peace, order, and good government power" (sometimes called the "general" or "residuary" power), which is contained in the opening words of s. 91; secondly, the "trade and commerce power", which is contained in s. 91(2); and thirdly, the "criminal law power", which is contained in s. 91(27).

We take the view that the appropriate classification of the Competition Bill is as a law in relation to "the regulation of trade and commerce", and that accordingly it is valid under the trade and commerce power. We also consider that a very strong argument can be advanced for its validity under the peace, order, and good government (p.o.g.g.) power. However, we propose to deal first in this paper with the criminal law power. It is the criminal law power which has hitherto been regarded as the constitutional base of anti-combines legislation in Canada, and so it seems desirable to first consider the line of cases which has made that approach necessary. Our description of this line of cases will also show that some parts of the Competition Bill are undoubtedly valid as criminal law and that the remainder is arguably valid as criminal law.

Our paper will then turn to the "trade and commerce" power, and will show that this power, which was virtually suppressed by the Privy Council under Lord Haldane, is now resuming its place as an important

head of federal legislative power. It will be established that the weight of authority now gives support for a confident argument that the Competition Bill would be upheld as a "regulation of trade and commerce" by the present Supreme Court of Canada.

Then we shall consider the p.o.g.g. power, and we shall show that its history closely parallels that of the trade and commerce power. After an aberrant period when Lord Haldane dominated the Privy Council in Canadian appeals, there has been a steady development of the p.o.g.g. power to the point where it may now be available as support for any law which "goes beyond local or provincial concern or interest and must from its inherent nature be the concern of the Dominion as a whole". We shall show that the Competition Bill probably satisfies that test.

The "Criminal Law" Power

History

The federal Parliament, under s. 91(27) of the B.N.A. Act, has the power to enact "criminal law". This is the power which has hitherto been relied upon as the primary constitutional support for Canada's anti-combines legislation.

The first anti-combines statute was enacted by the federal Parliament in 1889. It was intended to be a criminal law, and in 1892 the provisions were transferred to the Criminal Code. Machinery for investigation and for cease and desist orders was added in 1910. This statute was not challenged in the courts.

In 1919 a more ambitious regime of regulation was enacted by the Combines and Fair Prices Act and the Board of Commerce Act. These two statutes prohibited the hoarding of necessaries of life (which were defined as staple foods, clothing and fuel), and they prohibited profiteering in necessaries of life. A court of record called the Board of Commerce was created with power to determine when a seller was making an unfair profit from necessaries of life, and with power to issue cease and desist orders which in effect enabled the Board to fix maximum prices. In the *Board of Commerce* case (*Re Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919,* [1922] 1 A.C. 191, 60 D.L.R. 513), the Privy Council, speaking through Viscount Haldane, held that the legislation was invalid. Much more will be said about the *Board of Commerce* case later in this paper, but we might as well briefly explain the reasoning here: the p.o.g.g.

power was of no avail because it was available only to meet emergency conditions; the trade and commerce power was of no avail because it had no independent content and could be invoked only as ancillary to other federal powers; and the criminal law power was of no avail because it was available only where "the subject matter is one which by its very nature belongs to the domain of criminal jurisprudence." ([1922] 1 A.C. 191, at pp. 198-9). Viscount Haldane's judgment in the *Board of Commerce* case is remarkable in that each of the three reasons given for rejecting federal power has subsequently been expressly repudiated by later decisions of the Privy Council, and is undoubtedly no longer part of the constitutional law of Canada. It does not necessarily follow that the result is wrong, but if the result is right it must be for reasons which are not expressed in the judgment. So far as the p.o.g.g. power and the trade and commerce power are concerned, these will be discussed later in this paper. For the present, we shall consider the criminal law power.

Viscount Haldane's view that the criminal law power should be confined to "the domain of criminal jurisprudence" appeared to contemplate that there were historical bounds to the criminal law which precluded the creation, if not of new crimes, at least of crimes which were substantially different from those in existence in 1867. This view cast doubt upon whether any anti-combines legislation could be supported under the criminal power. But the federal Government persevered. In 1923 the federal Parliament enacted a new Combines Investigation Act. This Act repealed the two 1919 statutes, and replaced them with a prohibition of certain anti-competitive "combines". The new Act granted investigatory powers to a registrar and commissioners, but these officials were not given the power to order the cessation of anti-competitive activities. In the *P.A.T.A.* case (*Proprietary Articles Trade Association v. A.-G. Can.*, [1931] A.C. 310, [1931] 2 D.L.R. 1), the Privy Council, speaking through Lord Atkin, upheld the validity of this 1923 legislation as criminal law. Lord Atkin said at p. 324 that it was

> . . . of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of "criminal jurisprudence"; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.

Lord Atkin's definition of the criminal law as no more than a prohibition coupled with a penalty arguably stated the position too

broadly. There has been no disposition in later judgments or commentary to revert to Viscount Haldane's domain of criminal jurisprudence, but there have been suggestions that an element of moral opprobrium or group welfare purpose should be added to the definition, so as to impose some limitation on the federal Parliament's criminal law power. (For discussion, see McDonald, "Constitutional Aspects of Canadian Anti-Combines Law Enforcement", 47 Can. Bar Rev. 161 (1969), at pp. 184-6; Laskin, *Canadian Constitutional Law*, 4th ed. (1973), at pp. 822-5). But the *P.A.T.A.* case placed beyond doubt that the criminal law was capable of expansion into the world of commerce, and later changes in the anti-combines laws have been premised on this broad view of the criminal law.

The federal Parliament in 1935 enacted a new anti-combines statute, which was upheld by the Privy Council under the criminal law and trade and commerce powers in *A.-G. Ont. v. A.-G. Can.*, [1937] A.C. 405, [1937] 1 D.L.R. 702. In this case a tribunal power to approve certain practices and relieve them from prosecution (advance clearance) had been held unconstitutional by the Supreme Court of Canada (*Reference re Dominion Trade and Industry Commission Act*, [1936] S.C.R. 379, [1936] 3 D.L.R. 607); this part of the Supreme Court's decision was not taken on appeal to the Privy Council, but the Privy Council reversed the Supreme Court on some other points and it is possible that it would not have upheld the Supreme Court on this one (McDonald, 47 Can. Bar Rev. 161 (1969), at p. 179). Another statute enacted in 1935 was a prohibition on price discrimination which was added to the Criminal Code. This statute was upheld as valid criminal law by the Privy Council in *A.-G. B.C. v. A.-G. Can.*, [1937] A.C. 368, [1937] 1 D.L.R. 688, affg [1936] S.C.R. 363, [1936] 3 D.L.R. 593. In 1951 the federal Parliament prohibited resale price maintenance, and this was upheld as valid criminal law by the Supreme Court of Canada in *R. v. Campbell* (1965), 58 D.L.R. (2d) 673*n*, affg 46 D.L.R. (2d) 83 (Ont. C.A.). In 1952 the federal Parliament authorized the courts to make orders prohibiting the continuation of illegal practices, or dissolving an illegal merger, in addition to imposing conventional criminal sanctions. The constitutionality of a prohibition order was challenged in *Goodyear Tire & Rubber Co. of Canada Ltd. v. The Queen*, [1956] S.C.R. 303, 2 D.L.R. (2d) 11 and upheld as valid criminal law by the Supreme Court of Canada.

It can be seen that there is abundant support for the statement by

Laskin that "resort to the criminal law power to proscribe undesirable commercial practices is today as characteristic of its exercise as has been resort thereto to curb violence or immoral conduct" (*Canadian Constitutional Law*, 4th ed. (1973), at p. 824).

Competition Bill's new criminal offences

In the light of the history of the constitutional challenges to the anti-combines laws, some parts of the Competition Bill can be confidently accepted as valid criminal law. Any outright prohibitions of trade practices are bound to be upheld as criminal law. Thus, the extension of prohibitions to businesses not formerly subject to the Combines Act, *e.g.*, to the professions and to other providers of services, is valid. The same conclusion follows with respect to the Bill's extension of prohibitions to conduct not formerly specifically proscribed, *e.g.*, implementation of foreign conspiracies (s. 32.1), bid-rigging (s. 32.2), anti-competitive sports practices (s. 32.3), misleading advertising (s. 36), misrepresentation of tests or testimonials (s. 36.1), double ticketing (s. 36.2), pyramid selling (s. 36.3), referral selling (s. 36.4), bait and switch selling (s. 37), sale above advertised price (s. 37.1), improper contests (s. 37.2), resale price maintenance (s. 38). Investigative powers to consider the laying of a criminal charge have also consistently been upheld as valid criminal law, and provisions in the new Bill which add to such powers are also clearly constitutional (ss. 18, 20, 27).

Restrictive Trade Practices Commission's new powers

The Competition Bill does, however, contain a number of provisions which cannot be confidently accepted as valid *criminal* law. The Bill gives some new powers to the Restrictive Trade Practices Commission. In ss. 31.2 to 31.6 the Commission is empowered to inquire into the question whether a particular adverse practice is occurring, and then to make an order compelling particular parties to rectify the situation. This goes beyond what has previously been upheld as criminal law because (1) the inquiry by the Commission is not a preliminary step towards criminal prosecution; (2) an order can be made without any prior conviction for a criminal offence; and (3) if the provisions can be upheld as within the criminal law power, they may have the effect of turning the Commission into a court of criminal jurisdiction. These three points

make the status as criminal law of these Commission powers questionable.

There has so far been no decided case in which a tribunal's regulatory power (as opposed to investigatory power) has been characterized as criminal law. And certainly in most contexts such a characterization would be implausible. In the Competition Bill, however, it could be argued that the Commission's powers are incidental to the criminal offences in the Bill. In fact the practices over which the Commission is given power have been stigmatized as contrary to the public interest in various reports by the Restrictive Trade Practices Commission (R.T.P.C. Report No. 1, Concerning the Manufacture, Distribution and Sale of Ammunition in Canada (Ottawa 1959), (refusal to deal); R.T.P.C. Report No. 9, Concerning the Production and Supply of Newspapers in the City of Vancouver (Ottawa 1960) (tying of newspaper advertisements); R.T.P.C. Report No. 18, On an Inquiry into the Distribution and Sale of Automotive Oils etc. (Ottawa 1962) (full-line forcing and directed buying)). They are all practices which either could be criminal themselves or could develop into criminal practices.

Would the Supreme Court of Canada be prepared to uphold the Commission's new powers as criminal law? The *Board of Commerce* case would be one roadblock, but that case's "domain of criminal jurisprudence" reasoning may lead the Supreme Court to overrule it, or ignore it, or distinguish it in one of the ways suggested later in this paper. Another obstacle is the Supreme Court of Canada's rejection of a tribunal's advance clearance power in *Reference re Dominion Trade and Industry Commission Act, supra,* but, as we explained above, other parts of that same decision were reversed by the Privy Council (*A.-G. Ont. v. A.-G. Can., supra),* and the advance clearance point was not appealed.

More favourable to the validity as criminal law of the Commission's regulatory powers is the broad statement of the criminal law power which is to be found in *Goodyear Tire & Rubber Co. of Canada Ltd. v. The Queen, supra.* In that case, where it will be recalled the validity of a prohibition order was in issue, Locke, J., in an opinion concurred in by five other members of the court, said at p. 308 that:

> The power to legislate in relation to criminal law is not restricted, in my opinion, to defining offences and providing penalties for their commission. The power of Parliament extends to legislation designed for the prevention of crime as well as to punishing crime.

This is interesting in that it shows that Locke, J., was not viewing the power to make prohibition orders as merely an additional penalty for a crime which had been committed, but rather as a measure directed to prevent criminal activity in the future. If indeed "prevention" is on the same basis as "cure" (as Viscount Simon said in *A.-G. Ont. v. Canada Temperance Federation*, [1946] A.C. 193 at p. 207, [1946] 2 D.L.R. 1, quoted by Locke, J., at p. 309), then one could make an argument that the fact that the Commission's regulatory powers are designed to prevent conduct which either would be criminal or could develop into criminal conduct is sufficient to uphold the powers as criminal law.

We consider that the argument for treating the Commission's regulatory powers as criminal is merely a subsidiary argument. The principal argument for their validity is not that they are valid under the criminal law power, but that they are valid under the trade and commerce power and the p.o.g.g. power. We explain later why we consider that trade and commerce and p.o.g.g. are the more appropriate classifications. If we are correct in our view of the scope of trade and commerce and p.o.g.g., then there will be no need to classify the Commission's powers as criminal, and no need to regard the Commission as a court of criminal jurisdiction. If, however, the Supreme Court did unexpectedly decide to revive the old narrow conceptions of trade and commerce and p.o.g.g. which we believe are now dead, then as a compensatory measure it would probably be willing to concede a broad scope to the criminal law power. This is in effect what happened in the Privy Council, where the narrowing of trade and commerce and p.o.g.g. led to a broadening of criminal law. If (contrary to our opinion) this is to be the approach of the Supreme Court of Canada, then there is an argument in favour of sustaining the Commission's powers as valid criminal law.

Civil cause of action

Section 31.1 affords a civil remedy in damages to a person who has suffered loss or damage as a result of either "conduct that is contrary to any provision of Part V" (the criminal offences of the Act), or "the failure of any person to comply with an order of the Commission or a court under this Act". Obviously, if, as we argue later, the Competition Bill can be sustained under the trade and commerce power or the p.o.g.g. power, there could be no serious challenge to the creation of a civil cause of action in the statute. It is only the criminal law power

which by its very nature contemplates primarily public rather than private enforcement. There is no reason to suppose that the Parliament's other heads of power place any limits on the mode of enforcement which Parliament may adopt, for example, the industrial property statutes clearly envisage civil actions. In our view this is probably the short and conclusive answer to the validity of the civil remedy.

However, if (contrary to our view) the Bill can be sustained only under the criminal law power, the validity of the civil remedy would have to stand or fall as a criminal law. The courts have been ready to accept as valid "criminal law" a wide range of penalties for breach of a statute, and it is likely that restitution of property or compensation for loss to the victim would be valid (Laskin, *Canadian Constitutional Law*, 4th ed. (1973), at p. 836; *Re Torek and The Queen* (1974), 44 D.L.R. (3d) 417, 2 O.R. (2d) 228 (H.C.J.)). But s. 31.1 goes further than this in that it contemplates a separate civil action for damages, and thus an award of damages outside the criminal process altogether. There is not even a requirement that the defendant has been convicted of the criminal offence which is alleged to have caused the loss. The plaintiff would simply prove the facts relied upon in his civil suit.

The question whether the federal Parliament has the competence to confer a separate civil right of action for breach of a criminal statute has been the subject of conflicting judicial dicta. In two cases plaintiffs have sued for damages for breach of the anti-combines laws. In each case the plaintiff lost on the basis of statutory interpretation: the legislation was interpreted as not purporting to confer a civil right of action. In the first case there are *obiter dicta* in the Ontario Court of Appeal which suggest that the federal Parliament would in any case have no constitutional power to confer a civil right of action for breach of a criminal statute (*Transport Oil Ltd. v. Imperial Oil Ltd. and Cities Service Oil Co. Ltd.*, [1935] O.R. 215 at p. 219, [1935] 2 D.L.R. 500 *per* Middleton, J.A.). But in the second case the Supreme Court of Canada doubted the correctness of the *Transport Oil* dicta (*Direct Lumber Co. Ltd. v. Western Plywood Co. Ltd.*, [1962] S.C.R. 646 at pp. 649-50, 35 D.L.R. (2d) 1 *per* Judson, J.). Laskin, (*Canadian Constitutional Law*, 4th ed. (1973), at pp. 832-8) reports this difference of opinion, and some related controversies, but does not take sides himself. McDonald, ("Constitutional Aspects of Canadian Anti-Combines Law Enforcement", *supra*, at p. 228) takes the view that the federal Parliament does have the power, as an incident to its criminal law power, to add a civil

cause of action to a criminal statute. This is probably the better view, on the basis both of the weight of authority and upon the expansive approach of the courts to the criminal law power. We conclude, therefore, that the civil cause of action can probably be upheld as incidental to a valid criminal law.

We must repeat, however, that any doubt about the validity of the new civil cause of action disappears altogether if the Competition Bill is supported under the trade and commerce power or the p.o.g.g. power: the civil action is clearly valid under either of those heads.

Powers of federal court

Under s. 29.1 of the Competition Bill "a court" has jurisdiction to issue an interim injunction to prohibit the commission of an offence pending prosecution of the offender. The term "court" is defined in s. 29.1(8) as meaning "the Federal Court of Canada or a superior court of criminal jurisdiction as defined in the Criminal Code". This power to issue an injunction is almost certainly valid, even as criminal law, since it is specifically addressed to the commission of criminal offences during the period prior to prosecution and conviction. But the question arises: is investment of jurisdiction in the Federal Court of Canada valid?

Under s. 46 the Federal Court of Canada is given jurisdiction to try criminal offences created by the new Bill. Is this valid?

It will be recalled that a similar question was raised, but not answered, in the discussion of the Commission's new powers — on the assumption (which we believe to be incorrect) that those powers can only be upheld as criminal law.

What is involved in the previous paragraphs is the question whether the federal Parliament has the power to invest with criminal jurisdiction a court of its own creation. The reason why this is unclear is that the B.N.A. Act, by s. 91(27), confers on the federal Parliament the power to make laws in relation to "the criminal law, *except the constitution of courts of criminal jurisdiction,* but including the procedure in criminal matters". What is contemplated by s. 91(27) is that the federal Parliament will enact the substantive and procedural criminal law, but will vest jurisdiction in provincially-established courts. The provincial Legislatures, by s. 92(14), are given power to make laws in relation to "the administration of justice in the province, including the constitu-

tion, maintenance, and organization of provincial courts, both of civil *and of criminal* jurisdiction . . . ".

The federal Parliament does however have power to create federal courts under s. 101 of the B.N.A. Act. Section 101 authorizes the constitution of (1) "a general court of appeal for Canada", and (2) "any additional courts for the better administration of the laws of Canada". It is the latter branch of this section which provided the constitutional power for the establishment of the Exchequer Court in 1875, and of the Federal Court of Canada in 1972. It is arguable that s. 101 authorizes the constitution of a federal court of criminal jurisdiction, because s. 101 is expressed to apply "notwithstanding anything in this Act". The notwithstanding clause is arguably sufficient to overcome the exclusion from s. 91(27) of "the constitution of courts of criminal jurisdiction". On the other hand, it is possible for the courts to "read down" the notwithstanding clause in s. 101 as not overriding the more specific exclusion in s. 91(27), especially as s. 91 itself includes a notwithstanding clause. There is no decided case on point, and commentators are disagreed. McDonald (47 Can. Bar Rev. 161 (1969), at pp. 220-5) favours the narrower view, while Laskin (*Canadian Constitutional Law*, (4th ed. (1973), at p. 793; compare 3rd ed. rev. (1969), at p. 818 (same proposition)) favours the broader view that the federal Parliament does have the power to constitute a court of criminal jurisdiction.

The issue is complex, and we do not wish to embark in this short paper on the extended argumentation which it justifies, but we have concluded that the investment of criminal jurisdiction in the Federal Court of Canada is probably valid. It is worth pointing out that this issue would not be by-passed by a holding that the Bill is valid as an exercise of the trade and commerce power or the p.o.g.g. power. Such a holding would not alter the facts that there are criminal offences in the Bill, that the jurisdiction to try those offences is a criminal jurisdiction, and that it has been invested in a federal court. With respect to the powers of the Restrictive Trade Practices Commission, the issue would be by-passed by the Bill being upheld as an exercise of the trade and commerce power or the p.o.g.g. power, because then the Commission's powers would be properly classifiable as non-criminal.

The "Trade and Commerce" Power

Early interpretation

The federal Parliament, under s. 91(2) of the B.N.A. Act, has the

power to make laws in relation to "the regulation of trade and commerce."

Despite the breadth of this language, the Privy Council severely confined the trade and commerce power. Their lordships held that it did not authorize the regulation of intraprovincial transactions because these were matters of "property and civil rights in the province", within provincial jurisdiction under s. 92(13). In *Citizens Insurance Co. v. Parsons* (1881), 7 App. Cas. 96, the Privy Council held that the provinces had the power to regulate the terms and conditions of insurance policies. The federal Parliament's trade and commerce power did not "comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province". What the trade and commerce power would comprehend was (1) interprovincial and international trade, and, (2) "general regulation of trade affecting the whole Dominion".

The *Citizens Insurance* definition of the trade and commerce power is still frequently cited as authoritative. But of course its two categories are very vague, and there have been many vicissitudes in their application by the courts. Without going into detail, it is generally accurate to assert that the Privy Council during the period when it was dominated by Lord Haldane (1912 to 1928 was Lord Haldane's tenure) gave both categories a very narrow scope. The nadir of the power came in the *Board of Commerce* case, a case which has already been discussed in this paper (pp. 202-3 above), in which the Privy Council, speaking through Lord Haldane, struck down the Combines and Fair Prices Act, which was the anti-combines legislation that comes closest to our present Competition Bill. In that case, Lord Haldane suggested in argument that the trade and commerce power had no independent content and could be invoked only as ancillary to other federal powers. In the judgment itself the trade and commerce power was rejected in one uninformative sentence (p. 198): s. 91(2) "did not, by itself, enable interference with particular trades in which Canadians would . . . be free to engage in the Provinces".

No attempt was made by the Privy Council to resurrect the trade and commerce power until after Lord Haldane died in 1928. In 1929 the *P.A.T.A.* case, which has already been discussed in this paper (p. 203 above), came before the courts. It will be recalled that in this case the Combines Investigation Act was upheld as an exercise of the criminal law power. However, the Privy Council, now speaking through Lord Atkin, in an *obiter dictum* specifically rejected Lord Haldane's notion that the trade and commerce power could only be used in furtherance of

a power that Parliament possessed independently of it. Lord Atkin said at p. 326 that the words of the trade and commerce power "must receive their proper construction where they stand as giving independent authority to Parliament over the particular subject-matter", and he explicitly stated that their Lordships were leaving open the question whether the Combines Investigation Act could be sustained under the trade and commerce power as well as under the criminal law power.

In 1936 another reference was heard by the Supreme Court of Canada relating to one of the anti-combines laws, namely, a federal statute providing that persons in any of certain specific industries could enter into rationalization agreements after approval by the Governor-in-Council on the advice of a Commission: *Reference re Dominion Trade and Industry Commission Act,* [1936] S.C.R. 379, [1936] 3 D.L.R. 607. Chief Justice Duff wrote the judgment for a unanimous court and held the legislation *ultra vires*. In so doing he stated at p. 382:

> If confined to external trade and interprovincial trade, the section might well be competent under head no. 2 of section 91; and if the legislation were in substance concerned with such trade, incidental legislation in relation to local trade necessary in order to prevent the defeat of the competent provisions might also be competent. . . .

While there was no appeal to the Privy Council on this particular part of the statute, the other sections which were struck down by the Supreme Court were upheld in the Privy Council, *A.-G. Ont. v. A.-G. Can.,* [1937] A.C. 405, [1937] 1 D.L.R. 702. Specifically the Board held that the trade and commerce power would uphold the creation and regulation of a uniform law of trade marks. Thus, by 1937, it was clear that the "general" trade and commerce power gave some power of uncertain scope to establish uniform laws across Canada in the economic sphere even if those laws affected property and civil rights.

Since the abolition of appeals to the Privy Council in 1949 there has been a steady expansion of the trade and commerce power. In order to understand the nature and extent of this expansion it seems desirable to look briefly at the cases dealing with the "interprovincial" (and international) trade and commerce power, and then at the cases dealing with the "general" trade and commerce power.

Interprovincial trade and commerce

In a series of marketing cases before the abolition of appeals to the Privy Council, the Privy Council and the Supreme Court of Canada were so strict in their holdings that the trade and commerce power could not extend to intraprovincial trade that they virtually destroyed the effective

federal power to regulate marketing. In *The King v. Eastern Terminal Elevator Co.,* [1925] S.C.R. 434, [1925] 3 D.L.R. 1, the Supreme Court of Canada struck down a federal statute which regulated the grain trade. As is common knowledge (and was recognized by the Judges in the case), very little of Canada's grain is actually consumed in the province of production, and the great bulk of it is exported. Nevertheless, the federal statute had to fasten onto some local operations, and in particular to license and regulate grain elevators, in order to make the scheme effective. The court held that the regulation of local works such as elevators made the scheme invalid. Similarly, in the *Natural Products Marketing* case (*A.-G. B.C. v. A.-G. Can.,* [1937] A.C. 377, [1937] 1 D.L.R. 691), a statute was held invalid which provided for the establishment of marketing schemes for natural products whose principal market was outside the province of production, or which had a partly export market. The Privy Council held the statute invalid because it included within its purview some transactions which could be completed within the province.

The reversal of the Privy Council's anti-federal tendency was discernible in the *Ontario Farm Products Reference (Reference re The Farm Products Marketing Act,* [1957] S.C.R. 198, 7 D.L.R. (2d) 257), a case concerning a provincial statute in which four Judges indicated by implication that federal power would extend to some transactions which were completed within a province. In *R. v. Klassen* (1959), 20 D.L.R. (2d) 406, 31 C.R. 275, the Manitoba Court of Appeal held that a federal marketing statute, designed to regulate the interprovincial and export trade in grain, could as an incident of that regulation impose a quota system on a local feed mill the operations of which were exclusively intraprovincial. This decision appears to be inconsistent with the *Eastern Terminal Elevator* and the *Natural Products Marketing* cases. And yet the Supreme Court of Canada denied leave to appeal. The new development suggested by the refusal of leave to appeal in *Klassen* was confirmed in *Caloil Inc. v. A.-G. Can.,* [1971] S.C.R. 543, 20 D.L.R. (3d) 472, when the Supreme Court of Canada unanimously upheld a federal prohibition on the transportation or sale of imported oil west of the Ottawa valley. The purpose was to protect the domestic industry from the then cheaper imported product. This prohibition clearly caught many transactions which would otherwise have been completed within a province. Yet it was upheld as "an incident in the administration of an extraprovincial marketing scheme."

Also favourable to federal power are two recent cases in which

provincial marketing plans were held to be unconstitutional on the ground that they were in relation to the federal subject-matter of trade and commerce. The *Manitoba Egg Reference* (*A.-G. Man. v. Manitoba Egg and Poultry Association*, [1971] S.C.R. 689, 19 D.L.R. (3d) 169) decided that Manitoba's egg marketing plan, which applied to all eggs in Manitoba, whether produced in Manitoba or imported into Manitoba, was invalid. The primary purpose of the legislation was to protect Manitoba producers, and the efficacy of that object required that imported eggs be controlled on the same basis as domestic Manitoba eggs. The Supreme Court of Canada denied that there was any factual basis for a finding that the legislation was intended to discriminate against out-of-province producers; yet they held that the plan was "designed to restrict or limit the free flow of trade between provinces as such", and because of that was "an invasion of the exclusive legislative authority of the Parliament of Canada over the matter of the regulation of trade and commerce" ([1971] S.C.R. 689 at p. 703 *per* Martland, J.; Laskin, J., at p. 717 is to the same effect). Notice how sweeping this decision is: it does not declare the Manitoba plan invalid only in respect of out-of-province eggs; it declares the entire plan invalid, even though the overwhelming majority of its applications would be to eggs produced in the province. Once again, we see the theory that an interprovincial flow of trade carries even local transactions into the federal trade and commerce power.

A similar approach is evident in the most recent marketing case in the Supreme Court of Canada, namely, *Burns Foods Ltd. v. A.-G. Man.* (1973), 40 D.L.R. (3d) 731, [1975] 1 S.C.R. 494. In that case what was in issue was not an entire provincial marketing plan (as in the *Egg* reference), but an order of the Manitoba Hog Producers' Marketing Board prohibiting Manitoba hog packers from slaughtering hogs in Manitoba unless the hogs had been purchased from the Marketing Board. The order was made in order to stop Manitoba packers from buying hogs directly from producers in Saskatchewan and thereby by-passing the Hog Producers' Marketing Plan, which required all hogs to be purchased through an auction conducted by the Board. The purpose of the impugned order was to subject hogs from outside the province to exactly the same rules as hogs from within the province. The Supreme Court of Canada, by a majority of six to one, held that the order was unconstitutional. According to Pigeon, J., for the majority at p. 737, "the direct regulation of interprovincial trade is of itself a matter

outside the legislative authority of any Province and it cannot be treated as accessory of the local trade."

Manitoba Egg and *Burns Foods* do take a very restrictive view of the provincial power to create an effective marketing scheme under the authority of "property and civil rights in the Province". By the same token, they implicitly accept a broader view of the federal "trade and commerce" power, for whatever is withheld from property and civil rights on the grounds of its extraprovincial effects must be within the trade and commerce power. When these cases are read with *Caloil* it becomes clear that the old Privy Council cases on the trade and commerce power are no longer reliable guides to the prediction of the decisions of the present Supreme Court of Canada under the interprovincial trade and commerce power.

General trade and commerce

There has not been a recent decision of the Supreme Court of Canada defining the "general" trade and commerce power. However, there is an important decision of the Federal Court of Appeal which has been appealed to the Supreme Court of Canada. The case is *Vapor Canada Ltd. v. MacDonald* (1972), 33 D.L.R. (3d) 434, [1972] F.C. 1156. In issue is the validity of s. 7 of the Trade Marks Act which relates to passing off and other like trade practices. Paragraph (*e*) of subsec. 7(1) states that "No person shall . . . do any . . . act or adopt any . . . business practice contrary to honest industrial . . . usage in Canada". Chief Justice Jackett, for the Federal Court of Appeal, held that the whole section, including this paragraph, was valid federal legislation under the general trade and commerce power. He characterized the Act as "a law of general application regulating standards of business conduct in Canada" (p. 449), and concluded that such a law was one for the general regulation of trade affecting the whole country (p. 447).

At the time of writing (December, 1975) the appeal in *Vapor* has been argued in the Supreme Court of Canada, but the Supreme Court has not yet rendered a decision. Obviously, if the position of the Federal Court of Appeal is upheld, it will constitute a more dramatic development of the trade and commerce power than the Competition Bill would require.[2]

[2] See Addendum to this article at p. 227.

Writing about the trade and commerce power in 1963, in a foreword to Smith's book on *The Commerce Power in Canada and the United States* (1963), Ivan Rand said:

> The development of this Dominion power with its vital interest for every part of the country, has been unrealistic and inadequate. In the result, the effective management of the economy as a whole in terms of political and legislative action, of the necessity for which we are now daily witnesses, is shown to have become trammelled to an extent which forces us to contemplate a degree of fresh appraisal of the limitations to which the Dominion has been reduced.

The recent decisions, particularly *Caloil, Manitoba Egg, Burns* and *Vapor* suggest that a fresh appraisal is upon us.

Application to Competition Bill

Relating the current state of the trade and commerce power to the Competition Bill, it is clear that it is the "general" trade and commerce power which provides the most obvious support for the Bill. Here we have a law which aims at the "general regulation of trade affecting the whole Dominion" (to quote from the well-known *Citizens Insurance* dictum). But the "interprovincial" trade and commerce power is also equally plausible, for, as explained above, the Competition Bill is designed to facilitate the flow of resources and products throughout the nation without regard for provincial boundaries.

We have no doubt that services are within the term "trade and commerce", although this point appears never to have been decided in Canada, presumably because the federal Parliament has not hitherto attempted to regulate the service industries. There were some suggestions in the early insurance cases that the insurance business was not a "trade", but the cases were not decided on that ground, and, as Laskin comments, no consideration was given to the question whether insurance was "commerce" (Laskin, *Canadian Constitutional Law*, 4th ed. (1973), at p. 346). In the United States it was initially thought that the insurance business was not within the interstate commerce power of the federal Government, but in 1943 that position was reversed by the United States Supreme Court (*U.S. v. South Eastern Underwriters Association* (1943), 332 U.S. 574) and it is now firmly established that all services are included within the reach of the Sherman Act, the constitutional validity of which rests on the word "commerce" alone. The authorities are conveniently gathered in the recent decision in *Goldfarb v. Virginia State Bar* (1975), 95 S. Ct. 2004, in which the Supreme Court of the United States held that the adoption of a minimum

fee schedule by the lawyers who were members of the Fairfax County Bar Association in Virginia constituted price-fixing in violation of the Sherman Act. The supply of services — even by a learned profession — was commerce. In Canada, where the constitutional authority is based on "trade and commerce", rather than just "commerce", it is unlikely that any different result would be reached. Suppliers of services have always been described as people carrying on a trade. Indeed it would be strange if the Competition Bill, which has its common law genesis in the *Dyers* case (1415), Y.B. 2 Hen. V, Vol. 5, pl. 26, (a case involving a restraint in a service industry) were to be restricted so as not to include the service industries. Service industries are now a large part of the total business in the country (see the Economic Council of Canada *Interim Report on Competition Policy,* (1969) Chapter VII), and the flow of services is not confined within provincial boundaries.

The procedural changes introduced by the new Bill, including the new civil action for damages, do not give rise to constitutional difficulty. As was mentioned in the discussion of the civil cause of action under the criminal law power, outside the realm of criminal law there is no suggestion in the cases that would limit the range of procedures and remedies which the Parliament may employ to enforce otherwise valid legislation.

The new powers of the Restrictive Trade Practices Commission are also valid for exactly the same reason. These powers are the means selected by Parliament to carry out part of its otherwise valid regime of competition policy.

The only part of the Competition Bill that does not easily fit into the general scheme of competition policy is the part dealing with consumer protection measures. While these provisions are all prohibitory in nature and are clearly valid under the criminal law power they also could be supported under the "general" trade and commerce power. Honest market legislation, even at the consumer level, is necessary to the proper working of the free enterprise system.

We believe that the case law after Lord Haldane's death in 1928 is uniformly consistent with our conclusions. Indeed, as noticed earlier, in the *P.A.T.A.* case, [1931] A.C. 310, [1931] 2 D.L.R. 1, while the Privy Council upheld the Combines Investigation Act on the basis of the criminal law power, Lord Atkin went out of his way to say (at p. 326) that their lordships desired to guard themselves from being supposed to lay down that the statute could not be supported under the

trade and commerce power. This statement of Lord Atkin was referred S.C.R. 303 at p. 308, 2 D.L.R. (2d) 11, although again the court found it unnecessary to consider the trade and commerce power because it held that the authority of the federal Parliament under the criminal law power was sufficient. Thus there are some judicial dicta supporting the existing Combines Investigation Act under the trade and commerce power. With the extensive amendments proposed by the Competition Bill it would be simpler and more direct to support the statute under that power.

The one real difficulty in the case law is of course the *Board of Commerce* case, dating from the Haldane period. The legislation in the *Board of Commerce* case, while entirely dissimilar in point of detail, is similar to the Competition Bill in its ends and means. Our view of the *Board of Commerce* case is that it was wrongly decided. As we have pointed out, each of the reasons given by Lord Haldane for rejecting the legislation there in issue has subsequently been expressly repudiated. In the light of later cases we believe that the legislation there in issue should have been upheld as an exercise of the trade and commerce power, and perhaps also as an exercise of the peace, order, and good government power (to be discussed next). We are confident that the Supreme Court of Canada would not regard itself as inflexibly bound to follow all of the decisions of the Privy Council in Canadian constitutional appeals. Accordingly, we believe that it would be proper to argue before the Supreme Court of Canada that the *Board of Commerce* case should not be followed, and that the court might be willing to take that step.

In case the Supreme Court of Canada were not prepared to go so far as to overrule or, more accurately, refuse to follow the *Board of Commerce* case, there are several bases upon which the *Board of Commerce* case could be distinguished. First, the *Board of Commerce* legislation was narrower in scope than the Competition Bill, because the former was applicable only to a limited class of products, namely "necessaries of life". Therefore, as Duff, C.J.C., commented in *Reference re Alberta Statutes,* [1938] S.C.R. 100, [1938] 2 D.L.R. 81, (quoted above), the *Board of Commerce* legislation was much closer to "the regulation of the contracts of a particular business or trade" which the older cases consistently held to be outside the federal trade and commerce power. The Competition Bill, by contrast, applies to every trade. Secondly, as Lord Atkin commented in the *P.A.T.A.* case, *supra,* at p. 325 the *Board of Commerce* legislation gave exceptionally broad powers to the Board

of Commerce, going so far as to permit the Board "to inquire into individual cases without applying any principles of general application." The Competition Bill defines the new powers of the Restrictive Trade Practices Commission as specifically as the circumstances permit, and it therefore regulates by the use of rules (or principles) of general application. A third distinction may be found, not in the legislation itself, but in the social and economic environment. The *Board of Commerce* case was decided at the end of the first world war. At that time trade was more local than it is now. Improvements in transport and communications, the growth of concentrated business enterprises organized on a national or multi-national basis, the increase in the number of international agreements relating to trade and commerce, and the general increase in personal mobility have transformed the Canadian economy since the first world war. The Supreme Court of Canada, interpreting the B.N.A. Act as a living tree capable of growth and adaptation, might well be willing to regard the modern social and economic environment as sufficiently different to justify giving the Competition Bill a different constitutional classification from the *Board of Commerce* legislation.

The "Peace, Order, and Good Government" (P.O.G.G.) Power

Early interpretation

The opening words of s. 91 of the B.N.A. Act give to the federal Parliament power "to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces".

It is well known that during the period when Lord Haldane dominated the Privy Council in its Canadian appeals, the Privy Council narrowed the scope of the p.o.g.g. power until it seemed to be available as a regulatory power only in emergencies such as war. Their lordships held that the power could not support an insurance statute, *A.-G. Can. v. A.-G. Alta.*, [1916] 1 A.C. 588, 26 D.L.R. 288; a combines and fair prices statute, *Board of Commerce*, [1922] A.C. 191, 60 D.L.R. 513; a labour relations statute, *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396, [1925] 2 D.L.R. 5; an unemployment insurance statute, *A.-G. Can. v. A.-G. Ont.*, [1937] A.C. 355, [1937] 1 D.L.R. 684; minimum wage and hours of labour statutes, *A.-G. Can. v. A.-G.*

Ont., [1937] A.C. 326, [1937] 1 D.L.R. 673; and a natural products marketing statute, *A.-G. B.C. v. A.-G. Can.*, [1937] A.C. 377, [1937] 1 D.L.R. 691. Even the depression of the 1930's was deemed by the Privy Council of this period to be an insufficient "emergency" to enable the federal Parliament to use the p.o.g.g. power as a basis of economic regulation. Only the first world war was deemed sufficient, *Fort Frances Pulp and Power Co. Ltd. v. Manitoba Free Press Co. Ltd.*, [1923] A.C. 695, [1923] 3 D.L.R. 629; though not the economic dislocation which followed it, *Board of Commerce* case, *supra*.

Lord Haldane's "emergency" doctrine always suffered from two grave difficulties. The first, and most serious, was that it was a highly implausible reading of the B.N.A. Act, because the structure of s. 91 makes clear the the p.o.g.g. power is the primary grant of power to the federal Parliament. The enumerated heads of power in s. 91 are listed merely as examples of the peace, order, and good government power; as s. 91 expressly states, the enumerated heads are listed "for greater certainty, but not so as to restrict the generality of the foregoing terms of this section" — the "foregoing terms" being the p.o.g.g. power. The result of the Haldane construction was to elevate the enumerated heads to the status of an exhaustive list of federal powers, and to reduce the p.o.g.g. power to a further enumerated head called "emergency conditions" or some similar phrase. Such a construction was simply contrary to the express language of s. 91.

The second difficulty with the "emergency" doctrine was *Russell v. The Queen* (1882), 7 App. Cas. 829, a case decided by the Privy Council before Lord Haldane's time. In that case the Privy Council, speaking through Sir Montague E. Smith, held that the p.o.g.g. power was capable of sustaining the Canada Temperance Act, a federal statute which regulated the sale and consumption of liquor on a local option basis. This statute affected property and civil rights in the province, because "the free use of things in which men may have property is interfered with", but "that incidental interference does not alter the character of the law" (p. 839). Actually, their lordships did not commit themselves as to whether the Canada Temperance Act was a matter within p.o.g.g. or trade and commerce, though they clearly leaned towards p.o.g.g. In the *Local Prohibition* case (*A.-G. Ont. v. A.-G. Can.*, [1896] A.C. 348), however, the Privy Council, speaking through Lord Watson, held that the *Russell* case was based on the p.o.g.g. power; and Lord Watson defined p.o.g.g. in terms which did not rely

upon an emergency: p.o.g.g., he said, "ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in s. 92" (p. 360). The inconsistency between *Russell* and the emergency doctrine was so obvious that it evidently troubled Lord Haldane himself, leading him in *Toronto Electric Commissioners v. Snider,* [1925] A.C. 396 at p. 412, [1925] 2 D.L.R. 5, to "explain" *Russell* upon the ground

> . . . that the evil of intemperance at that time amounted in Canada to one so great and so general that at least for the period it was a menace to the national life of Canada so serious and pressing that the National Parliament was called on to intervene to protect the nation from disaster.

Recent interpretation

In *A.-G. Ont. v. Canada Temperance Federation,* [1946] A.C. 193, [1946] 2 D.L.R. 1, a new attack was made upon the Canada Temperance Act, on the basis either that *Russell* was wrongly decided and should be overruled, or that the emergency which (according to Lord Haldane) had been created by the evil of intemperance had now disappeared. The Privy Council, now speaking through Viscount Simon, refused to overrule *Russell* and described Lord Haldane's "explanation" of *Russell* as "too narrowly expressed" (p. 206). Then, in an amazing turnabout, their lordships rejected the emergency doctrine altogether, at p. 205:

> In their Lordships' opinion, the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole . . . then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch upon matters specially reserved to the provincial legislatures.

Legislation which satisfied this test could be called for by an emergency, such as "war" or "pestilence", but it could also be unrelated to an emergency, such as "the drink or drug traffic, or the carrying of arms" (pp. 205-6); " . . . it is the nature of the legislation itself, and not the existence of emergency, that must determine whether it is valid or not" (p. 206). The Privy Council's decision was, therefore, that the Canada Temperance Act was valid.

After the *Canada Temperance Federation* case the Privy Council

reiterated the emergency doctrine several times, either without reference to the *Canada Temperance Federation* case (*Co-operative Committee on Japanese Canadians v. A.-G. Can.*, [1947] A.C. 87, at p. 101, [1947] 1 D.L.R. 577 *per* Lord Wright; *Canadian Pacific Railway Co. v. A.-G. B.C.*, [1950] A.C. 122 at pp. 140-1, [1950] 1 D.L.R. 721 *per* Lord Reid), or with a disapproving reference to the *Canada Temperance Federation* case (*Canadian Federation of Agriculture v. A.-G. Que.*, [1951] A.C. 179 at pp. 197-8, [1950] 4 D.L.R. 689 *per* Lord Morton of Henryton). When appeals to the Privy Council ended in 1949 (*i.e.*, for cases commenced after 1949), the position was thoroughly confused. Was the emergency doctrine still good law, as these cases suggested, or was it now bad law, as *Canada Temperance Federation* had distinctly decided?

Since the abolition of appeals the Canadian courts have invariably and unhesitatingly chosen to apply the *Canada Temperance Federation* test, and to ignore the emergency doctrine. In *Johannesson v. West St. Paul*, [1952] 1 S.C.R. 292, [1951] 4 D.L.R. 609, the Supreme Court of Canada confirmed that aeronautics was a matter within federal legislative competence under p.o.g.g. This was a unanimous decision by the court, and of the five opinions written all but one relied upon the language of the *Canada Temperance Federation* case to support federal legislative power. (The fifth opinion, that of Estey, J., was not inconsistent with the others, but Estey, J., assumed that the issue was settled in the Dominion's favour by the *Aeronautics* case (*Re The Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54, [1932] 1 D.L.R. 58)). For decisions that atomic energy and pollution are also within p.o.g.g. under the *Canada Temperance Federation* test, see *Pronto Uranium Mines v. Ontario Labour Relations Board*, [1956] O.R. 862, 5 D.L.R. (2d) 342 (McLennan, J.); *Denison Mines Ltd. v. A.-G. Can.*, [1973] 1 O.R. 797, 32 D.L.R. (3d) 419 (H.C.J.) (Donnelly, J.); *R. v. Lake Ontario Cement Ltd.*, [1973] 2 O.R. 247, 35 D.L.R. (3d) 109 (H.C.J.) (O'Driscoll, J.).

In *Munro v. National Capital Commission*, [1966] S.C.R. 663, 57 D.L.R. (2d) 753, the Supreme Court of Canada upheld the validity of the National Capital Act, a federal statute which established a national capital region consisting of an area comprising the part of Ontario and Quebec including and surrounding Ottawa. This Act created an agency called the National Capital Commission, and vested in the Commission certain planning powers, including the power to expropriate land. An

expropriation of land led to a challenge to the statute. In upholding the statute Cartwright, J., who wrote for a unanimous court, quoted with approval the *Canada Temperance Federation* test, and said that he found it ''difficult to suggest a subject matter of legislation which more clearly goes beyond local or provincial interests and is the concern of Canada as a whole than the development, conservation and improvement of the National Capital Region . . . .'' (p. 671).

In *Re Offshore Minerals of B.C.*, [1967] S.C.R. 792, 65 D.L.R. (2d) 353, the Supreme Court of Canada held that the federal Parliament had authority to make laws in relation to the mineral resources of the lands underlying the territorial sea off the coast of British Columbia. The authority came either from s. 91(1A) (public debt and property), or from ''the residual power in s. 91''. So far as the latter was concerned, ''the mineral resources of the lands underlying the territorial sea are of concern to Canada as a whole and go beyond local or provincial concerns or interests'' (p. 817). Although the *Canada Temperance Federation* case was not cited, that of course is where the language comes from.

The most recent decision of the Supreme Court of Canada on the p.o.g.g. power is *Jones v. A.-G. Can.* (1974), 45 D.L.R. (3d) 583, [1975] 2 S.C.R. 182 in which it was held that the federal Official Languages Act was valid. This Act, confined as it is to the institutions of the Parliament and Government of Canada, and to federal courts and courts of criminal jurisdiction, could have been upheld under the various powers by which those institutions are created or invested with jurisdiction. A court which was unwilling to make use of the p.o.g.g. power would presumably have followed this route. But Laskin, C.J.C., writing for a unanimous court of all nine members, chose instead to uphold the Act as a law in relation to p.o.g.g. He did not offer any definition of p.o.g.g., but said that he was relying on its ''residuary character'' (p. 589).

Once a statute is characterized as in relation to p.o.g.g. (or any other head of federal power) it is no objection to its validity that it regulates contracts or property or other subject-matters which would otherwise be within provincial jurisdiction. The zoning of land and the expropriation of land are matters of ''property and civil rights in the province'' which would normally be within exclusive provincial jurisdiction, but a federal statute in relation to aeronautics *(Johannesson)* or the national capital region *(Munro)* may validly impose zoning requirements or expropriate

land, because aeronautics and the national capital region are matters within the peace, order, and good government of Canada. It is clear, therefore, that, if the regulation of competition is held to be a matter within p.o.g.g. (or trade and commerce), then federal power will extend to the kind of detailed regulation of contracts, property rights and other matters which would normally be within "property and civil rights" which is contemplated by the Competition Bill.

The *Canada Temperance* definition may now be safely accepted as the law of Canada. However, it is exceedingly vague, and the cases have made no attempt to elaborate more precise rules. In *Canada Temperance* itself, and in *Johannesson, Pronto, Munro, Offshore Mineral Rights, Lake Ontario Cement* and *Denison Mines* the courts simply asserted that the subject-matter in issue satisfied the *Canada Temperance* test. Since the courts have never since the abolition of appeals rejected an assertion of federal legislative competence seriously based upon the p.o.g.g. power, they have never been forced to spell out what are the limits of that power. Nor have the courts so far found it necessary to comment on the authority of the Privy Council cases which were decided on the basis of the now discredited emergency doctrine. We believe that it is possible that some of these cases will not be followed by the Supreme Court of Canada. We have earlier explained that we believe that the *Board of Commerce* case might be overruled. But, at the very least, it can be asserted with some confidence that the court will not be eager to extend to new facts a decision such as *Board of Commerce* whose reasoning depends upon an "emergency" interpretation of p.o.g.g. and an "ancillary" interpretation of trade and commerce. If the Competition Bill is attacked solely on the basis of *Board of Commerce* and the other inter-war Privy Council decisions, then the attack is a weak one.

Application to Competition Bill

There are strong positive reasons for asserting that the Competition Bill satisfies the *Canada Temperance Federation* test, *i.e.*, that it "goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole". We have already explained that Canada is one marketplace with goods, services, cash and credit flowing freely without regard for provincial boundaries. No competition policy could be effective in the ordering of the economy of Canada as a whole if it could not embrace the entire marketplace. In

this respect its national dimensions are similar to those of radio or aeronautics, and, while less similar, arguably as clear as those of the liquor trade, atomic energy, pollution, the national capital region and official languages.

Conclusions

Our conclusion is that the Competition Bill is within the legislative powers of the federal Parliament. There are three constitutional powers to be considered.

(1) Trade and commerce

The strongest argument for the validity of the Competition Bill, in our view, would be based on the ''trade and commerce'' power (B.N.A. Act, s. 91(2)). The Bill is designed to regulate indirectly the economy of the whole country by ensuring competitive markets for Canadian goods and services. The policy is to promote the most efficient allocation of Canada's resources of people and materials by removing artificial impediments to the free flow of resources to those sectors of the economy where they can be best utilized. But Canada is one economy, not ten economies: the flow of resources occurs now, and should occur in the future, without regard for provincial boundaries. The regulation of this flow by competition policy (or any other policy) cannot be accomplished by any one province, or even by all provinces acting in concert. The provinces do not have the constitutional power to do so, and if they did the territorial limits to their competence would doom their efforts to failure. Competition policy is a matter either of ''interprovincial and international trade and commerce'', or of trade and commerce which is ''national in its scope''. As such it is within the federal trade and commerce power. (For elaboration, see pp. 210-19.)

(2) Peace, order, and good government

Nearly as strong is the case for federal power under ''peace, order, and good government'' (B.N.A. Act, s. 91). The question which has to be answered here is whether the Competition Bill deals with a matter which ''goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole''. The national character of the Canadian economy inevitably means that competition policy goes beyond local or provincial concern or interests,

and the objective of securing efficient allocation of Canada's resources through competition policy "must from its inherent nature be the concern of the Dominion as a whole". The Competition Bill is accordingly within the "peace, order and good government" power of the federal Parliament. (For elaboration, see pp. 219-25.)

(3) Criminal law

The arguments based on "trade and commerce" and "peace, order, and good government" go to sustain the validity of the entire Bill. The "criminal law" power is a third possible head of federal power (B.N.A. Act, s. 91(27)), but the strength of its support varies with the various elements of the Bill. The existing Combines Investigation Act and its antecedents have been consistently upheld over the years as criminal law. Much of the present Bill can without question be sustained on the same basis. The new criminal offences in the Bill, which are more extensive (*e.g.* they apply to services) and more detailed (*e.g.* they set out more consumer protection offences) than in the existing Act are undoubtedly valid as criminal law. This is also true of the investigative powers in the new Bill. (For elaboration, see pp. 202-5.)

Less clear is the validity as criminal law of the new regulatory powers of the Restrictive Trade Practices Commission (pp. 205-7), and the civil remedy for individuals who have suffered loss through a breach of the Bill (pp. 207-9). Even these provisions, however, are arguably valid as incidental to criminal law. (For elaboration, see pp. 205-9). However, if the Competition Bill is held to be a valid law within the "trade and commerce" power or the "peace, order, and good government" power, then the validity of the Commission's powers and the civil remedy would not be open to challenge.

A special problem surrounds the vesting of compulsory criminal jurisdiction in the Federal Court of Canada. There is doubt as to whether the federal Parliament has power to vest criminal jurisdiction in a federally-created court or tribunal. Laskin, writing as a law professor, has strongly asserted that the federal Parliament does have the power, but other writers and judges have disagreed. There is no decided case on point, but our view is that Laskin is correct, and that this provision of the Competition Bill is probably valid as well. (For elaboration, see pp. 209-10.)

ADDENDUM

After the foregoing paper was written, but before it was printed, the Supreme Court of Canada rendered its judgment in *MacDonald v. Vapor Canada Ltd.* on January 30, 1976 (not yet reported). The decision of the Federal Court of Appeal in this case, which is described at p. 215 of the paper, was reversed by the Supreme Court of Canada. The Supreme Court held that s. 7(*e*) of the federal Trade Marks Act was unconstitutional. It will be recalled that s. 7(*e*) prohibits business practices which are "contrary to honest industrial or commercial usage in Canada". The principal opinion was written by Laskin, C.J.C., and concurred in by Spence, Pigeon, Dickson and Beetz, JJ. A separate concurring opinion was written by de Grandpré, J., and concurred in by Martland and Judson, JJ. However, de Grandpré, J.'s brief opinion did not indicate any disagreement with Laskin, C.J.C.'s reasoning and did not really do much more than repeat Laskin, C.J.C.'s conclusions.

In addition to the trade and commerce power (and the treaty power with which we are not concerned), there was an argument based on the criminal law power. The criminal law argument was not very strong because the Trade Marks Act did not impose any criminal sanction for breach of s. 7 of the Act. The only sanction was a civil action for injunction, damages or an accounting of profits. However, it was apparently argued that because s. 115 of the Criminal Code imposes a criminal sanction for breach of any federal statute which does not include its own criminal sanction, which would include s. 7 of the Trade Marks Act, s. 7 could be treated as criminal. Such an argument would of course validate virtually any federal law, and Laskin, C.J.C., dismissed it rather easily as "an extravagant posture". However, in what is probably an *obiter dictum,* he went on to say that the *Goodyear Tire* case "does not, in any way, give any encouragement to federal legislation which, in a situation unrelated to any criminal proceedings, would authorize independent civil proceedings for damages and an injunction". This dictum appears to be relevant to pp. 207-8 of the paper, although Laskin, C.J.C., does not refer to the *Direct Lumber* case, in which the Supreme Court of Canada suggested that an independent civil action could be included in a criminal statute. Probably, his remark must be read in the context of a statutory provision which itself contained no criminal sanction.

In rejecting the argument based on the trade and commerce power, Laskin, C.J.C., pointed out that the various prescriptions of s. 7(*a*)

through (*d*) of the Trade Marks Act were simply enactments (with minor modifications) of existing civil causes of action, known both to the common law and the civil law. Section 7(*e*) went beyond existing civil causes of action, but was really only an extension of tortious or delictual liability. As such, s. 7 was confined to matters within provincial jurisdiction. The mere fact that the law applied "throughout Canada" was not "a sufficient peg on which to support the legislation". The position might well have been different, Laskin, C.J.C., said several times, if s. 7 was part of a "regulatory scheme" administered by a "federally-appointed agency". But "such a detached provision [as s. 7(*e*)] cannot survive alone unconnected to a general regulatory scheme to govern trading relations going beyond merely local concern". These qualifications by Laskin, C.J.C., appear to leave untouched the basic argument of our paper that a comprehensive scheme for the regulation of competition throughout Canada, monitored by a federally-appointed agency, is within the trade and commerce power.

There was no discussion in the *Vapor* case of the peace, order, and good government power.