CONSTITUTIONAL ASPECTS OF CANADIAN ANTI-COMBINES LAW ENFORCEMENT*

BRUCE C. McDONALD†
Kingston

I. Introduction.
II. Techniques For Change.
   A) Reinterpretation.
      (1) Constitutional doctrines of change.
      (2) Existing constitutional doctrine: Anti-combines.
      (3) Criminal law power.
      (4) Trade and commerce power.
      (5) Peace, order and good government.
   B) Delegation.
   C) Constitutional amendment.
III. Regulated Industries.
IV. Administration and Enforcement.
   A) Location of responsibility.
   B) Rules of procedure.
   C) Specialized tribunal.
V. Damage Actions.
VI. Dissolution and Divestiture.
VII. Conclusions.

I. Introduction.

An ineffective law is worse than no law at all. To be effective the vast majority of laws must meet certain basic conditions. First, the conduct norm must reflect prevailing social opinion. Second, it must be capable of efficient application in terms of speed, expense, coverage and relative accuracy. Third, the sanction or remedy must secure the desired result. Any law is only as good as the weakest of these aspects of it.

*This paper was written in partial fulfilment of the requirements for a graduate degree at the University of Michigan.
†Bruce C. McDonald, of the Faculty of Law, Queen's University, Kingston, Ontario.
Ignoring for the moment the obvious inter-relation between the conditions the weakest one in current Canadian combines control may be said to be the third, namely, effectiveness of the remedies applied to offensive conduct. By far the most common remedy for an undue restriction upon competition has been the criminal fine which until December, 1966 not once exceeded twenty-five thousand dollars for any one company. Even counting legal expenses it is reasonably certain that the benefit gained by a company through illegal activity frequently exceeded the cost to the company. The cost-benefit ratio for the public is no doubt roughly the converse.\(^1\) Far from altering the behaviour of the convicted party or the structure of the industry there is evidence that in a significant number of cases the undesirable situation persists, even if it assumes other forms. The current tendency to rely almost exclusively on condemnation without more reminds one of a cartoon described by Berle wherein a workman on a hydro construction project stood on top of a huge dam with a loud hailer and shouted to another workman below that the dam had been declared unconstitutional.

What are the causes of inadequate combines remedies? All cannot be blamed on a deliberate refusal by Parliament to exhaust its legislative competence. Within the last two decades both the variety and possible severity of remedies have been increased so that the Combines Investigation Act\(^2\) now provides for incarceration, unlimited fines, changes in tariff, prohibition and dissolution orders for both past and probable activity, as well as orders concerning patent licences and trade mark registrations. Section 35 provides further that "Nothing in this Part shall be construed to deprive any person of any civil right of action". Within this catalogue of sanctions permitted by the law makers, why have the law appliers been so reticent? The standard sanction has been and is a modest fine, often accompanied by a prohibition order. These sanctions have not been as effective as one might wish, even if only as part of a programme to publicize the relevant laws. The law appliers in combines control include Parliament which supplies the enforcement budget, the Governor in Council, the Attorney General of Canada, the Minister of Consumer and Corporate Affairs, the civil service administration, the

\(^1\) A study of the Canadian tire industry concluded that "the process of combines policy has produced remedies which seem inadequate in relation to the cost of securing them": Stykolt, Economic Analysis and Combines Policy (1965), p. 70.

\(^2\) R.S.C., 1952, c. 314, as am.
courts and private litigants. Their collective failure to exploit fully the remedies furnished by the legislation may be due to a number of reasons. They may feel that the remedies applied secure conformity with the conduct norms. They may feel that social and moral values have so changed that the current norms or their form of expression, essentially laid down in 1889, 1910 and 1923, no longer reflect prevailing opinion. Alternatively, or additionally, it may be that the available remedies together with the procedures by which they are applied are too restricted, cumbersome, costly or inaccurate to work effectively in a significant number of cases.

Chances are, most of the above suggestions contain part of the truth. This article is, however, concerned only with a prevalent view that (1) effective combines control demands the availability to the law appliers of as wide and flexible an arsenal of remedies as possible, and (2) a constitutional straightjacket prevents Parliament from supplying this arsenal, thereby making effective combines control in Canada impossible. Conceding the first of these propositions, the impending Economic Council report and parliamentary review of our combines legislation make it imperative that we know precisely how far if at all our constitution prevents us from evolving the most desirable combines policy imaginable.

By way of thumbnail sketch, the usual procedure under the Combines Investigation Act may be described as follows. Information commonly in the form of an informal complaint or literature item inspires the Director of Investigation and Research to begin an inquiry to determine whether he feels an offence has been or is about to be committed. If his findings are positive a statement of evidence is presented before a hearing of the Restrictive Trade Practices Commission. The Commission is required by the Act to write a report on the practices disclosed to exist, appraising their effect upon the "public interest" and recommending remedies if any. If the Attorney General decides to seek formal sanctions a criminal prosecution follows.

The offences in Part V of the Combines Investigation Act (conspiracy or arrangement, merger, monopoly and specified distribution practices) have been constitutionally justified by the courts under the criminal law power. This in itself does not limit the scope of remedies, however, for constitutional classification goes to the substance of a law. The only constitutional limit upon the scope and nature of criminal remedies is the doctrine of colourability. It is true, of course, that traditionally penalties such
as fines or imprisonment have been thought most appropriate for deliberate deviance from precisely expressed norms. Unlike typical criminal laws, however, the norms in the Combines Investigation Act are necessarily vague, the basic test of criminality being "undue" restraints upon competition, or competition which "is or is likely to be lessened to the detriment or against the interest of the public". Even without disputing the desirability of justifying such laws as criminal, it is easy to understand why law appliers are reluctant to impose severe fines or incarceration. There often is no way to discover in advance whether one's conduct is offensive, and as businessmen seek to perform their social function of maximizing profit they tread upon unsafe ground.

So far as Parliament is concerned, uneasiness persists about such remedies as negative advance clearances, cease and desist orders, negotiated settlements or undertakings, consent decrees, dissolution or divestiture orders, public or private actions for damages, and a general power to deprive parties of licence or franchise. Why should there be uneasiness? If conduct is substantively criminal, is there not full freedom to develop the most effective deterrent or curative sanctions? How does the doctrine of colourability operate with respect to the scope of available remedies? Prohibition orders provided under section 31(1) of the Act have been held to come within the criminal law power but the courts have cautiously avoided passing upon the constitutional validity of the provision for dissolution orders. Particularly is there concern insofar as these equitable remedies may be imposed for an incipient offence without a conviction. The social and economic utility of the various remedies cannot be denied. For example, negative clearances are used in other jurisdictions with respect to trade associations, proposed mergers and export consortia. They could well be used with respect to refusals to supply due to loss leadering, purchasing pools for quantity discounts, and perhaps even for some horizontal agreements. The other remedies would also each add unique measures of flexibility to enforcement policy.

It is impossible to divorce the available remedies from the agency which is to apply them or the procedures by which they are to be applied. Clearances, consent settlements or the details of dissolution or divestiture orders require some economic sophistication so that the relevant questions might be asked and realistic solutions

---

3 This is the test for the conspiracy offence, s. 32.
4 This is the language of the merger definition in s. 2(e). The monopoly definition in s. 2(f) employs similar language.
arrived at. The ideal antitrust decision maker has training or facility in market analysis, statistics and cost accountancy as well, perhaps, as law. Yet we are told by the courts that the lady of the common law is not an economist. Also, we must provide an efficient institutional framework for the continued supervision of enforcement decrees. Summary procedures are occasionally desirable. All other major industrialized countries have constituted a specialized tribunal to perform this type of function. If combines legislation in Canada is only justifiable under the criminal power Parliament may be unable to provide such a tribunal, since sections 91(27) and 92 (14) of the British North America Act probably exclude from federal competence the constitution of courts of criminal jurisdiction.

Another corollary of classifying the substance of Part V as criminal legislation lies in the application of rules of criminal procedure to the enforcement proceedings. For example, anti-combines cases consistently refer to the need for proof beyond a reasonable doubt and to the proposition that the burden lies always on the Crown. Insofar as these burdens have any real meaning in such cases they follow from criminal classification of the substance except where they are specifically abrogated by legislation. While anti-combines cases have emasculated the Woolmington\(^a\) concern for the proof of intent, they continue to cite the rule in Hodge's case\(^b\) respecting the use of circumstantial evidence in criminal cases. Other applicable rules include those relevant to rights of trial by jury, non-compellability of an accused under section 4 of the Canada Evidence Act, rules of construction of penal statutes, and conceivably the use of similar fact evidence. All these rules favour an accused party and, of course, arose in response to the severe political, social and economic consequences of criminal penalties in past centuries. They should continue to apply where punitive or deterrent remedies are invoked for flagrant deviance from a specific norm, but where the concern is solely to restructure an industry or to prevent certain types of future conduct for economic reasons the procedural safeguards of criminal law have less to recommend them. Further, in this age of transition from formal adversary proceedings to less formal proceedings in specialized functional bodies, it is sometimes difficult to see the value in combines cases of a strict application of rules relating to hearsay, opinion and judicial notice.

---

\(^b\) (1838), 2 Lewin's C.C. 227; 168 E.R. 1136.
According to decided cases, other heads of federal jurisdiction fortuitously justify certain specific remedies. The power of the Governor in Council under section 29 of the Combines Investigation Act to implement a corrective tariff for an indicated undesirable situation derives from section 91(3) of the British North America Act. The patent remedy exercisable under section 30 by the Exchequer Court is similarly based upon section 91(22) of the British North America Act. Neither of these remedies requires a criminal conviction. Tax consequences, or "political remedies" such as subsidies or the use of government purchasing power likewise would present no constitutional problem.

The other aspect of constitutional difficulty is the coverage of the legislation. It might be thought that legislation justified under the criminal law power would reach wholly intra-provincial commercial activity whereas legislation justified under the trade and commerce power would not. But how are areas of exclusive provincial jurisdiction to be protected?

The basic issue is the constitutional classification of the substantive law in Part V of the Combines Investigation Act. The article will examine the existing jurisprudence in the context of the capacity of the constitution to accommodate change. Some specific remedial problems will also be discussed. It is important to determine how far the answers lie in the realm of abstract logic uninfluenced by the commercial realities of the subject matter, and how far the essential factors in past decisions have been the predispositions of the judges on political and economic questions.

II. Techniques for Change.

A) Reinterpretation.

(1) Constitutional doctrines of change.

The British North America Act distributes plenary legislative jurisdiction between the federal and provincial legislatures. The particular distributions relevant to the problem of combines remedies are familiar. Section 91 awards to the federal government

---


8 Insofar as trade marks are concerned they would presumably fall under s. 91(2): Attorney-General of Ontario v. Attorney-General of Canada, et al., [1937] A.C. 405, at p. 417. These cases concerned a predecessor to the present s. 30 and while they probably indicate the law, their relevance to the reconstituted section has been doubted: Fox, Parturiunt Montes; Nascetur Ridiculus Mus (1946), 24 Can. Bar Rev. 749.
the 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". The section proceeds to itemize, "for greater certainty, but not so as to restrict the generality of the foregoing terms of this section", certain exclusive classes of laws which the general federal power includes. Two of the thirty-one categories so listed are:

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.

Section 92 lists sixteen classes of laws in relation to which the provinces have exclusive legislative jurisdiction. These include:

13. Property and civil rights in the province.
14. The administration of justice in the province, including the constitution, maintenance, and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts.
15. The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section.
16. Generally all matters of a merely local or private nature in the province.

Classification of laws according to the distribution of powers depends ultimately, as it must, upon the impressions the judges have of social problems and non-legal facts. These views are not always described in the judgments, but a brief outline of the doctrinal methodology of constitutional interpretation in Canada will place in context the necessity of finding "purpose" in order to classify any statute including, of course, the Combines Investigation Act.9

Since the British North America Act awards the residual powers to the Dominion, the first question a court must ask is whether the "pith and substance", or real underlying "purpose and effect", or the "leading feature" of the legislation relates to one of the sixteen heads of provincial jurisdiction. If not, then it belongs to the federal government. If it does relate to one of the section 92 powers, however, the court must then inquire whether it might also reasonably fall within an enumeration of federal

---

jurisdiction. If not, the field is provincial. It is possible, however, for the legislation to possess both a provincial aspect (for instance property and civil rights) and a federal aspect (for instance trade and commerce). \(^{10}\) The problem then becomes one of balancing the federal feature against the provincial feature. The primary feature will prevail if one is found to be relatively more significant. If however, both features are of equivalent importance the subject of the legislation constitutes a concurrent field. In the absence and until the passing of conflicting or duplicative federal legislation a provincial statute in this area of equivalent importance will remain in effect. Where provincial and federal statutes conflict or duplicate each other however, the doctrine of paramountcy applies to suspend the operation of the conflicting or duplicative provincial provisions. \(^{11}\)

The British North America Act is, of course, a simple statute of the British Parliament and yet, as the basic constitutive law of the Canadian federation it possesses certain characteristics of a written constitution. As a result, its meaning and real effect have not as a matter of law been crystalized by an interpretation according to traditional rules of statutory construction. \(^{12}\) Despite a role for historical analogy in constitutional interpretation, and despite occasional reference in the past to the heads of jurisdiction as watertight compartments, case authorities supporting a "living tree" interpretation are becoming more numerous. This has been a political and economic necessity for only by liberal construction may the necessary generalities of fundamental law be exploited to accommodate social change and new challenges. Only in this way may a "statute" regulate intelligently conditions not even conceived at the time it was drafted.

\(^{10}\) The familiar aspect doctrine means that "subjects which in one aspect and for one purpose fall within section 92 may in another aspect and for another purpose fall within section 91": *Hodge v. Reg.* (1883), 9 App. Cas. 117, at p. 130. The doctrine is frequently repeated and applied in this form. See, for example, *Re Combines Investigation Act and Section 498 of the Criminal Code*, supra, footnote 7, at p. 413, per Duff J.


\(^{12}\) Professor Laskin, as he then was, has raised the question whether even broader interpretative rules might apply if the British North America Act were to be replaced by, or even relabelled as, a "Constitution of Canada": *Laskin, Amendment of the Constitution: Applying the Fulton-Favreau Formula* (1965), 11 McGill L.J. 2, at p. 14. Also see Smith, The Commerce Power in Canada and the United States (1963), pp. 26-27, 36-41.
One of the implications of the liberal approach to interpretation is that a particular subject of legislation may shift from classification under one head of jurisdiction to classification under another. This possibility, a by-product of the functional element in the test, has frequently been recognized by the courts. So have they recognized the further possibility that change in social, political or economic circumstances may remove the jurisdiction from either the federal or the provincial government and give it to the other, or at least may supply the legislation with two piths and two substances in such a way as to invoke the doctrine of paramountcy. An example of this latter was pointed out by the Supreme Court of Canada in 1913:

... when a matter primarily of civil rights has attained such dimensions that it "affects the body politic of the Dominion" and has become "of national concern", it has, in that aspect of it, not only ceased to be "local and provincial", but has also lost its character as a matter of "civil rights in the province" and has thus so far ceased to be subject to provincial jurisdiction that Dominion legislation upon it under the "peace, order and good government" provision does not trench upon the exclusive provincial field and is, therefore, valid and paramount.

These considerations are significant in the combines context. In 1889 Parliament, with no apparent consideration of constitutional jurisdiction, viewed the combines problem as one with strong moral overtones somewhat akin to common theft, and consequently enacted the combines proscriptions as criminal legislation. Depending on the scope of the criminal law head of federal jurisdiction, a changed view of the nature of the combines problem to one of regulating the health of the economy may mean that such a constitutional classification is no longer appropriate. The desired remedies will also alter as the purpose of the statute changes, and to make new remedies available the the constitutional reflection of the changed nature of the issues must be adjusted.

---

13 For example, Re Combines Investigation Act and Section 498 of the Criminal Code, supra, footnote 7, at pp. 415-416, per Duff J. The emergency doctrine is also an example of this proposition.

14 In the Matter of Sections Four and Seventy of the Canadian "Insurance Act, 1910" (1913), 48 S.C.R. 260, at p. 310, per Anglin J. A similar statement relating specifically to combines legislation was made by Duff J. in Re Combines Investigation Act and Section 498 of the Criminal Code, supra, footnote 7, at pp. 415-416.

For reasons associated with the above, another technique to permit change has developed. The general rule against admissibility of extrinsic evidence in statutory interpretation is partially relaxed for constitutional questions. Perhaps more accurately, since the issue is the purpose and effect of the legislation rather than interpretation of its language, the courts invoke a liberal view of the mischief rule together with open reliance upon judicial notice and expert evidence. The purpose of the legislation and the effect of its implementation are distinct. Both are important to the process of constitutional classification and if there is serious doubt as to the purpose, it will be tested by the effect of the legislation. The basic purpose or leading feature of the legislation is so critical, however, that the courts accept in evidence on that issue reports of royal commissions and like objective publicly sponsored studies of the relevant social problem. In most constitutional cases concerning combines legislation the courts have relied upon the inspirational studies and reports for evidence of purpose. Concerning the validity of the present section 32(1) of the Combines Investigation Act, Lord Atkin stated:

Both the Act and the section have a legislative history, which is relevant to the discussion. Their Lordships entertain no doubt that time alone will not validate an Act which when challenged is found to be ultra vires; nor will a history of a gradual series of advances till this boundary is finally crossed avail to protect the ultimate encroachment. But one of the questions to be considered is always whether in substance the legislation falls within an enumerated class of subject, or whether on the contrary in the guise of an enumerated class it is an encroachment on an excluded class. On this issue the legislative history may have evidential value.

The substance of what Lord Atkin was saying is that although mere passage of time, or mere legislative activity and device is not enough to place a subject under another head of legislative jurisdiction, yet the subject can shift when, with evidence of a changed nature of the substantial problem, the

---


legislation appears in essence to "relate" to another class of jurisdiction. This is distinguished by the courts from legislation under one power which only incidentally "affects" matters under another power.

The capacity of constitutional law to permit apparent changes of position must not be confused with the separate and distinct issue of stare decisis and the question whether the Supreme Court will ever reverse itself or refuse to follow the Privy Council. For instance, a present finding of a federal power to implement labour conventions need not necessarily amount to a rejection of the 1937 decision for its time and place, but could conceivably mean that the essential nature of the problems and the relative emphasis of its various aspects has altered over the course of the last thirty years. The same problem arises in connexion with the criminal law. The criteria for the pith and substance of crime will remain the same but any given legislation or subject matter must be able, with a change of public attitude over a period of years, to shift into or out of the criminal head of federal jurisdiction. It is the facts that are changing, not the law. The function of criminal law remains the same while the examples of crime change from time to time. Only if the essential nature and magnitude of the problem have remained the same must the controversial issue be faced, namely, whether the Supreme Court is or should be absolutely bound either by Privy Council decisions or by its own.

For these reasons it can be critical that Parliament not pre-judge the constitutional limitations and feel restrained by unrealistic and artificial restrictions. Moot issues of constitutional law are not part of the legislative function, even if they are increasingly part of the function of federal-provincial conferences. If there is any real doubt in Parliament on the issue of constitutionality it should be resolved in favour of the validity of the proposed legislation. The legislation will later be tested in the

---

18 This classic situation concerns the internal performance of treaty obligations when the implementing legislation would normally be a matter of provincial jurisdiction. The Canadian government presently defers to the decision of Attorney General of Canada v. Attorney General of Ontario, [1937] A.C. 326, which denies such an implementing power to the federal government.

19 Much has been written on this question, the most recent study being MacGuigan, Precedent and Policy in the Supreme Court (1967), 45 Can. Bar Rev. 627. Particularly since 1966 when the House of Lords adopted the American view of the social responsibilities of a final court of appeal insofar as the doctrine of precedent was concerned, expectation has grown that the Supreme Court will not consider itself absolutely bound by its own decisions.
It is even more important that inquiring commissions not feel limited by constitutional considerations. Such an unfortunate position was taken by members of the MacQuarrie Committee on combines legislation in 1952, and severe limitations were accordingly placed upon the Report. The terms of the reference were:

... to study, in the light of present day conditions, the purposes and methods of the Combines Investigation Act and related Canadian statutes ... and to recommend what amendments, if any, should be made to our Canadian legislation in order to make it a more effective instrument for the encouraging and safeguarding of our free economy.\(^{31}\)

One of the assumptions which the Committee chose to underly its work was that substantive combines legislation could only be federal if it were criminal law. The restrictive manifestations of this assumption are evident throughout the Report.\(^{22}\) Such an approach only assists in perpetuating the limitations of the past, since the views of these committees as to the non-legal dimensions of the problem, and their recommendations, influence the courts as well as the legislature by providing evidence concerning the purpose of the legislation. It is unfortunate if the investigating body, whether it be the Economic Council of Canada or an ad hoc group, limits itself to the leading feature as found by previous judicial decisions concerning the statute to be reformed.

(2) Existing constitutional doctrine: Anti-combines.

The conspiracy prohibitions of the Combines Investigation Act were originally passed in 1889 as criminal legislation by a Parliament which saw the problem as a specific moral one appropriate to the criminal law. Six major constitutional law cases dealing with anti-combines control have relied exclusively upon the criminal law power as the source of federal jurisdiction. These cases must be examined to determine how far they may limit a refashioning of our norms and controls.

The first case concerned the most ambitious Canadian experiment at combines and price control. In 1919 Parliament,


\(^{22}\) Ibid., p. 7. Insofar as the assumption affected the consideration of possible remedies, see Report, pp. 20, 28, 34, 37 and 38.
prompted by the "Profiteering Act" passed in England in 1919,\(^{23}\) perhaps also by the Federal Trade Commission Act of 1914\(^{24}\) in the United States and by undesirable economic effects of wartime, passed the Combines and Fair Prices Act, 1919.\(^{25}\) An accompanying statute created a court of record called the "Board of Commerce of Canada" to administer it. Section 17 of the Combines and Fair Prices Act prohibited all hoarding of staple foods, clothing or fuel, and also unfair profiteering with respect to those necessaries. Section 18 empowered the Board to inquire into these practices and to issue cease and desist orders which in effect could control price and profit levels for particular participants in particular markets. Breach of an order of the Board constituted an indictable offence punishable by fine or imprisonment. Similar powers were accorded the Board with respect to combines (mergers, monopolies or concerted action). Section 38 of the Board of Commerce Act\(^{26}\) purported to empower the Board to file any order with the Exchequer Court or a provincial superior court, thereby making it a rule or order of that court enforceable as such.

The constitutional validity of the essential element in the fair prices scheme, namely the authority of the Board to inquire and to issue restraining orders, was tested in a stated case that went from the Board to the Supreme Court of Canada concerning an order limiting profits on the sale of men's clothing in Ottawa.\(^{27}\) The court of six split evenly, with the result that the presumption in favour of the constitutional validity of statutes left the Acts standing. The Privy Council, however, supported the views against the validity of the statutes.\(^{28}\)

The Attorney General of Canada argued that the Acts could be supported under one or a combination of the trade and commerce power, the criminal power or the general "peace, order and good government" power. The point upon which members of the Supreme Court seemed to come closest to agreement was that even

\(^{23}\) 9-10 Geo. 5, c. 66.  
\(^{25}\) 1919, 9-10 Geo. 5, Dom., c. 45.  
\(^{26}\) 1919, 9-10 Geo. 5, Dom. c. 37.  
\(^{27}\) *In the Matter of the Board of Commerce Act and The Combines and Fair Prices Act of 1919* (1920), 60 S.C.R. 456. Although the scheme was established just after the war the emergency power was not argued, as this would have limited justification to the period of emergency. In this latter connexion see *Price Bros. and Co. v. The Board of Commerce of Canada* (1920), 54 D.L.R. 286 (S.C.C.).  
if section 17 and prospectively oriented orders could be classed as "criminal law", justification under the criminal power would accomplish little, for the reason that the Board would then be a court of criminal jurisdiction. Section 101 of the British North America Act could not override sections 91(27) and 92(14) to give the federal Parliament competence to constitute such a court. However, half the court avoided direct pronouncement to this effect by holding the scheme justified under both the trade and commerce power and the general power. The reasoning which led them to this conclusion was that the nature of commerce and interprovincial trade was such that to regulate prices effectively in any given place a national, co-ordinated administration was essential.\textsuperscript{29} Co-operative federal-provincial legislation was thought to pose so many problems as to be impracticable. Price regulation of the nature provided in the challenged statutes was thought to be a matter of national concern within the meaning of the \textit{Insurance} decision.\textsuperscript{30} The other half of the court rejected justification under the trade and commerce power on the ground that the two statutes enabled a federal authority to regulate contracts of a particular business or trade, as well as non-commercial private hoarding, within a single province and thereby transgressed the line drawn between sections 91(2) and 92(13) by \textit{Citizen Insurance}.\textsuperscript{31} Further, they felt that the statutes could not be justified under the general power of the Dominion because the subject matter was not of unquestioned national significance and would offend a head of jurisdiction under section 92, namely property and civil rights within a province.\textsuperscript{32} The Privy Council, upholding the views against the validity of the statutes, dealt largely with the attempted justification as criminal legislation. Viscount Haldane stated the enactment was colourable as it did not deal with a subject "which by its very nature belongs to the domain of criminal jurisprudence",\textsuperscript{33} but rather related to property and civil rights of particular trades within a province.

\textsuperscript{29} \textit{Supra}, footnote 27, at pp. 466-467, per Anglin J.

\textsuperscript{30} \textit{Supra}, footnote 14.

\textsuperscript{31} \textit{Supra}, footnote 9.

\textsuperscript{32} This view of the scope of the general power came from \textit{Attorney General of Ontario v. Attorney General of Canada}, [1896] A.C. 348, a case which drastically restricted the earlier liberal and centralizing view of \textit{Russell v. The Queen} (1882), 7 App. Cas. 829. The narrow view in turn has now been discarded. See infra, at footnotes 111 and 112.

The two sterilized 1919 statutes were repealed by the Combines Investigation Act, 1923. Reshuffled by the 1927 statutory revision, the new Act prohibited "combines" (mergers, monopolies or concerted arrangements). It provided a Registrar to look for and inquire into existing or forming combines. The Registrar's report on each investigation would form the basis of a decision by the Governor in Council to alter the tariff, a decision to seek revocation of a patent in the Exchequer Court, or a decision to prosecute criminally. The Governor in Council had power to pass regulations under the Act.

In 1929 the constitutional validity of the new statute was tested on a reference to the Supreme Court of Canada together with section 498 of the Criminal Code which now is substantially section 32(1) of the Combines Investigation Act. Both pieces of legislation were unanimously found in the Supreme Court of Canada together with section 498 of the Criminal Code. Both pieces of legislation were unanimously found intra vires. The court recognized that while the criminal law power should be interpreted in its widest sense, yet this had necessarily to be limited by the exclusive areas of provincial jurisdiction. Mr. Justice Duff wrestled briefly with the substantive meaning of the natural "domain of criminal jurisprudence", and the court concluded that the legislation, which was of general application going to maintain competition, was justifiable as criminal law. Section 91(27) was felt to include as an essential part, rather than only an ancillary part, the power to provide for investigation into actual and potential crime. No attention was therefore given to the other arguments of the Attorney General of Canada to the effect that either the trade and commerce or the general power could also support the legislation.

On appeal the Supreme Court was upheld in result by the Privy Council in a decision considered fundamental to the current constitutional position of the combines legislation. It is important that Lord Atkin conditioned his advice upon the principles laid down in Citizens Insurance and John Deere Plow Co. v. Wharton which caution courts dealing with constitutional issues (1) to decide no more than is absolutely necessary for the case at

at p. 130: "It is not competent either for the Dominion or a Province under the guise, or the pretence, or in the form of an exercise of its own powers, to carry out an object which is beyond its powers and a trespass on the exclusive powers of the other...."

S.C., 1923, c. 9.
Re Combines Investigation Act and Section 498 of the Criminal Code, supra, footnote 7.
Ibid., at pp. 413-415.
Supra, footnote 9.
hand, (2) to avoid any attempts at exhaustive definition of any head of legislative jurisdiction, and (3) to reduce *obiter dicta* to a minimum. Lord Atkin first outlined the basic structure of the distribution of powers. He stated that the general power was the major source of federal authority. It was subject to the specific enumerations in section 92 which were in turn qualified by the specific heads of section 91. After examining the Select Committee *Report* of 1888 and the tie between the Combines Investigation Act and the Criminal Code, as evidence of the purpose of the 1923 Act, he found the legislation to fall within the criminal law power. The *Board of Commerce* case was distinguished on the ground that unlike the 1923 statute the earlier scheme went to accumulations by non-traders, fixing prices of surplus articles, regulating profits, and to articles produced by householders for private use. As well, the 1919 Act set out no principles of general application.

In justifying the legislation under the criminal law power Lord Atkin took the view that Parliament alone was competent to define what was within the domain of criminal jurisprudence from time to time. He appeared thereby to remove section 91(27) from the reach of the doctrine of colourability:

> Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? Morality and criminality are far from co-extensive. . . .

This view, tantamount to saying that the pith and substance of criminal law is the criminal sanction rejects the concept of the natural domain of criminal jurisprudence taken in the *Board of Commerce* case. Quite apart from the elusive nature of a “penal consequence”, Lord Atkin’s view was an untenable extreme for a federal constitution and a judicial retreat was inevitable.

Lord Atkin assumed a favourably noncommittal attitude toward possible justification of the Combines Investigation Act under the trade and commerce power, and his position remains the most authoritative statement on that issue:

> The view that their Lordships have expressed makes it unnecessary to discuss the further ground upon which the legislation has been sup-

---

41 *Supra*, footnote 28.
ported by reference to the power to legislate under s. 91, head 2 for “The regulation of trade and commerce”. Their Lordships merely propose to disassociate themselves from the construction suggested in argument of a passage in the judgment in the Board of Commerce case under which it was contended that the power to regulate trade and commerce could be invoked only in furtherance of a general power which Parliament possessed independently of it. No such restriction is properly to be inferred from that judgment. The words of the statute must receive their proper construction where they stand as giving an independent authority to Parliament over the particular subject matter. But following the second principle noticed in the beginning of this judgment their Lordships in the present case forbear from defining the extent of that authority. They desire, however, to guard themselves from being supposed to lay down that the present legislation could not be supported on that ground.43

In 1934 the Conservative government established a Royal Commission on Price Spreads the report of which, in 1935, inspired attempts at drastic change in the control of competition.44 One of these changes made price discrimination an offence under the Criminal Code.45 The new section 498A(1)(a) made it an indictable offence for a supplier to discriminate by discount, rebate or allowance against competitors of a purchaser. The other two paragraphs in subsection one went to territorial price discrimination and to predatory pricing practices engaged in “for the purpose of destroying competition or eliminating a competitor”. On a reference, the Supreme Court found the entire section in praesidio by a division of four to two.46 The majority was brief and followed the P.A.T.A.47 line on the scope of the criminal power. Implying disagreement with the authority of P.A.T.A., Mr. Justice Duff also said the legislation was not in substance colourable. The two dissenters were of the view that paragraph (a) was colourable in that it went more to private injury than to a public injury to competition generally. They would have classified paragraph (a) as relating to property and civil rights. Mr. Justice Crockett’s dissent systematically refuted the P.A.T.A. view

43 Ibid., at p. 326.
44 An interesting study of this Commission demonstrated the role played by small and often unrelated political considerations in the formation of combines policy and legislation. See Forster, The Politics of Combines Policy: Liberals and the Stevens Commission (1962), 26 C.I.E.P.S. 511.
45 An Act to amend the Criminal Code, S.C., 1935, c. 56, s. 9. The new section remains today in substantially the same form as section 33A(1) of the Combines Investigation Act, supra, footnote 2.
47 Supra, footnote 7.
of the criminal law power. The dissenters agreed that the two other subsections were valid.

The Privy Council dismissed the appeal.48 Lord Atkin in a very brief judgment replied to Mr. Justice Crocket's critique of P.A.T.A. He affirmed the right of the judiciary to examine for colourability, saying that if legislation was not in pith and substance within section 92, then it was within the criminal law power if Parliament declared it to be criminal law and provided a criminal sanction. Otherwise, presumably, the law could and would be classified under another head of federal power. In view of Lord Atkin's brief judgment the price discrimination section in the Combines Investigation Act probably remains on firm constitutional ground, unaffected by the decline in authority of the P.A.T.A. view of the criminal power.

On the price discrimination reference neither the majority in the Supreme Court nor the Privy Council considered the trade and commerce power or the general power.

The Report on Price Spreads also gave rise to The Dominion Trade and Industry Commission Act, 1935.49 This statute embodied an interesting experimental attempt to co-ordinate the administration of several federal statutes which dealt with marketing, unfair trade practices and combinations in restraint of trade. The Dominion Trade and Industry Commission was created as the co-ordinating agency and was given powers to regulate commerce and industry. Among the twenty-seven statutes so to be administered were the Patent Act,50 the Trade Mark and Design Act,51 the Unfair Competition Act,52 the Combines Investigation Act,53 and twenty-three sections of the Criminal Code. Section 14 of the 1935 statute was the most significant provision for our purposes. Providing a type of negative clearance procedure section 14 enabled a unanimous Commission, after a combines investigation, to recommend to the Governor in Council that the latter approve such private industry agreements relating to prices or production as would reduce "wasteful or demoralizing competition", without causing undue restraint of trade, in any specific industry. Such approval would mean that no combines prosecution could be brought in relation to performance of the agreement without the consent of the Commission. Further, by section 23

---

49 S.C., 1935, c. 59.
50 R.S.C., 1927, c. 150, as am.
51 R.S.C., 1927, c. 201, as am.
52 S.C., 1932, c. 38.
53 R.S.C., 1927, c. 26, as am.
the Commission was authorized to conduct "Fair Trade Conferences" with individual industries to discuss and evaluate the fairness or desirability of prevailing commercial practices. The Commission was permitted to publish its opinion concerning any undesirable practices. The Commission had authority to recommend prosecution but lacked power to impose sanctions.

On a reference testing all portions of the Dominion Trade and Industry Commission Act, the Supreme Court held section 14 to be outside the competence of the federal Parliament. Not only was it not necessarily incidental to an exercise of the criminal law power, but since its sweep included agreements entirely intraprovincial in nature and effect and was not confined to interprovincial or external trade, neither was it justifiable under the trade and commerce power. The court did not see fit to imply the validating limitation into the legislation. Nor did the court consider whether the exemption of certain agreements could be viewed as an administrative, or prerogative, provision relating to a decision to prosecute under the criminal law. The Supreme Court also found two other sections to be ultra vires but did not pass on section 23 as it had received no argument on that section.

An appeal was taken with regard to all but section 14. The Privy Council held all the legislation before it to be intra vires, including the two sections found to be ultra vires by the Supreme Court in section 23. This latter finding followed a rejection of the contention by represented provinces that the authorized conferences contravened Citizens Insurance by permitting the Commission to review and to criticize individual and intraprovincial agreements. The Privy Council took the view that this provision gave no authority to interfere with property and civil rights. One can only speculate as to how the Privy Council would have treated section 14, but its view of section 23 seems to weaken the Supreme Court's position on section 14.

In 1946 conduct now covered by the Combines Investigation Act was removed from the purview of the Dominion Trade and Industry experiment.

In 1952 Parliament provided prohibition orders and dissolu-

---

tion orders as combines remedies. This legislation as amended in 1960 is now section 31 of the Combines Investigation Act. By subsection (1) a court may on the application of an attorney general at the time of a conviction for a Part V offence, or within three years thereafter, issue a prohibition order “in addition to any other penalty”. The dissolution order under subsection (1), restricted to mergers and monopolies, may be issued on the same basis. Subsection (2), amended in 1960 by adding provision for the dissolution order, goes much further and permits either order to be issued for an incipient offence in the absence of a conviction. In this case the order is issued by a superior court of criminal jurisdiction in proceedings commenced by information of an attorney general. In the case of an order issued under subsection (2) or within three years after a conviction but not at the time of conviction, the proceedings are tried without a jury and, so far as possible, according to the procedure applicable in injunction proceedings in the superior courts of the province.

The constitutional basis of section 31(1) was immediately argued. In R. v. Goodyear Tire and Rubber Co. Ltd., et al. several rubber companies pleaded guilty to a conspiracy charge but resisted the Crown’s application that a prohibition order accompany the fine. The section was challenged, of course, as constituting an interference with the exclusive provincial right to pass laws relating to property and civil rights. Both the criminal law power and the trade and commerce power were argued by the Attorney General of Canada in support of the legislation. The trial judge reasoned that the conspiracy section had been held to be valid criminal legislation and according to P.E.I. v. Egan the federal government had the power to punish by way of specific prohibition order. The Ontario Court of Appeal upheld section 31(1) as necessarily incidental to a proper exercise of the criminal law power. Mr. Justice Roach, speaking for a unanimous court of five, relied on a statement by Mr. Justice Duff in Re Combines Investigation Act and Section 498 of the Criminal

---

57 S.C., 1952, c. 39, s. 3.
58 S.C., 1960, c. 45, s. 12(1).
59 S. 31(4).
61 Provincial Secretary of P.E.I. v. Egan and Attorney General of P.E.I., [1941] S.C.R. 396. The trial judge as well as the majority of the Supreme Court in Goodyear referred to a statement by Duff C.J., at p. 400 on the subject of a three year driving prohibition accompanying a penalty for the particular offence. Chief Justice Duff’s judgment was not the majority judgment, and in any event all discussion of the constitutionality of the federal provision in Egan was obiter dicta.
1969] Constitutional Aspects 181

Code\textsuperscript{62} and on the Canada Temperance case\textsuperscript{63} for his opinion that the criminal law power covered legislation going to the prevention of crime as well as to punishment for offences committed. Two examples cited in support were preventive detention and the practice of binding over to keep the peace. Also, since an order under the section could go only to conduct "directed towards the continuation or repetition of the offence", in the words of the statute, it was limited to criminal attempts. Mr. Justice Roach's logic is difficult to avoid, given criminal classification of the substantive offence.

The Supreme Court of Canada upheld the Court of Appeal in all material respects. Although all provincial attorneys general were invited to present argument, none did so. The majority judgment, delivered by Mr. Justice Locke, noted that the prohibition order in section 31(1) was described in the legislation as a penalty, available upon conviction. The "prevention of crime" theory was endorsed: "The power of Parliament extends to legislation designed for the prevention of crime as well as to punishing crime".\textsuperscript{64}

The occasion and scope of such "equitable" remedies as prohibition and dissolution orders represent important problems, since these orders are among the best avenues for restructuring an industry or for proscribing particular behavioural practices of a company. The Supreme Court of Canada in Goodyear specifically refrained from passing on the constitutional validity of the provision in section 31(1) for a dissolution order upon conviction, holding it to be clearly severable.\textsuperscript{65} This question has yet to be faced, as has the question of the constitutional validity of either order imposed without conviction under section 31(2) for an incipient offence.\textsuperscript{66} The finding of severability for section 31(1) may mean that the Supreme Court is not prepared to extend any farther the prevention of crime theory. Logically, such a theory has considerable potential as a centralizing device when applied to the distribution of powers in the British North America Act.\textsuperscript{67} Also,

\begin{itemize}
  \item \textsuperscript{62} Supra, footnote 7.
  \item \textsuperscript{63} Attorney General of Ontario, et al v. Canada Temperance Federation, et al., [1946] A.C. 193, at p. 207. A contrary view had been expressed twenty-five years earlier in the Board of Commerce case, supra, footnote 27, at pp. 461-462, per Anglin, J.
  \item \textsuperscript{64} Supra, footnote 60, at p. 308 (S.C.R.).
  \item \textsuperscript{65} Ibid., at p. 310, per Locke, J. for the majority, and p. 313, per Rand J.
  \item \textsuperscript{66} A few prohibition orders have been issued under s. 31(2) but none of the applications has been contested.
  \item \textsuperscript{67} An analogous hazy area dealing with the prevention of conduct concerns the fine line to be drawn between the provincial right to suppress a
\end{itemize}
since no conviction is necessary for section 31(2) and consequently the "other penalty" reasoning would not apply, a fortiori the constitutional position of section 31(2) is no better than that of section 31(1). However, nothing here precludes justification under the general power or the trade and commerce power except, perhaps, a similarity between the constitutional problems of section 31(2), and those of The Combines and Fair Prices Act, 1919 and section 14 of The Dominion Trade and Industry Commission Act. Both the latter were held ultra vires.

By both subsections either type of order may go to "any other person" as well as to the party convicted or the party who appears likely to commit the offence. On the meaning and limitations of this phrase the Supreme Court of Canada in Goodyear affirmed Mr. Justice Roach, who had stated that the "other person" had to be specified in the order, and since the order was justified under the criminal law power the other person or persons had to be standing in such a relation to the convicted party that any limitation of his activity operated as a penalty upon the convicted party. Consequently, most orders go specifically to the control of officers, servants, agents, parents and subsidiaries of a convicted corporation. The orders are limited in scope to conduct relating to an offence under the Combines Investigation Act, but the fact remains that someone may be penalized, or at least restricted, without first being convicted or without even tending to commit an offence himself.

None of this fits easily into traditional criminal law theory. It is noteworthy that although the Supreme Court of Canada in Goodyear supported the wide view of the criminal power, the majority did reiterate that P.A.T.A. had left the trade and commerce power open as an avenue of constitutional justification.

The last major case concerning the constitutionality of portions of the Combines Investigation Act ended recently with a unanimous finding by seven judges of the Supreme Court of Canada that section 34 prohibiting resale price maintenance was intra

nuisance, which might also be criminal, and the federal right to punish. See Bedard v. Dawson and Attorney General of Quebec, [1923] S.C.R. 681. At p. 684, Idington J. said: "As to the argument addressed to us that the local legislatures cannot legislate to prevent crime, I cannot assent thereto for in a very wide sense it is the duty of the legislature to do the utmost it can within its power to anticipate and remove, so far as practicable, whatever is likely to tend to produce crime. . . ." Cf. R. v. Lamontagne, [1945] O.R. 606; Johnson v. Attorney General of Alberta, [1954] S.C.R. 127.

68 Supra, footnote 25.
69 Supra, footnote 49.
70 Supra, footnote 60 (S.C.R.).
A Canadian sales agent of an American manufacturer of surgical blades had been indicted under section 34(2)(b) for allegedly aiding and abetting the manufacturer to induce jobbers to resell at prices not lower than certain minimums. Apart from interpreting the words "induce" and "dealer" in the section the main issue became the constitutional validity of section 34. Three of five judges in the Ontario Court of Appeal held the section to be valid criminal legislation. Chief Justice Porter, with whom Mr. Justice Kelly agreed on the constitutional point, dissented on the ground that the section was colourable. The Supreme Court of Canada gave a somewhat unhelpful judgment without calling upon the respondent Crown:

We are all in agreement with the conclusions of the majority in the Court of Appeal and we are in substantial agreement with their reasons. The appeal is dismissed.

Consequently it appears that section 34 has been solidly justified as federal legislation "substantially" for the reasons set out in the Court of Appeal by Mr. Justice Schroeder, with whom Roach and Gibson J.J.A., agreed on the constitutional issue. Mr. Justice Schroeder was brief on the point. After affirming Lord Atkin's decisions in P.A.T.A. and Reference re Section 498A of the Criminal Code, which together leave room for the doctrine of colourability, he concluded:

The provisions of s. 33A(1)(a) (formerly contained in s. 498A of the Cr. Code) and s. 34 of the Combines Investigation Act have this point in common, that in their essential nature they are designed to safeguard the public against what Parliament regarded as the evil consequences of the commercial activities therein described, since their effect was to impose restraints upon free and equal competition, a practice which, in the opinion of Parliament, ought to be suppressed in the public interest. The legislation is in pith and substance criminal legislation and falls with the exclusive powers assigned to Parliament by s. 91(27) of the B.N.A. Act, hence its validity is unassailable.

There is, indeed, an element of specificity in the resale price maintenance section which makes it more properly criminal law than the conspiracy, merger or monopoly offences. However, Chief Justice Porter supplied a vigourous dissent in Campbell on constitutional grounds. Taking the view that judicial supervision of the pith and substance of criminal law must prevail even over a genuine attempt by Parliament, he argued that resale price main-

72 Ibid.
tenance dealt with contracts, which *prima facie* were within section 92(13) and 92(16) of the British North America Act. Unlike the conspiracy, merger or monopoly provisions section 34 did not require proof of public harm, which was essential to a valid criminal law, and whether there was harm on the facts depended on the general economic context. Mere vertical agreement, particularly only one, respecting price policy was not necessarily either harmful to the public nor a restraint upon competition. In effect, then, Chief Justice Porter argues that *per se* offences against competition which did not include proof of public harm or which were not "implicitly harmful" could not be justified under the criminal law power. It is not a strong constitutional argument.

Unlike section 34, however, the merger and monopoly provisions in the Combines Investigation Act must by their very nature be quite unspecific in language. The conspiracy section, desirably or otherwise, is also unspecific. It is commercially and economically unrealistic to make all offences *per se* offences, and the current result is that criminality hinges on tests such as "unduly" and "likely to be lessened to the detriment or against the interest of the public". Particularly in this area traditional standards of criminal proof and procedure, as well as the limited nature of available remedies, affect the control of competition in a most unrealistic fashion.

(3) Criminal law power.

Even if the *P.A.T.A.* definition of criminal law might be ideal for penologists it is clearly unsatisfactory for Canadian constitutional lawyers. Earlier cases than *P.A.T.A.* had held that the penalty was at best ancillary to the criminal law power and that substance alone was relevant to classification. The relative insignificance of the fact of a penalty has since been reaffirmed, a necessary development if for no other reason than to accommodate the provincial penalty power in section 92(15). This is, of course, why the courts cannot abdicate the classification exercise to a legislative body; certain heads of jurisdiction in either section 91 or 92 could, if read too liberally, erode all meaning from the distribution of powers. The judicial doctrine of colourability is an essential weapon in protecting the distribution.

---

⁷⁴ Ibid., at p. 101.  
⁷⁵ Supra, footnote 7.  
⁷⁷ See Laskin, op. cit., footnote 11, at p. 247.
Even the apparent simplicity of testing substance by form of sanction is deceptive, for the criminal sanction may take many forms. But it nevertheless appeals as an easier task than otherwise defining the pith and substance of criminal law. As to the latter we have been told that section 91(27) comprehends "the criminal law in its widest sense", that it goes to every subject "which by its very nature belongs to the domain of criminal jurisprudence", and that federal jurisdiction in relation to criminal law is "plenary". But what are the essential features of crime or, in specifics, what is the pith and substance of criminal law?

It is difficult, perhaps impossible and perhaps even undesirable to furnish anything but broadly defined tests. Most would agree, for example, that as the part of public law most directly concerned with the orderly functioning of society as a collective unit the criminal law goes to public peace and welfare, physical order and state security. Included in these general objectives are particular rules going to the physical and moral safety of private persons and their property. Geared to society as a whole, criminal laws are of general application even if some particular rules apply only to specified classes of persons.

The social significance of the criminal sanction and its historical severity have contributed other features which now may well be a necessary part of criminal law within the meaning of

79 In re The Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919, supra, footnote 28, at pp. 198-199.
80 Reference Re Section 498A of the Criminal Code, supra, footnote 46, at p. 366.
81 There is, of course, a vast literature on this question. Helpful attempts include Williams, The Definition of Crime (1955), 8 Current Legal Problems 107, and Hughes, The Concept of Crime: An American View, [1959] Crim. L. Rev. 239, 331. See also the analysis by the United States Supreme Court as to whether deprivation of citizenship is a "penal" sanction: Kennedy v. Mendoza-Martinez (1963), 83 S. Ct. 554, at pp. 567-577.
82 The Supreme Court of Canada has occasionally sought to define the type of interests properly secured by the criminal law. In Re Combines Investigation Act and Section 498 of the Criminal Code, supra, footnote 7, Mr. Justice Duff described the objects of criminal laws as follows on p. 413: "They are concerned primarily not with rights, with their creation, the conditions of their exercise, or their extinction; but with some evil or some menace, moral or physical, which the law aims to prevent or suppress through the control of human conduct."

Twenty years later in the Margarine case Mr. Justice Rand spoke to the same effect: "Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality; these are the ordinary though not exclusive ends served by that law. . . ." In the Matter of a Reference as to the Validity of Section 5(2) of The Dairy Industry Act, R.S.C. 1927, Chapter 45, [1949] S.C.R. 1, at p. 50.
the British North America Act. At common law the one constant consequence of criminality was the element of public repudiation or condemnation for breach of a norm of conduct designed for the general interest. Public agencies conducted the investigation and prosecution and executed the sentence. The King could impose any penalty or detriment for a felony and in early Anglo-Saxon England anything less than total deprivation of civil rights, including property and life, was technically an act of mercy. The anti-social character of the conduct together with the severity of the penalty resulted in and were reinforced by two things, apart from special rules of criminal procedure. First, criminal laws were specific, enabling a person to know precisely in advance the legal quality of his act. Particularly for conduct not generally considered morally reprehensible in itself, this specificity is the source of the moral opprobrium which is typically such an important part of conviction. Specificity justified the severe penalty. Second, the sanction was applied only after the line had been transgressed. Criminal laws (as opposed to criminal remedies) are usually but not necessarily negative in form, form being in some cases largely a matter of drafting preference.

Surely the limits of the criminal law power in section 91 must eventually be defined by such considerations as outlined above. This is not to suggest that the Supreme Court has not on occasion attempted to do so, one of the more recent examples being the attempted distinction between advertence and inadvertence with relation to the driving of motor vehicles. In the case of conduct not obviously reprehensible the opinion of Parliament, or the purpose of the legislation, may well be evident from inspirational commission reports, from enforcement provisions, from expert evidence or sometimes from the type of remedy supplied.

If the norm is determined to be criminal in substance, why should there be any restriction upon the remedy devised? Particularly, if we can regulate convicted humans by execution or in-

---

83 Canada has not been as willing as the United States to find criminal laws void for uncertainty. The requirement of certainty is part of due process in the United States, and the highest degree of specificity is required where penal sanctions attach for an offence which does not require mens rea in the sense of a guilty mind. Specifically with relation to antitrust, American courts have sustained "reasonably calculated" and "tend to accomplish" as tests for criminality but have rejected "real value" and "reasonable profit". See Flynn, Federalism and State Antitrust Regulation (1964), pp. 44-48. With specific respect to the Sherman Act of July 2nd, 1890, c. 647, 26 Stat. 209, 15 U.S.C.A., §§ 1-7 as am., see Nash v. United States (1912), 33 Sup. Ct. 780.

carceration, why not convicted companies by dissolution or prohibition order? How different in principle is a fine from a divestiture order? If under the criminal law we permit personal freedom to a convicted person subject to conditions that he not go to places A or B, or do things C or D, why can we not likewise restrict a business’ practices or prices? Mr. Justice Rand has emphasized the viability of the criminal law power to meet social change:

It is accepted that head 27 of s. 91 of the Confederation statute is to be interpreted in the widest sense, but that breadth of scope contemplates neither a static catalogue of offences nor order of sanctions. The evolving and transforming types and patterns of social and economic activities are constantly calling for new penal controls and limitations and that new modes of enforcement and punishment adapted to the changing conditions are not to be taken as being equally within the ambit of parliamentary power is, in my opinion, not seriously arguable.

The pith and substance of any given piece of legislation depends on the relative importance attached to its various features by the particular court. On this assessment, for example, rests any right of the federal Parliament to provide for the dissolution of provincially incorporated companies as part of a comprehensive scheme for supervision of the economy. Particular remedies may therefore be relevant to classification of the substance. Patent, trademark or tariff remedies dependent upon conviction would probably be justified under the criminal law power but failing that would find refuge under heads 22, 2 and 3 respectively of section 91. Negative clearances, prospectively oriented and administratively negotiated, probably would have greater impact upon characterization than any other single combines remedy or procedure.

One must not, however, ignore the “prevention of crime” theory. The cases are clear that the federal Parliament alone is competent to pass legislation relating to the prevention of crime.\footnote{R. v. Goodyear Tire and Rubber Co. Ltd. et al., supra, footnote 60, at p. 311 (S.C.R.). See \textit{Industrial Acceptance Corporation v. The Queen}, [1952] 4 D.L.R. 615, affd [1953] 2 S.C.R. 273.}
This is immensely valuable to combines control if the substantive offences are only justifiable as criminal law, for the underlying causative factors of most serious combines offences are thought to involve industry structure. As all other antitrust jurisdictions in the world have decided, combines control is less effective if action may only be taken after the fact. Negative clearances, like prohibition or dissolution orders for incipient offences, stand their best chance under the prevention of crime portion of the criminal law power. Indeed, in result negative clearances would not be far removed from the informal "programme of compliance" currently such an important part of the administration of the Combines Investigation Act.\footnote{As described by the Director of Investigation and Research at p. 15 of his Annual Report for the Year ended March 31st, 1967: "For several years now the administration of Canadian anti-combines legislation has featured the Director's 'program of compliance' under which businessmen are encouraged to discuss their problems with the Director in advance of the adoption of policies which might offend against the law. There has been a most encouraging response to this program both from businessmen and their counsel and it is planned to continue and intensify it. . . . It should be emphasized that the Director does not have authority to regulate business practices nor to decide the law. The program of compliance is designed to avoid the commission of offences by informing businessmen and their advisers about the Combines Investigation Act in general and its application to particular situations as they arise in the course of business. Its success depends upon the willingness of businessmen to raise their questions with the Director and their own legal advisers. It is, of course, open to any businessman, if he so desires, to adopt a course of conduct that he considers to be lawful and which he is prepared to have tested by the courts so that the application of the law to specific circumstances may be determined through the judicial process."}

However, even if the prevention of crime theory would ensure justification of most of the remedies an effective combines policy would require, it could do little for the procedures or the tribunal by which the remedies were to be applied.

\textit{(4) Trade and commerce power.}

The federal antitrust laws in the United States provide a wide range of remedies for conspiracies, monopolization, mergers, price discrimination and the like. Included by the Sherman Act\footnote{Supra, footnote 83.} in this arsenal are fines and imprisonment for both combinations in restraint of trade and monopolization. As with the Clayton Act\footnote{Act of Oct. 15th, 1914, c. 323, 38 Stat. 730, 15 U.S.C.A., § 12 \textit{et seq.}, as am.} and the Federal Trade Commission Act,\footnote{Supra, footnote 24.} the Sherman Act was passed under the constitutional authority of the commerce clause which empowers Congress to regulate commerce with .\footnote{Supra, footnote 83.}
foreign nations and among the several states.\cite{92} Most of the individual states also have antitrust statutes, passed under the police power, which apply to commerce not subject to the federal commerce power. Particularly since the depression and World War Two, however, the commerce clause has been interpreted by the courts in such a way that all significant commercial activity is now controlled centrally. Consequently the federal antitrust laws apply to activity where interstate movement occurs at any point in the full flow of commerce, to intrastate activity which has an interstate competitive effect, and to severe restraints on competition even though the quantitative interstate commercial effect is slight.\cite{93}

The British North America Act was framed with a greater interest in central control than motivated the constitutional fathers to the south. Reaction in the founding provinces to the consequences of decentralized control in the United States has been well documented. The broad and unqualified language of section 91(2) reflected the basic interest that strength from economic unity replace the floundering provincial economies. Yet, as the American courts broadened their commerce clause until it meant essentially what the Fathers of Confederation has sought for Canada, so have the Privy Council and the Canadian courts reacted against the hopes of the framers of their constitution and have decentralized commercial control.\cite{94}

At least until relatively recently the history of interpretation of the trade and commerce power has almost uniformly reinforced the federal paralysis which resulted from a series of Privy Council decisions in the years 1881-1896. The predominant view was that section 91(2) did not in any way go to either general commerce, contracts, particular trades or occupations, or commodities so far as those things might be intraprovincial. The test for the local nature of a transaction was abstractly legal, divorced from commercial effect.

During the hard years random obiter dicta preserved a small niche for the trade and commerce power. It was said that the federal power went to external trade and interprovincial trade, together with such ancillary local control as was necessarily incidental to a proper exercise of the federal power. The P.A.T.A. case rescued section 91(2) from a temporarily held view that its life force depended somehow on a special liaison with the peace, order and good government provision.\cite{95} But voices crying

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{92} Constitution, Art. I(8)(3).
\item \textsuperscript{93} Flynn, \textit{op. cit.}, footnote 83.
\item \textsuperscript{94} Smith, \textit{op. cit.}, footnote 12, pp. 1-156.
\item \textsuperscript{95} Supra, footnote 7.
\end{enumerate}
\end{footnotesize}
out for the economic need of a strong federal commerce power, such as that of Chief Justice Anglin, remained in the minority.

It has been suggested that in 1957 with the case *Re The Farm Products Marketing Act* the Supreme Court of Canada has opened the door for a new look at the trade and commerce power. The majority of the court seemed to lean to the American “flow of commerce” approach and held that a transaction wholly within the province for the purposes of the law of contract might yet be interprovincial for other constitutional purposes. Particularly, Mr. Justice Rand made reference to areas of trade regulation which lay outside provincial competence: “. . . strictly trade regulations such as prices or the specification of standards, which could no more be imposed than Provincial trade marks. Regulation of that nature could directly nullify external trade vital to the economy of the country”. Wages, insurance, taxes and the like would remain local, but the federal Parliament had jurisdiction over trade.

The new attitude manifested in the *Farm Products Marketing* case has been followed in other decisions and has led several commentators to the view that comprehensive combines legislation now rates a fair chance of being justified under the trade and commerce power. Any liberalizing trend remains, however, a precarious one. Dean Rand was in 1963 still able to make the following assessment of the capacity of section 91(2) as found by the courts:

. . . 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 the daily witnesses, is shown to have become tramelled to an extent which forces us to contemplate a degree of fresh appraisal of the limitations to which the Dominion has been reduced.
Any liberalization which might have occurred in the judicial approach to the trade and commerce power has resulted from going beyond mechanical formalism, which characterized the early cases, to examine the non-legal business and economic facts of the subject matter before the court. Moreover, the liberal judgments have been explained and justified against the factual context. What are the commercial realities relevant to the preservation of competition? Presumably for constitutional purposes we must look beyond the prohibition of interprovincial tariffs and provision for a single currency. Without attempting to be exhaustive, certain phenomena are clear. Improved communication and transportation have greatly increased the mobility of labour, capital, raw materials, finished produce and managerial talent. The capacity of capitalism to raise the standard of living through increased productivity has been proven to lie in larger business units with economies of scale resulting from mass production, distribution and sales promotion. Conglomerate mergers with their supposed advantages in capital, financing, distribution and managerial ability increase in number. Retailing is increasingly de-personalized. Interlocking directorates and multi-provincial or international corporations where strategic decisions including price policy are made centrally, are more and more common. The ease with which provincially incorporated companies may do business outside the province also betrays the relative commercial insignificance of provincial boundaries. As there are national trade associations, so is labour often organized on an industry-wide basis, a basis which may be national or international. Modern (post depression) economic theory provides an important role for central government, for reasons associated with everything from general employment to stagnation and inflated price levels. So are there political implications in the growth of concentration in industry, which demand central and coordinated supervision. The steady lowering of national economic barriers to trade and increased numbers of trade agreements increases our commercial interdependence with foreign countries.

Recognition of the characteristics of a modern economy will not denude the provinces of power over what may remain intra-provincial in substantial effect. For example, many service industries may retain that character and, assuming maintenance of the Citizens Insurance line,\(^\text{108}\) will remain substantially under provincial

\(^{108}\) Sir Montague Smith set out the central limitation on the scope of the trade and commerce power in Citizens Insurance Co. v. Parsons, supra,
control. But commercial interdependence gives a general character to much of what once possessed only a local character. To the extent the provinces ever comprised watertight economic compartments they have sprung many leaks. It would be most unfortunate if the constitutional implications of these developments were not recognized.

From the point of view of combines control, the advantages of justification under the trade and commerce power would largely be procedural, including the form and authority of the administering institutions. Also, the law could more easily go to tests of industry structure and behaviour than to such economically irrelevant matters as conspiracy, attempts, or the rule in Hodge's case. In short, the subject could in substantive law, administration and remedies be recognized for what it is, namely an exercise in broad economic regulation.

(5) Peace, order and good government.

If justification of effective combines measures under the trade and commerce power be thought to distort the desirable reach of that power, the economic context in which the laws of competition must function suggests another quite legitimate basis for federal control. This is the general power.

The release of the general power from bonds of early judicial restriction is more firmly established than is any similar release for the trade and commerce power. Initially in the history of constitutional interpretation, the general power was invoked as the foundation for the Canada Temperance Act on the grounds that the subject of the legislation was of general concern and uniform legislation throughout the Dominion was desirable. In the particular case this avoided having to squeeze the legislation, which permitted local option, within the Citizens Insurance limitation of the trade and commerce power. But later the Privy Council, wrestling with difficult passages in the Local Prohibition case and perhaps overly zealous in its desire to protect the federal character of the country, separated the general power from the enumerations in the face of the language of section 91.

footnote 9, at p. 113: "... authority to legislate for the regulation of trade and commerce does 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."

104 Supra, footnote 6.
105 Russell v. The Queen, supra, footnote 32.
One consequence of this was that paramountcy would not be invoked in favour of the general power. In the 1920's the peace, order and good government clause was reduced to a second class power subservient to the enumerated powers and relegated to an "emergency" function.\(^{107}\)

In the early 1930's the courts tentatively began to broaden the scope of the general power\(^{108}\) and in 1946 Viscount Simon openly rejected the strict view:

... 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 on matters specially reserved to the provincial legislatures.\(^{109}\)

As is so often the case this change of direction was followed by a temporary reaction,\(^{110}\) but Viscount Simon's position quickly resurfaced\(^{111}\) and a unanimous Supreme Court of Canada recently reaffirmed it clearly and unequivocally,\(^{112}\) finally laying to rest the narrow position taken in the early cases.

A strong argument can be made that the general character and structure of the Canadian economy do not as such come within a specific enumerated head of jurisdiction or even, if they do, that the problems and significance of regulating competition have attained the dimension outlined above in the *Canada Temperance Federation* case.\(^ {113}\) As the members of the General Agreement on Tariffs and Trade move down the road to freer trade many markets at home and abroad expand their geographical boundaries. The international competitive position of Canadian industry affects our productivity, our balance of payments and ul-

---


\(^{112}\) *Munro v. National Capital Commission*, [1966] S.C.R. 663, at pp. 670-671. The case upheld the expropriation of private lands outside the Ottawa city limits by the National Capital Commission acting under the authority of a federal statute. For recent application of the general power to a peacetime economic emergency see *Swait v. Board of Trustees of Maritime Transportation Unions* (1966), 61 D.L.R. (2d) 317 (Que. C.A.), per Rinfret and Brossard J.J.

\(^{113}\) *Supra*, footnote 109.
timately our standard of living. There is a need to rationalize our public goals and as it would be undesirable to have less than ideal forms of control, so would it be undesirable to have portions of our laws of competition prescribed and administered by eleven different jurisdictions, each with its own substantive law, periods of limitation, enforcement procedures, sanctions and the like.

This is not to argue that all federal provisions relating to competition need be justified under the general power. Appropriate sections could be sustained under the criminal power, the trade and commerce power, the taxation power, or the patent power. But the general power does not suffer the limitations of the criminal law power, nor need it meet the Citizens Insurance test.\(^{114}\) Rather, it rises above the particular limitations of any one of the enumerated powers. This means that any regulation of competition genuinely in the broad national interest, even in a form previously subsumed under a particular head of jurisdiction, must now "from its inherent nature be the concern of the Dominion as a whole".

B) Delegation.

From one point of view reinterpretation by the judiciary in the light of changed economic conditions is the most desirable way by which the widest catalogue of federal combines controls could be made available. The courts, however, walk between Scylla and Charybdis in their attempt to preserve a workable federal character to the constitution. They cannot be faulted for showing caution when faced with the generalities of the general power, the trade and commerce power or the criminal law power on the one hand, and heads 13 and 16 of section 92 on the other.

It may well be that the judiciary will not be prepared to award the necessary powers for comprehensive combines control to the federal government. Part of the dilemma stems from the fact that trading, said to be a federal matter, involves the transfer of property rights by contract, said to be provincial. Comprehensive combines control would require authority to dissolve companies which may be provincially incorporated, or to limit their capacity. There should be power to suspend any licences\(^{115}\) and perhaps to require forfeiture of property. As well, certain political remedies such as the awarding of government contracts can be used effectively in some anti-competitive markets, and a rationalized approach here would require co-operation.

\(^{114}\) Supra, footnote 103.

\(^{115}\) In this connexion see P.E.I. v. Egan, supra, footnote 61. License suspension can have both a federal and provincial aspect.
The judiciary alone cannot make a federation run smoothly or effectively. A degree of political co-operation is always necessary to provide flexibility and efficiency in total governmental effort. Whether the particular form of co-operation amounts only to consultation or agreement at the political or administrative level respecting programmes and enforcement, or involves complementary legislation, it requires mutual confidence, understanding, and a rough uniformity of goals.

Conscious of the limitations upon constitutional change at the hands of the judiciary, the courts have, on occasion, advocated fuller use of the tools of co-operation between the provinces and the Dominion. Such advocacy was common in the frustrating series of marketing legislation cases. In the words of Lord Atkin in 1937:

> It was said that as the Provinces and the Dominion between them possess a totality of complete legislative authority, it must be possible to combine Dominion and Provincial legislation so that each within its own sphere could in co-operation with the other achieve the complete power of regulation which is desired. Their Lordships appreciate the importance of the desired aim. Unless and until a change is made in the respective legislative functions of Dominion and Province it may well be that satisfactory results for both can only be obtained by co-operation. But the legislation will have to be carefully framed, and will not be achieved by either party leaving its own sphere and encroaching upon that of the other.\(^{116}\)

Mr. Justice Rand, twenty years later in the Supreme Court of Canada, made a similar point after stating that wages, workmen's compensation, taxes, insurance and other aspects of the economic setting of commerce were matters for provincial jurisdiction:

> It follows that trade regulation by a Province or the Dominion, acting alone, related to local or external trade respectively, before the segregation of products or manufacturers of each class is reached, is impracticable, with the only effective means open, apart from conditional regulation, being that of co-operative action; this, as in some situations already in effect, may take the form of a single board to administer regulations of both on agreed measures.\(^{117}\)

It has long been settled that Parliament and the legislatures could delegate the exercise of their powers in particular areas to subordinate agencies.\(^{118}\) This type of action is to be distinguished

---


\(^{117}\) Reference re The Farm Products Marketing Act, R.S.O. 1950, c. 131, supra, footnote 96, at p. 214.

\(^{118}\) Hodge v. Reg., supra, footnote 10; Re Gray (1918), 57 S.C.R. 150; Reference re Regulations (Chemicals) under the War Measures Act, [1943] S.C.R. 1. In Valin v. Langlois (1879), 3 S.C.R. 1, the Dominion Parliament was held competent to transfert jurisdiction to try controverted election
from a direct "interdelegation" of legislative power between Parliament and a legislature which, since jurisdiction must come from the British North America Act rather than from mere consent, cannot be permitted. However, the courts have allowed this latter principle to be circumvented by approving a scheme whereby both Parliament and one or more provinces delegate administrative powers to a common subordinate agency created with a capacity to receive powers. According to the courts cooperative delegation does not amount to an abdication by either Parliament or the legislature, but rather supplies a proper and intelligent outlet for the type of co-operation demanded by many situations if Canadian federalism is to function satisfactorily. By providing this constitutional licence for co-operative federalism the courts have returned a rather sensitive ball to the politicians. A joint administration dependent on political agreement lacks the stability of a judicial solution, but usually it will only follow a distribution of powers confirmed by the judiciary which does not provide enough exclusive or centralized control for effective handling of a specific problem. Canadians concerned with securities regulation, consumer protection, poverty, the conditions of aboriginal peoples and other recently perceived problem areas now seek to follow the lead in the direction of integrated, complementary federal and provincial legislation which has been set by schemes to regulate marketing and motor transport.

Recent Australian experience is perhaps also instructive. The commerce clause in section 51(i) of the Constitution Act, 1900, substantially follows the language of the federal commerce clause in the United States. The judicial formulae differentiating "intra-State" from "inter-State" as matters of degree are, not surprisingly, similar to those developed in Canada, the United States, and other federal countries. But the practical effect of the cases has cases from the House of Commons to the superior courts of the provinces and to give the judges of those courts the power and duty of trying such cases. In similar fashion does the Criminal Code invest provincial magistrates with extensive, if limited, jurisdiction to try offences under the Code. See generally Lederman, Some Forms and Limitations of Co-operative Federalism (1967), 45 Can. Bar Rev. 409.


63-64 Vict., c. 12.
been to limit the federal commerce power in Australia to reflect the limiting language of section 51(i) and in result it is roughly as narrow as the trade and commerce power in Canada. Criminal law is not federal in Australia, however, and in the past such federal control of competition as has existed has been justified under the commerce power.\footnote{128}

Section 51 (xxxvii) of the Commonwealth Constitution specifically permits some interdelegation to the Parliament of the Commonwealth by the state parliaments. As well, the state and federal governments have available the same institutions for cooperation as Canada possesses.\footnote{128}

The Trade Practices Act 1965,\footnote{124} passed under the federal commerce clause, is the cornerstone of a recent Australian venture in co-operative federalism. It is an attempt to rationalize and improve previously existing federal and state legislation concerning competition. The statute requires that certain defined restrictive agreements be registered. If the parties to such an agreement fail to register they commit an offence punishable by fine. The Commissioner of Trade Practices, if he views an "examinable" agreement as contrary to the public interest and is unable to negotiate a change with the parties to the agreement, refers the agreement to the Trade Practices Tribunal constituted under the Act. The Tribunal has subpoena powers and can examine witnesses under oath, but it is not bound by the rules of evidence. A non-reviewable restraining order is issued if the agreement is found to be contrary to the public interest.\footnote{125} Breach of the order is punishable contempt. Penal sanctions\footnote{126} attach only to breach of such a specific order, to breach of a number of specific administrative provisions in the Act, and to conviction for collusive tendering or bidding agreements. Other procedures and remedies under the Act include negative clearances, written undertakings, interim orders, and provision for a private right to recover damage caused


\footnote{129}{Comans, Note, (1953), 31 Can. Bar Rev. 814.}


\footnote{125}{Defined in s. 50.}

\footnote{126}{Fine or incarceration.}
by an act done in contravention of a Tribunal order or the collusive tendering or bidding prohibitions. Section 8 of the Act envisages complementary state legislation conferring jurisdiction upon the federally constituted Trade Practices Tribunal, or legislation by reference in the state legislatures. This opting-in arrangement was designed, according to section 8, to help achieve "orderly and convenient concurrent operation of this Act and complementary law of the States, by means of co-operation . . .".

As might be expected for Canada, Australian experience indicates that political problems in achieving co-operation present the real hurdles. The law of competition bears directly on the business community and as a result there is a risk of less than complete political co-operation. Alternatively, continued co-operation could well become a pawn in the wider political chess game. Delegation must be retractable to fall short of abdication. However, absent any genuine apprehension in Canada of losing power over a period of time through political or even legal prescriptive claim, it is probable that the provinces would more readily relinquish powers to a joint board than they would acquiesce in a judicial adjustment or relinquish powers permanently by constitutional amendment.

Co-operative efforts to control prices and trade practices have been discussed by the federal and provincial governments but no progress toward co-operative legislation on the broad question of competition has been made evident. Given that a board could be constituted, presumably by a federal statute, with the purpose and capacity of supervising competition in Canada, who would delegate what powers, and how? The scope of the federal authority to act in the field is unsettled and consequently the range of provincial power also remains in doubt.

In cases where the relevant division of jurisdiction is between the criminal law power and provincial authority over property and civil rights, provincial legislation in the form of an adoption by reference to a comprehensive federal statute might well not be permissible. The provinces could not, for example, imitate the practice of many American states which pass state antitrust laws

127 This possibility was mentioned by Rand J. in the Nova Scotia Inter-delegation case, supra, footnote 119, at p. 50.
128 Joint efforts at price control were on the agenda for discussion by federal and provincial finance ministers in September, 1966. Co-operative control of certain trade practices was discussed at the federal-provincial conference in October, 1968 preparatory to a ministerial conference early in 1969.
substantially identical to the Sherman Act. If the federal statute is in pith and substance criminal legislation, the provincial statute is *ultra vires*, unlike the case of Attorney General for Ontario v. Scott where both Ontario and England were found competent to enact, for themselves, maintenance order legislation. However, if the federal Parliament possesses jurisdiction over interprovincial trade and the provinces have parallel jurisdiction over intraprovincial trade, there is no obstacle to legislation by reference. Alternatively, and depending on the nature of the underlying political agreement, the provinces and the Dominion could each pass a substantially identical, comprehensive statute, or each could simply delegate to a common administrative agency all its powers of regulating competition. Between these two extremes, any degree of specification of scope or limitation on the authority of the common agency could be provided. There would be little advantage in submitting agreed competition legislation to the Supreme Court by reference in order to discover the precise lines of competence at the particular time of legislating.

C) Constitutional amendment.

Another avenue by which to improve or clarify the constitutional basis for regulating competition is formal constitutional amendment. Failing judicial reinterpretation, the control of competition could probably be improved by a delegation technique even if all the provinces did not co-operate. Constitutional amendment, however, would require the unanimous co-operation of the provinces, since it bears directly on the distribution of powers in sections 91 and 92. In view of the relative legal simplicity and political difficulty of this solution, there is no point in prolonging discussion here. Current efforts to reassess the British North America Act.

---

129 Supra, footnote 83.
133 See the white paper on constitutional amendment, supra, footnote 119, for both the tradition of the past and possible legislation if a comprehensive amendment section is ever to be placed in the British North America Act.
America Act may in time, however, result in facilitating the regulation of competition.

III. Regulated Industries.

The subject of regulated industries goes more to the scope of application of anti-combines' law than to remedies as such, but insofar as it bears upon effective and rationalized control it will be appropriate to explore briefly the relevant constitutional issues.

For some time there existed a loose thought that "regulation" was a matter of provincial competence whereas "prohibition" fell to the federal Parliament.¹²⁴ The former was, fuzzily, felt to connote specific controls or orders, often imposed by specialized subordinate agencies dealing with concrete problems or future conduct. The latter presumably referred largely to the federal power to pass criminal law. Any dichotomy between regulation and prohibition is, however, too facile. The power to regulate must include the power to prohibit, and it is clear that the federal Parliament authoritatively regulates in a detailed manner such businesses as banks, air transport and communication. Similarly, in proper areas provincial legislatures may undoubtedly prohibit certain activities.

As has been mentioned, Citizens Insurance drew the line between the federal trade and commerce power and provincial jurisdiction over property and civil rights by saying that the former did not extend to the regulation of contracts of particular businesses or trades in a single province. Are subjects which are provincial as between these two powers, nevertheless subject to overriding prohibitory federal criminal legislation? The question as phrased is perhaps rhetorical, for if the federal legislation is valid criminal legislation, the answer is clearly "yes". However, to limit erosion of provincial powers the courts, in determining the pith and substance of federal legislation, have tended to modify the scope of the criminal law power by reference to the Citizens Insurance line.¹²⁵

For example, the legislation considered in the Board of Com-

¹²⁴ Professor Smith attributes this view to an early failure by the courts to grasp the essentials of a federal distribution of powers: op. cit., footnote 12, pp. 49-71.

¹²⁵ Leigh, The Criminal Law Power: A Move Toward Functional Concurrency? (1967), 5 Alta L. Rev. 237. The doctrine of mutual modification stems from the fact that plenary legislative power was granted by the British North America Act. It states that the dichotomy of power and responsibility which is created between ss 91 and 92 enables the court to test the scope of one by reference to the other. See Citizens Insurance, supra, footnote 9.
case was held to transgress the *Citizens Insurance* line and to trench upon the exclusive provincial power to pass laws relating to property and civil rights within the province. Section 17 of the Combines and Fair Prices Act, 1919\(^{136}\) prohibited hoarding of food, clothing or fuel which was not "reasonably required" and prices which were not "reasonable and just". The Board of Commerce had power to restrain and prohibit breaches of the Act. Conviction only lay for disobedience of an administrative order. The Privy Council struck down the legislation:

The Board is empowered to inquire into individual cases and to deal with them individually, and not merely as the result of applying principles to be laid down as of general application.\(^{137}\)

The legislative scheme was regarded, rightly or wrongly, as a purported delegation to a Board of a power which Parliament did not possess. At best it was general legislation going to a series of intraprovincial trades. This, presumably, is the source of doubt as to the validity of section 31(2) of the Combines Investigation Act. Provision for prohibition or dissolution orders might conceivably be regarded as machinery for regulating specific industries, despite the general objectives of the Act.

The Combines Investigation Act represents an economic and political theory, namely, competition in commerce. It is the main Canadian instrument designed to achieve as matters of public policy the goals embodied in that theory. The goals include optimal long run allocation of total productive and distributive resources in order ultimately to supply the greatest material happiness to the greatest number. In theory at least, consumer choice directs investment by increasing or decreasing demand. If effective competition or the opportunity for it can be assured in the market place, price and profit levels will perform their critical functions by floating with consumer demand and with the supply created by existing producers. It therefore follows that the socially optimal price and profit is the competitive price and profit and no other. Profit levels will encourage or discourage entrants to any given industry if barriers to entry are reduced as far as reasonably possible. So long as meaningful market rivalry and adequate alternatives exist, as they can even in oligopolistic markets, innovative and other economies will be introduced to force down costs and thus to permit the creation of consumer preference by means of lower prices. Inefficient producers will and should go out of business.

\(^{136}\) *Supra*, footnote 25.  
\(^{137}\) *Supra*, footnote 28, at pp. 199-200.
The technique of the Combines Investigation Act is to prohibit certain defined restraints upon competition. By going to industry structure (for instance, concentration and entry) and behaviour (for instance, collusive agreements and distribution practices), the ultimate goals are more likely to be secured. Competitive rivalry, facilitated by supervision of industry structure and behaviour, is only desirable for its influence on the ultimate performance of the industry (for instance, efficiency, profits and prices) and of the economy as a whole.

Legislative schemes to "regulate" specific industries usually go directly to performance. *A priori* administrative judgments determine critical features, such as licensing or rating practices or even prices, usually in order to satisfy particular goals for that industry which are thought to be paramount to the general goals of competition.

The constitutional problem concerns the legislative power to determine the regulatory force which is to guide the economy. Without any legislation the tendency would be toward self-regulation by the competitors themselves. The Combines Investigation Act is designed to maintain competition as the regulatory force, for policy reasons outlined above. Specific regulatory schemes such as farm products marketing legislation substitute regulation of performance by government decision. Such schemes therefore conflict in purpose and effect with the Combines Investigation Act.

All laws, federal or provincial, criminal or otherwise, take effect at the particular level. The necessity of particular application does not affect the fundamental objective of the legislation, which may be quite general. In constitutional law language, legislation may affect property and civil rights without being in relation to property and civil rights. For example, criminal combines law held valid in *P.A.T.A.* was applied to prohibit undue price fixing by coal dealers in Sault Ste Marie,\(^{138}\) a market which by most tests would be intraprovincial. The facts of the particular case could not imply that even in that instance the Combines Investigation Act sought in essence to regulate the contracts of a particular business within a province. The same point could be made when a specific equitable decree under the generally-oriented Combines Investigation Act goes beyond industry structure or behaviour to the performance of a particular industry or group of enterprises within a province.

Given constitutional validity of the federal controls, what is the status of the multitude of provincial regulatory schemes which, in apparent conflict at least with the goals of the federal prohibitions against price fixing and other restraints on competition, purport to confer upon a variety of boards the power to set prices, quotas, product and advertising standards, as well as related matters, for particular industries? Or, apart from any problem of conspiracy or "arrangement" as applied to such restrictions, the provincial statute might require or induce mergers or other agreements between competing producers. The apparent conflict between federal and provincial legislation is obvious. Whether any given piece of regulation is economically or socially good or bad is, at least in theory, irrelevant to the constitutional question.

Protracted discussions and analyses of the doctrine of federal paramountcy may be found elsewhere. The doctrine applies in fields of overlapping, or concurrent jurisdiction, where a double aspect is present. In other words, before the critical issue of conflict or occupation of the field can be faced both statutes must, standing alone, be constitutionally valid. They must, therefore, have different purposes. Definition of the requisite degree of conflict necessary to invoke the doctrine of paramountcy and suspend the operation of the provincial law is the moot point. Should a court require only a small amount of federal legislation, and assume that Parliament intended all other activity in the sphere to be free and open? Is mere duplication enough? Or must there be an actual incompatibility in operation, so that compliance with one involves breach of the other? The Supreme Court, perhaps seeking what Leigh has called a "functional concurrency", has drawn upon the language of "repugnancy" in section 95 of the British North America Act and has produced a weight of autho-

---

139 Examples are legion. One is The Milk Industry Act, R.S.O., 1960, c. 239. The Milk Industry Board of Ontario has been given authority, inter alia, to investigate costs, prices, price spreads and trade practices. It can prohibit refusals to deal in the absence of just cause and has price-fixing powers. The Board also possesses a regulation-making power which extends to grading, packing, and advertising. For other examples see the numerous regulations constituting particular marketing boards under provincial farm products marketing legislation.


141 For example, the articles by Lederman and Laskin, supra, footnote 11.
rity favouring the strict view.142 This probably is good federalism, and the United States courts apply the federal supremacy clause in a substantially identical way. As with the pre-emption doctrine in the United States, paramountcy in Canada is very rarely applied in favour of an implied federal intention to occupy a field by deciding not to legislate.143

There have been many instances where but for sheltering provincial legislation, conduct of competitors would probably have been found to contravene the Combines Investigation Act. Periodically one reads that growers of certain natural products, disturbed by low prices and prevented by federal legislation from fixing prices privately, consider application under provincial legislation to obtain a marketing board in order to have minimum prices maintained. How can such provincial legislation stand, even by the strictest view of paramountcy? The problem has arisen for consideration in a small handful of cases.

The plaintiff in Gibbins v. Metcalfe144 was a member dealer of the Winnipeg Grain Exchange. The Exchange had been incorporated by an Act of the Manitoba legislature to organize and make uniform the practices involved in the selling of produce, and to settle disputes. In retaliation against the plaintiff's practices which reduced the agreed commissions payable to members, the defendant members collectively boycotted the plaintiff. The issue was whether such combined behaviour, organized through the Exchange, was illegal either by the common law or by virtue of section 520 of the Criminal Code which now is section 32(1) of the Combines Investigation Act. The Court of Appeal affirmed the trial judgment to the effect that on the facts the predominant motive was not to injure maliciously, but rather was to further private and Exchange business interest. Also, the Exchange organization was not "undue" within the meaning of section 520.

In The King v. Gage145 the by-laws of the same Exchange, setting prices and commissions, were placed in issue in a criminal

---


143 Unfortunately there has been no thorough examination of the implications involved in the implicit view that federal legislatures should tell persons what they can do, as well as what they cannot do. The problem is alluded to in Laskin, op. cit., footnote 11, at p. 240.

144 (1905), 15 Man. L.R. 560 (Queen's Bench), 584 (Court of Appeal).

145 (1907), 13 C.C.C. 415 (Queen's Bench), 428 (Court of Appeal).
action. The court recognized that the agreements constituted trade restrictions, but also pointed out that the life of the grain trade depended upon the resulting organization and stability. Consequently, as in Gibbins v. Metcalfe the restraints were found on the facts not to be "undue" within the meaning of the federal legislation. Another factor indicating that the arrangement was not contrary to the public interest were the size of the profits, which the court found were fair and reasonable.

It will be observed that the line of reasoning in the above two cases avoids the application of paramountcy by finding an absence of conflict. Conflict is avoided by the accommodating general words of the federal statute, for depending on the offence conduct must on the facts be "undue" or "contrary to the public interest" to be criminal. This places the courts in a rather difficult position. Either they must deliberately evaluate the provincial policy by the loose federal language of "public interest" and countenance the possibility of an adverse finding, or they must, in effect, concede that the meaning of the federal statute may be tested by reference to provincial legislation. It might be thought that a workably narrow view of paramountcy would favour the latter approach, but in substance such a view comes close to provincial paramountcy.

One position which keeps reappearing throughout the cases is that almost by definition provincial governments legislate in the public interest. This might be said of all constitutionally valid legislation but the reluctance of the judiciary to question the merits of legislative policy is understandable. However, the "public interest" for the purpose of constitutional law and the doctrine of paramountcy is not one mysterious, indivisible Good, but rather is composed of the objectives and techniques of the statutes in question. The goals and techniques of the Combines Investigation Act have been outlined above. The goals of the statute constituting the Winnipeg Grain Exchange were more particular, and the techniques conflicted with the more general federal techniques. The goals of provincial oil and gas regulatory schemes are safety, conservation, and efficient and orderly exploitation. The techniques again conflict with the prohibitions of the Combines Investigation Act. Are the qualifying words such as "unduly" in the federal legislation properly construed to accommodate goals which are

---

146 This resembles the way the United States courts usually protect state legislation which restricts competition otherwise probably protected by the Sherman Act. Such statutes are found not to impose "unreasonable burdens" on interstate commerce. See Flynn, op. cit., footnote 83, pp. 87-92.
inconsistent with the goals of the Combines Investigation Act, even if they are more particular and perhaps more desirable for a specific industry?

It is, of course, not tenable to argue that the more particular legislation will always prevail where an issue of conflict arises. For example, the federal law of murder would surely prevail over a provincial provision for euthanasia as part of a mental health programme or hospital regulation. Otherwise, of course, provincial legislation would as a matter of law almost invariably be favoured over the general proscriptions of the Combines Investigation Act. In Gibbins v. Metcalfe and in Gage the courts assumed that the provincial statute did not necessarily exempt the relevant sector of the economy from the reach of the federal law. Indeed, the provincial statute itself was only relevant as perhaps additional evidence on the issue of "dueness".

In R. v. Simoneau[147] the accused had sold milk at prices lower than the minimums fixed under Quebec's Dairy Products Act. The accused argued that the provincial statute was ultra vires. He also pleaded the price-fixing prohibitions of the Combines Investigation Act (at that time section 498 of the Criminal Code) and argued suspension of the provincial statute by virtue of Dominion paramountcy. The court convicted, holding that the provincial statute was intra vires and no conflict existed because the provincial scheme was not undue within the meaning of the federal provision. Mr. Justice Marin also approved the judgment of Macdonald J.A. in the British Columbia marketing case R. v. Chung Chuck,[148] to the effect that if the provincial statute standing alone is constitutionally valid, then action pursuant to that statute cannot constitute a criminal offence under section 498 of the Code. Mr. Justice Macdonald had concluded by saying of the provincial statute: "If it is intra vires legislation and authorizes the very acts prohibited by s. 498 of the Code then the latter is ultra vires of the Dominion parliament." Such a view improperly ignores the doctrines of concurrent jurisdiction and Dominion paramountcy. The presence of conflicting federal legislation does not affect the constitutional validity of the provincial statute; it simply suspends it and renders the provincial law inoperative.

The judgment in Simoneau, including the misconception, was mirrored in Cherry v. The King,[149] which concerned the Saskatchewan Milk Control Act. Again the avowed purpose of the provin-

cial statute was to regulate the production, supply, distribution and sale price of milk in the province for reasons of public health and convenience, and to prevent discriminatory, unfair and unwarranted competition.

The most authoritative case to deal with the issue was the reference on the Ontario Farm Products Marketing Act which went to the Supreme Court of Canada. By section 4(1)(b) the Farm Products Marketing Board was permitted to "investigate the cost of producing, processing and marketing any farm product, prices, price spreads, trade practices, methods of financing, management policies and other matters relating to the marketing of farm products". One of the grounds upon which the statute was challenged was that it conflicted with the Combines Investigation Act. By a seven to one division the court held the provincial statute valid and operative so far as it went to intraprovincial transactions. To the paramountcy argument the reaction of Chief Justice Kerwin was typical of the majority of the court:

...it cannot be said that any scheme otherwise within the authority of the legislature is against the public interest when the legislature is seized of the power and, indeed, the obligation to take care of that interest in the Province.

This confirms the position taken in Chung Chuck. The question that comes to mind is the fate of such provincial legislation if the Combines Investigation Act were to provide that horizontal arrangements restricting competition were per se illegal. Several antitrust economists support passage of such a law. Another of the legion exemplary problems that might be posed is the validity of provincial labour relations legislation that specifically permitted collective agreements going directly to prices or production quotas.

Mr. Justice Rand adopted a different view of the type of conflict necessary before federal paramountcy could be invoked:

The Provincial statute contemplates coercive regulation in which both private and public interests are taken into account. The provisions of the Combines Investigation Act and the Criminal Code envisage voluntary combinations or agreements by individuals against the public interest that violate their prohibitions. The public interest in trade regulation is not within the purview of Parliament as an object against which its enactments are directed.

This view, understandable so long as sections 32 and 33 of the

150 Reference re The Farm Products Marketing Act, R.S.O. 1950, c. 131, supra, footnote 96.
151 Ibid., at p. 206.
152 Ibid., at pp. 219-220.
Combines Investigation Act remain justified as criminal law, emphasizes a moralistic view of mergers, monopolies and trade association activity which is now largely obsolete and discarded. Ultimately the Act seeks certain economic ends in terms of performance. By specific provision it goes to "Every one who . . . arranges . . .". Is it, or rather should it be, possible for an industry, organized by a trade association, to insulate itself wholly or partially from the threat of combines prosecution by a successful appeal to or lobby with a provincial government to set up a regulating board? The actual mechanics and procedures of drafting regulations may vary considerably and may place the initiative either on government or on industry. Such a situation risks involvement in economically extraneous considerations of federal-provincial politics. Essentially, the position taken in the Farm Products Marketing case means that the federal government may legislate to protect what it conceives to be the "public interest" within its sphere of competence, and then the provincial government may define the scope of the interest covered by the federal statute.

The last case particularly illustrative of a conflict is the leading merger decision of R. v. Canadian Breweries Limited. The issue was whether, according to the statute, the merger had operated or was likely to operate to the detriment or against the interest of the public. Accordingly, part of the defence was that the public interest was guaranteed by the Liquor Control Act of Ontario, under which the provincial Liquor Control Board set beer prices pursuant to a constitutional right to regulate a particular industry within the province. Chief Justice McRuer, acquitting the accused, held that the Liquor Control Board possessed the statutory authority to set beer prices and in fact did so, even though it only set the prices after hearing joint representations by the beer companies through their co-operative marketing company. On the issue of conflict between the provincial legislation and the Combines Investigation Act, Chief Justice McRuer first read the Board of Commerce and P.A.T.A. cases as standing for the proposition that constitutionally valid provincial legislation operated to shrink the scope of application of (equally valid) federal legislation. He concluded: "When a provincial legislature has conferred on a Commission or Board the power to regulate an industry and fix prices, and the power has been

exercised, the Court must assume that the power is exercised in the public interest.”

The net result, of course, was that while the federal legislation aimed substantially at securing price competition, the provincial legislation precluded this and left only quality, taste, service and packaging to the natural regulating forces of competition. It is submitted that if valid provincial legislation does shrink the scope of valid federal legislation, then even by the strictest possible view a problem of the occupied field is presented and the issues of paramountcy must be faced. If one statute goes generally to preserve competition and another goes to limit it in any respect, there is a conflict in the operation of the two pieces of legislation which is manifested by the inability of both to be applied to the same facts. In the language of Mr. Justice Martland in Smith v. The Queen, “compliance with one law involves breach of the other.” For another specific example, if a company is subject to a prohibition order issued under the Combines Investigation Act and a provincial government establishes a contradictory marketing scheme, which law is the company to follow?

The issue of paramountcy does not arise in many combines prosecutions for the reason that the Director of Investigation and Research, in deciding whether to proceed with a case, is naturally influenced by the position assumed by the courts where the combines legislation conflicts with a valid and otherwise operative provincial statute. The approach, or retreat, of Simoneau and Cherry has carried the day.

It may be that the courts, in refusing to apply the doctrine of paramountcy in favour of the Combines Investigation Act over provincial regulatory legislation, have achieved a politically viable solution. But when political accommodation is dependent upon a legal solution formulated by the courts, completely satisfactory results are fortuitous. The central government could simply enough arrange for any industry or industries to be exempted from the reach of the Combines Investigation Act even though it is only

\[155\] Ibid., at p. 33.  
\[156\] Supra, footnote 142, at p. 800.  
\[157\] E.g. D. H. W. Henry, Unfair Distribution and Pricing Practices, in Upper Canada Law Society Special Lectures, Vol. II, Trade Competition (1963), pp. 38, 57. The standard judicial position has also been expressed by the Supreme Court of Canada in a combines prosecution: “Under the decision in the Stinson-Reeb case, the public is entitled to the benefit of free competition except in so far as it may be interfered with by valid legislation. . . .” Container Materials, Limited et al. v. The King, [1942] S.C.R. 147, at p. 159, per Kerwin J.  
\[158\] See, for example, the local option technique sanctioned in Lord's Day Alliance of Canada v. Attorney General of British Columbia, [1959] S.C.R. 497.
competent to substitute detailed regulation for interprovincial industries. Such federal exemption or regulation currently exists for certain industries and in several cases special laws of competition have been created.\(^{169}\) Only the provinces, however, would be competent to provide detailed control over exempted intraprovincial industries. Again, co-operative federalism is necessary to rationalize objectives and make the system work.

Another relevant area of legislative conflict should be noted. This concerns vertical price fixing, or resale price maintenance, which is for most purposes prohibited by section 34 of the Combines Investigation Act. As noted earlier, this section was recently confirmed as valid criminal legislation.\(^{169}\) There is authority holding such a contract unenforceable due to a federal prohibition even though on the facts the particular business was clearly intraprovincial.\(^{161}\) The main question, however, concerns the applicability of a few existing provincial statutes specifically authorizing resale price maintenance for certain local industries.\(^{162}\) There is no record of any attempted enforcement of these statutes. It is submitted that so long as section 34 remains federal law the provincial statutes are suspended and inoperative.

### IV. Administration and Enforcement.

**A) Location of responsibility.**

Effective administration obviously requires clear allocation of responsibility among the enforcement authorities. In the absence of centralized enforcement, whether by joint agency or other reason, political agreement must clarify any ambiguities left by the law. This is necessary for reasons of budgeting, legal efficiency and, in anti-combines enforcement, political reasons, since the decision whether and whom to prosecute is partly a political decision. The allocation of responsibility in Canadian anti-combines law has not always been clear or sensible, though the absence of provincial combines laws has resulted in less difficulty than has been experienced in the United States,\(^{163}\) and for most purposes there has been no real problem.


\(^{161}\) Supra, footnote 71.

\(^{162}\) Wampole & Co. v. F. E. Karn Co. Limited (1906), 11 O.L.R. 619.

\(^{163}\) See Flynn, op. cit., footnote 83, p. 249.
The offences under the Combines Investigation Act have been justified as criminal law. The decision to prosecute is usually made only after the parties and the facts of each case have been subjected to investigation by the Director of Investigation and Research and to a hearing before the Restrictive Trade Practices Commission in accordance with the provisions of the Act. Indeed, the scheme of the statute envisages the decision to prosecute only being made after the winnowing process of the administrative discretions, upon consideration of the Restrictive Trade Practices Commission view of the effect of the arrangement upon the public interest, and after the exercise of any relevant political judgment.\textsuperscript{164}

Until 1960 the conspiracy and price discrimination offences now found in the Combines Investigation Act were located in the Criminal Code as sections 411 and 412 respectively. Not only is the Code traditionally administered by the provinces, but until 1949 there was no express authority by which the Attorney General of Canada could initiate prosecutions under sections 411 and 412. While as a matter of fact several prosecutions were carried by the federal government, such an unwelcome strain was imposed on provincial budgets by costly and frequently unsuccessful prosecutions that pressure grew to amend the Act.\textsuperscript{165} As a result, in 1949 it was enacted that the Attorney General of Canada could institute and conduct prosecutions under sections 411 and 412 of the Code as well as under the Combines Investigation Act, and that for such purposes he could exercise “all the powers and functions conferred by the Criminal Code on the attorney general of a province”.\textsuperscript{166}

\textsuperscript{164} Prosecutions for misleading price advertising are a consistent exception to this procedure. Almost invariably, for these cases, the Director bypasses the Commission pursuant to the authority of s. 15 of the Combines Investigation Act and submits his evidence directly to the Attorney General of Canada. Misleading price advertising is a summary offence and as such is subject to a six month limitation period for commencing prosecution: Criminal Code, s. 693(2). Consequently there is inadequate time for a submission to the Commission.

\textsuperscript{165} See, for example, House of Commons Debates, 1899, p. 1937; 1919 (1st sess.), pp. 4592-4598; 1949 (2nd sess.), p. 2153 \textit{et seq}. In \textit{Attorney General of Canada v. City of Toronto} (1943), 79 C.C.C. 297, the Ontario Court of Appeal affirmed a decision that the government which paid for the combines prosecution in the sense of counsel and witness fees was entitled to have the fine paid into its treasury. \textit{Re Provincial Treasurer, Re Certain Fines} (1937), 68 C.C.C. 177 (S.C.C.) was applied. However, the costs of combines prosecution are such that with the scale of fines commonly levied in the past, this rule has not created a significant source of revenue. See the statistics reported in House of Commons Debates, June 27th, 1966, pp. 6837-6864.

\textsuperscript{166} S.C., 1949 (2nd Sess.), c. 12, s. 1. This provision is now section 15(2) of the Combines Investigation Act. See also Debates; House of Commons, 1949 (2nd sess.), pp. 2153-2165. For previous statutory efforts
The language of the section, just quoted, seems to be more in line with traditional co-operative practice of the federal and provincial departments than with the explicit provisions of the British North America Act. Do the powers of an attorney general of a province under the Code really derive from a delegation in the Code, or do they come directly from the British North America Act? General administrative practice has been for the province to be largely responsible for the enforcement of the Code and for federal government officers to enforce the other criminal statutes such as the Narcotic Control Act, Bankruptcy Act, Canada Shipping Act, and the Combines Investigation Act.

Section 91(27) of the British North America Act awards the federal Parliament exclusive jurisdiction over criminal law and criminal procedure. Section 92(14) gives exclusively to the provinces the administration of justice in the province. This latter probably does not extend to enforcement in the Exchequer Court but does extend to enforcement in courts of criminal jurisdiction which, it will be argued below, the provinces alone are competent to constitute.

Two views are possible. By the first, all enforcement authority for federal criminal law falls to the federal government under the criminal procedure power. This leaves the Attorney General of Canada with any residue of enforcement authority not specifically delegated to provincial officers. By the alternative view, section 92(14) means that all enforcement authority in courts of criminal jurisdiction is provincial, except that which is necessarily incidental to effective substantive criminal legislation.  This latter enforcement power would be exclusively federal. It would accommodate special types of offences often contained in statutes other than the Code, such as the Combines Investigation Act, where specialized enforcement institutions are constituted. It would also accommodate the few offences under the Code where a special federal interest may be involved, such as harbouring a deserter or corrupting a judicial officer, prosecution for which requires the consent of the Attorney General of Canada.

If the 1949 amendment was justifiable as legislation necessarily incidental to effective legislation over the substance, that at co-ordination see the Combines Investigation Act, R.S.C., 1927, c. 26, ss 31, 32, and the Dominion Trade and Industry Commission Act, 1935, supra, footnote 49, s. 22.

167 This would appear to be the better view. See Re Public Inquiries Act (1919), 48 D.L.R. 237 (B.C.C.A.) per Macdonald C.J.A. See also the exchange between Mr. Garson, Minister of Justice, and Mr. Fulton on July 8th, 1955 in Debates, House of Commons, 1955, pp. 5879-5881.
part of a provincial attorney general's competence prior to 1949 may well have depended upon a delegation under the Code.

Within their own respective spheres of constitutional competence no specific statutory authorization is required to give the Attorney General of a province or of Canada the power to initiate or withdraw a prosecution. These are discretionary, independent common law powers belonging to the holder of the office qua law officer of the Crown, and for which there is individual rather than collective responsibility. Within another's constitutional sphere of jurisdiction each attorney general prosecutes only as a private citizen subject to the other's pleasure.

Often the critical aspect of enforcement is not who absorbs the cost, but rather who exercises any discretion as to whether, and if so whom, to prosecute. This can be very important in anti combines cases because only at this point may such factors as unequal business pressures, the extent of complicity or economic effect be accommodated. The decision is presumably also based partly on the Commission's appraisal of the public interest involved, and upon the Commission's recommended remedies. As well, some remedies such as those relating to patents, trade marks or tariff change, may only be applied by federal agencies or courts.

The situation after 1949, then, was that while the combines conspiracy section was contained in the Code over which the provincial attorneys general exercised traditional enforcement authority, the Combines Investigation Act conferred enforcement authority for the conspiracy section upon the Attorney General of Canada. In R. v. McGavin Bakeries Ltd. (No. 1) the charges against the bread companies were laid by an appointed agent of the Attorney General of Alberta. The accused challenged the authority to prosecute, alleging without evidence that the Attorney General had refused to prosecute and so therefore his agent had no power to file charges. Mr. Justice Boyd McBride dis-

---

168 See Edwards, The Law Officers of the Crown (1964), Chs 10-12. By The Department of Justice Act, R.S.C., 1952, c. 71 the Minister of Justice is made ex officio Her Majesty's Attorney General of Canada and as such is entrusted with the powers and charged with the duties belonging to that office in England by law or usage so far as those powers and duties are applicable to Canada. In Ontario, for a provincial example, The Executive Council Act, R.S.O., 1960, c. 127, authorizes the Lieutenant Governor to appoint an Attorney General from among the Ministers of the Crown. These provisions are similar in principle to their counterpart in the constitution of the United Kingdom, within the spirit of the British North America Act.

agreed, pointing out that the agent received his authority to lay charges from the Criminal Code and not from the provincial Attorney General. With the scarcity of evidence as to the views of the Attorney General of Alberta, the court held that the onus of proof lay upon the party challenging the authority to prosecute to show the refusal of the Attorney General. The prosecution was not one requiring the prior specific consent of either Attorney General. It was further alleged by the accused that the prosecution was being conducted under instructions from the federal Minister of Justice, but the court rejected this objection on the basis of the new provision in the Combines Investigation Act:

I take the plain unambiguous meaning of the act to be that the Attorney General of Canada is added as one more person who may institute the proceedings, that is, prefer a formal charge in Alberta, and who thereafter may conduct the prosecution. . . . 170

The practice had been, until 1960 when the sections were transferred from the Code, for the provincial attorney general to carry nominally anti-combines prosecutions under the Code, but for the Attorney General of Canada to carry them in fact. The latter also carried a few nominally. 171

Assuming the constitutional validity of section 15(2) of the Combines Investigation Act, the Attorney General of Canada has authority to institute and conduct prosecution for a combines offence. The following question remains: if the Attorney General of Canada decided in the exercise of his discretion not to prosecute, could a provincial attorney general yet proceed with the prosecution? An affirmative answer is not without case authority. 172 Alternatively, if the Attorney General of Canada decided to prosecute could the attorney general of the relevant province order a stay of proceedings either under section 490 of the Criminal Code or by an exercise of his common law authority and under section 92(14) of the British North America Act? If provincial attorneys general possess these powers they possess the strength to frustrate completely federal combines enforcement which is based on the view of the public interest held by the Restrictive Trade Practices Commission, the Minister of Consumer and Corporate Affairs or the Attorney General of Canada.

170 Ibid., at pp. 267-268.
It is submitted that centralized enforcement authority is so necessary to the general scheme of combines enforcement that as a matter of constitutional law the discretionary powers are initially vested exclusively in the Attorney General of Canada. This same demand for co-ordinated administration lay behind the removal in 1960 of sections 411, 412 and 416 from the Criminal Code. The substantive proscriptions are now located solely in the Combines Investigation Act. Any competence of provincial attorneys general to participate in the enforcement of combines law is therefore limited to express delegation in the Combines Investigation Act. By that statute, the Minister of Consumer and Corporate Affairs has ultimate authority and responsibility for inquiries and reports by the Director of Investigation and Research and the Restrictive Trade Practices Commission. The Attorney General of Canada controls counsel functions, evidence and prosecutions and alone has competence to enforce before the Exchequer Court. Competence of provincial attorneys general is limited to application for prohibition or dissolution once a conviction has occurred, or commencing proceedings seeking prohibition or dissolution for an incipient offence.

It is difficult to understand why provincial attorneys general have neither more nor less of a role in anti-combines enforcement than they in fact possess. It is easier to think that their present permitted role is simply a result of piecemeal reforms designed for other purposes. Equally awkward divisions of authority have been evident elsewhere for some time.

An increasing number of enforcement problems, such as that of bankruptcy law, has indicated that optimum enforcement

\[173\text{Ss 8(c), 14(2) and (4), 17(7), 18(1)(b), 19, 22, 27, 42 and 44.}\]
\[174\text{Ss 13, 15, 19(2) and 22(3).}\]
\[175\text{Ss 30 and 41A.}\]
\[176\text{Ss 31 and 40(4).}\]
\[177\text{Normal consumer purchases represent a bargain and trade of money for goods. It is, presumably, equally undesirable for a trader to misrepresent either the price of the goods, or their quality or quantity. Yet for years misleading representations as to price have been punishable on summary conviction under s. 33C of the Combines Investigation Act, whereas converse types of misleading advertising constitute indictable offences punishable by up to five years imprisonment under s. 306 of the Criminal Code. The federal government enforces the former and has been reasonably active in recent years. Enforcement of the Code provision is charged to provincial authorities who have been quite inactive in this respect. The omnibus criminal law bill (C-150) of the 1968-69 session of Parliament proposes transfer to the Combines Investigation Act of s. 306 of the Code, without altering its form, "in order to permit those provisions to be more effectively enforced by federal authorities". S. 7(d) and (e) of The Trade Marks Act, S.C., 1952-53, c. 49 substantially duplicates s. 306 of the Criminal Code.}\]
harmony and efficacy requires agreement between provincial and federal authorities. Anti-combines is a prime example.

B) Rules of procedure

Whether or not the main burden of combines enforcement falls to the regular courts, the applicable rules of evidence bear directly upon the economic sophistication and realism of the decision. Currently the whole range of usual rules of evidence and criminal procedure are applied including the location and quantum of the burden of proof, the rule of Hodge's case,\(^{178}\) use of similar fact evidence, construction of penal statutes, compellability of an accused person, and judicial notice.

Rules of procedure are, in large part, tied closely to the nature of the sanction or remedy. Rules of criminal procedure therefore are traditionally the most demanding.

The British North America Act awards to the federal Parliament exclusive jurisdiction over criminal procedure. This covers the enforcement of laws justified constitutionally as criminal law. By section 92(14) the provinces have exclusive jurisdiction over the administration of justice including civil procedure in provincially constituted courts. Therefore, while the Canada Evidence Act is currently the procedural statute of general application to combines prosecutions, this would not necessarily be so to the extent that the Combines Investigation Act were justified under the trade and commerce or general powers. Arguably, the Canada Evidence Act would then be displaced even for penalties levied for breach of substantive provisions or for non-compliance with such things as subpoenas and orders. Particularly if "civil" remedies or administrative controls were provided, rules of criminal procedure or evidence would not apply.

Displacement of rules of criminal procedure need not mean that the provinces would gain procedural jurisdiction over combines enforcement, with potential embarrassment of differing provincial rules. Two avenues remain by which the central government might retain control over procedure. First, such evidentiary and procedural provisions as are necessarily incidental to effective legislation over the substance can be justified under the substantive head of jurisdiction.\(^{179}\) So, for example, there need be no

---

\(^{178}\) Supra, footnote 6.

\(^{179}\) Given the frequency with which one encounters evidentiary provisions in non-criminal federal statutes there is a curious lack of authority on this point. Such authority as does exist confirms the view taken in the paper: Attorney General of Alberta and Winstanley v. Atlas Lumber Company, [1941] S.C.R. 87.
threat to section 41 of the Combines Investigation Act which provides that any document found on the premises or in the possession of any accused, co-conspirator or their agents is admissible as evidence of the truth of the facts claimed, asserted or alleged in the document. However, it may be that section 31(4) would become unnecessary, requiring as it does that proceedings for a prohibition or dissolution order for an incipient offence “shall be tried by the court without a jury, and the procedure applicable in injunction proceedings in the superior courts of the province shall, in so far as possible, apply”. Both these provisions have been legislated as an exercise of the criminal procedure power. A second instance in which combines procedure would remain federal is if a special federal tribunal were constituted to adjudicate combines matters. Civil procedure in federally constituted courts falls under the residual clause in the distribution of powers.

In 1949 the section which is currently section 40(3) of the Combines Investigation Act was passed, depriving a corporate accused of trial by jury.\footnote{189} In \textit{R. v. McGavin Bakeries Ltd. (No. 3)}\footnote{181} the section was challenged as breaching a fundamental, substantive constitutional right. Disagreeing with some authority to the contrary, Mr. Justice Boyd McBride held that jury trial was a matter of criminal procedure over which Parliament alone was competent. As well, the provision was necessarily incidental to an effective exercise of the criminal law power.

Elements of due process are not well articulated or perhaps even guaranteed in Canada. If there is an entrenched core of civil liberties which cannot be regulated by either the provinces or the Dominion acting alone,\footnote{182} this list is not precise. It has been suggested that the Canadian Bill of Rights, a specific federal statute, over-rides certain evidentiary provisions of the Combines Investigation Act,\footnote{183} but particularly in view of the existing jurisprudence on the Bill of Rights such an effect is rather unlikely.

Presumably any questions relating to publication of reports

\footnote{189} S.C., 1949, 2nd Sess., c. 12, s. 2.
\footnote{181} (1951), 12 C.R. 123.
\footnote{182} In the \textit{Alberta Press} case a bill regulating political information printed by local newspapers was struck down as interfering with the type of society and democracy upon which all government in Canada depended in order to function properly: \textit{In the Matter of Three Bills Passed by the Legislative Assembly of the Province of Alberta}, [1938] S.C.R. 100. This decision was carried to its logical conclusion by Mr. Justice Abbott in \textit{Switzman v. Ebling}, [1957] S.C.R. 285, at p. 328.
\footnote{183} Clyster, \textit{op. cit.}, footnote 100, pp. 69-70.
of the Restrictive Trade Practices Commission are subject to the same principles as outlined above. Section 19 of the Combines Investigation Act requires the Commission, after proceedings before it, to report to the Minister of Consumer and Corporate Affairs as to the effect of the arrangement upon the public interest, together with recommendations concerning remedies. Unless the Commission suggests withholding of publication, the report must be published within thirty days of submission. If such a withholding is recommended the Minister has a discretion to publish all, part or none of the report.

As part of their authority to pass laws relating to the administration of justice the provinces possess authority to regulate pretrial publicity of both judicial and non-judicial organs. One might argue that since the Commission report is inadmissible in a combines prosecution, pretrial publication of evidence together with Commission conclusions of legal innocence or guilt prejudice the subsequent trial. However, even though the courts have held that no penal consequences flow from publication of the report as such, they would probably find that the decisions whether or not to publish the report falls within the criminal procedure power, since it is part of the general scheme of enforcement. Alternatively it could be held necessarily incidental to effective exercise of the authority to pass the substantive rules. Nevertheless, so long as anti-combines law continues to be criminal the point will remain a difficult one, since the whole rationale of publication is that the public will read and be influenced by the conclusions of the Commission, in their attitudes toward the companies involved.\footnote{Statement by Mr. Mackenzie King in House of Commons Debates, 1909-1910, p. 2059.}

C) Specialized tribunal.

Whereas the nineteenth century was an age of unification and co-ordination of adjudicative processes, the last half century has witnessed refragmentation of those processes along functional lines. In response to increasing specialization the plethora of new tribunals are characterized by relaxed, streamlined procedures and by the training and expertise of the decision makers.

Increasingly the competence of traditional courts of criminal jurisdiction to administer combines legislation realistically is challenged. The fact-finding function in combines cases, based largely upon extensive documentation and ideally upon expert economic
1969] Constitutional Aspects - 219

evidence, is quite removed from the usual case for which courts of criminal jurisdiction were constituted. There is, of course, no intrinsic need to constitute a new adjudicative body. What is imperative is that the rules of procedure permit utilization of all relevant evidence and that the decision makers possess the competence to isolate the key issues and decide them realistically. Much of the evidence is statistical and documentary. Most of the critical issues such as market definition, evaluation of the redeeming features of a merger, or formulation of an effective remedy, are primarily exercises in economics. The a priori principles capable of statement in legislation favouring effective competition are too general to permit consistently intelligent application by persons who are either non-expert themselves or who do not have the fullest assistance of experts. The regular courts in the United States have responded remarkably well to the factual challenges of antitrust law, whereas other jurisdictions such as England and Australia have constituted specialized tribunals to deal with problems of restrictive business practices.\textsuperscript{185}

Constitutional difficulties aside, the alternatives are numerous. Procedures of existing courts could be altered, a new court of record such as the Board of Commerce or the English Restrictive Practices Court could be constituted, an administrative tribunal could be created, or a separate panel of an existing court could be given all combines litigation.\textsuperscript{186} A hesitating small step in the latter direction was taken in 1960 when section 41A was added to the Combines Investigation Act.\textsuperscript{187} This section, in apparent dis-

\textsuperscript{185} See, for example, the sophisticated analysis of the United States Supreme Court in \textit{U.S. v. duPont de Nemours & Co.} (1956), 76 S. Ct. 994 and in \textit{Brown Shoe Co. v. United States} (1962), 82 S. Ct. 1502. See also a paper by a past president of the Restrictive Practices Court in England, Mr. Justice Diplock, \textit{Antitrust and the Judicial Process} (1964), 7 J. of L. and Eco. 27. Mr. Justice Diplock suggests that general tests such as “undue” or “public interest” are so nebulous and dependent on policy as to be virtually non-justiciable. However, he writes favourably of the applicability by the Restrictive Practices Court of the “gateways” set out in the English legislation. The English court is composed of High Court judges and representatives from industry, commerce or public affairs.

\textsuperscript{186} Designating judges for certain types of cases in order that they might accumulate expertise has been recommended elsewhere in Canadian commercial law: \textit{Interim Report of the Select Committee on Company Law} (1967), Ch. XIV (Province of Ontario). Bankruptcy and admiralty law for some time have had the benefit of the technique of designating a judge from an existing court.

\textsuperscript{187} \textit{Supra}, footnote 58, s. 19. The Minister of Justice, Mr. Fulton, explained the reasons behind section 41A as follows: “In taking cases to the Exchequer Court you will be able to build up a body of jurists who become skilled in this field of assessing issues which are largely economic. Secondly, you will get a more expeditious settlement of the issue involved, in that you go directly to the Exchequer Court, and you have only one
regard of section 40(2), provides that the Attorney General of Canada may with the consent of all the accused institute and conduct a prosecution for indictable offences under Part V in the Exchequer Court. No jury is permitted for such trials. Proceedings commenced under section 31 by an information to secure a prohibition or dissolution order may be brought in the Exchequer Court without consent of the parties.

The Exchequer Court has long possessed jurisdiction under section 30 of the Combines Investigation Act, but that section does not involve prosecution and is constitutionally supported by the patent and trade and commerce heads of section 91. Only at the time this article is being written is there a move to use section 30 for the first time. The court has acted under section 41A, however, and although its record is short it is quite encouraging. All the significant cases have gone before Mr. Justice Gibson. In none, however, was the constitutionality of section 41A argued, presumably because jurisdiction has been consensual. It is, of course, beyond dispute that constitutional competence cannot be conferred by mere consent, whether by governments on an ad hoc basis or by anyone else.

Section 41A(1) purports to confer upon the Exchequer Court of Canada all the powers and jurisdiction of a superior court of criminal jurisdiction under the Criminal Code or the Combines Investigation Act. In other words, far from giving jurisdiction to an existing criminal court, it purports to constitute such a court. Section 91 of the British North America Act, "notwithstanding anything in this Act", by head 27 specifically withholds this power from the Dominion: "... except the Constitution of Courts of Criminal Jurisdiction. . . ." Section 92(14) confers upon the provinces the exclusive power to constitute, maintain and organize provincial courts of criminal jurisdiction, as part of the administration of justice in the province. Section 101, again "notwithstanding anything in this Act", permits the Parliament of Canada appeal from that court to the Supreme Court of Canada. Whereas, if you go first to the trial court, you have three separate hearings: the trial court, the court of appeal, and the Supreme Court of Canada." (Proceedings of the Senate Standing Committee on Banking and Commerce, August 4th, 1960, p. 93.)

186 The Queen v. Canadian Coat and Apron Supply Ltd. et al., [1967] 2 Ex. C.R. 53; R. v. Canadian Warehousing Association (1967), 2 C.R.N.S. 204. R. v. Mills and Son, Limited et al. decided in Vancouver in April, 1968 has not yet been reported. The first two cases under section 41A were uncontested applications in 1963 for prohibition orders under section 31(2). The orders were granted: Report of the Director of Investigation and Research for the Year Ended March 31st, 1964 (1964), pp. 58-59. Similar uncontested applications have been granted since.
to constitute, maintain and organize a general court of appeal for
Canada, and to establish "any additional Courts for the better
Administration of the Laws of Canada".

The problems presented by the British North America Act are
obvious. Which non obstante clause prevails, the one in section 91
or that in section 101? Can there be a federal court of criminal
jurisdiction which escapes section 92(14)? If so, does it escape
the more sweeping language of the exception in section 91(27)?

No clear or settled answer to these questions is to be found.
Concurrency is hardly a rational compromise. Linguistic analysis
and logical arguments are inconclusive. For example, in favour
of a federal power one could argue that the later statement in
section 101 prevails over the former in section 91, or that the
non obstante clause in section 91 applies only to the positive grants
of power and not to exceptions. On the other hand it could be ar-
gued with at least as much force that as a matter of statutory
interpretation the particular should always prevail over the more
general, and that the exception in 91(27) is part and parcel of
the definition of the power enumerated. It could be argued that
the exception in 91(27) was intended only to reinforce the ex-
clusive grant in 92(14), but if that were the purpose why is the
former broader in its sweep? Indeed, had the exception been
omitted from 91(27) the provincial power would have remained
unaffected and at the same time there could have been little doubt
but that the Dominion was competent to constitute federal courts
of criminal jurisdiction. From a broader point of view, in sup-
port of the federal argument one could argue that if the provinces
alone were competent to constitute courts of criminal jurisdiction
they could, by refusing to exercise their power, effectively frustrate
the federal power to pass criminal law. Likewise, however, it
could be argued that if the federal Parliament created criminal
courts and assigned all criminal law to their exclusive jurisdiction,
a provincial power would be rendered meaningless. Such extreme
possibilities need not be countenanced, any more than a refusal by
the Dominion to name or pay the judges.

What have the courts said on the point? In Valin v. Langlois the
issue was the validity of a statutory federal imposition of a
duty upon judges of provincially constituted courts to try con-
troverted elections of federal members of Parliament. While the
precise issue of constituting a criminal court therefore did not

389 Supra, footnote 118. Leave to appeal refused (1879), 5 App. Cas.
115.
arise, some relevant comments were made by members of the court. Generally the judges recognized a distinction between constituting a court with the capacity and for the purpose of exercising a certain type of jurisdiction, on the one hand, and assigning or delegating particular duties to an existing court on the other. Either would have been justifiable so far as elections were concerned and it was held that the Dominion Controverted Elections Act, 1874 constituted a new federal Dominion Election Court over which the judges of provincial courts presided. The only direct statement on the issue concerning us was a dictum by Tschereau J.:

The constitution, maintenance and organization of Provincial Courts of criminal jurisdiction is given to the Provincial Legislatures, as well as the constitution, maintenance and organization of courts of civil jurisdiction, yet, cannot Parliament, in virtue of section 101 of the Act, create new courts of criminal jurisdiction, and enact that all crimes, all offences shall be tried exclusively before these new courts? I take this to be beyond controversy.\textsuperscript{100}

\textit{Valin v. Langlois} was applied in \textit{In re Vancini}\textsuperscript{191} where the issue was the right of the federal Parliament to confer upon provincial magistrates the power to try offences under the Criminal Code. The court adopted a statement by Lefroy which went beyond the requirements of the case:

\ldots the Dominion Parliament can, in matters within its sphere, impose duties upon any subjects of the Dominion, whether they be officials of provincial courts, other officials, or private citizens; and there is nothing in the British North America Act to raise a doubt about the power of the Dominion Parliament to impose new duties upon the existing provincial courts, or to give them new powers, as to matters which do not come within the subjects assigned exclusively to the legislatures of the provinces, or to deprive them of jurisdiction over such matters.\textsuperscript{192}

The case where the issue has arisen most directly as to whether the Dominion Parliament has competence to constitute a court of criminal jurisdiction was the \textit{Board of Commerce} case. By federal statute the Board has purportedly been constituted as such a court, and had been awarded extensive powers over commerce. It will be recalled that the scheme was held invalid on the ground that in pith and substance the substantive law related to property and civil rights. However, all but one of the six judges in the Supreme Court of Canada made reference to the problem of constituting a court. Mr. Justice Anglin, speaking as well for Davies C.J. and

\textsuperscript{100} Ibid., at p. 75.  \textsuperscript{191} (1904), 34 S.C.R. 621.  \textsuperscript{192} Ibid., at p. 626.
Mignault J. referred only to "formidable obstacles" to the creation of a Dominion court of criminal jurisdiction, while at the same time affirming the application of Valin v. Langlois and Vancini if, as he contended, substance were justified under the trade and commerce power. Idington and Brodeur JJ. expressly denied federal competence to constitute a court of criminal jurisdiction.

The issue was argued in the Privy Council. Viscount Haldane did not have to face the question squarely. The closest he came was in the course of his remarks concerning the preservation of meaningful provincial jurisdiction from the generalities of the federal powers:

> For analogous reasons their Lordships think that s. 101 of the British North America Act, which enables the Parliament of Canada, notwithstanding anything in the Act, to provide for the establishment of any additional courts for the better administration of the laws of Canada, cannot be read as enabling that Parliament to trench on Provincial rights, such as the powers over property and civil rights in the Provinces exclusively conferred on their Legislatures.

There are few other obiter dicta and no ratio decidendi which deal with the problem at hand. Professor Laskin, as he

---

193 In the Matter of the Board of Commerce Act and The Combines and Fair Prices Act of 1919, supra, footnote 27, at p. 473.
194 Ibid., at pp. 482-487, per Idington J. and at pp. 518-519, per Brodeur J.
195 Supra, footnote 28, at p. 199.
196 Consolidated Distilleries Limited v. The King, [1933] A.C. 508 involved enforcement by the Crown, in the Exchequer Court, of bonds given as security under the Inland Revenue Act, R.S.C., 1906, c. 51. The appellants conceded that by s. 101 of the British North America Act the Exchequer Court could properly be awarded jurisdiction for the enforcement of these contracts and the issue became the interpretation of the Exchequer Court Act. The case contains no helpful dicta relating to the central problem.

The case of Attorney-General for Alberta and Winstanley v. Atlas Lumber Company Limited, supra, footnote 179, held invalid a debt adjustment scheme established by the Alberta legislature whereby consent of a provincial Board was made a precondition for enforcement of any liquidated debt under any statute. The only relevant dictum was a careful statement by Davis J. at pp. 104-105: "If the constitution of the civil courts by a province and the provincial legislation governing the administration of justice in a province is not adequate at any time in the view of the Parliament of Canada for the purposes of those specific matters which are within the exclusive legislative competence of the Dominion, the Parliament of Canada may itself establish additional courts."

The case of Attorney-General for Ontario et al. v. Attorney-General for Canada et al., [1947] A.C. 127 concerning the abolition of appeals to the Privy Council might also come to mind in this respect, but the effect and reasoning of that case is restricted to the Statute of Westminster and conferral of exclusive and final jurisdiction upon a "General Court of Appeal for Canada" within the language of s. 101. At p. 153 Lord Jowitt L.C. declared that s. 101 by its terms overrides any power conferred by s. 92 upon the provinces, but he makes no mention of s. 91, its identical non obstante clause, or the exception in head 27.
then was, has asserted that section 101 gives Parliament the authority to constitute courts of original criminal jurisdiction.\(^{197}\) Such a view is contrary to the weight of applicable judicial statements. Neither *Valin v. Langois*, *In re Vancini*, nor the case concerning abolition of appeals to the Privy Council can be extended to cover the unique problem of courts of original criminal jurisdiction. Any force existing in the dicta in *Valin v. Langois* or *Vancini* was surely removed by the statements in the *Board of Commerce* case. In the absence of binding judicial resolution of the question, it is further submitted that the arguments favouring exclusive provincial competence are more persuasive. The Dominion Parliament retains a strong influence through its power over criminal procedure and its competence to designate work for specific provincial courts, but the specificity and combination of sections 91(27) and 92(14) must surely prevail over section 101 to the extent of any conflict.

There is no question about the "better administration" permitted by section 41A of the Combines Investigation Act. Parliament saw this to lie in the increased specialization of the court, in the efficiency achieved by eliminating a level of appeal and restricting the rights to appeal, and in the consensual jurisdiction for prosecution. Matters of evidence and proof also seem to be expedited in the Exchequer Court. However, this is not the issue.

Accordingly it is submitted that section 41A is *ultra vires*. The next question which arises is whether an administrative tribunal, with its implications respecting qualification and tenure of the decision maker and its rules of procedure, may be properly constituted to administer criminal law? The Board of Commerce, it will be recalled, was designed to issue orders which could be filed with a superior court and enforced as orders of that court. The courts did not pass on this technique as a tool for the enforcement of criminal law, for the scheme failed on other grounds. The *John East* case\(^{198}\) has recognized possibilities for new tribunals to administer schemes of social control not envisaged in 1867. But criminal law is not new and it is submitted that its importance in our legal system, with its sanctions and safeguards, requires that it be left with the superior courts. If the substance of combines control were recognized as being something other than criminal law, as is desirable from most points of view, then there could


be no objection to administration by an inferior tribunal with penal sanctions for breach of specific orders being applied by the regular courts.

Given justification of the substance as criminal law, there are two viable adjudicative alternatives to the present situation. First, each province could constitute a special court. Second, the federal authority could designate judges in existing courts of criminal jurisdiction. Neither is ideal.

Justification of the core provisions of the Combines Investigation Act under something other than the criminal law power would permit the latitude necessary to streamline enforcement procedures and ensure reasonably expert decision makers. Any specialized agency would be constituted and staffed by a federal authority regardless of whether it were classified as a “court” and justified under section 101, or classified as an “administrative tribunal” and justified under the same head of jurisdiction as the Combines Investigation Act provisions. Any incidental penal sanctions for breach of specific orders and requirements would still probably be enforced in the regular criminal courts, although the constitutional necessity for this is by no means clear.

V. Damage Actions.

Private persons frequently possess a certain amount of incentive and information which can be harnessed as part of the total combines enforcement effort. In Canada the only way this has been done deliberately is through sections 7 and 8 which provide that if six resident Canadian citizens apply with evidence to the Director of Investigation and Research for an inquiry, he must conduct such inquiry “as he considers necessary”. Experience has borne out the uselessness of this provision. The Director can, as he must be able to, stop his inquiry at any point. Also, in fact he will start an inquiry on the basis of any dependable or promising information. Private persons cannot be given extensive control over the investigatory resources of government. The question is how far their powers of private lawsuit can contribute to total enforcement. Should multiple damage awards be provided? Should problems of proof, even of damages, be facilitated? How far

199 Much has been written about the distinction between “courts” and “administrative tribunals”. It is probable that the desirable form of combines agency would be a “tribunal” with power to take initiative in proceedings, since its basic function would be to apply extra-legal expertise in the specialized administration of a particular public policy. It would not function predominantly to provide private relief, and its decisions on substance ideally would be nonreviewable.
should private litigants be given the advantage of concluded government investigations, or of convictions secured by government action?

Ultimately some of these questions force us back to an examination of the precise nature of the injury occasioned by a combines offence. A disparity of suggestions have come from the courts, reflecting perhaps a gradual shift from a criminalistic view, to a view emphasizing the right to enter a trade as a type of civil liberty, to one emphasizing the health of the economy. The statements talk of private right, public right, and of injury to such a bundle of private rights that somehow a public injury arises.200

The only statutory mention of private rights to civil recovery is section 35, located in the part of the Act containing the main prohibitions: “Nothing in this Part shall be construed to deprive any person of any civil right of action.” The section was added to the Act in 1952.201 The relevant civil rights of action are presumably those based on contract or tort; a contract is not unenforceable as between the parties merely because it offends the statute, and a tort action based on conspiracy would not interfere with the federal enforcement programme. The section is an exercise of federal jurisdiction with respect to one aspect of a contract or conduct.

The received common law of tort and contract, as such, is neither federal nor provincial. Constitutional law and the British North America Act go to the distribution of legislative power and therefore are relevant only to statutory change of the common law. While it may well be true that quantitatively most of the common law of tort and contract falls within provincial competence over “Property and Civil Rights”, insofar as it is relevant to federal heads of jurisdiction it may only be legislatively changed by the Dominion.

Either provincial or federal legislation may supply guidance as to public policy for common law purposes. For example, one of the more basic principles of the law of tort is that damages lie for an intentional infliction of economic harm unless there is justification. At an early stage it was necessarily conceded that public policy favouring competition justified certain forms of intentional financial harm to one’s market rival. Furthermore,

201 Supra, footnote 57, s. 7.
no action lay even where a group of competitors combined to take business from another, so long as the predominant motive was their own business interest. The end was desirable and the means not illegal. Yet what is the effect upon this tort when the federal Parliament declares the means of combination to be illegal? Surely for that particular form of injury the tort justification falls, and recovery is had by the common law once cause and damages are established. Conspiracy, price discrimination, merger and monopoly are presumably all affected by this principle, although the latter two in particular raise formidable challenges for the private litigant.

Apart from the influence of legislation upon common law actions, the precise relationship between breach of a criminal statute and a civil cause of action has always been controversial. Much has been written about the difficulties of theory and statutory interpretation. The key question, of course, is whether the Dominion is competent to confer or restrict a private right of action for a competitive injury due to a combines offence. If it is so competent the technique is secondary. The courts could interpret inconclusive legislation to find that Parliament “intended” to confer a civil cause of action for the resulting injury. Alternatively, Parliament could follow the American lead as has England. Section 7 of the Sherman Act and section 4 of the Clayton Act expressly provide a private right to sue for treble damages where injury resulted from a breach of the antitrust laws. Section 4 of the United Kingdom’s Resale Prices Act, 1964 confers a private right to recover for breach of statutory duty while at the same time declaring that criminal proceedings do not lie for breach.

If and so long as the prohibitions in the Combines Investigation Act are justifiable only as criminal law there is little likelihood of Parliament expressly purporting to confer a civil cause of action for breach, or of the courts finding such an intent in

---

205 It will be recalled that in the price discrimination reference in 1936 two judges of the Supreme Court of Canada dissented on the ground that what is now s. 33A(1)(a) went more to private than public injury. This reflects the private incentive that might be harnessed through provision of a damage action as an enforcement tool. Damages would be relatively easy to assess.
206 Supra, footnote 83.
207 Supra, footnote 90.
208 12-13 Eliz. 2, c. 58.
legislation which is less clear. Crimes offend a public interest in peace, order and security, and only incidentally might they specially injure a private interest. However, there seems to be no strong reason why a civil action could not be conferred even under the criminal law power, and indeed there is authority indicating that it can. Particularly is this so if the civil action is supplementary to a possible fine or jail sentence.

In Transport Oil Ltd. v. Imperial Oil Ltd. et al the plaintiff was injured by a restriction on the price and distribution of gasoline which contravened the Combines Investigation Act. The trial court said the statute evinced no intent by Parliament to confer a civil right of action. The appeal was dismissed on the same ground. The Court of Appeal indicated that the Act expressly set out the full enforcement arsenal thought desirable by Parliament and that in any event it would have been unconstitutional for the Dominion to have intended anything under the criminal law power with respect to civil rights of action.

It is submitted that it is incorrect to argue that the Dominion cannot provide for a civil cause of action as an enforcement tool under the criminal law power, unusual as this might be. Even if Parliament were incompetent to do so, however, it could yet preclude a civil right of action. The doctrine of duplication and interference, concerning conflict and paramountcy, should operate regardless of whether the civil cause derives from legislation or common law:

... the Code has dealt comprehensively with the subject-matter of the provincial statute. An additional process of forfeiture by the Province would both duplicate the sanctions of the Code and introduce an interference with the administration of its provisions. ... [T]he criminal law has been enacted to be carried into effect against violations, and any local legislation of a supplementary nature that would tend to weaken or confuse that enforcement would be an interference with the exclusive power of Parliament.

Section 35 of the Combines Investigation Act now prevents preclusion of all civil actions as a matter of statutory interpretation. However, it is yet open for the courts to find that any common law actions are not facilitated by the statute.

---

208 Parliament was held competent to confer a private civil cause of action upon an informer to recover a penalty in Doyle v. Bell (1884), 11 O.A.R. 326. The relevant legislation concerned elections, but only one judge in a court of four restricted his reasoning to legislation justified other than under the criminal law power.


In 1962 a case reached the Supreme Court wherein a tort claim for damages was made on the basis of price discrimination and conspiracy in lumber distribution. The suit was based on a breach of the Combines Investigation Act. The Alberta Court of Appeal was affirmed and the action dismissed on the ground of statutory interpretation alone, that Parliament intended the expressed remedies to be the sole remedies. The Supreme Court expressly refrained from adopting the second view in Transport Oil, namely, that Parliament lacked the competence to confer a civil cause of action for breach of the statute. Since the Transport Oil decision a dictum in the Supreme Court and some commentary had opposed that view.

Decisions such as Direct Lumber are not offensive. The plaintiff did not choose to rely on any common law action he might have had, and the question was essentially how far the court was going to do what it thought Parliament could have done but clearly did not do. Legislation expressly conferring private causes of action for statutory violation is not new, particularly in the field of antitrust. It was not a problem for which a fiction was needed to avoid a legislative oversight.

Incongruous as it may seem, the "other penalty" type of reasoning, employed in Goodyear to justify the prohibition order as an exercise of the criminal law power, might lend itself easier to provision for a civil action with multiple or other punitive damages. Such enhanced awards also increase compensation and therefore the private incentive to enforce. American experience particularly since World War II has been that private actions for treble damages are a valuable part of total antitrust law enforcement.

English law as received in the nine common law provinces included, so far as it falls within provincial jurisdiction, the Statute of Monopolies of 1624. Section 4 of the Statute confers a civil right of treble damages ("his remedy . . . to be grounded upon this Statute") upon parties injured "by occasion or pretext of any monopoly". Shortly after the Dominion passed its first anti-combines law the Ontario legislature re-enacted, largely as a statement of heritage and public policy, a series of landmark English

---

statutes one of which was the Statute of Monopolies. The Statute has only rarely been argued in court and no exhaustive judicial comment exists concerning it. As for whether it confers a right of action even for a monopoly offence as defined in the Combines Investigation Act, the answer is probably negative. Constitutional competence aside, the "monopolies" which concerned the English Parliament in 1624 were improper or excessive uses of the royal prerogative.

Unlike the practice in continental European countries, English criminal law did not provide a private right for restitution or compensation. This was left to civil proceedings. Restitution was not regarded as an important function of the criminal penalty. There were instances, however, where the criminal court could in its discretion order restitution or compensation to a party injured by another in the commission of an offence. The Criminal Code likewise provides for such orders with respect to certain offences. Section 628 provides that upon conviction for an indictable offence the court may, upon application of a person aggrieved, at the time of sentence order the accused to pay an amount to the applicant by way of satisfaction or compensation. The order can be filed and enforced as a civil judgment. There is no reason why this authority could not be invoked in combines cases. The fact and amount of the award are discretionary, thus presenting both advantages and disadvantages to injured parties. Some proof of loss would presumably be required in order to establish the right to apply under section 628. As well, the compensatory principle embodied in the section might prevent awards for multiples of damage. But the section could very well ease normal requirements of proof.

The above procedure, of course, does not provide a right of recovery. Rather, it is discretionary and presumably is to be influenced partially by sentencing criteria. It has been argued above that the criminal law power can comprehend conferral of a right of civil recovery but in practice this is unlikely to be done unless it can be justified under the trade and commerce or general powers.

Section 7 of the Trade Marks Act deals with various acts of unfair competition and together with section 52 of the same

---

213 Passed in England as 21 Jac. 1, c. 3, the copy stands unrepealed in Ontario as R.S.O., 1897, c. 323.
215 See ss 373, 628-630.
statute has been held to confer a civil statutory cause of action upon a party injured by someone who breached section 7.\textsuperscript{216} Despite its location, section 7 is not really part of trade mark law as such and its constitutional validity cannot necessarily rest on decisions finding trade marks to be within the trade and commerce power.\textsuperscript{217} But trade mark law is in a generic sense only a part of unfair competition law and it would be surprising if section 7 were not likewise justifiable under the trade and commerce power. Incidentally, the same conduct which offends section 7 and thereby gives rise to a civil cause of action for damages is also punishable as an indictable offence under the Criminal Code.\textsuperscript{218}

Even assuming that one way or another, if not in all ways as submitted here, the Dominion is competent to confer a civil cause of action for statutory breach, heavy burdens of proof respecting facts, causation and damages rest upon an injured party unless his action is facilitated in some manner. This can be done in several ways. He could, for example, be given limited access to evidence gathered by any government investigation. Section 5(a) of the Clayton Act\textsuperscript{219} could also usefully be followed to create an exception to the rule in \textit{Hollington v. Hewthorn & Co. Ltd.}\textsuperscript{220} respecting the use of convictions in subsequent civil actions.

Little need be said about the possibility of government suits for damages, which have been provided in both the United States and the United Kingdom.\textsuperscript{221} In large part the same principles as discussed above apply equally to government actions. However, given provision for an unlimited fine, and given that the amount of harm caused is a factor already utilized in combines sentencing, the public has an existing financial remedy.\textsuperscript{222} Many would, of course,

\textsuperscript{217} There has been no real test of the constitutional validity of s. 7, although a dictum exists which can be construed in favour of its antecedent, s. 11 of the Unfair Competition Act, 1932, supra, footnote 52: \textit{Good Humour Corporation of America v. Good Humour Food Products Ltd. et al.}, [1937] Ex. C.R. 61, at p. 75. The unfair competition legislation implements a Canadian obligation under Art. 10 bis of the Paris Convention for the Protection of Industrial Property, March 20th, 1883, as revised, see Fox, \textit{Canadian Patent Law and Practice} (3rd ed., 1948), p. 1232. Provincial legislation substantially duplicative of part of s. 7 exists: e.g. The Libel and Slander Act, R.S.O., 1960, c. 211, ss 18, 19.
\textsuperscript{218} See ss 350-355, and the blanket penalty provision in s. 107.
\textsuperscript{219} \textit{Supra}, footnote 90.
\textsuperscript{220} [1943] 2 All E.R. 35 (C.A.).
\textsuperscript{221} Clayton Act, \textit{supra}, footnote 90, s. 4(a); Resale Prices Act, 1964, \textit{supra}, footnote 207, s. 4(3).
\textsuperscript{222} S. 627 of the Criminal Code provides for the recovery of pecuniary penalties by civil proceedings instituted by Her Majesty.
argue that as applied it does not approach reasonable compensation.

VI. Dissolution and Divestiture.

Section 31 of the Combines Investigation Act permits a court to require a person "to do such acts or things as may be necessary to dissolve the merger or monopoly in such manner as the court directs".

American antitrust lawyers frequently use the terms "dissolution" or "divestiture" to refer to any one or all of dissolution, divorcement or divestiture, which are available in civil actions in the United States as antitrust remedies. For the purposes of this article, "dissolution" will be used to refer to the revocation or forfeiture of corporate charter or a compulsory winding-up, and "divestiture" to refer to compulsory sale or disposal of specified corporate assets. As used here, then, the terms will connote action taken with respect to particular companies. They are both comprehended by the dissolution power of section 31, which goes to a merger or monopoly. The terminology is adjusted here solely to facilitate examination of the relevant constitutional law. (The American remedy of divorcement is simply a particular type of divestiture.)

The original 1888 bill to prohibit conspiracies in restraint of trade included forfeiture of charter as the only corporate remedy. This remedy, only meaningful if the power to re-incorporate is also controlled, was not included in the Trade Combination Act as passed the following year.

It is difficult to overemphasize the economic significance of the power to restructure an industry. A structural remedy is the only intelligent response to a structural offense. However, the constitutional validity of the power "to dissolve" under section 31 has yet to be tested. It will be recalled that in 1956 the Supreme Court of Canada expressly reserved the question for future consideration, severing the power "to dissolve" from the prohibition remedy.

In a criminological sense forfeiture of charter or compulsory winding-up constitutes capital punishment for a corporation, and as such it is a drastic penalty only to be utilized as a last resort. Obvious economic reasons also exist for minimizing the use of

---

223 Bill 138, Clause 2 (1888).
224 S.C., 1889, c. 41. The only reason given for the change from the draft was that the old bill might be applied too severely by the judiciary: Debates, House of Commons, 1889, p. 1113 (Mr. Wallace).
winding-up as a tool to maintain competition. But constitutionally the problem is more complicated because corporations gain life only through an exercise of legislative power. Section 92(11) of the British North America Act gives to the provinces the exclusive power relating to "The Incorporation of Companies with Provincial Objects". The remainder of the incorporating power falls into the residuum and therefore rests with the Dominion. The essential question is whether and under what conditions a jurisdiction other than the one conferring powers and capacities upon a corporation can restrict those powers or capacities. Dissolution is utilized under several corporations statutes as a remedy against companies incorporated under the authority of each particular statute, but what right has the Dominion to tamper with provincially incorporated companies? What authority does one province have over another's corporate creatures?

It does not help to repeat that no body politic can pass legislation relating primarily to a class over which another has exclusive jurisdiction. The real question is the familiar one: how does one determine the pith and substance, or leading feature? In *John Deere Plow Co. v. Wharton*\(^\text{225}\) the Privy Council held *ultra vires* a British Columbia statute which prohibited Dominion companies from engaging, in any operations within the province until the company met certain conditions and secured a provincial licence. The Privy Council agreed that the company had otherwise to conform to provincial legislation but, as pointed out by the same body a short time later:

\[
\text{... they were careful not to say that the sanctions by which such Provincial laws might be enforced could validly be so directed by the Provincial Legislatures as indirectly to sterilize or even to effect, if the local laws were not obeyed, the destruction of the capacities and powers which the Dominion had validly conferred.}\(^\text{226}\)
\]

This is the nub of our question, for the dissolution power under the combines legislation, insofar as it may apply to provincially incorporated companies, presents the converse situation.

The recent *British Columbia Power* case held *ultra vires* a provincial legislative scheme the primary purpose and effect of which was to expropriate the major asset of a particular Dominion company.\(^\text{227}\) The statute represented a form of divestiture. The reason for the adverse finding was that the discriminatory

---

\(^{225}\) *Supra*, footnote 39.

\(^{226}\) *Great West Saddlery Co. v. The King*, [1921] 2 A.C. 91, at p. 100.

purpose and limited effect of the legislation betrayed the primary feature as relating to a Dominion company rather than to expropriation generally. Indications were given in the judgment that if the province had proceeded under legislation of more general application the intended publicly owned utility monopoly in the province could validly have been established, with the same effect upon the Dominion company.\footnote{\textit{Ibid.}, at pp. 683-684. Also see Lederman, Legislative Powers to Create Corporate Bodies and Public Monopolies in Canada, in Lang, ed., Contemporary Problems of Public Law in Canada (1968), p. 108, and an essay by the editor in Ziegel, Canadian Company Law (1967), pp. 181-187, 190-193.}

When then is the status of the dissolution power in the Combines Investigation Act? The Act goes to competition generally, and all business enterprises are as subject to the dissolution remedy as they are to any other remedy under the Act. In short, the Act is not discriminatory. Its application is not limited to companies, nor does it apply to some companies more than others, nor does it isolate particular industries for special restriction. What is the pith and substance or primary feature of the dissolution power? There is no doubt that it could affect provincially incorporated companies. But unless it be found exclusively within provincial jurisdiction, the double aspect doctrine and principle of Dominion paramountcy guarantee validity. There can be no doubt of Dominion competence to dissolve federally incorporated companies under the Combines Investigation Act. The question is, does this competence derive from the fact that they are federal companies? Is any dissolution power, regardless of its purpose, legislation relating to companies? It is submitted that if Parliament has declared criminal the use of certain capacity, whether that capacity is created by provincial legislatures or otherwise, the Dominion is competent to prevent or undo the illegal use of that capacity. The Dominion is likewise competent if its authority derives from the trade and commerce power.

It is conceivable, however, that the courts would stop short of holding that the power currently enshrined in section 31 extends to dissolution of provincially incorporated companies. One does not have to search far for judicial support for the view that the Dominion cannot for any purpose destroy capacity it lacked the competence to create. Dissolution can go directly to the terms of section 92(11) of the British North America Act. Need such a reservation in favour of the provinces necessarily
mean that section 31 could not extend to divestiture orders against provincial companies? Divestiture as defined for the purposes of this article is indeed the more likely application of section 31. Unlike dissolution it does not go to the very existence of the company and so does not conflict so clearly with the provincial power to incorporate. On the other hand, incorporation implies the existence of capacity and powers. By striking at the power to hold certain assets, whether in the form of plant, shares or licences, or at the capacity to accept certain powers, such as the right to trade in certain provinces or regions, would divestiture essentially be going to the incorporation itself? One of the general effects of the proscriptions and remedies in the Combines Investigation Act is, of course, to limit the exercise of certain corporate powers and capacities. Restrictions upon size and the nature and location of activities are involved. Prohibition orders, which have been constitutionally justified, can prevent future exercise of certain corporate powers or capacities. But can mandatory orders going to reduction in size or present powers be ordered? Again, combines legislation authorizing divestiture would doubtless be valid insofar as federal or foreign companies were concerned. But while the case for application of divestiture orders to provincial companies is somewhat stronger than the case for dissolution, it is yet not beyond doubt.

VII. Conclusions.

In an important article in 1960 Dr. Brecher, an economist-lawyer, made the following point concerning Canadian anti-combines law:

Two fundamental questions are at stake: whether civil proceedings can be made a pillar of the enforcement system; and whether clear and substantial limits can be imposed on the present capacity of provincial governments to override federal authority by legislating control over competition in particular industries. There are legitimate grounds for believing that negative answers would have gravely adverse implications for the future effectiveness of anti-combines policy.289

This article has attempted to answer these and related constitutional problems of anti-combines enforcement.

The main proscriptions in the Combines Investigation Act have been justified as criminal legislation and prevailing official opinion has been that only in this way may the federal government retain the authority to enact general laws relating to competition.

A corollary view has been that the character of possible remedies and enforcement procedures is thereby severely restricted. Therefore, the first question is: precisely how limiting is it, in terms of remedies and procedures, for the Combines Investigation Act to be justified constitutionally under the criminal law power? Second, if there are limitations, how may they be decreased?

There appear to be few, if any constitutional restrictions upon the range of sanctions as such. A law is classified by its substance. While the remedy provided goes to the effect of the law and thereby to its primary feature for constitutional purposes, the remedy is by no means conclusive evidence on that question. Criminologists increasingly feel the challenge to suggest more imaginative and effective official responses to crime, for both deterrent and curative reasons, and radical proposals are on the horizon. For example, psychological, chemical and technological advances, accomplished and anticipated, have led some persons to the view that prisons as we know them will become virtually obsolete in this century. There is, fortunately, little evidence that a constitutional straightjacket confines criminal law to the traditional remedies of fines, incarceration, corporal or capital punishment. Constitutionally those remedies, like all others, affect property and civil rights in the province but such an effect does not determine classification of the leading feature of the law. In the combines context, and taking advantage of the prevention of crime principle, it is possible to justify fines, incarceration, prohibition orders, dissolution orders, divestiture orders, consent settlements and civil damage actions under the criminal law power.

To say something is possible is, of course, not to say it is beyond dispute. The British North America Act forces us to make strained and unnatural distinctions between different types of enforcement procedure. It ignores the rainbow. For example, the prevention of crime theory, assisting justification of nonpenal remedies which can nip undesirable tendencies in the bud and as such have become an essential part of antitrust law enforcement in the United States, Europe and Japan, presents some threat to traditional provincial jurisdiction over "regulation".

However, even if justification under the criminal law power places no restrictions upon the type of remedies furnished, this only is important if procedures and enforcement agencies can be provided which will permit their intelligent application. Here is probably the biggest limitation imposed by the criminal law power,
for a specialized agency would be a court of criminal jurisdiction which the provinces alone are competent to constitute. Procedures such as advance clearances or declaratory judgments are likewise foreign to criminal law and procedure.

These few but critical limitations upon federal authority would be avoided if the courts were to justify the major combines proscriptions under another head or heads of jurisdiction. The trade and commerce power has been frequently suggested as the most logical refuge. The general power is another possibility. As well as overcoming the procedural limitations of the criminal law power, many legislators and judges would be more inclined to seat an expanded scope of remedies under a "civil" head of jurisdiction. On the other hand, of course, there would have to be less reliance upon the centralizing benefits of the criminal procedure power or upon the supplemental criminal laws concerning attempts and aiding and abetting.\(^{230}\)

Even if the anti-combines proscriptions in 1889 fell in substance within the proper scope and function of the criminal law, evidence of a shift in their basic purpose is overwhelming. It is apparent that the nonlegal change unaccompanied by legal adjustment has resulted in a misconception that lies at the root of the constitutional problems of combines control.\(^{231}\) No longer are the sole or even major concerns moralistic, specific or retrospective.\(^{232}\) Rather, an amoral, general, current and prospective interest in the health and viability of the economy has for some time dominated the enforcement interest. The critical phenomenon is not the method of restraint but the economic result. Conspiracy is little different from oligopolistic price leadership or conscious parallelism. This emphasis on commercial effects is exemplified in part by judicial reference to them as a test for criminal intent. Commercial and economic effects likewise are central to the statutory definitions of the merger, monopoly and price discrimination offences. The same concern lies behind the informal "programme of compliance" developed by the Director of Investigation and Research to take account of


\(^{231}\) Nor have the substantive legal standards taken advantage of a continuing refinement of relevant economic theory. See Skeoch, *The Combines Investigation Act: Its Intent and Application* (1956), 22 C.J.E.P.S. 17.

\(^{232}\) See, for example, the view expressed in the Progress Report of the Special Joint Committee of the Senate and House of Commons on Consumer Credit, April 25th, 1967, pp. 3453-3454.
business realities within the present enforcement apparatus. These economic characteristics of the relevant public interest are critical to constitutional classification because much depends on how the problem, or pith and substance, is defined. Much depends, for example, on whether a particular application of a highly detailed divestiture order is seen in the general competitive context or is viewed as a legislative attempt to regulate a particular industry.

By way of general observation it does seem strange that the ethical qualities and fairness of competitive methods be within federal control under the trade and commerce power, and yet there be doubt about similar authority to preserve the competitive system itself. Nor is the line between anti-combines and unfair competition crystal clear, for public and private harm can be found in both areas. Price discrimination legislation is the classic example of overlapping goals, but other examples may readily be found.

The courts have developed techniques for accommodating social or economic change and even within the limiting doctrine of precedent have reserved the possibility of justifying the Combines Investigation Act under a head or heads of Dominion jurisdiction other than the criminal law power.

Admittedly, any power to regulate business may raise delicate political questions but there is little reason to think that judicial reinterpretation which is carefully delimited and explained would create political strain. Judicial refusal to place competition controls under the trade and commerce or general powers, however, would still leave room for co-operative delegation based on political agreement. Some instability or lack of comprehensiveness is risked by the latter solution, of course, but the record of federal-provincial co-operation is not a discouraging one. Assuming political agreement on general competition policy, delegation to a common agency would avoid wasted resources, jurisdictional disputes, compromises and double jeopardy which irritate antitrust enforcement in the United States. Even if the Dominion were unable to secure full effective powers in its own right, a co-operative scheme of delegation would be measurably facilitated if the limited amount of Dominion competence were justifiable under the trade and commerce power.

It is trite to reiterate that we live in an age of rapid and profound change. Political theories of decentralized control, including

283 Flynn, op. cit., footnote 83, especially Ch. V.
nationalism and federalism, are increasingly viewed as major hopes for harmony and liaison within cultural diversity and minority protection. At the same time these theories are challenged by increasing advantages of economic interdependence. Maximization of mutual welfare requires political co-operation across jurisdictional borders. Combines control is one of many examples. A growing Canadian need for a solution to the jurisdictional morass in the field of price control and economic behaviour is obvious.\textsuperscript{234}

Prevailing legislative confusion is due as much to past court decisions as it is to recent economic and commercial development. The necessary generalities of fundamental law solve little by themselves, and their application to concrete problems requires judicial examination of the real underlying facts of each case as well as articulation of value judgments by members of the court. At least until the end of the second World War, Canadian constitutional interpretation was in large part dominated by "judiocentric" language\textsuperscript{235} rather divorced from social and political con-

\textsuperscript{234} See the unanswered request made by Mr. Herridge in Debates, House of Commons, December 9th, 1966, p. 10919, for "... a statement that will clearly define the constitutional responsibility of the federal government to legislate on such matters as price control, standards, packaging, labelling, etc." The acute confusion and overlap in responsibility for the packing and sale of food had been outlined the previous day before the Special Joint Committee of the Senate and House of Commons on Consumer Credit.

The fragmented, unharmonized governmental effort to influence or control prices and inflation is obvious on many fronts. The Special Joint Senate-Commons Committee on Consumer Credit studied consumer problems and prices along the same lines and at the same time as did the Batten Royal Commission in the prairie provinces. Both examined barriers to entry, promotional practices, deception and performance. Several of the Batten Commission's recommendations were directed to the federal government. Similar duplication has been evident respecting the marketing of gasoline: see R.T.P.C. Reports No. 5 (1960), Nos 12, 13 and 14 (1961), No. 40 (1966), and the Report on Monopoly in Distribution of Propane-British Columbia (Ottawa, 1965), as well as the Report of the Royal Commission on Gasoline Price Structure (Victoria, 1966). Debates in both the House of Commons and provincial legislatures in recent years abound with statements by various Ministers showing uncertainty about the constitutional delineation of power to influence prices.

It is interesting to consider the extent to which activity by legislative committees and commissions itself constitutes a technique for influencing prices and behaviour. See generally the Proceedings of the Special Joint Committee of the Senate and House of Commons on Consumer Credit, 1966-67, and especially the Interim Report reproduced in the Progress Report, April 25th, 1967, pp. 3467-3473.

\textsuperscript{235} This term, used by Flynn, op. cit., footnote 83, p. 174, refers to argument and decision made totally within the sterile framework of abstract legal tests, logic, and linguistic label with no express reference to underlying nonlegal content or values. See generally an excellent and stimulating article by Weiler, Two Models of Judicial Decision-Making (1968), 46 Can. Bar Rev. 406, and Levi, An Introduction to Legal Reasoning (1948). Vis-
Almost inevitably this led to irrational, awkward divisions of jurisdiction. A recent tendency away from this attitude is apparent and the tendency is likely to become the rule, particularly as the doctrine of precedent is relaxed. This is a virtual necessity, for we cannot afford to be enslaved to an interpretation of Canadian social or economic realities imposed by nonresidents in the nineteenth and early twentieth centuries.

It is clear that a combines control structure pressed within traditional criminal law techniques and procedures cannot effectively preserve competition or deal with commercial realities as they have developed. It is costly and time consuming in operation, economically unsophisticated in its application and inaccurate in its "all or nothing" condemnation. This assessment is held by business and government alike. A well integrated, comprehensive anti-combines enforcement programme undoubtedly would preserve traditional penal sanctions for flagrant and deliberate deviance from specific standards, but as in the United States, Europe and Japan criminal sanctions must be integrated with civil and administrative remedies and procedures. Remedies and procedures must be as flexible as the fact situations are various. Otherwise, effective legislation dealing with the substance will be impossible.

count Haldane has received much criticism on this count: e.g., Laskin, op. cit., footnote 107, at pp. 1059-1060. The Honourable Mr. Rand has also deplored the heritage of Canadian constitutional interpretation, namely, the tendency to rely exclusively on abstract formulae to solve particular concrete problems: "The weakness of an interpretation reaching to such extremes lies in the abstract character of its formulation as contrasted with that of a purpose of practical accommodation required for government by two sets of authority. The legal mind tends to theorizing in concepts; as in metaphysics, it seeks a structure of ideational completeness, a mosaic in contours of ideal fineness. The demand is for a keen-edged intellectual fabrication rather than a workable and acceptable external reality." Smith, op. cit., footnote 12, p. vii.