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SMOKING GUNS: THE FEDERAL GOVERNMENT CONFRONTS THE TOBACCO AND GUN LOBBIES

Allan C. Hutchinson and
David Schneiderman

They rode into Ottawa wearing sharp suits and carrying expensive briefcases, accompanied by a posse of well-placed lobbyists and high-priced lawyers. It was a put-up or shut-up showdown between multi-national tobacco companies, RJR-MacDonald and Imperial Tobacco, and the Canadian government. With the eyes of the world upon them, it was constitutional high noon in Ottawa's Supreme Court corral. In dispute was the ability of the federal government to curtail the corporate speech of tobacco companies aimed at inducing consumption of the principal cause of cancer in North America. But there was much more at stake. In the shadow of the tobacco lobby was the equally powerful gun lobby. The fate of gun control legislation passing through Parliament would be threatened by any decision in favour of the tobacco legislation.

As we now know, the tobacco lobby was successful in its efforts to set aside the most restrictive aspects of the *Tobacco Products Control Act*. Much of the commentary on the *RJR-MacDonald*¹ has concentrated on the Charter dimensions of that decision, particularly the implications for the regulation of commercial speech generally. In this comment, we want to take a different focus and concentrate on the federalism implications of the case — the extent of the federal criminal law power. The federal government's 'exclusive' jurisdiction under section 91(27) has always been a difficult and dynamic category of power to circumscribe: its scope is potentially limitless and can subvert the division of powers between the federal and provincial legislatures. With succinct understatement, Justice Estey was close to the mark when he noted that "criminal law is easier to recognise than to define."² In seeking to set some guidelines and limits, the courts have tended to swing between unrealistically narrow and broad interpretations. Striking a considered and consistent balance has proved an elusive task for the courts. As the most

recent effort in this process of delineation and definition, *RJR-MacDonald* gives a progress report on where the Supreme Court is and where it might be going. However, as with so much earlier case law about the criminal law power, there is more smoke and mirrors than anything else.

SMOKE AND MIRRORS

The federal government's power under section 91 to prohibit and regulate commercial advertising came under serious threat in *RJR-MacDonald*. The sobering reality of that threat is dramatized by the disagreement amongst all levels of courts about the source of the federal power to prohibit and regulate tobacco advertising. At the Quebec Superior Court, Chabot J. held that the federal government did not have the power to enact a prohibition on tobacco advertising or require mandatory health warnings; no authority could be found under the federal criminal law power or the 'national dimensions' branch of the peace order and good government power. The Quebec Court of Appeal thought differently. It unanimously held that the federal government could enact the *Tobacco Products Control Act* under the national dimensions branch of POGG. According to the Court, the problem of tobacco consumption in Canada has reached such proportions as to be of national concern, having the singleness, distinctiveness and indivisibility that distinguishes matters of national concern from matters of local provincial concern. The Act, however, could not be justified under the federal criminal law power as tobacco consumption and its promotion by advertising did not have "an affinity with a traditional criminal law concern."³ The Supreme Court of Canada, Justices Sopinka and Major dissenting on this point, agreed with the Quebec Court of Appeal that the Act was a

valid exercise of federal power, but under the federal power to make criminal law; they declined to offer an opinion on its constitutional validity under the POGG power.

Why such confusion among so many and so learned judges about the ambit of the federal criminal law power? Apart from and in addition to the overall indeterminacy of constitutional law, the confusion can be traced back to the decisions of the late nineteenth century Privy Council. By circumscribing the federal regulation of trade and commerce to no one specific trade in *Parsons* and denying jurisdiction to the federal government to prohibit trade other than in the exceptional circumstances that give rise to the exercise of the POGG power, the Privy Council curtailed federal ability to control important economic levers through the trade and commerce power.⁴ But as long as an enactment concerned prohibitions with penal consequences attached,⁵ the criminal law power could serve as the convenient vehicle for every kind of regulation, economic or otherwise — laws prohibiting combinations and price discrimination were justified early in the twentieth century⁶ and, later in the century, those prohibiting resale price maintenance and the continuation or repetition of an illegal combinations were upheld under the criminal law power.⁷ This state of affairs inspired Bora Laskin to write in the third edition of his case-book that “[r]esort to the criminal law power to proscribe undesirable commercial practices is to-day as characteristic of its exercise as has been resort thereto to curb violence or immoral conduct.”⁸

So expansive was this power that the federal government was driven to invoke the criminal law power even to regulate the insurance industry⁹ and to prohibit the production of margarine. In the *Margarine Reference* case, the Supreme Court of Canada decided that enough was enough and tried to place some limits on the criminal law power. In a famous judgment, Justice Rand sought to narrow the unrestricted scope of the criminal law power to those laws that had a “criminal public purpose.” He maintained that such ends were served by laws which had as their purpose “public peace, order, security, health, morality” because these were the “ordinary though not exclusive ends served” by the criminal law.¹⁰ Decades later, the criminal law power still retains pivotal importance as the repository of much that was denied the federal government under its general power over trade and commerce.¹¹ Nevertheless, it is hard to reach any other conclusion than that Rand’s ‘triple-p’ formula — prohibition + penalty + pur-

pose — only starts off any rigorous doctrinal analysis; it does not and cannot complete the task without much more.

In *RJR-MacDonald*, the Supreme Court was asked by the tobacco manufacturers to find the *Tobacco Products Control Act* beyond federal competence as being largely in the nature of economic regulation within the scope of provincial jurisdiction. The Court refused the invitation, accepting that the criminal law could justify federal intervention in the powerful tobacco manufacturing industry by hampering its alluring packaging and prohibiting its advertising campaigns.

Writing for the majority of the Court, Justice La Forest concluded that the restriction of advertising and the requirement of mandatory labelling qualified as an exercise of the criminal law power. The pith and substance of the Act — that process of identifying the dominant purpose of legislation which drives the constitutional analyses in division of powers cases — was identified as a concern with public health.¹² Health is not an enumerated head of power, but is rather a subject matter of divided jurisdiction over which the provinces and the federal government have an interest. Indeed, Justice Rand had earlier confirmed health as one of the ordinary ends served by the criminal law, that of safeguarding the public from “injurious or undesirable effect.”¹³ According to La Forest J., the scope of the federal power to create criminal legislation with respect to health matters is broad, and is “circumscribed only by the requirements that the legislation must contain a prohibition accompanied by a penal sanction and must be directed at a legitimate public health evil.”¹⁴ That is, the law must not be a colourable attempt to intrude into the realm of provincial jurisdiction. By way of example, La Forest J. argues that a law would be colourable if it pertained only to a particular industry (*Parsons* and *Labatt*) or only to the regulation of advertising generally (*Irwin Toy*). He considered these both to be areas of provincial concern.

It could not be said that this was a colourable intrusion into provincial jurisdiction. According to La Forest J., the law’s underlying concern was not the regulation of advertising because it then “surely would have enacted legislation applying to advertising in more than one industry.”¹⁵ On the other hand, if the concern was the regulation of the tobacco industry as an industry, he was of the view that “it would surely have enacted provisions that relate to such matters as product quality, pricing and labour

relations.”¹⁶ In somewhat circular fashion, the Court held that it was not advertising generally because the Act applied to only one industry and it was not regulation of one industry because it did not concern aspects of production in that industry. To bootstrap his argument, Justice La Forest explained that Parliament chose not to prohibit the tobacco industry itself (by outlawing consumption, for example) for the simple reason that it was “not a practical policy option at this time.”¹⁷ Applying a mix of *realpolitik* and behavioural science, La Forest J. explained that, as cigarettes are a highly addictive product and over one-third of Canadians smoke, a prohibition on consumption likely would be resisted. Prohibition could lead, as it did earlier in the century to an increase in “smuggling and crime.”¹⁸ Given the complex social problems created by tobacco consumption (this provides the lead-in to La Forest J.’s deference to Parliament in his discussion of least restrictive alternatives), “innovative legislative solutions are required to address them effectively.”¹⁹ The effectiveness of this legislative solution, however, is not one which the Court would broach in its federalism review: “the goal in pith and substance analysis is to determine Parliament’s underlying purpose in enacting a particular piece of legislation; it is not to determine whether Parliament has chosen that purpose wisely or whether Parliament would have achieved that purpose more effectively by legislating in other ways.”²⁰

Justices Major and Sopinka expressed disagreement with the majority view in respect of the ban on tobacco advertising. While the requirement of product warnings could be justified under the federal criminal law power, the advertising ban could not be as it did not concern a “typically criminal public purpose.”²¹ In a significant modification of Rand’s formulation in the *Margarine Reference*, the two dissenters proposed a narrow test for determining whether a subject was in pith and substance a matter for the criminal law: the activity to be suppressed “must pose a significant, grave and serious risk of harm to public health, morality, safety or security.”²² The type of commercial speech targeted by the Act did not meet the test of gravity and seriousness in endangering public health.

Furthermore, the dissenting judges disagreed with the majority on two further points — the validity of ancillary regulation and the relevance of exemptions. On the first issue, La Forest J. had written that

activities ancillary to an ‘evil’ could be prohibited even though the underlying evil remains unregulated. Relying on similar ancillary prohibitions on prostitution and assisted suicide, the majority found it constitutionally unimpeachable, even though Parliament had taken a “circuitous path” to accomplish the goal of lessening tobacco consumption. In contrast, the minority could see no analogy between the criminalization of activities that follow in the wake of prostitution or assisted suicide and tobacco consumption. According to Major, “[t]obacco advertising is in itself not sufficiently dangerous or harmful to justify criminal sanctions,”²³ disregarding the fact that it is the suppression of tobacco consumption that is the targeted evil and not simply commercial speech. On the second issue, the minority found that the exemptions in the Act accorded to publications and broadcasts from outside of Canada suggested that the Act was in the nature of economic regulation rather than criminal law. If 65% of the Canadian magazine market would still include tobacco advertisements, despite the prohibition, how could a criminal prohibition be justified simply by virtue of an advertisement’s Canadian origins?²⁴ The majority replied by referring to the rule of interpretation that a law does not lose its criminal character merely because it contains exemptions; this was the case, for instance, in Canada’s former criminal code prohibition on abortions outside of accredited hospitals.²⁵ The minority, suggesting that the federal POGG power might provide appropriate authority for the advertising ban, preferred not to “come to any conclusion on this point” in view of their agreement with the majority that, in any event, the Act failed under the Charter.²⁶

The upshot of *RJR-MacDonald* is that, while there are very real problems with banning tobacco advertising entirely so long as tobacco remains a legally available substance, the Supreme Court has confirmed that the federal government is well within its jurisdiction and rights to ban tobacco consumption and to place some Charter-warranted restrictions on tobacco advertising.²⁷ Moreover, the victory for the tobacco lobby has been bought at a high price for the gun lobby. It now seems almost certain that the Supreme Court will reject any constitutional challenge to the new *Firearms Act* based on the division of powers. When the smoke clears, it will be seen that the tobacco lobby has shot the gun lobby where it hurts most.

GUNS AND ROSES

The government has introduced gun control legislation in the form of the new *Firearms Act*.²⁸ As well as amending various sections in Part III of the *Criminal Code*, the Act provides for a comprehensive licensing system for those persons possessing or wishing to possess firearms that are not prohibited or restricted. To this extent, the Act builds on a set of existing and constitutionally-valid rules that prohibit or restrict the possession of certain firearms. In future, the possession and sale, import or export, of all firearms will be subject to control and regulation. The stated purpose of the legislation is to increase public safety and control crime by ensuring that all firearms — potentially dangerous and life-threatening devices — are registered. The Act does not prevent the ownership of firearms, but requires that they be registered and controlled. In light of the fact that there are roughly 1400 firearm deaths each year,²⁹ the measures appear to be modest and reasonable, bringing Canada in line with laws in most other countries. Indeed, the *Firearms Act* is considered by the gun control lobby to be too timid in the face of havoc wreaked by people using guns.

To no one's surprise, the gun lobby has resisted the introduction of the *Firearms Act* with all the political and legal might that it can muster. Their central contention is that there is no established correlation between the ownership of firearms and a propensity to commit crimes and that registration will only interfere with the proprietary rights of law-abiding citizens and not prevent the use of illegally-obtained firearms in criminal activities. Apart from the many policy and social arguments that it has sought to deploy, the gun lobby has argued strenuously that this legislation is unconstitutional in origin and content. Its initial position has been that such legislation falls outside the federal government's legitimate authority under section 91(27) and more properly falls under provincial jurisdiction. As best as can be gathered, its contention is that, while the restriction and prohibition of guns may at times be criminal in nature and, therefore, validly federal in jurisdiction, the imposition of a licensing and registration scheme is traditionally a matter of 'property and civil rights' and, therefore, falls under exclusive provincial authority. Whatever (dubious) merit this argument might have previously held now seems to have been effectively scotched by the Supreme Court's decision in *RJR- MacDonald*.

Prior to the decision in *RJR-MacDonald*, the constitutional position seemed to be reasonably well-established.³⁰ The federal government has the clear authority to legislate under its criminal law power to prevent as well as to control crime. For instance, in the 1981 case of *Pattison*, the Alberta Court of Appeal upheld the validity of the federal law which provides for the seizure of firearms in the interests of public safety:³¹

The legislation may be preventative of crime.... When the object is to reduce the incidence of injury or death to the citizens of the country by the type of violence made possible by the destructive power of a firearm, it becomes clearly within the legislative competence of the Government of Canada under the head of criminal law to so enact.

Also, the courts have made clear that it is entirely legitimate for the federal government to create regulatory offences (as opposed to so-called 'true' crimes³²) that are ancillary to the exercise of its criminal law power. Furthermore, the fact that criminal laws are not part of the *Criminal Code* is not determinative; the nomenclature of the legislation is not decisive in matters of constitutionality.

If the federal government's jurisdiction to enact the *Firearms Act* was ever open to any doubt, it has been almost entirely swept away by the Supreme Court in *RJR-MacDonald*. The majority of the Court, in confirming that the criminal law power is plenary in nature, broad in definition, flexible over time, and catholic in substance, held that the challenged *Tobacco Products Control Act* had an underlying public purpose — the containment of the detrimental effects caused by tobacco consumption — that was criminal in nature. The fact that Parliament had not criminalised the ultimate 'evil' of tobacco consumption was not at all determinative: "it would be absurd to limit Parliament's power to legislate in this emerging area simply because it cannot as a practical matter impose a restriction more specifically aimed at the evil."³³ Although the Act did not serve a purpose that was traditionally or commonly considered to be criminal, the federal government's criminal law power enabled it to create new crimes. Accordingly, if the ban on tobacco advertising could be validly criminalised on the basis that it helped to protect Canadians' health from smoking, there seems little reason to believe that the licensing of gun ownership

to protect Canadians' safety from firearm injuries could not equally be validated as an exercise of the criminal law power. Insofar as the smoking of tobacco threatens people, then it must also be so for the use of firearms.

But perhaps even more telling is the opinion of the dissenting minority in *RJR-MacDonald*. Mindful that their judgments were driven by an overriding concern to ensure that the criminal law power is not used indiscriminately by the federal government to bring anything and everything within its constitutional mandate, the words and arguments of Justices Sopinka and Major offer weighty support for the validity of the *Firearms Act*. They held that the definitional heart of the federal criminal law power is to be found in the authority to prohibit conduct which poses "a significant and serious risk of harm to public health, safety or security."³⁴ Although they held that tobacco advertising was too far removed from the injurious effects of tobacco use to fall within the scope of the criminal law power, it seems reasonable to assume that they would find that the connection between gun control and injurious conduct was not so remote. In an important aside, Justice Major opined that the only ancillary matters that have and can fall within the scope of the criminal law power are those where the core activity "concerns matters which have traditionally been subject to criminal sanctions and pose significant and serious dangers in and of themselves."³⁵ Whatever the case may be with the smoking of tobacco, the possession and use of firearms continues to be a conventional matter of criminal regulation.³⁶

Of course, the full extent of the criminal law power can only be appreciated and assessed when the use of that power to invalidate provincial legislation is canvassed. It is only when the courts take as broad an interpretation of the federal government's criminal law power in actions to challenge provincial legislation as they do in validating federal legislation that there is real cause for alarm. If the criminal law power is treated as expansively when provincial law is being challenged as when federal legislation is being defended, there is good reason to doubt the wisdom of the Supreme Court's in *RJR-MacDonald*. Such an interpretation would exert a considerable centripetal and unwelcome force on the balance of constitutional jurisdiction. However, in recent years, the Supreme Court's treatment of the criminal law power to curtail provincial legislation has continued to accommodate the reasonable exercise of provincial powers in areas that are commonly perceived to be

criminal in nature and scope.³⁷ Relying upon the provinces power under section 92(15) to impose "punishment by fine, penalty or imprisonment," the courts have tended to uphold provincial penal legislation; concurrent and overlapping jurisdiction is alive and well in some areas of criminal regulation. Moreover, the courts have not been quick to regard the existence of similar federal and provincial schemes to regulate anti-social conduct as bringing the paramountcy doctrine into play.³⁸

In *Morgentaler* (No. 3), the Supreme Court struck down a provincial law that required certain designated medical procedures, including abortion, to be performed in hospitals. The province claimed that this measure was intended to prohibit privatization in order to maintain high-quality health care and was, therefore, within the province's constitutional jurisdiction. In a unanimous decision, the Supreme Court determined that the legislation's real purpose was to "suppress the perceived harm or evil of abortion clinics"³⁹ and held it to be an invalid incursion into the federal government's criminal law jurisdiction. At the heart of Sopinka's judgment for the Court was the insistence that, while the establishment and enforcement of a local standard of morality does not necessarily invade the field of criminal law, "interdiction of conduct in the interest of public morals was and remains one of the classic ends of the criminal law."⁴⁰ The effect of this very strong judgment is to jar the general belief that, provided that a province has a viable claim to jurisdiction under a valid head of provincial power, there is plenty of room for concurrent jurisdiction in matters concerning social regulation. However, in light of the Supreme Court's emphatic judgment in *RJR-MacDonald*, the judgment in *Morgentaler* may prove to be more of an aberration, driven more by the Court's irritation at a province's duplicity in trying to slip one by the courts and the constitution, than the beginning of a new trend in criminal law doctrine.

In many ways, the gun lobby's challenge to the *Firearms Act* on federalism grounds is speculative and the least likely to succeed; it represents a small part of a larger scatter-gun approach that seems committed to firing anything that constitutionally moves. The gun lobby's efforts to target those provisions of the Act that touch on *Charter* matters seem closer to the target, but they still likely are outside of its constitutional range and argumentative fire-power. For instance, the contention that section 7's guarantee of life liberty and security of the person can be used to ground some kind of American-style right to bear

arms is fanciful in the extreme; if anything, section 7 can be viewed as protecting people from guns rather than enhancing gun ownership. Also, the gun lobby and their lawyer's claims that sections of the *Firearms Act* infringe people's rights to be safe from "unreasonable search and seizure" and from "cruel and unusual treatment or punishment" are difficult to sustain. Regarding the former claim, the courts have held that it is not unreasonable to allow spot-check inspections to be carried out in relation to regulated activity so as to monitor compliance with appropriate safety or health standards.⁴¹ There is particular concern about the ability to inspect residential dwellings and, in this regard, the Act makes those inspections, absent a judicially-authorized search warrant, illegal without reasonable notice and the consent of the occupant. Regarding the latter claim, while the courts have been solicitous to protect people from the imposition of minimum sentences where the sentence might be "grossly disproportionate" to the criminalised conduct, they have not condemned out-of-hand the imposition of minimum sentences where the context is serious enough.⁴² Moreover, even if the gun lobby's arguments prevailed on these matters, it would not jeopardize the whole legislation, but only particular severable parts of it.

The most pressing and deserving constitutional argument being made by the gun lobby against the *Firearms Act* concerns its potential infringement of aboriginal and treaty rights that are entrenched by section 35. It is clear that many Aboriginal people who have a constitutionally-protected right to hunt also have the right to possess a firearm for that purpose. The pertinent question, following the *Sparrow* decision,⁴³ is whether the impediments to exercising these constitutional rights are justifiable as reasonable regulations that are warranted by a "compelling and substantial objective" and interfere with the particular right as little as necessary. This difficult to judge, but the federal government's efforts to engage in consultations with affected Aboriginal groups and its willingness to make special arrangements to administer the licensing system as it involves Aboriginal peoples will go much of the way to satisfying the constitutional requirements of section 35. Nevertheless, although concern for the position of Aboriginal groups is admirable, one cannot help but be a little suspicious of lobbyists who 'convert' to the aboriginal cause only when it is in their own best interests to do so: fair-weather friends are no friends at all.

PARTING SHOTS

In conclusion, therefore, it can be reported that the Canadian government lost in their shoot-out with the tobacco lobby, at least temporarily. Nevertheless, there are indications that victory might have been won at too high a price; having won the battle, the tobacco lobby might actually have put themselves in danger of losing the war. In manner of speaking, it might be choking on its own success; the decision might galvanise a weak government to take a stronger stand. However, it might be that, in the constitutional showdown between Ottawa and the tobacco lobby, one of the federal stray bullets hit the unsuspecting gun lobby and caught them unawares. The decision in *RJR-MacDonald* has strengthened the government's hand in silencing the outraged cries of the gun lobby — the *Firearms Act* will likely not fall for want of federal jurisdiction. Smoking guns, indeed. □

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Endnotes

1. *RJR-MacDonald v. A.G. Canada* (1995), 127 D.L.R. (4th) 1 (S.C.C.); (1993), 102 D.L.R. (4th) 289 (O.C.A.); and (1991), 82 D.L.R. (4th) 449 (Q.S.C.) (all further S.C.C. references are to paragraph numbers).
2. *Scowby v. Glenndinning*, [1986] 2 S.C.R. 226 at 236 per Estey J.
3. (1993), 102 D.L.R. (4th) 289 at 341-42.
4. See *Citizens Insurance Company v. Parsons* (1881), 7 A.C. 96 and *A.-G. Ont. v. A.-G. Can.*, [1896] A.C. 348.
5. Any prohibited act with penal consequences attached, wrote Lord Atkin in *PATA*, qualifies as a valid exercise in criminal law. See *Proprietary Articles Trade Association v. A-G Can.*, [1931] A.C. 310 at 324.
6. *PATA, ibid.*; *A.G.B.C. v. A.-G. Can.*, [1937] A.C. 368.
7. *R. v. Campbell*, [1965] S.C.R. vii.; *Goodyear Tire and Rubber Co. v. The Queen*, [1956] S.C.R. 303.
8. *Laskin's Canadian Constitutional Law*, 3rd ed. (Toronto: Carswell, 1966) at 851.
9. *Insurance Reference*, [1916] 1 A.C. 588.

10. *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1 at 49-50.
11. This occurred despite the fact that the 'trade and commerce' power had been revived partially by the Supreme Court of Canada in *GMC Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641.
12. Para. 30.
13. Quoting Rand J. at para. 32. This jurisdiction had been confirmed by the Supreme Court in *Schneider v. The Queen*, [1982] 2 S.C.R. 112 (regarding compulsory treatment for heroin addiction) and *R. v. Wetmore*, [1983] 2 S.C.R. 284 (regarding Food and Drugs Act).
14. Para. 32.
15. Para. 33.
16. Para. 33.
17. Para. 34.
18. Para. 34.
19. Para. 36.
20. Para. 44.
21. Quoting Peter W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Scarborough: Carswell, 1992) at para. 198.
22. Para. 200.
23. Para. 212.
24. Para. 215.
25. In *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616 at 627.
26. Para. 217.
27. For more on this, see Richard Moon, "RJR-MacDonald v. Canada on the Freedom to Advertise" (1995) 7 Constitutional Forum 1.
28. Bill C-68, *An Act respecting firearms and other weapons*, 1st Sess., 35th Parl., 1994-95.
29. Coalition for Gun Control, "Bill C-68: A Brief to the Senate Committee on Legal and Constitutional Affairs" (1995)
30. Matters seem to have changed since Lord Watson described an Act "restricting the right to carry weapons of offence, or their sale to young persons" as being solely within the authority of the provincial legislature. See *A.-G. Ont. v. A.-G. Can.*, *supra* note 4 at 362.
31. *A.-G. of Canada v. Pattison* (1981), 59 C.C.C. (2d) 138 at 142 per McGillivray C.J.A.
32. The courts have begun to distinguish again between 'true' and 'regulatory' crimes for Charter purposes. See *Thomson Newspapers*, [1990] 1 S.C.R. 425 and *R. v. Wholesale Travel Group*, [1991] 3 S.C.R. 154.
33. Para. 48.
34. Para. 201.
35. Para. 210.
36. It might be that the regulation of shooting clubs and ranges (s.29) is beyond federal competence. To the extent that this regulation is incidental to the government's larger objective, it would pass constitutional muster. See the discussion of the test of "fit" in *GMC*, *supra* note 11.
37. *Labatt*, [1980] 1 S.C.R. 914 courtesy of Estey J. is one of the few cases in which the S.C.C. held that prohibition + penalty = criminal purpose; this involved advertising. See also *Boggs v. The Queen*, [1981] S.C.R. 49 per Estey J. (driving while provincial licence suspended).
38. Hogg, *supra* note 21 at 492-95.
39. *R. v. Morgentaler*, [1993] 3 S.C.R. 463 at 512 per Sopinka J.
40. *Ibid.* at 496.
41. See *R. v. McKinley Transport*, [1990] 1 S.C.R. 627 and Hogg, *supra* note 21 at 1065-66.
42. See *R. v. Smith*, [1987] 1 S.C.R. 1045 and *R. v. Goltz*, [1991] 3 S.C.R. 485.
43. *R. v. Sparrow*, [1990] 1 S.C.R. 1075.