

Comments on Legislation and Judicial Decisions

Chronique de législation et de jurisprudence

THIRD PARTY BENEFICIARIES IN THE SUPREME COURT OF CANADA.—It is not uncommon in commercial leases for the lessor to agree to insure its own interests against damage by fire. Fires are often caused by negligence, and one of the risks that is always present in the minds of the parties to such an agreement is the risk that one of the lessee's employees might negligently cause a fire that damages the lessor's property. It seems a plain implication, therefore, of the lessor's promise to insure, that the lessor will not in such circumstances sue the lessee for its employee's negligence, for such a suit would have the effect of depriving the lessee of the insurance coverage which it had purchased as one of the terms of the lease. If the lessor's insurer could sue the lessee in the lessor's name by subrogation, again the plain intention of the parties would be defeated. These propositions were established by the Supreme Court of Canada in *Smith v. T. Eaton Co. Ltd.*¹ Although the court in that case said nothing about the possibility of an action by the lessor against the tenant's individual employees, the tenor of the judgment suggests that this too would have defeated the parties' ordinary commercial expectations.

In *Greenwood Shopping Plaza Ltd v. Beattie*,² a lessor (Greenwood Shopping Plaza Ltd) covenanted with a lessee (Neil J. Buchanan Ltd) of premises in a shopping centre to insure against fire, and, to establish the point of subrogation discussed in the last paragraph beyond doubt, it was expressly provided that "the lessor . . . will arrange . . . not to grant subrogation rights for recovery of any loss through fire . . . occasioned by the acts of the [lessee]". Two of the lessee's employees, Robert Beattie and Roy Pettipas, acting in the course of their employment, negligently started a fire in the lessee's premises which damaged a large part of the shopping centre. It turned out that the lessor was under-insured, and the lessor personally and its insurer by subrogation sued together in the lessor's name for the

¹ [1978] 2 S.C.R. 749.

² (1980), 111 D.L.R. (3d) 257 (S.C.C.).

whole loss, naming as defendants Neil J. Buchanan Ltd, Robert Beattie, and Roy Pettipas.

The trial judge, Cowan C.J.T.D., held that the express provisions of the lease excluded any right of subrogation against the lessee, and that "it follows logically that if there is no right of subrogation against the Buchanan company, in respect of the particular loss, there should be no right of subrogation against the employees of the Buchanan company for whose negligence the Buchanan company is responsible".³ In the Court of Appeal the same conclusion was reached. MacKeigan C.J.N.S. said:⁴

Here the landlord's covenant to insure implied . . . a promise by the landlord to the tenant to assume by insurance the risk of loss by fire caused by any means, including the negligence of the tenant and its employees. That assumption of risk implied a further promise not to sue the tenant for damage that would be covered by that risk. In my opinion this latter promise must have been intended to extend to the employees through whom and for whom the tenant was responsible.

MacKeigan C.J.N.S. added that to impose liability personally on Beattie and Pettipas would "fly in the face of common sense modern commercial practice, and labour relations".⁵ This comment seems very apt. Most ordinary persons would be astonished at the notion that Beattie and Pettipas were to be personally liable—a result almost certain to cause the loss of all their property and financial ruin. Further thought would lead to the conclusion that no sensible system of commercial law could tolerate such a result which deprives the lessee of the coverage it had paid for, and enables the lessor and its insurer, who had been paid expressly to bear the risk, to shift it onto uninsured individuals. Further consideration must then prompt the thought that individual liability is unlikely to be welcomed by employees, and groups of employees with bargaining power would surely insist on an indemnity from the employer in such circumstances. But this hardly makes the prospect more tolerable, for then the loss will ultimately be borne by the lessee—the very party which had bargained by the terms of the lease not to bear that loss.

Yet the Supreme Court of Canada has allowed the lessor's appeal (with costs) and has held Beattie and Pettipas personally liable for the whole loss, on the ground that not being parties to the lease they could not benefit from its provisions.

This surprising result is not made more easy to understand by the court's reasons. The court had given leave to appeal specifically in

³ Quoted by the Supreme Court of Canada, *ibid.*, at p. 260.

⁴ (1979), 99 D.L.R. (3d) 289, at p. 294.

⁵ *Ibid.*, at p. 295.

respect of the question of the liability of Beattie and Pettipas. The opening words of McIntyre J.'s judgment are:⁶

This appeal concerns the doctrine of privity of contract and the question of the extent of third party rights under contract.

Yet there is no discussion at all of the merits of the doctrine, the court stating that the law had been settled in England in *Tweddle v. Atkinson*⁷ and in Canada in *Canadian General Electric Co. Ltd v. Pickford and Black Ltd*,⁸ a case which itself simply followed earlier English cases without discussion. There was no reference to the very extensive academic criticism of the rule against third party beneficiaries, no mention of the law in the United States, no mention of the recommendation for abolition of the rule by the English Law Revision Committee of 1937,⁹ no mention of Lord Reid's statement in *Beswick v. Beswick* that reform of the law was urgently needed,¹⁰ or of the Privy Council's determination in *New Zealand Shipping Co. Ltd v. A. M. Satterwaite and Co. Ltd* to bring the law into conformity with commercial expectations.¹¹

More surprising still than these omissions is the absence from the judgment of any suggestion that the result is unjust or even inconvenient. Although extensive passages were quoted from the judgment of MacKeigan C.J.N.S., the reference to flying in the face of common sense commercial practice and labour relations is not included. One could understand a decision, regretfully reached, that legal doctrine compelled an inconvenient result, but it is surprising that a busy Supreme Court of Canada should give leave to appeal, reversing a convenient result, in order to say that, and, if that were the attitude of the court, one would expect to see signs of a struggle to reach a result that accorded with commercial convenience, or at the least an appeal to the legislatures to step in where the court found itself unable to do justice on its own. But there is nothing of the kind in the short unanimous judgment of the court.

The practical question is how this decision will affect future cases that raise problems of privity of contract. The *New Zealand*

⁶ *Supra*, footnote 2.

⁷ (1861), 1 B. & S. 393.

⁸ [1971] S.C.R. 41.

⁹ Law Revision Committee, Sixth Interim Report, Cmnd 5449 (1937).

¹⁰ [1968] A.C. 58, at p. 72 (H.L.).

¹¹ [1975] A.C. 154. In *Port Jackson Stevedoring Pty. Ltd v. Salmon & Spraggen (Australia) Pty. Ltd*, [1980] 3 All E.R. 257, the Privy Council has reaffirmed the *New Zealand Shipping* case, Lord Wilberforce adding that "the decision does not support, and their Lordships would not encourage, a search for fine distinctions which would diminish the general applicability, in the light of the established commercial practice, of the principle. (At p. 261).

Shipping case, a Privy Council decision permitting a stevedore to take advantage of a limitation of liability in a contract of carriage, was cited with approval, but distinguished on the basis that there the promisee had acted as agent for the third party, and that "the stevedore in performing the service of unloading the ship for the shipper had given consideration".¹² The Supreme Court of Canada held that there was no evidence of agency in the *Greenwood* case, and agency will often be difficult to show in such cases, especially in respect of employees not yet identifiable at the time of the execution of the contract. The other reason attributed to the Privy Council (that the stevedore had given consideration by unloading the ship) refers, though rather compendiously, to a line of argument not dependent on agency, namely the construction of a collateral contract between the promisor and the third party whereby the promisor is taken impliedly to offer the benefits of the contract to the third party, and the latter accepts and supplies consideration by doing some act to benefit the promisor (in the *New Zealand* case, unloading the ship). This was the line of argument adopted by Beattie J. in the New Zealand Supreme Court¹³ with which the Privy Council expressed itself to be "in substantial agreement".¹⁴ It seems from the reference just cited that the Supreme Court of Canada may be taken impliedly to have approved this line of reasoning. The approach, though somewhat fictional, is capable of achieving a commercially convenient result in the hands of a court willing to go in that direction. In the context of the *Greenwood* case it would require the finding of a contract between lessor and individual employees whereby the employees performed their duties of employment (indirectly benefitting the lessor) in return for the lessor's promise to extend to them the benefits of its insurance arrangements. Though somewhat fictitious this analysis is not wholly unrealistic, for in the light of the result in the *Greenwood* case a union might well refuse to go to work until it had the lessor's assurance that the individual employees would not be sued. If express assurance in response to an express request would create a valid contract, an implied assurance and an implied request could do the same. It cannot be said that the Supreme Court of Canada has given encouragement to this line of reasoning, but at least the door is not closed to it.

The other avenue of escape mentioned by the Supreme Court of Canada is the device of trust. Trust was recognized as a means of avoiding the rule against third party beneficiaries but rejected in the *Greenwood* case for want of evidence: "We were not referred to any

¹² *Supra*, footnote 2, at p. 264.

¹³ [1972] N.Z.L.R. 385, [1971] 2 Lloyd's Rep. 399.

¹⁴ *Supra*, footnote 11, at p. 168.

evidence from which a trust could be inferred."¹⁵ Then appears this puzzling passage:¹⁶

It must also be observed that the clear and precise words of paragraphs 14 and 15 [of the lease] limit the application of the insurance provisions to the parties to the lease, the appellant and the company. Courts must, in cases of this sort, be wary against drawing inferences upon vague and scanty evidence, where the result would be to contradict the clear words of a written agreement and where rectification is not sought or may not be had.

This suggests that the court is finding *as a matter of construction* that the provisions of the lease did not purport to confer any benefit on the individual employees at all. On that basis the case could have been decided without recourse to the doctrine of privity, for even if the law permitted enforcement of contracts for the benefit of third parties, the third party would lose if the contract, on its true construction, did not manifest an intention to benefit him. But the whole tenor of the judgment up to this point appears to assume the existence of a promise for the benefit of the employees and then to show that the law will not enforce such a promise. In the passage just quoted McIntyre J. appears to say that clear and precise words limited the application of the provisions to the contracting parties. If this should later be held to be the ground of the decision, it will not affect the case of an express or genuinely implied promise for the benefit of a third party. The reference to rectification lends support to the view that if the right words had been used the result would have been different.

McIntyre J.'s words appear to be susceptible of three interpretations: (1) there was no intention to benefit the third parties; (2) there was such an intention, but no intention to create a trust; (3) intention to benefit a third party and intention to create a trust are synonymous, but that intention was absent in the case. It is not easy to see which of these interpretations is correct. The first interpretation, as has been shown, would enable the case to be decided without any reference to the doctrine of the privity of contract. If this were the correct interpretation one would have expected McIntyre J. to indicate that it constituted a separate ground of decision. The second interpretation (that there was an intention to benefit a third party, but no intention to create a trust) is what the reader would expect in the context (the passage quoted is part of a paragraph dealing with the trust argument), yet the words quoted do not seem to be directed at the question of trust, and the reference to rectification seems out of place in a discussion of whether a trust has been created. The third interpretation (that intention to benefit a third party is the same thing as an intention to create a trust) would have the effect of rescinding the doctrine by

¹⁵ *Supra*, footnote 4, at p. 265.

¹⁶ *Ibid.*, at pp. 265-266.

permitting the construction of a trust whenever an intention is manifested to benefit a third party. This would be a welcome conclusion to those who consider the doctrine of privity a source of injustice, but it seems at variance with the judgment as a whole. Even if the second interpretation is correct, however, McIntyre J. appears plainly to leave open the possibility of establishing a trust in favour of a third party by the use of appropriate words. Thus if the words trust or trustee are actually used, the third party will presumably be able to enforce the provisions for his benefit.^{16a} Equity has never required the use of express words to create a trust: the manifestation of an equivalent intention has always been sufficient. Older cases, including Canadian cases, readily found that the manifestation of an intention to benefit a third party was sufficient to create a trust where justice required the enforcement of the contractual provisions for the benefit of the contract beneficiary.¹⁷ Some modern cases have taken a narrower view,¹⁸ but it is still open to a court to find in a particular case that the necessary intention for the creation of a trust has been manifested. It is possible therefore that future courts will be willing to find the necessary intention to create a trust where justice requires enforcement of the contractual provisions for the benefit of the third party. As Corbin pointed out over fifty years ago this seems a wholly appropriate use of the doctrine of trust.¹⁹

A third possibility that springs to mind, though not one mentioned by the court, is the possibility of the lessee's obtaining a stay of proceedings. It has been held in several cases that although a third party beneficiary cannot himself enforce a contract for his benefit the promisee can do so and can obtain a decree specifically enforcing the promisor's contractual obligation.²⁰ These cases were not discussed by the Supreme Court of Canada and presumably remain intact. Consequently, it would seem that if, on its true construc-

^{16a} See now *John Manville Canada Inc. v. John Carol Ltd* (1980), 29 O.R. (2d) 592 (H.C.).

¹⁷ *Tomlinson v. Gill*, (1756) Amb. 330; *Mulholland v. Merriam* (1872), 19 Gr. 288; *Les Affréteurs Réunis S.A. v. Leopold Walford (London) Ltd*, [1919] A.C. 801 (H.L.: cited without disapproval in *Greenwood*).

¹⁸ *Vandepitte v. Preferred Accident Ins. Co.*, [1933] 1 D.L.R. 289 (P.C.); *Re Schebsman*, [1946] Ch. 83 (C.A.); *Green v. Russell*, [1959] 2 Q.B. 226 (C.A.). But in *Jackson v. Horizon Holidays*, [1975] 1 W.L.R. 1468 (C.A.), a promisee recovered damages suffered by a third party to be held on trust for the latter.

¹⁹ Corbin, *Contracts for the Benefit of Third Persons* (1930), 46 L.Q. Rev. 12.

²⁰ *Beswick v. Beswick*, *supra*, footnote 10; *Snelling v. John G. Snelling Ltd*, [1973] Q.B. 87 (stay of proceedings); *Sears v. Tanenbaum* (1970), 9 D.L.R. (3d) 425 (Ont. C.A.), *rev'd* on other grounds 18 D.L.R. (3d) 709 (S.C.C.); *Gasparini v. Gasparini* (1978), 87 D.L.R. (3d) 282 (Ont. C.A.). See also *Gore v. Van der Lann*, [1967] 2 Q.B. 31 (C.A.).

tion, the lease obliges the lessor not to sue the lessee's employees, the lessee could obtain an order to restrain any proceedings instituted by the lessor against the employees. Orders of this sort restraining actions at law (common injunctions) were regularly made by equity, and since the Judicature Act take the form of a stay of proceedings.²¹ It is true that this technique requires the co-operation of the promisee, but where the promisee is the employer of the beneficiary it could be expected in most cases that co-operation would be forthcoming.

A fourth and less satisfactory approach would be for the lessee to indemnify the employees and claim damages from the lessor for breach of contract. It has been said that a promisee can usually only obtain nominal damages for breach of a promise for the benefit of a third party, because the failure to benefit the third party usually does not damage the promisee.²² But in a case like *Greenwood* it is quite probable that the lessee will be obliged for the sake of good labour relations to indemnify the individual employees. If so, there is a monetary loss caused by the lessor's breach of contract, and, it would seem, a loss that could readily be contemplated as liable to result from the breach.

The rule against third party beneficiaries has given much trouble to the law of contracts. It has largely been eliminated in the American jurisdictions. In *Woodar Investment Development Ltd v. Wimpey Construction U.K. Ltd*²³ Lord Scarman said:²⁴

I respectfully agree with Lord Reid that the denial by English law of a "jus quaesitum tertio" calls for reconsideration. In *Beswick v. Beswick* . . . Lord Reid, after referring to the Law Revision Committee's recommendation in 1937 that the third-party should be able to enforce a contractual promise taken by another for his benefit, observed: "And, if one had to contemplate a further long period of Parliamentary procrastination, this House might find it necessary to deal with this matter." The committee reported in 1937. *Beswick v. Beswick* was decided in 1967. It is now 1979, but nothing has been done. If the opportunity arises, I hope the House will reconsider *Tweddle v. Atkinson* and the other cases which stand guard over this unjust rule.

The Supreme Court of Canada gives no reason in support of "this unjust rule" except that it is settled by authority. This seems, with respect, an insufficient reason to set against MacKeigan C.J.N.S.'s common sense commercial practice and labour relations. Perhaps it

²¹ See Judicature Act, R.S.O., 1980, c. 223, s. 18.6; Judicature Act, R.S.N.S., 1979, c. J-3, s. 38(5).

²² See *Beswick v. Beswick*, *supra*, footnote 10, at pp. 73 (Lord Reid), 82 (Lord Hodson), 102 (Lord Upjohn). Lord Pearce would have allowed the promisee to recover substantial damages, at p. 88. In *Jackson v. Horizon Holidays Ltd*, *supra*, footnote 18, substantial damages were recovered by the promisee to be held on trust for the third party.

²³ [1980] 1 W.L.R. 277.

²⁴ *Ibid.*, at p. 300.

should be assumed that the Supreme Court directed its mind to the merits of the rule but considered that the reform of such unjust rules of law was for the legislative rather than the judicial process. The Ontario Law Reform Commission is indeed considering the reform of contract law, but attempts at uniform legislation in Canada have not often been successful, and so it seems likely that the rule against third party beneficiaries will continue to be a source of trouble in Canadian contract law.

S. M. WADDAMS*

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CONSTITUTIONAL LAW—CRIMINAL LAW—CANADIAN BILL OF RIGHTS—RIGHT TO LEGAL COUNSEL ONCE A DEMAND FOR A BREATH SAMPLE IS MADE ON AN INDIVIDUAL.—

Even where this Court is asked to pass on the constitutional validity of legislation, it knows that it must resist making the wisdom of impugned legislation the test of its constitutionality.¹

In *Chromiak v. The Queen*,² a recent judgment of the Supreme Court of Canada, the issue before the court was whether an individual has the right to legal counsel once a demand for a breath sample is made upon him or her pursuant to section 234.1 of the Criminal Code.³ The court answered in the negative.⁴ The ratio given was that such an individual was not arrested or detained, therefore, had no right to retain and instruct counsel without delay as provided for in the Canadian Bill of Rights.⁵

Mr. Justice Ritchie, who delivered the unanimous judgment, supported the court's reasoning for such an interpretation, by adopting⁶ the dissenting opinion of Mr. Justice Pigeon in *Brownridge v. The Queen*.⁷

* S.M. Waddams, of the Faculty of Law, University of Toronto.

¹ *Curr v. The Queen* (1972), 26 D.L.R. (3d) 603, at p. 616 (S.C.C.). Mr. Justice Laskin, as he then was, made this statement after commenting on the need for breathalyzer legislation to prevent the terrible destruction of life and property on the highways.

² (1980), 102 D.L.R. (3d) 368.

³ R.S.C., 1970, c. C-34, as am.

⁴ Therefore, a *bona fide* request to consult a lawyer prior to giving a sample into the roadside screening device is not a reasonable excuse for refusal should the request be denied by the police.

⁵ R.S.C., 1970, Appendix III.

⁶ *Supra*, footnote 2, at p. 370.

⁷ (1972), 28 D.L.R. (3d) 1, at pp. 13-14.

The legal situation of a person who, on request, accompanies a peace officer for the purpose of having a breath test taken is not different from that of a driver who is required to allow his brakes to be inspected or to proceed to a weighing machine under s. 39(6) or s. 78(3) of the *Highway Traffic Act*, R.S.O. 1970, c. 202. Such a person is under a duty to submit to the test. If he goes away, or attempts to go away, to avoid the test, he may be arrested and charged but this does not mean that he is under arrest until this happens. He is merely obeying directions that police officers are entitled to issue. Motorists cannot reasonably expect to be allowed to seek legal advice before complying with such orders. Police officers are fully justified in treating as a definitive refusal a refusal to comply until legal advice is obtained.

Does s. 2(c) (ii) of the *Bill of Rights* alter the common law situation with respect to motorists requested to submit to a test required by the *Criminal Code* as opposed to tests required by provincial legislation? I do not think so. The provision under consideration applies to "a person who has been arrested or detained". Such is not, it appears to me, the legal situation of one who has been required "to accompany" a peace officer for the purpose of having a breath test taken. The test may well be negative and, in such a case, it would be quite wrong to say that this person was arrested or detained and then released. Detained means held in custody as is apparent from such provisions as s. 15 of the *Immigration Act*, R.S.C. 1970, c. I-12.

Mr. Justice Ritchie distinguished the majority decision in *Brownridge* (of which he delivered one and Mr. Justice Laskin, as he then was, the other) on the basis that in that case the accused was under arrest and held in the police cells and therefore entitled to counsel. The learned justice defined "detained", as found in the *Bill of Rights* to mean some form of "compulsory restraint"⁸ or "actual physical restraint"⁹ and, relying on the above statement of Mr. Justice Pigeon, held that such restraint is not present on the highway when an individual is stopped and a demand made pursuant to section 234.1.¹⁰

It is respectfully submitted that such reasoning is in error in three important aspects. First, as can be seen, the dissenting judgment of Mr. Justice Pigeon in *Brownridge*, accepted by the court in *Chromiak*, interpreted the word "detained" to mean "held in custody". The learned Justice supported his argument by reference to the Ontario Highway Traffic Act¹¹ and the federal Immigration Act¹² and, in so doing, failed to appreciate the blatant differences between those Acts and section 234.1 of the *Criminal Code*.

⁸ *Chromiak v. The Queen*, *supra*, footnote 2, at p. 373.

⁹ *Ibid.*

¹⁰ It would seem, then, that if faced with a demand pursuant to section 234.1, an individual would somehow have to have himself or herself placed under arrest in order to obtain the benefit of counsel.

¹¹ R.S.O., 1970, c. 202 as am.

¹² R.S.C., 1970, c. I-12, now replaced by S.C., 1976-77, c. 52, as am., s. 104(2).

The quasi criminal nature of the Highway Traffic Act imposes penalties much less severe than those of section 234.1 and, of course, the provisions of the Canadian Bill of Rights have no application to this provincial enactment. Therefore, a comparison of the two cannot be properly made and should not have carried much weight.

Likewise, reference to section 15 of the Immigration Act, to support the conclusion that "detained" means "held in custody" is misleading. The wording of that section, which Mr. Justice Pigeon relied on, states, *inter alia*:¹³

S. 15: Every Constable or Peace Officer . . . may, without the issue of a warrant . . . arrest and detain for an inquiry or for deportation

However, consideration of other sections of the same Act does not support and in fact contradicts the "held in custody" definition. For example:

S. 14(4): A warrant or order made or a direction given under this section is, notwithstanding any other Act or law, sufficient authority to the person to whom it is addressed or who may, under this Act, receive and execute it to arrest *and take into custody or cause the detention of the person concerned, as the case may be.*

S. 17(1): Subject to any order or direction to the contrary by the Minister, *a person taken into custody or detained* may be released under such conditions, respecting the time and place at which he will report for examination, inquiry or deportation, payment of a security deposit or other conditions, as may be satisfactory to a Special Inquiry Officer.¹⁴

and

S. 17(2): Where a person fails to comply with any of the conditions under which he is released *from custody or detention* he may be retaken into custody forthwith and any security deposit that may have been made as a condition of his release shall be deemed to be forfeited and shall form part of the Consolidated Revenue Fund.¹⁵

Further, although the Immigration Act does have severe penalties and is governed by the Bill of Rights, it does not contemplate the type of tests authorized by section 234.1 and indeed the legislators used the word detained as found in the Immigration Act in a confusing manner and the Act should not have been used as authority for a definitive answer.

Mr. Justice Pigeon's definition requires that an arrest first take place before there can be a detention. If this is so, theoretically, a suspect in a criminal case could be questioned by the police without the benefit of counsel, even though requested, provided the suspect is not placed under arrest.

¹³ *Ibid.*, italics mine.

¹⁴ *Ibid.*, italics mine.

¹⁵ *Ibid.*, italics mine.

Secondly, Mr. Justice Ritchie ignores the other majority decision in *Brownridge*, (albeit, a majority of one) that of Mr. Justice Laskin, as he then was:¹⁶

A factual point of difference between the *Curr* case¹⁷ and the present one is that the accused *Curr* had not been under arrest when he was asked to provide a breath sample; *Brownridge*, on the other hand, had been arrested on a charge of impaired driving before he was asked to give the sample. *I do not attach any significance to this factual difference in its relation to s. 2 (c) (ii) of the Canadian Bill of Rights.*

By distinguishing *Brownridge*, in the manner he did, Mr. Justice Ritchie has also added confusion to what once was considered settled law by the practicing bar, police officers and trial courts (especially at the Provincial Court level). The practice has been,¹⁸ since *Brownridge*, that if a demand is made upon an individual pursuant to section 235(1) of the Criminal Code, a *bona fide* request to consult counsel by that individual will not be refused by the police or, if refused, it will be a defence to a charge under section 235(2).¹⁹ This is so even where the individual was not under arrest at the time. How will the practice now be affected?

Thirdly, the reasoning of the court in *Chromiak* fails to appreciate the reality of the situation faced by a driver when stopped by a police officer:

Parliament in using the words "arrested and detained" in s. 2(c) of the *Canadian Bill of Rights* contemplated different situations because although arrest includes detention, detention does not necessarily include arrest. Certainly at the time, the respondent refused to acquiesce to Constable Brown's demand he was not under arrest; was he, however, being detained? In my opinion the common-sense answer is that he was. He had been stopped by Constable Brown while driving on the highway. What happened thereafter was a direct result of his so being stopped. *Once stopped, he was "detained" in my view, by Constable Brown.*²⁰

Although Mr. Justice Ritchie considered this case, he, in effect, distinguished it on the basis that the accused, MacDonald, was given the opportunity to retain counsel but was unable to do so after three attempts.²¹ He also recognized that the word "detention" does not necessarily include "arrest", but did not define the word "detention" in a realistic manner since his definition, for the purposes of the Bill of Rights, equates the words. How can there be a detention by a police officer, in the sense of "compulsory restraint" or "actual

¹⁶ *Supra*, footnote 7, at p. 15, italics mine.

¹⁷ *Supra*, footnote 1.

¹⁸ At least it has been in New Brunswick.

¹⁹ Or invoke prosecutorial discretion.

²⁰ *Queen v. MacDonald* (1974), 22 C.C.C. (2d) 250, at p. 356 (N.S.C.A.), italics mine.

²¹ *Quaere*: How the reasoning of the Nova Scotia Court of Appeal is affected by their ultimate decision in MacDonald?

physical restraint", without an arrest? For purposes of section 234.1 of the Criminal Code such situations would be few, if any. Further, even adopting Mr. Justice Ritchie's definition of detained, can it be said, whether objectively or subjectively, that the average Canadian driver does not feel compulsorily restrained or under actual physical restraint after being stopped by a police officer, especially when confronted with a demand under section 234.1? Again, the common sense answer is no.

The court by their definition have extended the meaning of the word far beyond what Parliament intended or could have intended²² and, in so doing, Mr. Justice Ritchie has done exactly what he cautioned against doing in interpreting section 2 of the Bill of Rights:²³

It seems to me that a more *realistic meaning* must be given to the words in question and they afford, in my view, the clearest indication that Sec. 2 is intended to mean and does mean *that if a law of Canada cannot be sensibly construed and applied "so that it does not abrogate, abridge or infringe", one of the rights and freedoms recognized and declared by the Bill, then such law is inoperative unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights.*

These words of Mr. Justice Ritchie are pertinent because a different decision in *Chromiak*, although it would not have rendered section 234.1 inoperative (that is no force of law),²⁴ would have rendered inoperative the practical everyday implementation of the section.

It is in the context of this practical application of section 234.1 to Canadian society that the judgment of the Supreme Court of Canada can be rationalized. Crown Counsel in argument before the District Court of Alberta in *Chromiak*,²⁵ best expressed it.²⁶

The intent of the legislation was clearly to have a fast convenient way of checking possible impaired drivers, often some distance from towns or cities, so as not to inconvenience either citizens or the police any more than necessary. *If the*

²² The definition of "detained" as found in legal dictionaries and standard dictionaries of the English language support this contention. For example, Black's Law Dictionary (4th rev. ed., 1968), defines "detain" to include, *inter alia*, to arrest, to check, to delay, to hinder, to hold, or keep in custody, to retard, to restrain from proceeding, to stay, to stop and The Concise Oxford Dictionary (5th ed., 1969), defines "detain" to include, *inter alia*, keep waiting, hinder.

²³ *Queen v. Drybones* (1970), 9 D.L.R. (3d) 473, at p. 482, italics mine.

²⁴ In *Brownridge*, Mr. Justice Ritchie held that refusal of right to counsel under the circumstances constituted a reasonable excuse for refusal and Mr. Justice Laskin, as he then was, held that such a refusal constituted a defence apart from the words "reasonable excuse" but neither would have rendered the legislation inoperative. *Supra*, footnote 7.

²⁵ *Queen v. Chromiak* (1978), 42 C.C.C. (2d) 556.

²⁶ *Ibid.*, at p. 558, italics mine.

Canadian Bill of Rights were to apply to S. 234 of the Criminal Code, the effectiveness and usefulness of the section would be greatly reduced.

District Court Judge McFadyen refused to accept such an argument in view of the importance he placed in the Bill of Rights:²⁷

Counsel for the respondent has submitted that such compelling reason can be found. I recognize that s. 234.1 of the Criminal Code was enacted as much for the convenience of the driver who was suspected of consuming alcohol as for the convenience of the enforcement authorities. It is true that the effectiveness of this section may well be reduced, particularly in country points where telephones may not be readily available. These factors must, however, be considered in light of the importance of the right granted to a person who is being detained, to consult counsel without delay.

The Supreme Court of Canada in *Chromiak v. The Queen* failed to attribute to the Canadian Bill of Rights this same importance but it may well be that the court was loath to remove section 234.1 from the arsenal of police powers, especially in the light of the need for such legislation in today's society. However, the court could have taken cognizance of the fact that if it had ruled in favour of the accused. Parliament need only have relied on the *non obstante* clause in section 2 of the Bill of Rights to make section 234.1 practically operative once again.

This *non obstante* clause, however, could have been one of the reasons the court ruled as it did, because of what Professor W.S. Tarnopolsky has labelled the "frozen concepts principle of interpretation".²⁸ He explains this principle by reference to another judgment of Mr. Justice Ritchie:²⁹

This in turn, led Mr. Justice Ritchie, in the *Miller and Cockriell*³⁰ case, in considering whether the death penalty provisions in the Criminal Code contravened the Bill of Rights, to conclude that since, shortly after the enactment of the Canadian Bill of Rights, the Parliament of Canada amended the Criminal Code several times with respect to the death penalty and did not include the "*non obstante*" clause of section 2 of the Bill of Rights, therefore Parliament did not assume that the death penalty provisions were contrary to the "cruel and unusual" clause of the Bill of Rights.

Professor Tarnopolsky concludes that.³¹

The result of this decision is that if Parliament did include the "*non obstante*" clause, the Bill of Rights would *not* apply, but that also when it does not include the clause, the Bill of Rights would *not* apply. The result of this "frozen concepts" interpretation is that the Bill of Rights could *never* have effect. This has

²⁷ *Ibid.*, at p. 561.

²⁸ A Bill of Rights and Future Constitutional Change (1979), 57 Can. Bar Rev. 626.

²⁹ *Ibid.*, at p. 631.

³⁰ *Regina v. Miller and Cockriell* (1976), 70 D.L.R. (3d) 324.

³¹ *Op. cit.*, footnote 28, *ibid.*

been one of the most important impediments to the effectiveness of the Canadian Bill of Rights.

Regardless of the manner in which the decision in *Chromiak* was reached, it remains the pronouncement of the highest court in the land and therefore binding. It is only hoped that the court has not made the wisdom of the impugned legislation before it, the test of its constitutionality³² and thereby added a new dimension to constitutional interpretation, a dimension which cannot co-exist with the Bill of Rights.

JOHN J. WALSH*

* * *

COMBINES INVESTIGATION ACT—CONSTITUTIONALITY.—It has long been recognized that the constitutional basis for federal authority over competition policy—the criminal law power—is too narrow. A recent Ontario High Court decision finally meets this criticism directly and broadens the basis, opening up welcome possibilities for Canada's competition legislation that never existed before. However, what the courts give with the right hand, they may also take away with the left. Two recent Supreme Court decisions cast doubt not only on the broadened basis but on the narrow basis as well.

A. *The Case for Broadening the Constitutional Basis—
R. v. Hoffman-LaRoche Ltd.*¹

The British North America Act of 1867² makes no reference to competition policy in either section 91 or 92 or anywhere else, perhaps because it did not become a political issue on this continent until later in the nineteenth century. When federal legislation finally attracted the courts' notice in 1922, it was not favourably received.

In the *Board of Commerce* case,³ the Privy Council struck down legislation purporting to vest an administrative body with the power to

³² It should be noted that Chief Justice Laskin did not sit on the hearing of the *Chromiak* appeal. *Quaere*: Would the ultimate decision have been different?

* John J. Walsh, of the Bar of New Brunswick, Chatham, N.B.

¹ (1980), 28 O.R. (2d) 104.

² 30 & 31 Vict., c. 3, as am. (U.K.).

³ *In re the Board of Commerce Act, 1919 and The Combines and Fair Prices Act*, [1922] 1 A.C. 191.

administer the Combines and Fair Prices Act directed to the investigation and restriction of monopolies and mergers, and to the withholding and enhancement of prices. In that particular instance, the Board prohibited a clothing retailer from charging more than "a fair profit". The legislation was held to be *ultra vires* the federal Parliament, Viscount Haldane writing that under normal, peace-time circumstances, general federal policy cannot justify such interference with provincial jurisdiction pursuant to section 92(13) (property and civil rights in the province).⁴ In so holding, the Board expressly rejected arguments that federal authority under section 91(2) (trade and commerce), section 91(27) (the criminal law), or the general power over peace, order and good government could justify the legislation.⁵

However, less than ten years later, the Privy Council backtracked and upheld federal legislation in relation to the same subject matter. In the *P.A.T.A.* case,⁶ the Board considered section 498 of the Criminal Code which made it an offence to be a party to a combination unduly or unreasonably lessening competition, and the Combines Investigation Act⁷ which empowered a judge to inquire into whether a combination unduly enhanced prices or promoted advantages at the expense of consumers. Writing the decision in the *P.A.T.A.* case, Lord Atkin clearly rejected Viscount Haldane's *Board of Commerce* test for deciding whether legislation was criminal or not and substituted a test of his own,⁸ a test which he found this legislation satisfied. Unfortunately, once having decided that the legislation could be validated on the basis of the criminal law power, His Lordship found it unnecessary to discuss any other possible heads of power including trade and commerce. Several decisions⁹ since have validated the Combines Investigation Act on the same criminal law basis citing the *P.A.T.A.* case as authority, but have refused to consider its constitutionality under trade and commerce which traditionally has been given a very narrow scope by the courts. For almost fifty years then, the federal authority to enact criminal legislation has been the one and only basis for federal legislation in relation to competition policy.

⁴ *Ibid.*, at p. 197.

⁵ *Ibid.*, at pp. 197-201.

⁶ *Proprietary Articles Trade Association v. Attorney-General for Canada*, [1931] A.C. 310.

⁷ Then R.S.C., 1927, c. 26; presently R.S.C., 1970, c. C-23, as am.

⁸ *Supra*, footnote 6, at p. 324: "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?"

⁹ *Attorney-General for British Columbia v. A.-G. Canada*, [1937] A.C. 368; *R. v. Campbell* (1965), 58 D.L.R. (2d) 673 (S.C.C.); *Goodyear Tire and Rubber Co. v. The Queen*, [1956] S.C.R. 303.

Justifying the Combines Investigation Act on the basis of the criminal law power has imposed certain restrictions on the legislation as commentators¹⁰ have noticed. Because penal consequences are involved, the standard of proof required is perhaps a higher standard than economic considerations and circumstances would warrant. Because only a province is competent to constitute a court of criminal jurisdiction, the federal government may be prevented from establishing a specialized agency with more than investigatory powers. Because advance clearances, declaratory judgments and private damage awards are foreign to the criminal law, it may be impossible to enact these remedies which have proved to be so effective in United States' antitrust enforcement. It should be emphasized that these restrictions only apply if the criminal law is the sole basis for justifying federal jurisdiction.

A judgment released on February 5th of this year emanating from the Supreme Court of Ontario gives judicial expression to the view that the criminal law is not the only basis. In *The Queen v. Hoffmann-LaRoche Ltd.*,¹¹ Linden J., had before him a defendant accused of selling drugs to hospitals at unreasonably low prices designed to have the effect of substantially lessening competition contrary to section 34(1)(c) of the Combines Investigation Act.

The defendant raised a procedural matter involving a consideration of the Act's constitutionality. Assisted by the Attorney General of Ontario, the defence challenged the right of the federal Attorney General to prefer the indictment and prosecute the offence, arguing that only the Attorney General of the province has this right by virtue of section 92(14) of the British North America Act relating to the administration of justice in the province.¹² The prosecution supported its action by relying not only on the criminal law power but also on the

¹⁰ Notably, Bruce C. McDonald, *Constitutional Aspects of Canadian Anti-Combines Law Enforcement* (1969), 47 Can. Bar Rev. 161; S.G.M. Grange, *The Constitutionality of Federal Intervention in the Marketplace—The Competition Case* (C.D. Howe Research Institute, 1975).

¹¹ *Supra*, footnote 1.

¹² This defence was based in large measure on the dissenting reasons of Dickson J., in the Supreme Court of Canada decision *R. v. Hauser* (1979), 8 C.R. (3d) 89, indicating that the federal Attorney General may not prosecute violations of federal laws founded on s. 91(27)—criminal law and procedure—since the provincial attorneys general have exclusive jurisdiction in this domain due to s. 92(14)—the administration of justice within the province. In the judgment of Linden J., in *Hoffmann-LaRoche*, however, the question of who is to prosecute infractions of federal statutes is classified as a matter of criminal procedure, within the ambit of s. 91(27), as well as within s. 92(14).

The subsequent case of *Regina v. Kripps Pharmacy* decided at the county court level in British Columbia (1980), 14 C.R. (3d) 355 rejects the findings of Linden J., on

trade and commerce power and on peace, order and good government. The court decided in favour of the prosecution on all three heads for reasons worth repeating here.

In regard to the criminal law power, His Lordship indicated that section 91(27) grants to the federal Parliament the power to make laws respecting criminal law and its procedure and, as a necessary incident to this power, the authority to determine the manner of its enforcement.¹³ In a federal system, the federal government is not required to ask the province to prosecute federal laws for the very practical reason that, to forbid federal prosecution of competition legislation might impair the efficiency of these laws. This is because the type of criminal activity prohibited by the Combines Investigation Act is often national in scope, international in dimension, involving multinational corporations. To hold that jurisdiction to enforce the Act is vested exclusively in provinces would mean that offenders may go unprosecuted as the Attorney General of a province has little incentive to prosecute unlawful activities perpetrated in other provinces.¹⁴

With respect to trade and commerce, section 34(1)(c) in particular, and, by logical extension, the Combines Investigation Act as a whole, is a legislative scheme aimed at deterring unfair competitive practices affecting trade and commerce generally across Canada, legislation not limited to a single industry, commodity or area.¹⁵ It is recognized that the competition regulated may be merely of a local nature, in which case the matter may not fall within the federal trade

this issue in favour of Dickson J., 's conclusion that the provinces have jurisdiction to supervise criminal prosecutions. Accordingly, federal authorities would only be able to institute and conduct prosecutions under the authorization of the provincial Attorney General, which authorization, of course, could be withdrawn at any time. Finally, in *Canadian Pacific Transport Co., Ltd. and Kenneth G. Paulley v. The Provincial Court of Alberta and the Attorney-General of Canada* (unreported, Medhurst, J., December 16th, 1980), the Alberta Court of Queen's Bench (Judicial District of Calgary) upheld the federal Attorney General's authority to prefer an indictment and prosecute an offence alleged to have been committed under s. 32(1)(c) of the Combines Investigation Act. The court stated that, if the power to legislate the Combines Act derived only from the criminal law power, then it would have been obliged to follow the decision of the Alberta Court of Appeal in *Hauser* which said that only the Attorney General of Alberta may prosecute criminal laws (at p. 9). However, citing and quoting from the *Hoffmann-Laroche* decision with approval, Medhurst J., found the Combines Investigation Act supportable also under the trade and commerce power. Therefore, the federal Attorney General has the right to prosecute offences under the Act.

¹³ *Supra*, footnote 1, at pp. 184-185, 186.

¹⁴ *Ibid.*, at pp. 187-188.

¹⁵ *Ibid.*, at p. 191.

and commerce power.¹⁶ On the other hand, the conduct prohibited by the Act is generally national and international in scope.¹⁷ The previously narrow judicial interpretation of the trade and commerce power presented no obstacle to His Lordship. On the authority of *Citizen's Insurance Co. v. Parsons*,¹⁸ trade and commerce may include general regulation of trade affecting the whole Dominion.¹⁹ On the authority of the *P.A.T.A.* case,²⁰ no independent general power is needed to support the trade and commerce power.²¹

In considering peace, order and good government, the court determined that the control of competition—like the control of narcotics, aviation and radio—is a genuinely new problem not existing at the time of Confederation which clearly cannot be put into the provincial class of “matters of a merely local or private nature” and therefore falls into the federal residuary class.²² This reasoning is reinforced by the now-familiar themes of this judgment, the observations: 1) that the forbidden activities and their perpetration by national and multinational corporations can only be combatted by the federal government which has the incentive and resources to do so, and 2) that the Combines Investigation Act is fundamental to the economic health of the nation as a whole.²³

The significance of the *Hoffmann-LaRoche* decision upon the Combines Investigation Act is potentially far-reaching. The restrictions mentioned earlier in this comment can be easily overcome if either trade and commerce or peace, order and good government justifies the legislation. The doubt²⁴ concerning recent amendments to the Act—creating a civil right to damages²⁵ and granting discretionary powers to the Restrictive Trade Practices Commission to

¹⁶ *Ibid.* This was the case in *La Reine v. Miracle Mart Inc.* (unreported, Cour des Sessions de la Paix (Montreal), Rousseau, Juge des Sessions, January 30th, 1981). In this case, the accused was charged with having sold products to consumers at a higher price than advertised contrary to section 37.1 of the Combines Investigation Act. The court found that the sales and advertisements were entirely intraprovincial transactions; therefore, the section was *ultra vires* in so far as it purported to affect these acts (at pp. 2, 12-17). The fact that Quebec has a consumer protection law specifically addressing the alleged offence was of assistance, though not critical, to the court's findings (at pp. 16-17).

¹⁷ *Ibid.*

¹⁸ (1881), 7 App. Cas. 96.

¹⁹ *Supra*, footnote 1, at pp. 190-191.

²⁰ *Supra*, footnote 6.

²¹ *Supra*, footnote 1 at p. 190.

²² *Ibid.*, at p. 188-190.

²³ *Ibid.*, at p. 189; see also at pp. 188, 191-192.

²⁴ Expressed in *Grange, op. cit.*, footnote 10.

²⁵ S. 31.1. The validity of this section has recently been passed upon by several courts. In *Rocois Construction Inc. v. Quebec Ready Mix Inc.*, [1980] 1 F.C. 194, the

make certain orders,²⁶ among other things—is removed. But will the decision withstand the tests of appeal which are almost certain to follow? Much depends on the appeal courts' application of two recent Supreme Court decisions discussed below.

B. The Case for Narrowing or Eliminating the Constitutional Basis.

The Canadian Agricultural Products Standard Act²⁷ is federal legislation which has been in force for twenty-five years. The Food and Drug Act²⁸ is federal legislation which has been in force for 100 years. Both of these statutes have recently undergone a constitutional challenge before our highest court and both have failed to withstand the challenge. The reasoning of Estey J., who wrote the decisions for the majority in both cases, could have severe repercussions on the Combines Investigation Act.

In *Dominion Stores Ltd v. The Queen*,²⁹ the appellant had been charged under the Canada Agricultural Products Standards Act with having in possession for sale some apples under an authorized grade name which did not meet the requirements of the grade name in that they were bruised. The sole issue before the Supreme Court of Canada, raised by way of a stated case pursuant to the appellant's motion to quash the indictment, was whether the Act in question was *ultra vires* in whole or in part. In a five to four decision, the court decided that the Act was *ultra vires* insofar as it purported to regulate a transaction wholly within a province.³⁰

Federal Court was obliged to make a preliminary ruling on the constitutionality of ss. 31.1(1) (a) and 31.1(3). Marceau J., held the provisions to be unconstitutional on the basis that they were not properly ancillary to criminal legislation and that the "present state of authorities . . . does not provide any basis" for justifying constitutionality under trade and commerce or peace, order and good government. The Ontario High Court in the case of *Seiko Time Canada Ltd v. Consumers Distributing Co. Ltd* (1981), 29 O.R. (2d) 211, also held against the constitutionality of s. 31.1 on the basis of the reasons expressed in *MacDonald v. Vapor Canada Ltd* (1976). 66 D.L.R. (3d) 1 (S.C.C.), and agreed with Marceau J.'s statement that the federal authority over trade and commerce should not permit encroachment on the provincial authority over local commerce. In contrast to the Federal Court and the Supreme Court of Ontario, the Queen's Bench of Alberta has upheld the constitutionality of s. 31.1 in *Henuset Brothers Ltd v. Synchrude Canada Ltd et al.*, [1980] 6 W.W.R. 218 (Alta Q.B.) on the basis of the federal trade and commerce power. Rowbotham J., meets the argument raised by Holland J.'s reasons in *Seiko Time* and distinguishes s. 31.1 of the Combines Investigation Act from s. 7 of the Trade Marks Act, R.S.C., 1970, c. T-10, considered in *MacDonald* on the basis of the former provision's specific regulatory role within a comprehensive scheme controlling anti-competition trade practices.

²⁶ Ss 31.2-.6

²⁷ R.S.C., 1970, c. A-8.

²⁸ R.S.C., 1970, c. F-27. Enacted S.C., 1874, c. 8, as the Inland Revenue Act.

²⁹ (1979), 30 N.R. 399, rev'g 39 C.C.C. (2d) 127, [1978] C.C.L. 249, which had aff'd (1978), 37 C.C.C. (2d) 20, [1978] C.C.L. 1491 (S.C.C.).

³⁰ *Ibid.*, at p. 403 (N.R.).

The majority decision written by Estey J., rejected the argument that trade and commerce could validate the legislation in this case. Under the authorities, the power of Parliament with reference to the regulation of trade and commerce is limited to trade in the international and interprovincial sense. The federal Parliament may not, on this basis, regulate trading transactions occurring entirely within the provinces.³¹ Accordingly, the statute could not be supported on the basis of the trade and commerce power.

Nor could the legislation be supported on the basis of the criminal law power, the court decided. It disposed of this issue by reference to the words of Rand J. in a case³² considering the Dairy Industry Act, to the effect that the criminal law authority does not extend to validate legislation with economic objectives and with trade effects.³³

The writer does not claim that the Canada Agricultural Products Standards Act is so similar to the Combines Investigation Act that what the courts hold true about one Act should hold true for the other as well. Rather, it is the narrow interpretation given by the Supreme Court to the trade and commerce power and the conflict found to exist between the criminal law power and economic objectives in this case which, conceivably, may easily transfer to other constitutional cases. In fact, the Supreme Court has already shown a willingness to follow these principles consistently in a judgment pronounced one week after the judgment in *Dominion Stores*.

In *Labatt Breweries of Canada Ltd v. Attorney General of Canada*,³⁴ the appellant sought a declaration that its malt liquor product labelled "Special Lite" would not be mistaken for a "light beer" within the standards provided under the Food and Drugs Act. All nine members of the Supreme Court found that the appellant was not entitled to this declaration as the label could be so mistaken contrary to the Act. However, a majority of five members³⁵ found that the Act was *ultra vires* Parliament insofar as it related to malt liquor. The reasons why the label could be misleading are not, of course, important to us. What is important is the constitutional analysis of Mr. Justice Estey who again wrote the decision for the majority.

³¹ *Ibid.*, at p. 403 (N.R.). Although there was some suggestion in the case that the apples might have come from British Columbia (see at p. 415), all parties throughout the litigation approached the constitutional issue on the basis that the apples were offered for sale in a wholly intra-provincial transaction and that it mattered not whether they were produced in or out of Ontario where the offer for sale was alleged to have occurred.

³² *Re The Validity of s. 5(a) of the Dairy Industry Act, R.S.C. 1927, c. 45*, [1949] S.C.R. 1, at p. 50.

³³ *Supra*, footnote 29, at p. 413 (N.R.).

³⁴ (1979), 30 N.R. 496, rev'd (1974), 26 N.R. 617, which had rev'd (1978), 4 D.L.R. (3d) 61 (S.C.C.).

³⁵ Estey, Martland, Dickson, Beetz, Pratte JJ.

In the *Labatt's* decision, trade and commerce once again failed to serve as constitutional authority for federal trade regulation. The Food and Drugs Act is regulation concerned with production and local sale of specified products of a specific industry rather than regulation concerned with the control of the flow of articles through the distribution system,³⁶ it was held.

Estey J. could find no demonstration of any interprovincial aspect and, to the contrary, found the production operation to have a distinctly local nature due to the transportation expense of shipping the product.³⁷ Citing the Privy Council decision in *In re Insurance Act, 1910*,³⁸ His Lordship stated that the regulation of a single trade or industry is clearly not of general national concern so as to warrant the invocation of trade and commerce,³⁹ and neither national ownership or national advertising of a product will alone suffice to authorize the imposition of federal trade and commerce regulation.⁴⁰

Peace, order and good government, a head of power not raised in the *Dominion Stores* case, was not able to save the federal situation in the *Labatt's* case.⁴¹ In the first place, the brewing and labelling of beer and light beer is not a national emergency so as to fall within the authority of *Fort Frances Pulp and Paper Co. v. Manitoba Free Press*.⁴² In the second place, it is not a subject matter non-existent at the time of Confederation so as to fall within the *Radio Reference*⁴³ and the *Aeronautics Reference*⁴⁴ authorities. In the third place, it is not a matter of general concern beyond the powers of local government or where the failure of one province to co-operate would import grave consequences for residents of other provinces within the authority of *Attorney General for Ontario v. Canada Temperance Federation*.⁴⁵

As for the criminal law, this power was disposed of again by reference to the *Reference re the Dairy Industry Act*.⁴⁶ The Food and Drugs Act is economic regulation, not having the prescribed characteristics of the criminal laws, and is thus not a proper exercise of

³⁶ *Supra*, footnote 34, at p. 513.

³⁷ *Ibid.*, at p. 516.

³⁸ [1916], 1 A.C. 588.

³⁹ *Supra*, footnote 34, at p. 517.

⁴⁰ *Ibid.*, at p. 518.

⁴¹ *Ibid.*, at pp. 520-521.

⁴² [1923] A.C. 695.

⁴³ *Re Regulation and Control of Radio Communication*, [1932] A.C. 304.

⁴⁴ *Johannesson v. West St. Paul*, [1952] 1 S.C.R. 292.

⁴⁵ [1946] A.C. 193.

⁴⁶ *Supra*, footnote 32.

federal authority insofar as its purports to regulate in detail the production and sale of brewing industry products.⁴⁷

C. Conclusions.

Much the same language applied to the federal legislation attacked in the *Dominion Stores* and the *Labatt's* Supreme Court decisions can be applied to the Combines Investigation Act. If any federal statute can be described as "economic", that statute is surely the Combines Investigation Act. Furthermore, the Act certainly purports to apply to intraprovincial transactions. On these two very important points, the Act is indistinguishable from the Canada Agricultural Products Standards Act and the Food and Drugs Act. Accordingly, it is quite possible that courts reviewing the Combines Investigation Act's constitutionality in the wake of the *Dominion Stores* and *Labatt's* decisions might refuse to uphold federal authority on any basis including the criminal law power, although the Privy Council decisions mentioned earlier present a major obstacle to the extent that the court must apply *stare decisis*. This result is particularly likely where the subject transaction is wholly intraprovincial as was the situation in both the *Dominion Stores* and *Labatt's* cases.

In the writer's opinion, such a result would be very unfortunate. In spite of its shortcomings, the Combines Investigation Act is the only defence the Canadian economy has against anti-competitive practices. Many years of experience and expertise have been acquired by the federal agencies charged with its enforcement. As Mr. Justice Linden pointed out in *Hoffmann-LaRoche*, economic life in Canada is increasingly typified by activity which knows no provincial boundaries.

Therefore, courts reviewing *Hoffmann-LaRoche* and other cases where the question of the constitutionality of the Combines Investigation Act arises, should strive to distinguish the *Dominion Stores* and *Labatt's* decisions, confining their application to the legislation challenged in those cases. One distinction may be that the Combines Investigation Act is truly concerned with the general flow of articles through the distribution system, rather than with the production, labelling and local sale of specified articles such as apples or beer which were specifically regulated in the statutes challenged. Another distinction may be the intraprovincial nature of the alleged offences in the two Supreme Court of Canada cases, while *Hoffmann-LaRoche* involved sales to hospitals across Canada.

In summary, the Ontario High Court decision in *Hoffmann-LaRoche* validating the Combines Investigation Act under three different heads of federal authority could infuse new life into the en-

⁴⁷ *Supra*, footnote 34, at pp. 510-512.

forcement of the Act making it a more effective and efficient tool in the effort to ensure that free and fair competition prevails in the Canadian economy. It is important that these prospects not be dashed when the case is appealed.

ROBERT WEIST*

* * *

COMPETITIVE APPLICATIONS BEFORE THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION.¹—

1. *The General Legal Context.*

Does the law require that the Canadian Radio-television and Telecommunications Commission permit "competitive applications" when an application for the renewal or transfer of a broadcasting licence is brought before the Commission by the current licence-holder?

The Broadcasting Act² is silent on this matter. Section 17 talks of the issuing, amending and renewing of licences in a general way only. Section 19 dealing with hearings, and section 21 with procedure, likewise ignore the problem of competitive applications; so do the sections of the Act dealing specifically with licences. The Broadcasting Act, then, offers no *explicit* instruction on competitive applications. Nor does the Canadian Radio-television and Telecommunications Commission Act³ afford any assistance.

It might be argued that the statement in the Broadcasting Act that "Broadcasting undertakings in Canada make use of radio frequencies that are public property . . ." ⁴ carries with it a notion of full competition for licences. Without competitive applications, the argument might go, "public" property becomes "private" property (that is, the property of the licensee). But this analysis is likely incorrect.

* Robert Weist, of the Ontario Bar, Toronto.

¹ Most of the research for this article was undertaken for a report prepared under contract for the Department of Communications of the Government of Canada. The full report, by Robert E. Babe and Philip Slayton, is entitled *Competitive Procedures for Broadcasting—Renewal and Transfers* (Sept., 1980), and is available from the Department of Communications, 300 Slater Street, Ottawa, Canada K1A 0C8.

² R.S.C., 1970, c. B-11, as varied by the Canadian Radio-television and Telecommunications Commission Act, S.C., 1974-75-76, c. 49.

³ *Ibid.*, hereinafter cited CRTC Act.

⁴ *Supra*, footnote 2, s. 3(a).

First, the principles of statutory construction do not permit such a wideranging interpretation of legislation. Second, as I point out later, the statement in section 3 of the Act uses "property" in a vague and hortatory sense, and not in any technical legal sense. And, third, a licence over property, however renewable, is not itself a property right and does not change the fundamental nature of ownership of the licensed property.

A comparison of section 19(1) of the Broadcasting Act (dealing with the issuing, revocation and suspension of a licence) and section 19(3) (dealing with renewal) shows that the statute distinguishes clearly between issuing and renewing, placing the Commission under less constraints when it comes to renewal. Section 19(1) states that "A public hearing shall be held by the Commission . . .". Section 19(3) says that "A public hearing shall be held by the Commission . . . unless the Commission is satisfied that such a hearing is not required . . .". Obligations or constraints following from the requirement of public hearings (if any do follow) can be avoided in the case of renewal if the Commission chooses not to hold a hearing, that is, "is satisfied that such a hearing is not required . . .". The Act does not deal separately with transfer: I address the implications of this omission later.

Section 21 of the Broadcasting Act empowers the CRTC to "make rules respecting the procedure for making applications, representations and complaints to the Commission and the conduct of hearings under section 19 [public hearings] and generally respecting the conduct of the business of the Commission . . .". The Commission, perhaps relying on the difference between section 19(1) and section 19(3) that I have mentioned, has adopted different procedures for issuing and for renewal:

When the issue of a licence is in prospect, competing applications are invited . . . and are heard at the same time. When a licensee applies for renewal of its licence, the Commission hears the application and determines whether or not to renew. Any person is entitled to file an intervention to such renewal to attempt to demonstrate why the licence should or should not be renewed An application for the licence by another party will not, however, be heard in competition with the renewal application.⁵

When it comes to changes in the effective ownership or control of licensees or undertakings (transfer), "persons other than the vendor and purchaser may file interventions but may not themselves under current procedures apply for the licence in question or for control of the undertaking in question".⁶ After a recent review of these proce-

⁵ Canadian Radio-television and Telecommunications Commission, Proposed CRTC Procedures and Practices Relating to Broadcasting Matters, July 25th, 1978, p. 33.

⁶ *Ibid.*, p. 43.

dures, the Commission concluded, albeit with some hesitation, that "no major procedural change in this regard is feasible . . .".⁷

The courts (at the time of writing) appear to have considered the competitive applications issue directly and fully only twice. In the *Capital Cable* case,⁸ dealing with renewal, the applicant asked for a writ of mandamus to order the CRTC "to hear the application of the applicant for a cable television licence . . . on the grounds that the practice of the CRTC to hear only an application to renew a licence, along with interventions, and then hear other applications for the said licence only if the application is refused is contrary to law and rules of natural justice".⁹ At trial, Dubé J. ordered a writ of mandamus to issue, but the Federal Court of Appeal set aside his decision. Pratte J. for the court simply said that "We have not been persuaded . . . that, in the circumstances of this case, the CRTC had the legal duty to hear the respondent's application for a renewal of its own licence".¹⁰

In *APBBC v. CRTC et al.*,¹¹ a transfer case, the appellant appealed against a CRTC decision¹² denying a motion by the appellant requesting that the CRTC withhold its decision on an application for the "transfer" of a licence pending consideration of a "competitive application" to be made later by the appellant. The applicant had asked the CRTC to approve the acquisition by a new company (Comox Valley Cablevision)¹³ of the cable television undertaking of the vendors, to approve an application by CVC for a licence for the undertaking upon surrender of the current licence held by the vendors, and to approve an application by CVC to transfer effective control of CVC, through the transfer of shares, to another company (Cablenet). Mr. Justice Urie, for the Federal Court of Appeal, commented that:¹⁴

. . . the sole issue of any consequence raised by the appeal, is whether, when an application is made to the Commission for the issuance of a new licence, section 19 of the *Broadcasting Act*, R.S.C. 1970, c. B-11 requires that the public hearing envisaged by the section must include hearings on the applications received from all parties desiring to obtain the licence for the area sought and not just that of a proposed purchaser of the assets of any existing licensee.

⁷ *Ibid.*, p. 45.

⁸ *In re the Broadcasting Act and in re Capital Cable Co-operative and the Canadian Radio-television Commission and Victoria Cablevision Limited*, [1976] 2 F.C. 627, overruled [1976] 2 F.C. 633.

⁹ [1976] 2 F.C. 627, at p. 628.

¹⁰ [1976] 2 F.C. 633, at p. 634.

¹¹ *Association for Public Broadcasting in British Columbia v. Canadian Radio-television and Telecommunications Commission et al.* (1981), 115 D.L.R. (3d) 73.

¹² Decision No. 78-724.

¹³ Hereinafter referred to as CVC.

¹⁴ *Supra*, footnote 11, at p. 76.

Urie J. concluded that section 19 does not contain this requirement. First, he considered, following a review of the Broadcasting Act, that part of the CRTC's regulatory mandate "includes the procedure to be followed to effect the issuance, revocation, suspension or renewal of . . . licences";¹⁵ "the only duty on the Commission in connection with the issuance of a licence or the revocation of an existing one, is to hold a public hearing as required by section 19 . . .".¹⁶ Secondly, Urie J. concluded that section 24(1) of the Act means that "an applicant for revocation . . . is entitled to ask the Commission to consider that the Applicant's consent be conditional on the Commission approving of the transfer of the Applicant's assets to another person".¹⁷ Finally, Urie J. observed that the CRTC did not appear "rigidly or slavishly" to adhere to a policy of not calling for competitive applications:¹⁸

. . . it heard the Appellant's preliminary motion, reserved its decision thereon and while it ultimately rejected it, it did not do so without considering its merits as its reasons disclose. The Commission, thus, did not, as I see it, fetter its discretion in making a decision by adhering rigidly to a fixed policy.

It seems reasonably clear that the CRTC is under no obvious obligation to entertain competitive applications for licence renewal or transfer.

2. *The Specific Legal Arguments.*

Transfer, rather than renewal, is the more difficult case; that is because, as I have mentioned, section 19(3) of the Broadcasting Act, dealing with renewals, does not require the Commission to hold a public hearing, and in the face of this provision it is difficult indeed to argue that the Commission must consider competing applications. But the Act says nothing at all about transfer. This omission has led to the argument that, according to the statutory scheme, transfer must be treated as the surrender or voluntary revocation (pursuant to section 24) of a licence, and the issuing of a new licence under section 19(1); therefore a public hearing is mandatory. One possible answer to this argument is that transfer of control does not affect the licence itself which remains unaltered in the same corporate entity.¹⁹ Accordingly, transfer is properly treated as an amendment to the licence conditions, and under section 19(2)(a) of the Broadcasting Act a public hearing is only required when amendment is in issue "if the Executive Commit-

¹⁵ *Ibid.*, at p. 78.

¹⁶ *Ibid.*, at p. 79.

¹⁷ *Ibid.*

¹⁸ *Ibid.*, at p. 80.

¹⁹ See *Chitty et al. v. CRTC et al.*, [1980] 1 F.C. 464, at pp. 467-468.

tee is satisfied that it would be in the public interest to hold such a hearing . . .”.

If the “statutory argument” is right, the CRTC must hold public hearings in transfer cases. What are the requirements of a “public hearing”?

Whether or not an administrative tribunal must observe the canons of natural justice depends on what the parent statute says, and on the function and character of the tribunal. For the CRTC, the statutes give little or no help. The Commission is given broad discretion to determine its own procedure, although a provision granting discretion does not necessarily rule out natural justice.²⁰ On the question of function and character, Johnston has said this:²¹

If one examines the *Broadcasting Act*, it seems clear that the primary purpose of the public hearing process is to assist the Commission in carrying out an essentially administrative function which is the licensing and supervision of broadcasting undertakings in accordance with the policies set out in section three of the Act. Some indicators in the Act which tend to support this view are the fact that the holding of hearings in some cases is discretionary, that the wording of the public hearing Section, 19, refers to hearings “in connection with” rather than “to determine” licensing matters and that a separate section, 17, which gives the Commission its authority in licensing matters, makes no reference to public hearings but makes the prerequisite of the exercise of this authority the furtherance of the policy objectives set out in Section 3.

Johnston relies on *The Queen v. Board of Broadcast Governors*.²² The Board recommended to the Minister that a licence be granted to the applicant provided the applicant submitted an acceptable technical brief, which he did. A competitor asked that the Board’s decision be quashed on the basis that he, the competitor, was not given the opportunity to see the technical brief. At trial this argument was upheld, but the Court of Appeal held that the Board had lived up to its procedural obligations, and that the Board’s decision was a recommendation only and did not affect legal rights. Said Laidlaw J.A.:²³

If the Board takes the steps and follows the procedure prescribed . . . it then becomes vested with the discretionary power to make such recommendations “as it deems fit”. The act of making that recommendation is in my opinion purely administrative in character.

Later he commented:²⁴

No doubt the Board was under a duty to conduct the hearing in good faith and in a fair manner free from prejudice or bias and also to give [the parties] a proper opportunity of being heard. At the same time it is plain that the hearing required by

²⁰ See Reid and David, *Administrative Law and Practice* (1978), p. 54.

²¹ Notes on Procedure at CRTC Public Hearings (1972), Can. Comm L.R. 143.

²² [1962] O.R. 657.

²³ *Ibid.*, at p. 664.

²⁴ *Ibid.*, at p. 669.

s.s. (3) was not intended to be a trial . . . I think the Board was free to prescribe and follow its own course of procedure.

The CRTC, unlike the Board of Broadcast Governors, does not merely recommend, but makes decisions that affect legal rights. In *Confederation Broadcasting v. CRTC*,²⁵ the CRTC renewed a licence for less than one year, with the frequency to be reassigned at the end of that term. The appellant argued that such an order was *ultra vires* the Commission in a renewal hearing, and that natural justice had been violated since the Commission had not given sufficient notice to the appellant of the main issue. Spence J., speaking for four members of the Supreme Court of Canada, held that, following *Board of Education v. Rice*,²⁶ the Commission was required to give "a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view".²⁷ This, said Mr. Justice Spence, the Commission failed to do. The other members of the court, on the natural justice issue, held simply that sufficient notice had been given. *Confederation Broadcasting* had nothing to do with competitive applications and at best might offer some general guidance for the solution of that problem. Are those who seek to apply competitively "parties in the controversy"? Almost certainly not. And, even if they are, what constitutes "fair opportunity" in that context?

In general, the *Association for Public Broadcasting in British Columbia* decision suggests strongly that the Johnston analysis is right. As Urie J. said in that case: "The nature of the hearing was for it [the CRTC] to determine as the independent public authority charged with the regulation and supervision of the Canadian Broadcasting system."²⁸ Perhaps, however, one should not forget Urie J.'s cautious comments about fettering discretion.

One group of legal arguments concerning competitive applications—the statutory construction/natural justice group—is inconclusive. There is another group of arguments—the "common law" arguments, or, more particularly, arguments from the nature of a licence.²⁹ These arguments attempt to show that the Commission's refusal to hear competitive applications has created licences in the nature of private property, contrary to the statutory "public property" nature of radio frequencies. Related arguments suggest, for example, that the common law of licensing, in the absence of express

²⁵ [1971] S.C.R. 906.

²⁶ [1911] A.C. 179.

²⁷ *Supra*, footnote 25, at p. 926.

²⁸ *Supra*, footnote 11, at p. 11.

²⁹ What I say here on arguments from the nature of a licence was suggested to me by Professor T.G. Youdan, of the Faculty of Law, University of Western Ontario.

statutory authorization, does not allow a licensee to assign or transfer his licence; and that, in common law, the transfer of effective control of the licence results in the transfer of the licence itself (which is contrary to law).

Could a broadcasting licence ever give a property right? At common law a licence to do some act with respect to the property of another does not confer any proprietary interest on the licensee. Could a licence, under any circumstances, derogate from the "public property" nature of radio frequencies? The "public property" statement in the Broadcasting Act probably means only that the Parliament of Canada controls the use of radio frequencies in the public interest. An analogous provision of the Ontario Provincial Parks Act³⁰ was considered in *Green v. The Queen*.³¹ Section 2 of that Act provides: "All provincial parks are dedicated to the people of the Province of Ontario and others who may use them for their healthful enjoyment and education, and the provincial parks shall be maintained for the benefit of future generations in accordance with this Act . . .". In *Green* an argument that the Province of Ontario had committed a breach of statutory trust created by this provision was rejected, *inter alia*, for the following reasons:³²

Notwithstanding the philosophical and noble intentions . . . of the Legislature to express in the pertinent section an ideological concept, no statutory trust has been created. It becomes necessary to break down the wording thereof: "All provincial parks are dedicated to the people of the Province of Ontario and others who may use them . . .". This simply makes clear that all persons . . . are entitled to make use of the parks

Quite apart from the nature of a licence itself, there can be no derogation from the "public property" nature of the radio frequencies: the phrase "public property" is hortatory or ideological, and cannot be used to found a legal argument.

CRTC approval of licence "transfer", when a broadcasting undertaking has been sold, has been attacked on the basis that the Broadcasting Act does not alter the common law rule that a licence is not transferable, and that the CRTC practice creates, without lawful justification, property rights in the licence. But first, it is not the common law that makes a licence non-transferable, but, rather, the concept of a licence as permission given a person to do something that would otherwise be unlawful. Secondly, and more important, the mere fact that a licence holder may obtain a financial benefit through his influence in the granting of a new licence does not mean that he has property rights in the licence.

³⁰ R.S.O., 1970, c. 371.

³¹ [1973] 2 O.R. 396.

³² *Ibid.*, at p. 406.

The specific legal arguments in favour of competitive applications are not strong. At best, they are inconclusive. The most cogent point is that the CRTC is likely obliged by the Broadcasting Act to hold public hearings for so-called "transfer" cases: that is because the statutory scheme requires that transfer applications be treated on the basis of revocation and the issuing of a new licence. Even here, there is a rejoinder of some force—the "same corporate entity" reply. But even if it can be shown that public hearings must be held, the battle for competitive applications is far from won (as the *Association for Public Broadcasting in British Columbia* case demonstrates). The requirements for public hearings probably extend no further than giving "parties in the controversy" a "fair opportunity". Those who would like to submit competitive applications are probably not, strictly speaking, "parties in the controversy", and, anyway, interventions would probably satisfy the "fair opportunity" requirement. Finally, it is not in the nature of a licence to create property in the licensee; the famous "public property" statement in the Broadcasting Act is hortatory; and the mere fact that a licence holder obtains a financial benefit through his influence in the granting of a new licence ("transfer") creates no property rights.

3. *The Real Point?*

Perhaps the legal arguments for competitive applications may best be seen as proxy arguments. They may in part be a means of criticizing the CRTC for allegedly failing—in its practices and procedures—to promote a broadcasting system of the kind intended (so it is sometimes said) by the Broadcasting Act. Failure of the legal arguments to withstand close scrutiny does not necessarily mean that these arguments in some other form might not have merit; it may suggest that advocates of competitive applications should pursue political rather than legal redress.

What policy arguments or criticisms might stand behind the legal arguments? For one thing, it is often argued that licence holders do not provide "quality" programming and in many cases do not observe their Promises of Performance (particularly those relating to Canadian content) which are made when the licence is first granted and which are formal conditions of the licence; these failures, so it is often said, are not taken into account by the CRTC at renewal time or when a "transfer" is contemplated. A second (and unrelated) point is that the profits of licence holders appear to be substantially greater than those of entrepreneurs in many other industries,³³ and some say such profits are unjustified and objectionable. Finally, it has been observed that CRTC procedures do not take into account the differing informa-

³³ See Babe and Slayton, *op. cit.*, footnote 1, ch. IV.

tion and transaction costs of relevant interests (for example, as between broadcasters on the one hand and audiences on the other); the consequence, the argument goes, is regulatory failure and unfortunate preferment of narrow and selfish interests. The legal arguments seem to encapsulate points such as these three, and institution of competitive applications presumably would help correct the failures and deficiencies the arguments address.

PHILIP SLAYTON*

* * *

COUR FÉDÉRALE—COMPÉTENCE EN AMIRAUTÉ—PROBLÈME DE L'EXISTENCE D'UNE LÉGISLATION FÉDÉRALE APPLICABLE—DROIT MARITIME CANADIEN.—En 1971, le Parlement canadien adoptait la Loi sur la Cour fédérale.¹ La Cour fédérale, division de première instance, se voyait investie d'une compétence "concurrente en première instance tant entre sujets qu'autrement, dans tous les cas où une demande de redressement est faite en vertu du droit maritime canadien ou d'une autre loi du Canada en matière de navigation ou de marine marchande, sauf dans la mesure où cette compétence a par ailleurs, fait l'objet d'une attribution spéciale".²

L'étendue de la compétence maritime de la Cour fédérale fut d'abord perçue de façon très libérale. Ainsi, la compétence de la Cour fédérale était confirmée si la matière, objet du litige dont elle était saisie, dépendait (1) soit de l'application du droit maritime canadien, (2) soit de l'application d'une législation fédérale en matière de navigation ou de marine marchande ou (3) si cette matière relevait de la compétence législative octroyée au Parlement en vertu de l'article 91(10) de l'Acte de l'Amérique du Nord britannique.³

En 1977, la Cour suprême du Canada rappela que la compétence juridictionnelle de la Cour fédérale ne recoupe pas la compétence législative du Parlement canadien. Ainsi, il ne suffit pas que la matière dont est saisie la Cour tombe dans l'une des catégories d'objets octroyées à la compétence exclusive du Parlement pour que celle-ci ait compétence. Au contraire, il faut démontrer l'existence

* Philip Slayton, Dean of the Faculty of Law, University of Western Ontario, London, Ont.

¹ S.R.C., 1970 (2ième supp.), c. 10.

² *Ibid.*, art. 22(1).

³ 1867, 30 & 31 Vict., c. 3 et mod. (R.-U.); *Robert Simpson Montreal c. Hamburg — Amerika Linie Norddeutscher*, [1973] C.F. 1356, j. Jaccett.

d'une législation fédérale applicable, que ce soit une loi, un règlement ou la "common law" pour que cette compétence puisse s'exercer.⁴

Appliquées spécifiquement à la question de la compétence en amirauté de la Cour fédérale, ces deux décisions avaient de quoi inquiéter les praticiens. En effet, le droit maritime canadien n'est pas un droit complètement écrit. Beaucoup de ses principes juridiques ne se trouvent dans aucune législation fédérale mais ont plutôt leur source dans l'usage, le droit maritime anglais et l'histoire législative britannique en matière d'amirauté. Par ailleurs, nombreuses sont les provinces qui ont légiféré en matière de droit maritime. Ainsi, la plupart ont adopté une législation en matière d'assurance maritime.⁵ Le législateur québécois a également intégré dans son Code civil plusieurs dispositions de droit maritime.⁶ Or, la compétence statutaire de la Cour fédérale doit, selon la Cour suprême, dépendre de l'application d'une législation fédérale.

A partir de ce moment, plus des deux tiers des décisions de la Cour fédérale en matière maritime porteront uniquement, selon un auteur,⁷ sur la question préliminaire de la compétence de la Cour.

En effet, la Cour confirmait ou déclinait sa compétence en invoquant différents motifs, selon le cas:

—la demande de redressement est fondée sur le droit maritime canadien, droit qu'elle assimile simplement à une législation fédérale applicable relevant de la compétence législative du Parlement canadien en matière de navigation ou de marine marchande;⁸ ou bien,

⁴ *Quebec North Shore Paper Co. & al. c. Canadian Pacific Ltd & al.*, [1977] 2 R.C.S. 1054; *McNamara Construction (Western) Ltd & al. c. The Queen*, [1977] 2 R.C.S. 654.

⁵ *The Marine Insurance Act*, R.S.O., 1970, c. 260; *Loi sur l'assurance maritime*, S.R.N.B., 1973, c. M-1; *Marine Insurance Act*, R.S.B.C., 1960, c. 231; *The Marine Insurance Act*, R.S.M., 1970, c. M-40; *Insurance Act*, R.S.N.S., 1967, c. 148; *Code civil du Québec*, art. 2606-2692 C.c. La plupart de ces législations reproduisent presque intégralement les dispositions de la loi britannique, *An Act to Codify the Law Relating to Marine Insurance (Marine Insurance Act)*, 1906, 6 Edw. III, c. 41. Quelques textes législatifs de Terre-Neuve disposent également de l'assurance maritime: voir: *Insurance Companies Act*, R.S.Nfld., 1970, c. 177 et *Insurance Contracts Act*, R.S. Nfld., 1970, c. 178.

⁶ Par exemple, voir les dispositions pertinentes à l'hypothèque maritime, au privilège maritime, à l'affrètement, au connaissement et au prêt à la grosse. Art. 2355-2467 et 2693-2711 C.c.

⁷ W. Tetley, *A Review of Maritime Law in Canada for the Past Year (1978)*, 39 R. du B. 947.

⁸ *Paré c. Rail Water Terminal (Quebec) Inc.*, [1978] 1 C.F. 23; *La Reine c. Canadian Vickers Ltd*, [1978] C.F. 675, [1980] 1 C.F. 366 (C.A.); *Sivaco Wire & Nail Co. c. Atlantic Lines & Navigation Co.*, [1978] 2 C.F. 270; *Skaarup Shipping Corp. c. Hawker Industries Ltd.*, [1978] 2 C.F. 361; *Associated Metals & Mining Corp. c. The Ship "Evie W"* (1977), 83 D.L.R. (3d) 538 (C.A.); *International Realty & Development Corp. c. Gore Mutual Ins. Co.*, [1978] 2 C.F. 691; *Hawker Industries Ltd. c. Santa Maria Shipowning and Trading Co. S.A.* (1978), 89 D.L.R. (3d) 699 (C.A.).

—la demande se réfère à un des chefs de réclamations spécifiquement prévus et énumérés au paragraphe 2 de l'article 22 de la Loi sur la Cour fédérale, lesquels chefs relèvent de la compétence législative du Parlement en matière de navigation ou de marine marchande.⁹

Quelques décisions ont précisé que les chefs de réclamations énumérés à l'article 22(2) ne fondent la juridiction de la Cour qu'en autant que l'on puisse prouver l'existence d'une règle de droit maritime pouvant les appuyer.¹⁰

Tout compte fait, ce qui pour le praticien constituait l'intérêt de la Cour fédérale ainsi que son efficacité, en particulier la souplesse de sa procédure,¹¹ l'étendue de sa compétence par rapport à celle des tribunaux de droit commun,¹² la connaissance par ses juges du droit maritime canadien et surtout, sa capacité de connaître des actions *in rem*,¹³ était gravement mis en péril par ce conflit prolongé au sujet de la seule question préliminaire de la compétence de la Cour.

La compétence en amirauté de la Cour fédérale et l'existence d'une législation fédérale applicable.

En 1979, la Cour suprême du Canada eût l'occasion de se pencher sur la question de la juridiction en amirauté de la Cour fédérale dans l'arrêt *Tropwood c. Sivaco*.¹⁴ Des marchandises avaient été chargées à Caën, France, pour être transportées par voie maritime jusqu'à Montréal. A leur arrivée, l'intimée ayant constaté des dégâts importants à la cargaison intenta un procès fondé à la fois sur la responsabilité contractuelle et délictuelle du transporteur maritime, l'appelante *Tropwood*. Selon le contrat de transport, le droit applicable en cas de réclamation devait être les Règles de La Haye, telles qu'elles sont appliquées en France; en conséquence, l'appelante niait l'existence d'un recours possible basé sur une loi canadienne. L'argument avait déjà été rejeté.¹⁵ Il faut noter ici que la version canadienne des Règles de La Haye diffère de celle qui prévaut en France, en ce qu'elle prévoit que ces dernières ne s'appliquent qu'au transport de

⁹ *Benson Bros. Shipbuilding Co. (1960) Ltd c. Mark Fishing Co.*, (1978), 89 D.L.R. (3d) 527 (C.A.); *Capricorn c. Antares Shipping Co.*, [1978] 2 C.F. 834 (C.A.); *Dome Petroleum Ltd c. Hunt Int. Petroleum Co.*, [1978] 1 C.F. 11.

¹⁰ *Sivaco Wire & Nail Co. c. Atlantic Lines & Navigation Co.*, *supra*, note 8; *Benson Bros. Shipbuilding Co. (1960) Ltd c. Mark Fishing Co.*, *ibid*.

¹¹ Voir les Règles Spéciales de Procédure en Amirauté, règles 1000 et ss. des règles de la Cour fédérale, Codification des Règlements du Canada (1978), vol. VI, c. 663.

¹² Art. 22(3), Loi sur la Cour fédérale, *supra*, note 1.

¹³ Art. 43, *ibid*.

¹⁴ [1979] 2 R.C.S. 157.

¹⁵ [1978] 2 C.F. 270.

marchandises en partance d'un port canadien.¹⁶ Or, la Cour suprême n'avait-elle pas, deux ans auparavant, exigé l'application préalable d'une législation fédérale (loi, règlement ou common law) comme prérequis essentiel à l'exercice par la Cour fédérale de sa compétence?¹⁷

Cette fois-ci, le juge en chef Laskin fut d'avis que la Cour fédérale avait compétence pour juger du litige. Le raisonnement de la Cour est toutefois fort laborieux et pour comprendre sa portée, il est important d'en suivre toutes les étapes.

D'abord, la Cour a admis que la Cour fédérale a compétence, en vertu de l'article 22 de la Loi sur la Cour fédérale, pour entendre toute demande de redressement faite en vertu du droit maritime canadien ou d'une autre loi du Canada en matière de navigation ou de marine marchande. Compte tenu de cette admission, la Cour s'est ensuite demandée s'il existait un droit fédéral applicable, que ce soit la loi, la common law ou une autre règle dûment adoptée ou reconnue par le Parlement et sur laquelle puisse se fonder la juridiction en amirauté de la Cour fédérale. Suite aux arrêts *Quebec North Shore* et *McNamara*,¹⁸ cette question paraissait inévitable. A cela, la Cour répondit que l'article 4 de la Loi de l'Amirauté de 1891¹⁹ avait introduit dans le droit du Canada, le droit maritime anglais tel qu'appliqué à ce moment par la Haute Cour de Justice et que cette loi de 1891 pouvait certainement être considérée comme une "quelque autre loi" à laquelle réfère la définition du droit maritime canadien;²⁰ cette loi permet donc l'exercice d'une telle juridiction en amirauté. Cette étape franchie, à savoir que la compétence en amirauté de la Cour fédérale repose sur une loi du Canada (en l'occurrence, le droit maritime appliqué par la Haute Cour d'Angleterre et lequel fut incorporé dans le droit du Canada), la Cour s'est ensuite demandée si la

¹⁶ Art. 2, Loi sur le transport des marchandises par eau S.R.C., 1970, c. C-15.

¹⁷ Voir *supra*, note 4.

¹⁸ *Ibid.*

¹⁹ 1891, 54-55 Vict. c. 29. L'article se lit en partie comme suit: "... et toutes personnes auront, tant dans les parties du Canada qui jusqu'ici ont été au-delà de l'atteinte des mandats de toute cour de Vice-Amirauté, qu'ailleurs dans ses limites, tous les droits et recours en toutes choses (y compris les cas de contrat et de tort et de procédures *in rem* et *in personam*) provenant de la navigation, de la marine, du trafic ou du commerce, ou s'y rattachant, qui peuvent être exercés dans toute cour coloniale d'Amirauté en vertu de l'Acte des Cours Coloniales d'Amirauté, 1890."

²⁰ Art. 2(b) de la Loi sur la Cour fédérale, *supra*, note 1. L'article définit le droit maritime canadien comme étant: "le droit dont l'application relevait de la Cour de l'Echiquier du Canada, en sa juridiction d'amirauté en vertu de la Loi sur l'Amirauté ou de quelque autre loi ou qui en aurait relevé si cette Cour avait eu en sa juridiction d'amirauté compétence illimitée, en matière maritime et d'amirauté compte tenu des modifications apportées à ce droit par la présente loi ou par toute autre loi du Parlement du Canada." Italiques nôtres.

réclamation de l'intimée relevait de ce droit tel qu'incorporé en 1891. Et dans l'affirmative, si celle-ci relevait de la compétence législative du Parlement en matière de navigation et de marine marchande. La Cour répondit de façon affirmative à ces deux questions. Les réclamations relatives aux dommages causés à des marchandises en provenance de l'étranger font partie du droit maritime; elles sont spécifiquement énumérées à l'article 22(2) e), h) et i) de la Loi sur la Cour fédérale et relèvent constitutionnellement de la compétence fédérale en matière de navigation et de marine marchande.

Ce que tous attendaient,²¹ la Cour suprême ne l'a pas affirmé. Elle n'a pas soutenu que le droit maritime canadien constitue une législation fédérale applicable. Suivant la logique suivie dans les arrêts *Quebec North Shore* et *McNamara*, elle a appliqué comme législation fédérale, l'article 4 de la Loi de l'Amirauté de 1891; l'article 4 de cette loi ayant introduit dans le droit du Canada, le droit maritime appliqué par la Haute Cour en 1890.

Plus récemment encore, la Cour suprême rendit un autre jugement sur la question de la compétence en amirauté de la Cour fédérale. Dans l'affaire *Antares Shipping Corp. c. Le Navire "Capricorn" & Portland Shipping Co. Inc. & Delmar Shipping Ltd*,²² l'appelante avait intenté une action *in rem* contre le navire "Capricorn"; elle cherchait à faire déclarer nulle la vente de ce navire par Delmar Shipping Ltd à Portland Shipping Co. Ltd. Elle alléguait que ledit navire lui avait déjà été validement vendu. Dans un jugement unanime, mais rendu cette fois-ci par le juge Ritchie, la Cour suprême soutint que ce genre de réclamation était prévu spécifiquement à l'article 22(2) a) de la Loi sur la Cour fédérale. Cette disposition de la loi constitue, selon la Cour, une législation fédérale applicable, entrant dans la catégorie de sujets prévue par la rubrique "navigation et marine marchande"²³ et conçue expressément pour donner compétence à la Cour fédérale dans le cas en litige.²⁴ Il faut avouer aussi que la Cour s'est basée sur l'article 44 de ladite loi qui permet à la Cour fédérale de rendre une ordonnance d'exécution intégrale; or, c'est justement ce que l'appelante recherchait, c'est-à-dire l'exécution du contrat de vente d'un navire qu'elle soutenait avoir préalablement conclu.

Toutefois, la Cour suprême a refusé d'entériner la proposition du juge Le Dain de la Cour d'Appel fédérale, à savoir que le droit maritime canadien est aussi reconnu comme une législation fédérale

²¹ Voir Tetley, *op. cit.*, note 7.

²² [1980] 1 R.C.S. 553.

²³ Acte de l'Amérique du Nord britannique, *supra*, note 3, art. 91(10).

²⁴ *Supra*, note 22, à la p. 559.

applicable dans l'exercice de la compétence d'amirauté de la Cour.²⁵ Se référant au jugement du juge Laskin dans l'arrêt *Tropwood*,²⁶ elle fut plutôt d'avis que c'était la Loi sur la Cour fédérale qu'il fallait examiner pour décider si la compétence conférée actuellement à la Cour fédérale de connaître des "affaires maritimes" est liée à un ensemble de règles de droit que l'on peut attribuer à la compétence fédérale et sur lequel cette juridiction peut s'exercer.²⁷

A ce stade-ci, la Cour suprême préfère donc s'en tenir aux dispositions de la Loi sur la Cour fédérale qu'elle considère être une législation fédérale applicable. Les chefs de réclamations énumérés à l'article 22(2)²⁸ de cette loi constituent donc des dispositions de droit positif, assez larges à notre avis, pour couvrir à peu près tous les cas de réclamations maritimes. Toutefois, dans chaque cas, il faut démontrer que la réclamation dont on veut saisir la Cour fédérale relève du champ des compétences législatives octroyées exclusivement au Parlement canadien en vertu de l'article 91(10) de l'Acte de l'Amérique du Nord britannique.

Finalement, dans l'arrêt *Aris Steamship Co. Inc. and Associated Metals & Minerals Corp. c. The Ship "Evie W" et al.*,²⁹ le juge Ritchie de la Cour suprême du Canada exprima une opinion très intéressante mais malheureusement *obiter* au sujet d'une réclamation pour dommages à la suite d'un retard dans la livraison d'une cargaison. Même si la question préliminaire de la compétence en amirauté de la Cour fédérale n'avait pas été expressément posée, la Cour suprême sentit le besoin d'y revenir une fois de plus. Spécifiquement, le juge faisait siennes les paroles du juge Laskin dans l'affaire *Tropwood*³⁰ concernant les cas de réclamations maritimes énumérées au paragraphe 2 de l'article 22 de la Loi sur la Cour fédérale.

Il est important de remarquer que les chefs de compétence énumérés au paragraphe 22(2) sont alimentés dans le cadre du droit applicable, par le droit maritime canadien ou toute autre loi du Canada en matière de navigation ou de marine marchande.³¹

L'abandon du critère de la compétence législative.

D'une certaine façon, l'intervention de la Cour suprême en 1977 dans les arrêts *Quebec North Shore* et *McNamara* nous paraît essentielle. Avant cette intervention, on soutenait généralement que la

²⁵ *Ibid.*

²⁶ *Supra*, note 14.

²⁷ *Supra*, note 22, à la p. 560.

²⁸ Alinéas a) à s).

²⁹ [1980] 2 R.C.S. 322.

³⁰ *Supra*, note 14.

³¹ *Ibid.*, à la p. 161. Italiques nôtres.

compétence de la Cour fédérale s'étendait à toute matière qui relevait de la compétence législative du Parlement.³²

Selon certains auteurs,³³ le critère de la compétence législative demeure le moyen le plus efficace pour établir de façon certaine la compétence de la Cour fédérale. Mais l'application de ce raisonnement aurait pu conduire à des hypothèses insoutenables sur le plan constitutionnel. Ainsi, il aurait été possible de saisir la Cour fédérale d'un litige portant sur une matière qui, bien que relevant de la compétence législative du Parlement, peut être régie par le droit provincial existant, droit civil ou common law, vu l'absence d'une législation dûment adoptée par le Parlement canadien. De plus, nous avons déjà souligné l'existence de nombreuses lois provinciales en matière maritime.³⁴ La Cour fédérale a été établie en vertu de l'article 101 de l'Acte de l'Amérique du Nord britannique qui permet au Parlement de créer des tribunaux en vue d'une meilleure administration des "lois du Canada". Cette dernière expression aurait pu ainsi englober une règle de droit provincial pourvu que la matière ait pu faire l'objet d'une loi que le Parlement aurait eu compétence pour adopter. Or, il a été décidé il y a déjà longtemps que l'expression "lois du Canada" se limite aux lois promulguées par le Parlement en vertu des compétences qui lui sont octroyées.³⁵

Donc, la compétence en amirauté de la Cour fédérale ne s'exerce pas dans une action où la demande de redressement est faite en vertu d'une loi relative à une matière relevant de la catégorie "navigation et marine marchande" et que le Parlement serait compétent pour adopter ou modifier s'il s'agit d'une loi provinciale: statut, droit civil ou common law.

Par exemple, les dispositions du Code civil québécois sur les privilèges maritimes³⁶ ou la Loi sur l'assurance maritime du Nouveau-Brunswick³⁷ ne peuvent servir de fondement pour l'exercice par la Cour fédérale de sa compétence en amirauté. Cette compétence ne s'exerce pas non plus dans une action relative à une matière qui relève de la compétence législative du Parlement (sous la rubrique "naviga-

³² *Robert Simpson Montreal c. Hamburg — Amerika Linie Norddeutscher*, *supra*, note 3.

³³ Robert W. Kerr, *Constitutional Limitations on the Admiralty Jurisdiction of the Federal Court* (1979), 5 Dal. L.J. 568; P.W. Hogg, *Constitutional Law — Limits of Federal Court Jurisdiction — Is There a Federal Common Law?* (1977), 55 R. du B. can. 550.

³⁴ *Supra*, note 5.

³⁵ *Consolidated Distilleries Ltd v. Consolidated Exporters Corporation*, [1930] S.C.R. 231.

³⁶ Art. 2383-2388 C.c.

³⁷ *Supra*, note 5.

tion et marine marchande”) si aucun corps de règles fédérales n’existe et ne s’appliquent.

Le droit maritime canadien comme une législation fédérale applicable.

Deux pré-requis sont donc essentiels pour que la Cour fédérale puisse exercer sa compétence en amirauté:

- 1) d’abord, il faut que la demande relève de la compétence législative du Parlement en matière maritime, particulièrement sous la rubrique “navigation et marine marchande”; puis,
- 2) il faut démontrer l’existence d’une législation fédérale applicable, que ce soit une loi, un règlement ou la common law fédérale.³⁸

Or, le droit maritime canadien relève de la compétence législative du Parlement en matière de “navigation et de marine marchande”.³⁹ Les parties écrites du droit maritime canadien, c’est-à-dire celles qui sont codifiées dans une loi du Parlement, constituent une législation fédérale applicable.

Il doit en être de même, à notre avis, de toutes les parties non écrites du droit maritime canadien. A ce sujet, on s’explique mal les hésitations de la Cour suprême à déclarer que le droit maritime canadien constitue une législation fédérale qui justifie l’exercice, par la Cour fédérale, de sa compétence en amirauté.

En effet, la Cour fédérale ne peut, nous l’avons déjà dit, exercer sa juridiction en amirauté à l’égard d’une demande fondée sur le droit provincial. Le droit maritime applicable, compte tenu de la compétence d’amirauté octroyée à la Cour de l’Echiquier,⁴⁰ puis ensuite à la Cour fédérale, est le droit maritime anglais tel qu’il existait à ses origines et tel qu’il a revécu à la suite de la disparition des restrictions que le Parlement britannique avait imposées à la compétence de la Cour d’Amirauté anglaise,⁴¹ c’est-à-dire l’ensemble du droit maritime en vigueur en Europe occidentale à l’époque de l’amiral et alors que ce droit faisait partie du droit des nations (*jus gentium*).⁴²

³⁸ *Tropwood c. Sivaco*, *supra*, note 14.

³⁹ *Ibid.*

⁴⁰ *Supra*, note 19, art. 3; Loi sur l’Amirauté, S.C., 1934, c. 31, art. 3.

⁴¹ Le Parlement britannique était intervenu maintes fois en vue de restreindre sévèrement la compétence attribuée dès 1360 à la Cour d’Amirauté à la suite des pressions exercées par les cours de common law, jalouses de leurs prérogatives. Graduellement, le législateur restaura cette juridiction. Voir, Lionel H. Laing, *Historic Origins of Admiralty Jurisdiction in England* (1946), 45 Mich. L. Rev. 163.

⁴² *Davie Shipbuilding Ltd c. La Reine*, [1979] 2 C.F. 235, à la p. 251.

Ce droit applicable est aussi le droit maritime anglais tel qu'il fut incorporé dans le droit canadien et tel qu'il fut modifié de temps à autre par le Parlement canadien en vertu de sa compétence législative en matière de navigation et de marine marchande.⁴³ Finalement, c'est ce corps de règles tel qu'il existe ou tel qu'il existera puisqu'il est susceptible d'être modifié par le Parlement en raison de la compétence législative en matière maritime de ce dernier, en particulier en raison de sa compétence en matière de navigation et de marine marchande.⁴⁴

Conclusion

Quoiqu'il en soit, si l'exercice par la Cour fédérale de sa compétence en amirauté doit être justifié par l'application d'un droit écrit fédéral, les chefs de réclamations énumérés à l'article 22(2) de la Loi sur la Cour fédérale constituent selon la Cour suprême des dispositions de droit substantif applicables et qui relèvent de la compétence législative du Parlement.⁴⁵

La portée de chacun de ces chefs de réclamations doit s'examiner à la lueur du contenu du droit maritime canadien.⁴⁶ Cet examen doit se faire de façon libérale, compte tenu de l'intention du législateur. Ce dernier, en conférant une juridiction d'amirauté à la Cour fédérale, l'a fait en se référant au droit appliqué soit par la Cour de l'Echiquier, soit par la Cour d'Amirauté britannique.⁴⁷ Compte tenu de l'article 42 de la Loi sur la Cour fédérale qui maintient en vigueur le droit maritime canadien tel qu'appliqué par la Cour de l'Echiquier en 1970, compte tenu de la compétence territoriale presque sans limite qui fut confiée à la Cour fédérale,⁴⁸ et compte tenu de la définition du "droit maritime canadien" de l'article 2 de la même loi,⁴⁹ il est clair que le législateur a voulu que ce droit qui relève de sa compétence législative, soit

⁴³ *National Gypsum Co. Inc. c. Northern Sales Ltd.*, [1964] R.C.S. 144, J. Cartwright; *Le Marin Denis Barthe c. Le Navire "SS. Florida"*, [1969] 1 R.C.E. 299.

⁴⁴ L'article 22(1) de la Loi sur la Cour fédérale spécifie que la compétence en amirauté de la Cour repose sur "le droit maritime canadien ou d'une autre loi du Canada en matière de navigation ou de marine marchande".

⁴⁵ *Antares Shipping Corp. c. Le Navire "Capricorn" & Portland Shipping Co. Inc. & Delmar Shipping Ltd.*, *supra*, note 22.

⁴⁶ *Tropwood c. Sivaco*, *supra*, note 14; *Avis Steamship Co. Inc. and Associated Metals & Minerals Corp. c. The Ship "Evie W."* et al., *supra*, note 29.

⁴⁷ La juridiction en amirauté conférée à la Cour de l'Echiquier référerait spécifiquement à celle dont était investie la Cour d'Amirauté britannique. Voir, *Loi sur l'Amirauté*, *supra*, note 40, art. 18(1) (2), et la "Loi de l'Amirauté", *supra*, note 19, art. 4.

⁴⁹ Art. 22(3).

appliqué sans restriction par la Cour fédérale, si ce n'est pour des raisons constitutionnelles.⁵⁰

ANDRÉ BRAEN*

⁵⁰ Depuis la rédaction de ce commentaire, la Cour suprême a rendu un autre jugement sur la question de la compétence en amirauté de la Cour fédérale. Voir *Wire Rope Industries of Canada (1966) Ltd v. Marine Shipbuilders Ltd and Straite Towing Ltd et al.*, jugement prononcé le 19 mars 1981. Non encore rapporté.

* André Braen, Professeur, Ecole de Droit, Université de Moncton, Membre du Barreau de la province de Québec.