CONSTITUTIONAL LAW—SECTION 91(2) OF THE CONSTITUTION ACT, 1867—COMPETITION LEGISLATION.—On October 13, 1983, the Supreme Court of Canada handed down its decisions in *Attorney-General for Canada* v. *Canadian National Transportation Limited*[1] and *R.* v. *His Honour Judge Wetmore*[2] (*Kripps Pharmacy*). The primary issue in the two cases was whether the Attorney-General of Canada was competent to conduct criminal proceedings. However, the cases also provide the opportunity for reassessing the scope of Parliament's authority under section 91(2) of the Constitution Act, 1867, and it is on this aspect of the cases I propose to comment. I will therefore deal with the conduct of criminal proceedings only to the extent that that is necessary to provide a background for the inferences that may be drawn about the trade and commerce power under section 91(2).

In *Canadian National Transportation*, the accused were charged with conspiracy pursuant to section 32(1)(c) of the Combines Investigation Act.[3] The federal Attorney-General assumed the prosecution pursuant to section 15(2) of that Act and the accused applied for a prohibition order. In *Kripps Pharmacy*, the accused challenged the authority of the federal Attorney-General to prosecute in respect of alleged violations of sections 8 and 9 of the Food and Drugs Act.[4] These sections, respectively, prohibited selling drugs manufactured or stored under unsanitary conditions and promoting drugs in a misleading manner.

Laskin C.J.C., writing for the majority in *Canadian National Transportation*, dealt with section 32(1)(c) of the Combines Investigation Act[5] as criminal law, and held that section 91(27)[6] of the Constitution Act, 1867 comprehended the conduct of criminal proceedings. Thus he did not have to decide whether section 32(1)(c) could also be upheld on trade and

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[1] (1983), 49 N.R. 241, [1984] 1 W.W.R. 193 (S.C.C.).

[2] (1983) 49 N.R. 286, [1984] 1 W.W.R. 577 (S.C.C.).

[3] R.S.C. 1970,c. C-23.

[4] R.S.C. 1970, c. F-27.

[5] *Supra*, footnote 3.

[6] In the text and footnotes a reference to section 91 or section 92 is a reference to those sections in the Constitution Act, 1867.

commerce grounds. This latter issue was central to Dickson J.'s concurring minority judgment. Dickson J. characterized section 32(1)(c) as regulation of trade and commerce, and so the question of federal power to enforce criminal law did not arise. In *Kripps Pharmacy*, Laskin C.J.C. simply followed *Canadian National Transportation*. Parliament could enforce its legislation regardless of the head of section 91 pursuant to which it was enacted. Because the accused did not challenge the validity of sections 8 and 9 of the Food and Drugs Act,[7] it followed that Parliament could authorize the Attorney-General of Canada to prosecute. Dickson J., the sole dissenter, characterized the legislation as exclusively criminal law. He therefore had to decide the question which he left open in *Canadian National Transportation*: could Parliament empower the federal Attorney-General to prosecute purely criminal offences? Dickson J. did not feel constrained by the majority judgment in *Canadian National Transportation* because, on his characterization of the legislation, it had not been necessary in that case to decide whether Parliament could enforce criminal law. Dickson J. held that the allocation of jurisdiction over the administration of justice in section 92(14) of the Constitution Act, 1867 narowed the scope of section 91(27), taking prosecutorial authority out of its ambit.

The primary holding in both cases is that Parliament is competent, pursuant to section 91(27) of the Constitution Act, 1867, to authorize criminal prosecutions. Laskin C.J.C., writing for the majority on each occasion, rejected the argument that provincial jurisdiction in section 92(14) over the administration of justice comprehends exclusive prosecutorial authority. In *Canadian National Transportation* he took the broad view that the power to enact substantive law, on whatever head, carries with it authority to enforce that law. Thus, the federal jurisdiction in relation to criminal law and procedure includes the power to prosecute. On this issue, there are interesting questions which still could be pursued. For example, in *Canadian National Transportation*, Laskin C.J.C. appeared to deny to the provinces any concurrent prosecutorial authority; I would suggest that a convincing case can be made that there is both a federal and provincial "aspect" to criminal prosecutions.[8] Moreover, as a practical matter, it may be that major changes will not take place in the administra-

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[7] *Supra*, footnote 4.

[8] As to Laskin C.J.C.'s remarks see *supra*, footnote 1, at pp. 251-252 (N.R.), 207-209 (W.W.R.).

Undoubtedly federal jurisdiction to enact a national criminal law implies the power to ensure its effective application. Otherwise Parliament's decision to criminalize a particular activity could be frustrated if a provincial Attorney-General declined to prosecute. The provincial aspect is that community needs and problems differ from one locality to another and provincial officials are closer to the scene. The administration, investigation and enforcement of most types of criminal offences must be responsive to local conditions. There is ample support for this provincial aspect in Canadian history and tradition, which was well reviewed by Dickson in his *Kripps Pharmacy* dissent.

tion of justice in Canada as a result of the two decisions. There is already a well established institutional infrastructure in place created within the framework of section 2 of the Criminal Code.[9] The Attorney-General of Canada will undoubtedly continue to prosecute non-criminal code offences, and the provincial Attorneys-General will prosecute those arising under the code. Nonetheless, the two cases clearly establish that Parliament has unquestioned primary jurisdiction to authorize the Attorney-General of Canada, or any delegate of his, to prosecute in respect of alleged violations of criminal law. Bearing in mind that this is the main effect of the cases, I propose in this comment to consider the inferences that may be drawn from them with respect to the scope of the trade and commerce power.

The Trade and Commerce Power

Dickson J.'s minority judgment in *Canadian National Transportation* and the Supreme Court's earlier decision in *MacDonald* v. *Vapor Canada Ltd.*[10] are, I would suggest, important steps forward in the development of the trade and commerce power. They envisage real scope for national economic regulation which need not be hinged upon extra-provinciality. If these decisions represent the current direction of the law, a federal scheme catching even purely local business in its sweep would be valid if it met five criteria enumerated by Dickson J. in *Canadian National Transportation*. Competition legislation can then be put upon a realistic trade and commerce basis.[11] The trade and commerce characterization of section 32(1)(c) of the Combines Investigation Act[12] has thus enormous significance for competition legislation. It is necessary to review briefly the law prior to *Vapor Canada* to understand why.

The *locus classicus* of the federal trade and commerce power is, of course, Sir Montague Smith's judgment in *Citizens Insurance Co.* v. *Parsons*.[13] The first branch of *Parsons* confirmed Parliament's authority to

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[9] R.S.C. 1970, c. C-34.

[10] [1977] 2 S.C.R. 134, (1976), 66 D.L.R. (3d)1.

[11] For an excellent discussion of the constitutional aspects of competition policy see B. McDonald, Constitutional Aspects of Canadian Anti-Combines Law Enforcement (1969), 47 Can. Bar Rev. 161; S. Grange, The Constitutionality of the Competition Bill (1975); P. Hogg and W. Grover, Constitutionality of the Competition Bill (1976), 1 Can. Bus. L.J. 197; and for a more general discussion A.E. Safarian, Canadian Federalism and Economic Integration (1974), pp. 58 *et seq.*

On the analysis suggested in the text it is also likely that the federal securities legislation contemplated in the federal government's proposals would be valid; see Department of Corporate and Consumer Affairs, Proposals for a Securities Market Law for Canada 1979, 3 vols.; and for a discussion of the constitutionality of the proposal see P. Anisman and P. Hogg, Constitutional Aspects of Federal Securities Legislation, vol. 3, p. 136.

[12] *Supra*, footnote 3.

[13] (1881), 7 App. Cas. 96 (P.C.).

regulate interprovincial and export trade. The second left open the possibility that Parliament could enact "general regulation of trade affecting the whole Dominion".[14] *Parsons* only precluded Parliament from regulating *contracts* of a particular business or trade, as distinct from the trade or business itself.

Despite the promise shown in *Parsons*, the Privy Council soon took a much more restrictive view of the trade and commerce power.[15] With

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[14] *Ibid.*, at p. 113.

[15] The real attenuation of the trade and commerce power began with *Attorney-General for Canada* v. *Attorney-General for Alberta* (*Insurance Reference*), [1916] 1 A.C. 588, (1916), 26 D.L.R. 288, (1916), 10 W.W.R. 405 (P.C.) where Viscount Haldane said, without citing any relevant authority, that "it must now be taken that [s. 91(2)] does not extend to the regulation. . .of a particular trade". This limitation goes far beond anything said in *Parsons*. Subsequent cases went still further and temporarily reduced trade and commerce to a subordinate head of power. This latter holding was scotched in *Proprietary Articles Trade Association* v. *Attorney-General for Canada* [1931] A.C. 310, [1931] 2 D.L.R. 1, [1931] 1 W.W.R. 552 (P.C.).

However the second branch of *Parsons* has never been a vigorous support for federal legislation. The reasons are rooted in both federalism concerns and history. The prevailing theory of political economy in the formative years of *Parsons* second branch was *laissez faire* rather than "collectivist". For a full discussion of the history of Canadian federalism along these lines, see J.R. Mallory, Social Credit and the Federal Power in Canada (1954), (reprinted 1976 with additional preface). See also P. Weiler, The Supreme Court and the Law of Canadian Federalism (1973), 23 U. of T. L.J. 307. The courts in the 1920's and '30's upheld "facilitative legislation" designed to enable the free market to function, but struck down "collectivist" or "regulatory" legislation. A free market cannot function without a law of contracts. Trademarks legislation makes possible product differentiation in similar goods. A law permitting the limitation of liability through incorporation facilitates raising capital. The courts upheld trademarks and incorporation laws in *Attorney-General for Ontario* v. *Attorney-General for Canada* (*Reference re Dominion Trade and Industry Commission Act*), [1937] A.C. 405, [1937] 1 D.L.R. 702, [1937] 1 W.W.R. 333 (P.C.) and *John Deer Plow Co.* v. *Wharton* [1915] A.C. 330, (1914), 18 D.L.R. 353, (1914) 7 W.W.R. 706 (P.C.).

Collectivism requires the government to intervene by enacting "regulatory legislation" to restrict the free market. Competition law, labour codes and marketing schemes designed to support commodity prices are the best examples. The courts prior to World War II struck down this type of regulation no matter which level of government enacted it. The Privy Council struck down federal competition codes in *In re The Board of Commerce Act, 1919, and the Combines and Fair Prices Act, 1919*, [1922] 1 A.C. 191, (1921), 60 D.L.R. 513, [1922] 1 W.W.R. 20 (P.C.) notwithstanding that the provinces acting alone, or even in concert, could not enact them. When Parliament attempted to rationalize labour relations, its scheme was declared unconstitutional in *Toronto Electric Commissioners* v. *Snider*, [1925] A.C. 396, [1925] 2 D.L.R. 5 [1925] 1 W.W.R. 785 (P.C.). With agricultural products marketing, the British Columbia government tried to fashion a price support system for provincially produced tree fruits. The Supreme Court of Canada held that it was *ultra vires* in *Lawson* v. *Interior Tree Fruit and Vegetable Committee*, [1931] S.C.R. 357, [1931] 2 D.L.R. 193, [1930] 2 W.W.R. 23, as an invasion of the federal trade and commerce power. When Parliament tried to fill the gap, the Privy Council struck down the federal legislation in *Attorney-General for British Columbia* v. *Attorney-General for Canada* (*Reference re Natural Products Marketing Act*), [1937] A.C. 377, [1937] 1 D.L.R.

respect to competition legislation as such, the first case of importance is *In re The Boad of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919*,[16] *(Board of Commerce)*. The courts there had to consider the validity of legislation establishing a board to administer legislation directed at the investigation and restriction of monopolies and the regulation of commodity prices and profits. The statutes applied throughout Canada, unlimited as to time. The board made an order prohibiting certain retail clothing dealers in Ottawa from charging a mark-up of more than a specified percentage of cost. The Supreme Court split on the constitutionality of the legislation, three judges supporting it on the basis of the trade and commerce and general powers, and three declaring it *ultra vires*. All of the members of the Court seemed to agree that, if the legislation was criminal law, the board could not administer it. The board would in effect be a court of criminal jurisdiction which Parliament is excluded from constituting pursuant to section 91(27). The Court appeared to agree that section 101 of the Constitution Act, 1867 could not override the more specific provisions of sections 91(27) and 92(14), even though protected by its own *non-obstante* clause. The three judges upholding the Acts did not have to decide the issue because they characterized the legislation as being in respect of trade and commerce, and peace, order and good government. The Privy Council, speaking through Viscount Haldane, struck down the legislation. It was not criminal law, because it did not relate to a subject "which by its very nature belongs to the domain of criminal jurisprudence".[17] In the course of his reasons, His Lordship relegated trade and commerce to a subordinate head to be invoked only in aid of some other independent head of federal power.

Both the "domain of criminal jurisprudence theory" and the notion that trade and commerce lacked independent status were repudiated several

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691, [1937] 1 W.W.R. 328, even though it was part of a joint federal-provincial cooperative effort.

Today, regulatory schemes are an important part of our national life. Provincial labour codes are common. The Supreme Court has recently paved the way for an effective agricultural products marketing scheme based in part on the first branch of *Parsons* in *Reference re Agricultural Products Marketing Act and Two Other Acts*, [1978] 2 S.C.R. 1198, (1978), 84 D.L.R. (3d) 257. However the *stare decisis* of the earlier period has stunted the constitutional growth of *Parsons* second branch. The best recent example is *Labatt Breweries* v. *Attorney-General for Canada*, [1980] 1 S.C.R. 914, (1979), 110 D.L.R. (3d) 594. The Supreme Court of Canada refused to even consider the legitimacy of Parliament's setting national standards of quality. Instead, it characterized the relevant provisions of the Food and Drugs Act as regulation of particular industries and struck it down. *MacDonald* v. *Vapor Canada, supra* footnote 10, and Dickson J.'s judgment in *Canadian National Transportation* can be seen as moves to invigorate *Parsons* second branch.

[16] (1920), 60 S.C.R. 456, 54 D.L.R. 354, [1920] 3 W.W.R. 658; on appeal [1922] 1 A.C. 191, (1921) 60 D.L.R. 513, [1922] 1 W.W.R. 20 (P.C.).

[17] *Supra*, footnote 15, at pp. 198-199 (A.C.), 518 (D.L.R.), 25 (W.W.R.).

years later by the Privy Council in *Proprietary Articles Trade Association* v. *Attorney-General for Canada,*[18] a case which, until *Vapor Canada* and *Canadian National Transportation*, was the cornerstone of the constitutional validity of federal combines legislation. The Combines Investigation Act,[19] the legislation considered in *Proprietary Articles Trade Association,* replaced that considered in *Board of Commerce*. The new Act prohibited "combines", being mergers, monopolies or the results of production agreements which lessened competition contrary to the public interest. A Registrar was responsible for inquiring into combines and preparing a report to the Governor in Council. The Governor in Council could use the report to decide, *inter alia,* whether to institute criminal proceedings.

Lord Atkin distinguished the legislation under review in *Board of Commerce* on the basis that it empowered an administrative board, as opposed to a court, to prohibit specific accumulations, force sales at prices fixed by the board, and limit profits. Here there was a general definition section, a general condemnation, and penal consequences flowed from judicial determination rather than administrative action. He upheld the legislation as criminal law, rejecting Viscount Haldane's notion that there was a fixed domain of criminal law. He therefore did not have to decide whether the new Act could also be supported by section 91(2). However, Lord Atkin specifically overruled Viscount Haldane's opinion that the section was a subordinate head of power, and stated that their Lordships were not to be understood as saying that the statute could not be supported as regulation of trade and commerce. The courts since *Proprietary Articles Trade Association* have consistently upheld most of the competition legislation which has come before them on criminal law grounds.

In *Reference re section 498 A of the Criminal Code*,[20] a majority of the Supreme Court upheld prohibitions on price discrimination and predatory pricing as valid criminal law, and an appeal against that decision was dismissed by the Privy Council. In *Reference re Dominion Trade and Industry Commission Act,*[21] the Supreme Court of Canada upheld most of the provisions of the Trade and Industry Commission Act,[22] under which a commission was established by statute to administer federal marketing, fair trade and competition legislation. However, the Court struck down an advance clearance procedure in section 14, which authorized the commission, after investigation, to recommend approval to the Govenor in Council

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[18] *Ibid.*

[19] *Supra,* footnote 3.

[20] [1936] S.C.R. 363, [1936] 3 D.L.R. 593, aff'd on appeal, [1937] A.C. 368, [1937] 1 D.L.R. 688, [1937] 1 W.W.R. 317 (P.C.).

[21] [1936] S.C.R. 379, [1936] 3 D.L.R. 607.

[22] S.C. 1935, c. 59.

of private agreements which reduced "wasteful" competition. If the recommendation was accepted, no criminal proceedings could be instituted without the commission's approval. The Supreme Court held that the provision was not criminal law, and could not be trade and commerce because it caught purely local agreements in its ambit. The holding on section 14 was not appealed to the Privy Council.[23]

The Supreme Court next considered post-conviction prohibition orders in *Goodyear Tire and Rubber Co.* v. *The Queen*.[24] Locke J., speaking for the majority of the Court, upheld these orders as a penalty, and further held that section 91(27) comprehended prevention of future crimes as well as punishment of past ones. The majority specifically declined to express an opinion on dissolution orders and was silent as to prohibition orders before conviction. In the last major case before *Vapor, R.* v. *Campbell*,[25] the Supreme Court of Canada dismissed without reasons an appeal against a decision upholding a federal prohibition on resale price maintenance.

Federal competition law has thus largely withstood constitutional challenge since *Proprietary Articles Trade Association*. Legislation on trade combinations, agreements in restraint of trade, price discrimination, predatory pricing, post-conviction prohibition orders, and resale price maintenance has been upheld as valid criminal law. However, the criminal law characterization creates serious administration and enforcement problems.[26]

Competition legislation is essentially the legislative implementation of an economic theory. Yet administration and enforcement has been constitutionally mandated to follow the rules of criminal procedure and evidence. Questions of burden of proof, exclusion of similar fact and hearsay evidence, inadmissibility of economic evidence and other similar issues impede the effective administration of competition schemes. Furthermore, with the advent of the Charter of Rights and Freedoms,[27] jury trials

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[23] However all of the other provisions were appealed in *Attorney-General for Ontario* v. *Attorney-General for Canada*, [1937] A.C. 405, [1937] 1 D.L.R. 702, [1937] 1 W.W.R. 333 (P.C.) and all were held to be within federal competence. Given the Privy Council's reasoning with respect to s. 23 of the Trade and Industry Commission Act, *ibid.*, a section raising similar issues to those in s. 14, it is possible that the Privy Council would have reversed the Supreme Court's holding on s. 14 if it had been appealed.

[24] [1956] S.C.R. 303, (1956), 2 D.L.R. (2d) 11.

[25] [1966] S.C.R. v, (1965), 58 D.L.R. (2d) 673, aff'g (1964), 46 D.L.R. (2d) 83 (Ont. C.A.).

[26] See generally McDonald, *loc. cit.*, footnote 11.

[27] S. 11(f) of the Canadian Charter of Rights and Freedoms. However in *Re PPG Industries Canada Ltd. and Attorney-General for Canada* (1983), 146 D.L.R. (3d) 261 (B.C.C.A.), leave to appeal to S.C.C. granted March 21, 1983, the British Columbia Court of Appeal held that s. 11(f) is restricted to natural persons. Thus s. 44(3) of the Combines Investigation Act, *supra* footnote 3, which provides that a corporation charged with

may be required. Laymen, either judges or jurors, rather than economic experts, will have to decide complicated questions affecting economies of scale, resulting synergies, industry and market structure, international agreements and Canada's competitive position in the world community. Specialized boards, applying economic factors and operating within a flexible framework, are more suitable tribunals than criminal courts. They are able to marshall expertise to evaluate economic evidence and implement complicated industry re-structuring. In addition, they are not bound to the adversary system. In many instances, negotiation and cooperation are the most efficient way of achieving competition goals. But grave constitutional difficulties are posed for specialized tribunals by the criminal law characterization. As Anglin J. put it in *Board of Commerce*,[28] sections 91(27) and 92(14) present formidable obstacles to the federal creation of a court of criminal jurisdiction. Thus, if the Combines Investigation Act[29] is exclusively criminal law, there are serious questions about some of the powers of the Restrictive Trade Practices Commission and the jurisdiction of the Federal Court of Canada.

MacDonald v. *Vapor Canada*[30] was the first indication that the Supreme Court of Canada was willing to consider seriously a trade and commerce basis for competition law. The plaintiff alleged that a former employee had violated section 7(e) of the federal Trade Marks Act,[31] which reads:

> "No person shall do any other act or adopt any other business practice contrary to honest industrial or commercial usage in Canada."

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violating the Act shall be tried without a jury, is valid. The case is on appeal to the Supreme Court of Canada at the time of writing.

[28] (1920), 60 S.C.R. 456, at p. 473, 54 D.L.R. 354, at p. 366, [1920] 3 W.W.R. 658, at p. 695. The issue is whether Parliament can create a "court", either in the form of a specialized tribunal or the Federal Court of Canada, and endow it with jurisdiction over criminal matters. Section 91(27) excepts the constitution of courts of criminal jurisdiction from the federal criminal law power. This authority is clearly confined to the provinces by s. 92(14). However s. 101 empowers Parliament to establish courts for the better administration of the laws of Canada which, on its face, includes criminal law. Sections 101 and 91 are both protected by *non-obstante* clauses. Thus s. 101 and 91(27) stand in apparent conflict and it is unclear which overrides. My view is that to give s. 101 such a broad reading would strip the exception in s. 91(27) of all meaning, whereas a reading down of s. 101 would leave both provisions with vitality. The investment of criminal jurisdiction in a federal court is probably invalid. It must be admitted, however, that the commentators are divided on the point. See *McDonald, loc. cit.*, footnote 11, at pp. 220-225, and B. Laskin, Canadian Constitutional Law (1975; 4th ed. rev. Abel), p. 793, favouring the narrow view; but compare Laskin, *op. cit.*, (1969; 3rd ed. rev. Laskin), p. 818, and P. Hogg and W. Grover, *loc. cit.*, footnote 11, at p. 210.

[29] *Supra,* footnote 3.

[30] *Supra,* footnote 10. For a comment on this case, see P. Hogg, (1976), 54 Can. Bar Rev. 361.

[31] R.S.C. 1970, c. T-10.

Section 7(e) had nothing to do with trademarks, but rather was a general proscription against unfair competition. In effect, it created a statutory tort enforceable by private action. Laskin C.J.C., speaking for the majority, declared it *ultra vires*. Laskin C.J.C.'s basic concern was not that section 91(2) could not support competition law, but rather that the enforcement of section 7(e) was unconnected to any regulatory scheme administered by a public agency. He said:[32]

> One looks in vain for any regulatory scheme in s. 7, let alone s. 7(e). *Its enforcement is left to the chance of private redress without public monitoring by the continuing oversight of a regulatory agency which would at least lend some colour to the alleged national or Canada-wide sweep of s. 7(e).* The provision is not directed to trade but to the ethical conduct of persons engaged in trade or in business, and, in my view, *such a detached provision cannot survive alone unconnected to a general regulatory scheme to govern trading relations going beyond merely local concern.*

The section was thus *ultra vires*, but only because there was no general and continuing scheme of public supervision, not because section 91(2) cannot justify competition legislation.

In *Canadian National Transportation*, Dickson J. had to characterize section 32(1)(c) of the Combines Investigation Act,[33] which reads as follows:

> 32. (1) Every one who conspires, combines, agrees or arranges with another person
> . . .
> (c) to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance upon persons or property,
> . . .
> is guilty of an indictable offence and is liable to imprisonment for five years or a fine of one million dollars or both.

The key to his characterization of the section is contained in the following paragraph of his judgment, which draws its support in part from *Vapor Canada*:[34]

> In approaching this difficult problem of characterization it is useful to note the remarks of the Chief Justice in *MacDonald* v. *Vapor Canada Ltd* . . . in which he cites as possible indicia for a valid exercise of general trade and commerce power the presence of a national regulatory scheme, the oversight of a regulatory agency and a concern with trade in general rather than with an aspect of a particular business. To this list I would add what to my mind would be even stronger indications of valid general regulation of trade and commerce, namely (i) that the provinces jointly or severally would be constitutionally incapable of passing such an enactment and (ii) that failure to include one or more provinces or localities would jeopardize successful operation in other parts of the country.

Reading the two cases together, the indicia for a valid exercise of the general trade and commerce power are fivefold:

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[32] *Supra*, footnote 10, at pp. 165 (S.C.R.), 25-26 (D.L.R.).

[33] *Supra*, footnote 3.

[34] *Supra*, footnote 1, at pp. 277 (N.R.), 244 (W.W.R.).

(1) the presence of a national regulatory scheme;
(2) the oversight of regulatory agency;
(3) a concern with trade in general rather than an aspect of a particular business;
(4) a constitutional incapability of the provinces, either jointly or severally, to pass a particular enactment;[35]
(5) a situation where failure to include one or more provinces or localities would jeopardize the successful operation of the entire scheme.[36]

Dickson J. was speaking for only three judges on a seven man bench. Laskin C.J.C.'s comments in *Vapor Canada* were part of a majority judgment, but the actual decision in the case was one of *ultra vires*. The matter is therefore technically still open. If, however, *Vapor Canada* and the analysis adopted by Dickson J. in *Canadian National Transportation* are accepted, many previously arguable questions are now resolved. They are powerful support for the proposition that the second branch of Sir Montague Smith's statement in *Citizens Insurance Co.* v. *Parsons*,[37] the general regulation of trade affecting the whole dominion, can support properly drafted competition legislation.

Much of the Combines Investigation Act[38] meets the five criteria. This is particularly true of parts IV.1 and V. They are concerned with trade

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[35] It will be recalled that Duff J. (as he then was) rejected this as a factor in *The King* v. *Eastern Terminal Elevator Co.*, [1925] S.C.R. 434, [1925] 3 D.L.R. 1.

[36] With competition law, for example, to allow an exemption to one province would put the others at a competitive disadvantage and possibly create a "race for the bottom". In the United States, see *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 56 S. Ct 855, 80 L. Ed. 1160 (1936). For discussion of this point and the *Carter* case, see R.L. Stern, The Commerce Clause and the National Economy, 1933-46 (1946), 59 Harv. L.R. 645, at pp. 664 *et seq.*

A similar problem arises in the context of agricultural products schemes where, to be effective, the scheme must cover the entire market. The object of these schemes is to stabilize the market and equalize producer returns. If local or extra-provincial transactions were excluded, both objects would be frustrated. Firstly, the market could not be stabilized. Grain is a fungible commodity. If demand is such that a certain supply level will support a particular price, that demand can be satisfied by either locally or extra-provincially produced grain. To the extent local grain feeds the demand, extra-provincial grain cannot, without resulting in an over-supply which drives prices down. Secondly, to equalize producer returns it must be a matter of indifference whether a particular producer's grain is sold in one place or another. His returns should be the same in any case. If grain sold locally was outside the scheme, a producer would sell part of his grain intraprovincially and still deliver to extra-provincial channels to the full extent of his quota. This would put the unfortunate producer whose local market was satisfied at the regulated price at a disadvantage. A cooperative scheme is now possible after *Reference re Agricultural Products Marketing Act and Two Other Acts, supra,* footnote 15.

[37] *Supra,* footnote 14.

[38] *Supra,* footnote 3.

in general within the context of a national scheme, are administered and enforced by a public agency and courts, could not be effectively passed by the provinces even acting in concert, and would likely create a "race for the bottom" if particular localities were exempted. The essentially civil provisions in part IV.1 are a valid exercise of the trade and commerce power.[38a] This runs contrary to the Supreme Court's holding on section 14 in *Reference re Dominion Trade and Industry Commission Act* that section 91(2) is excluded where purely local agreements are caught. Finally, it is likely that prohibition orders prior to conviction, the validity of which was left open in *Goodyear*, are permissible tools.[39]

Some constitutional questions remain. For example, dissolution and divestiture orders are important tools for restructuring concentrated industries. However, it is debatable whether these orders can be aimed at provincially incorporated companies. It is settled law since *John Deere Plow Co.* v. *Wharton*[40] that a provincial statute cannot sterilize federal companies. It is unclear how far this principle can be applied to the converse situation where a federal order is directed at a provincial company. On the one hand, dissolution is the greatest possible sterilization of a company. On the other, the paramountcy doctrine may intervene and even complete sterilization be permissible to achieve a valid federal objective. The same doubts with respect to dissolution apply to orders requiring provincial companies to dispose of all or substantially all their assets.[41]

On balance, I suspect that both of these remedies are valid. The central feature of competition policy is to ensure that industry maintains a structure which is conducive to competition. Where over-concentration develops, the regulatory authority responsible for overseeing the process must have effective remedial tools at its disposal. Dissolution and divestiture powers are fundamental to the effective administration of competition law.

The validity of the civil remedy in section 31.1 of the Combines

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[38a] See *BBM Bureau of Management* v. *Director of Investigation and Research*, (1984) 52 N.R. 137 (Fed. C.A.).

[39] The Federal Court's jurisdiction is probably secure, as is federal authority to create boards to administer and enforce the legislation. However, see P. Hogg and W. Grover, *loc. cit.*, footnote 11, at p. 210 for the view that the trade and commerce characterization does not settle the issue of Federal Court jurisdiction.

[40] *Supra*, footnote 15.

[41] For the converse situation, see *British Columbia Power Corp.* v. *Attorney-General for British Columbia* (1963), 44 W.W.R. 65 (B.C.S.C.), where Lett C.J.S.C. held that a Legislature could not strip a federal company of the ownership of its sole asset, the common shares of a provincial company. Laskin has said that *B.C. Power* makes federal companies "the pampered darling of Canadian constitutional law": see Laskin, Canadian Constitutional Law, (1975; 4th ed. rev.). *B.C. Power* is, of course, highly questionable in light of the Supreme Court of Canada's decision in *Canadian Indemnity Co.* v. *Attorney-General of British Columbia*, [1977] 2 S.C.R. 504, (1976), 73 D.L.R. (3d) 111, where a provincial expropriation of the entire insurance business of a number of federal companies was upheld.

Investigation Act[42] is also in serious doubt. As with section 7(e) of the Trade Marks Act[43] in *Vapor Canada*, it creates a civil tort enforceable by private action. Any person who has suffered loss or damage as a result of a violation of part V, or the failure of a person to comply with a Restrictive Trade Practices Commission order pursuant to part IV.1, can sue for recovery. Section 31.1 is neither connected to nor administered by a regulatory agency (except that a Commission order is a condition precedent to a part IV.1 suit) nor *necessarily* incidental to the regulatory scheme. It is clearly severable from the rest of the Act.

That is not to say that there are not arguments which may be made in support of section 31.1. In contrast to section 7(e), which was altogether divorced from trademarks, section 31.1 is part of an overall legislative and regulatory scheme. The provision has been upheld by one lower court[44] and its validity has been carefully left open by another.[45] Some support may also be garnered for section 31.1 in the criminal aspect of part V. Judson J., speaking for the Supreme Court of Canada in *Direct Lumber Co. Ltd.* v. *Western Plywood Co. Ltd.*,[46] doubted "whether any constitutional principle is raised when dominion criminal legislation is silent upon the question whether a civil action arises upon breach of its terms". As Professor Hogg points out,[47] one would expect that if there is no constitutional impediment to implying a civil right of action in a federal criminal statute, there should be none if Parliament expressly provides one. The counter-argument is that criminal law is enforced by public authorities, not private parties, and there is no rational or functional relationship between the section 31.1 damage action and criminal sanctions.[48] That is particularly so here where, even with respect to part V damages, a conviction is not a condition precedent to suit. Section 31.1 is in that respect clearly distinguishable from "civil" remedies cases such as *R.* v. *Zelensky*[49] and *Re Torek and the Queen*,[50] involving compensation and restitution after conviction.

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[42] *Supra*, footnote 3.

[43] *Supra*, footnote 31.

[44] *Henuset Bros.* v. *Syncrude Canada Ltd.* (1980), 114 D.L.R. (3d) 300, [1980] 6 W.W.R. 218 (Alta Q.B.).

[45] *Seiko Time Canada Ltd.* v. *Consumers Distributing Co. Ltd.* (1981), 128 D.L.R. (3d) 767, 34 O.R. (2d) 481 (Ont. C.A.), currently on appeal to the Supreme Court of Canada.

[46] [1962] S.C.R. 646, at p. 650, (1962), 35 D.L.R. (2d) 1, at p. 4, (1962), 39 W.W.R. 43, at p. 47.

[47] *Loc. cit.*, footnote 30, at p. 364.

[48] See *Rocois Construction Inc.* v. *Quebec Ready Mix Inc.* (1979), 105 D.L.R. (3d) 15 (Fed. T.D.), where Marceau J. took the opposite view from that in *Henuset*, *supra*, footnote 44, and struck down s. 31.1. *Rocois* is weakened by the fact that Marceau J. characterized the Combines Investigation Act *supra*, footnote 3, as exclusively criminal law, a shaky position after *Vapor Canada* and *Canadian National Transportation*.

[49] [1978] 2 S.C.R. 940, (1978), 86 D.L.R. (3d) 179.

[50] (1974), 44 D.L.R. (3d) 416, 2 O.R. (2d) 228 (Ont. H.C.).

On balance, section 31.1 is probably *ultra vires*. The Supreme Court of Canada will have an opportunity to decide the issue in a case which is currently before it, *Seiko Time Canada* v. *Consumers Distributing Co.*,[51] although the case may well be decided on non-constitutional grounds.

As a final matter, there are some tantalizing remarks in the majority judgment in *Kripps Pharmacy* which suggest that section 9(1) of the Food and Drugs Act[52] can be supported by the trade and commerce power. If so, the correctness on the trade and commerce point of the Supreme Court's earlier decision in *Labatt Breweries of Canada Limited* v. *Attorney-General for Canada*,[53] in which sections 6 and 25(1)(c) of the Act were struck down, is put into question. Section 9(1) reads as follows:

> No person shall label, package, treat, process, sell or advertise any drug in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety.

In *Kripps Pharmacy* Laskin C.J.C. dealt with the constitutionality of section 9(1) in brief reasons as follows:[54]

> This Court was concerned in *Labatt Breweries of Can. Ltd* v. *A.G. Can.*, [1980] 1 S.C.R. 914, 9 B.L.R. 181, 30 N.R. 496, with a proceeding relating to ss. 6 and 25 [am. 1976-77, c. 28, s. 16(2)] and the regulations thereunder of this Act. While these sections and the provisions herein involved are both found in Pt. II of the Act, very different issues arise in this appeal.
>
> *An examination of the various provisions of the Food and Drugs Act shows that it goes beyond mere prohibition to bring it solely within s. 91(27) but that it also involves a prescription of standards, including labelling and packaging as well as control of manufacture. The ramifications of the legislation, encompassing food, drugs, cosmetics and devices and the emphasis on marketing standards seems to me to subjoin a trade and commerce aspect* beyond mere criminal law alone. There appear to be three categories of provisions in the *Food and Drugs Act*. Those that are in s. 8 are aimed at protecting the physical health and safety of the public. *Those that are in s. 9 are aimed at marketing* and those dealing with controlled drugs in Pt. III of the Act are aimed at protecting the moral health of the public. One may properly characterize the first and third categories as falling under the criminal law power but the second category certainly invites the application of the trade and commerce power.
>
> However, it is unnecessary to pursue this issue and it has been well understood over many years that protection of food and other products against adulteration and to enforce standards of purity are properly assigned to criminal law.

Laskin C.J.C. did not therefore pursue the issue. Moreover, if *Labatts* is correct it is possible to characterize the legislation dealt with in *Kripps Pharmacy* as detailed regulation of the pharmaceutical industry; indeed, in

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[51] *Supra*, footnote 45.

[52] *Supra*, footnote 4.

[53] *Supra*, footnote 15. For further comment on *Labatts*, see J.C. MacPherson, Developments in Constitutional Law: The 1979-80 Term (1981), 2 Supreme Court L. Rev. 49, at pp. 64-81; H. Kushner, *Dominion Stores and Labatt Breweries*: Signals for a Return to a Theory of Provincial Rights (1981), 19 O.H.L.J. 118.

[54] *Supra*, footnote 2, at pp. 289 (N.R.), 581 (W.W.R.) (Emphasis supplied).

his dissent in the latter case, Dickson J. accepted *Labatts* as correctly decided, and characterized the *Kripps Pharmacy* legislation that way. It is questionable whether Laskin C.J.C. was correct in saying that "very different issues" arise in section 9(1) from those considered in *Labatts*, at least with respect to the trade and commerce characterization. It is true that section 9(1) deals with standards, including advertising, labelling and packaging, but in doing so it reaches down to the level of manufacturing and processing in the same way as the legislation considered in *Labatts*. The Chief Justice's remarks thus provide the opportunity for a reconsideration of the *Labatts* decision.

In *Labatts*, the Governor-General in Council was empowered by sections 6 and 25(1)(c) of the Food and Drugs Act[55] to set national standards of composition and quality of, *inter alia*, light beer. The regulations prohibited any person from marketing beer with more than 2.5% alcoholic content as light beer. Labatt Breweries marketed a brew composed of 4% alcohol under the label "Special Lite". Estey J., speaking for a majority of the Supreme Court, struck down the legislation as detailed regulation of particular industries by means of a series of codes.

The *Labatts* decision is problematic. First, the purpose of the legislation was not to create detailed codes *per se*, but rather to set national standards of quality. The *Kripps Pharmacy* majority appears to accept this as a legitimate purpose. In *Labatts*, the majority avoided considering the validity of Parliament's setting national standards by characterizing the legislation as regulation of particular industries. This weakness leaves *Labatts* open to question.

Second, the *Labatts* legislation was at the very least analogous to trademarks legislation, which is clearly supportable on the second branch of *Parsons*.[56] Trademarks allow product differentiation between similar products. Surely if Parliament can provide for product differentiation between similar goods, as with trademarks, it can set standards of composition and quality to require that similar goods be similar. Beer in Newfoundland should be the same thing as beer in British Columbia. The majority in *Labatts* struck down the national product standards regulation because it formed a series of detailed codes. Why should that matter? The "codes" were insuring uniformity of generic products, not regulating industries as such. The thrust of the regulation, as with that in *Kripps Pharmacy*, was to control the composition and quality of goods on a national level, not to trench on local aspects of trade such as production, labour or contracts of sale.

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[55] *Supra*, footnote 4.

[56] See *Reference re Dominion Trade and Industry Commission Act, supra*, footnote 15.

Third, Parliament was not purporting to regulate comprehensively the beer industry as it did with the insurance industry in *Insurance Reference*.[57] Anyone who wished to sell beer could do so. Parliament simply required that what was marketed as light beer had to be light beer.

In my view, Laskin C.J.C.'s comments in *Kripps Pharmacy* about section 9(1) of the Food and Drugs Act[58] can be applied to the regulation in *Labatts*. They may be a signal that the Supreme Court is ready to reconsider that decision; at the very least, they provide the opportunity for a reconsideration to be undertaken.

Conclusion

Canadian National Transportation and *Kripps Pharmacy* are important for several reasons. First, they firmly establish Parliament's authority to enforce all of its legislation. Second, Dickson J.'s judgment in *Canadian National Transportation*, when read with the judgment in *Vapor Canada*, is a strong source for federal jurisdiction on which to base competition legislation on trade and commerce grounds. Finally, Laskin C.J.C.'s comments on section 9 of the Food and Drugs Act[59] as a valid exercise of the federal trade and commerce power may presage a reconsideration of *Labatts*. It is to be hoped that future decisions will fulfil the promise of these two cases.

NEIL FINKELSTEIN*

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MEDICINE AND THE LAW—WITHHOLDING PAEDIATRIC MEDICAL CARE.—The subject of withholding surgical and comparable medical treatment from defective newborn infants and older children has become an increasing concern of the law in a number of jurisdictions. In mid-April 1982, for instance, in the "Baby Doe" case[1] the Indiana Supreme Court allowed parents to withhold food and corrective surgery from their week-old child

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[57] See *Insurance Reference, supra*, footnote 15.

[58] *Supra*, footnote 4.

[59] *Ibid.*

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[1] The Indiana Supreme Court does not make available the records of cases of this nature; see however R. S. Shapiro, Medical Treatment of Defective Newborns: An Answer to the 'Baby Doe' Dilemma (1982), 20 Harvard J. Legislation 137. The medical facts of the case are given by John E. Pless, The Study of Baby Doe (Letter) (1983), 309 New England J. Med. 664.

affected by Down's Syndrome and a deformed esophagus. This generated such an outcry of objection that the United States Department of Health and Human Services wrote to all federally assisted hospitals threatening termination of funding of those discriminating against the handicapped by withholding nourishment or treatment.[2] In England in August 1981, the Court of Appeal reversed a similar judgment of the Family Division and ordered an operation to correct an intestinal blockage in a Down's Syndrome newborn child.[3] In November of that year, however, a Crown Court acquitted a physician of attempted murder when he treated a Down's Syndrome child with stomach blockage and associated handicaps by administering a drug which suppressed appetite and breathing.[4] The judge observed to the jury that the defendant physician thought it "kinder, more humane and more in keeping with informed medical opinion to allow the child to die".[5]

The Canadian position on withholding treatment from defective newborns has recently been studied regarding both practice[6] and law.[7] The March 1983 decisions of the British Columbia Provincial Court and Supreme Court in the cases concerning Stephen Dawson, then aged just short of seven years, presented more recent materials, which invoked United States and English jurisprudence and developed Canadian case-law in a manner worthy of attention.

The power of legally competent individuals to decline surgical and comparable medical means of postponing their own deaths may be recognized.[8] Parents do not necessarily possess the autonomy regarding their children's lives which they enjoy regarding their own, since they are bound by legal duties concerning their children under both the Criminal Code[9] and provincial legislation on child welfare and protection. Further, parental preferences may at times appear at variance with children's

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[2] The United States District Court for the District of Columbia has declared that the Federal Regulation addressed to some 6,400 hospitals receiving federal funds, requiring them to post permanently in each delivery ward, maternity ward, paediatric ward, and nursery a notice against failure to feed and care for *any* handicapped infants, is arbitrary, capricious and invalid; see *American Academy of Pediatrics et al.* v. *Heckler (Secretary, Department of Health and Human Services)*, 561 F. Supp. 395 (D.C., D.C., 1983). Two months after this decision the Secretary published a new proposed rule; see 48 Federal Register 30846 (July 5, 1983).

[3] In *re B. (A Minor) (Wardship Medical Treatment)*, [1981] 1 W.L.R. 1421 (C.A.).

[4] *R.* v. *Arthur*, The Times, November 6, 1981 (Leicester Crown Court).

[5] Globe and Mail, Toronto, November 6, 1981.

[6] J.E. Magnet, Withholding Treatment From Defective Newborns: A Description of Canadian Practices (1980), 4 Legal Medical Q.271.

[7] J.E. Magnet, Withholding Treatment from Defective Newborns: Legal Aspects (1982), 42 Revue du Barreau 187.

[8] See e.g. B.M. Dickens, The Right to Natural Death (1981), 26 McGill L.J. 847.

[9] R.S.C. 1970, c. C-34; see s. 197.

interests as assessed by disinterested observers, so that an adverse parental interest may be perceived which renders parents suspect decision-makers regarding their children's survival and welfare.[10]

The legal dilemma has a largely technological origin. Premature and disabled children who until recent times would have died soon after birth may now be viable because of improved neonatal intensive care. Advances in paediatric pharmacology, transfusion techniques, microsurgery and, for instance, radiotherapy, together with high levels of interdisciplinary integration of specialist services in cardiology, neurology and, for instance, urology, permit the survival of children once irresistibly doomed. A number of such children survive, however, with gross neurological and physical handicaps, to become a sizeable economic and perhaps emotional charge upon their families, and upon the communities funding the medical and social services upon which the quality of their future lives will depend. Although courts strive to avoid quality of life considerations in determining parental duties towards their children, availability of costly neonatal intensive care which may contribute to future quality of life plays an important role in assessment of the duty to provide life-preserving treatment.

Ordinary and Extraordinary Care

The discomfort felt in expressing children's survival prospects by reference to financial considerations may be mitigated by recognition that the earliest ethical commentators upon the distinction between ordinary medical care, which is mandatory, and extraordinary care, which is discretionary, acknowledged that an important element in the distinction centres upon resources.[11] Modern ethical discourse distinguishes between proportionate and disapproportionate care, which retains a cost-effectiveness perspective; cost is not limited, however, to the purely economic costs of devoting scarce human and material resources to a child's survival.

The 1976 *Quinlan* case[12] has been most influential in incorporating the ordinary/extraordinary care distinction into relevant jurisprudence.[13] The underlying principle is that patients have a legal right to expect ordinary care, and arguably may have a duty to accept it,[14] but that

[10] See generally B.M. Dickens, The Modern Function and Limits of Parental Rights (1981), 97 Law Quarterly Rev. 462.

[11] See E.F. Healy, S.J., Medical Ethics (1956), p. 67; Gerald Kelly, S.J., Medico-Moral Problems (1958), p. 129; Paul Ramsay, The Patient as Person (1970), pp. 118 *et seq.*

[12] *In the Matter of Karen Quinlan* 335 A. 2d 647 (N.J.S.C., 1976).

[13] The distinction is traced to a 1957 address by Pope Puis XII; see Dickens, *loc. cit.*, footnote 8, at p. 858.

[14] Although United States jurisdictions are increasingly prepared to read the fundamental right to privacy to permit even non-terminal patients to decline life-preserving care, and a similar view has been favoured by the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, in its 1983 Study: Deciding to Forego Life-Sustaining Treatment.

administration of extraordinary care is legally discretionary on the part of patients, legal guardians of incompetent patients, and physicians. Further, since there is no legal duty to initiate extraordinary care, there is no duty to maintain it if such care is undertaken. The *Quinlan* court noted that:[15]

> . . . physicians distinguish between curing the ill and comforting and easing the dying; that they refuse to treat the curable as if they were dying or ought to die, and that they have sometimes refused to treat the hopeless and dying as if they were curable. In this sense . . . many of them have refused to inflict an undesired prolongation of the process of dying on a patient in irreversible condition when it is clear that such 'therapy' offers neither human nor humane benefit. We think these attitudes represent a balanced implementation of a profoundly realistic perspective on the meaning of life and death and that they respect the whole Judeo-Christian tradition of regard for human life . . .
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> Yet this balance, we feel, is particularly difficult to perceive and apply in the context of the development by advanced technology of sophisticated and artificial life-sustaining devices. For those possibly curable, such devices are of great value, and, as ordinary medical procedures, are essential. Consequently . . . they are necessary because of the ethic of medical practice. But in light of the situation in the present case (while the record here is somewhat hazy in distinguishing between 'ordinary' and 'extraordinary' measures), one would have to think that the use of the same respirator or like support could be considered 'ordinary' in the context of the possibly curable patient but 'extraordinary' in the context of the forced sustaining . . . of an irreversibly doomed patient.

The *Quinlan* decision was discussed in the first *Stephen Dawson* case.[16] The Provincial Court judge had to determine whether replacing a blocked shunt draining fluid from the brain of the hydrocephalic and severely handicapped boy was "necessary medical attention", which there was a parental duty to provide under section 197 of the Criminal Code[17] and under the provincial Family and Child Service Act,[18] or whether the proposed operation was an extraordinary surgical intervention. The judge found as facts that the shunt was a life support system, and that in the circumstances of the case, the proposed operation was an extraordinary surgical intervention, which the parents could legitimately decline.[19]

The Provincial Court judgment faithfully reflected the significance the *Quinlan* decision attached to the patient's clinical prognosis; the status of a given treatment as ordinary or extraordinary is determined not only by its inherent characteristics, but also by the anticipated outcome of applying the treatment to a particular individual patient. Provincial Court Judge Bryne found the young boy to be in a vegetative state, with no contact with his surroundings, no communication with the outside world, and no pros-

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[15] *Supra*, footnote 12, at pp. 667-668.

[16] *Re S.D.*, [1983] 3 W.W.R. 597, (1983), 42 B.C.L.R. 153 (B.C. Prov. Ct.).

[17] *Supra*, footnote 9; s. 197(1)(a) obliges parents to provide "necessaries of life" for children under the age of sixteen years.

[18] S.B.C. 1980, c. 11; s. 1 of the Act renders a child in need of protection if the child is, *inter alia*, "deprived of necessary medical attention".

[19] *Supra*, footnote 16, at pp. 617-618 (W.W.R.), 172 (B.C.L.R.).

pect of relief of these conditions. On appeal in the Supreme Court of British Columbia,[20] McKenzie J. may have disfavoured but did not expressly reject the Provincial Court's conclusions. He invoked the Supreme Court's *parens patriae* power[21] to conduct a hearing *de novo*. Accordingly, evidence was taken afresh, and the record and fact findings below were not addressed.

Evidence in the Supreme Court led the judge to quite a different view of the facts than had prevailed in Provincial Court,[22] and a considerably more optimistic clinical prognosis appeared if the shunt were to be replaced. An additional factor given emphasis in the Supreme Court, however, was presented in the affidavit of the distinguished paediatrician Dr. Sydney Segal, to the effect that "so long as this surgery is delayed Stephen Dawson's condition will continue to deteriorate and he may not die, surviving with severe distress".[23] This was the factual novelty the case added to existing Anglo-American jurisprudence, and it clearly influenced the judge. McKenzie J. observed in the penultimate paragraph of his judgment that:[24]

> There is not a simple choice here of allowing the child to live or die according to whether the shunt is implanted or not. There looms the awful possibility that without the shunt the child will endure in a state of progressing disability and pain. It is too simplistic to say that the child should be allowed to die in peace.

Relieving the child of the suffering of pain throughout a continuing life may have been a significant element in the conclusion that replacing the shunt was necessary medical care. It appeared from the preponderance of evidence of a favourable prognosis upon treatment, however, that in the circumstances of the case the procedure would have been ordinary care upon this basis alone.

It must be remembered that, although the Supreme Court judgment reversed the Provincial Court's decision, the higher court did not hear the case as an appeal, and did not reverse the findings of fact or conclusions of law arrived at the by the Provincial Court judge. Further, since the Supreme Court found different facts, it did not consider the law in light of the facts

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[20] *Re Superintendent of Family and Child Service and Dawson et al.* (1983), 145 D.L.R. (3d) 610, sub. nom. *Re S.D.*, [1983] 3 W.W.R. 618, 42 B.C.L.R. 173 (B.C.S.C.).

[21] The Family and Child Service Act, *supra*, footnote 18, provides in s. 21: "Nothing in this Act limits the inherent jurisdiction of the Crown, through the Supreme Court, over infants, as *parens patriae*, and the Supreme Court may rescind a permanent order where it is satisfied that to do so is conducive to a child's best interest and welfare".

[22] The lawyer appearing for the Dawson parents in Provincial Court was unable to appear in the Supreme Court, due to illness. The judge declined an adjournment, because of the urgency of the circumstances, and she was replaced for argument only by other counsel. Whether the lawyer's inability to cross-examine certain petitioners' witnesses affected the impact of their presentations remains a matter for speculation.

[23] *Supra*, footnote 20, at pp. 619 (D.L.R.), 628 (W.W.R.), 182 (B.C.L.R.).

[24] *Ibid.*, at pp. 623 (D.L.R.), 633 (W.W.R.), 187 (B.C.L.R.).

found below. Indeed, it may be argued that the two decisions are not necessarily incompatible, and that both may fit into a consistent jurisprudential framework supported by previous decisions.

The Supreme Court in *Dawson* made no mention of the *Quinlan* decision, but cited almost all of the judgment of Templeman L.J. in the English case, *In re B*.[25] This involved a Down's Syndrome child who, upon surgical removal of intestinal blockage, could be expected to live for twenty or thirty years. This constituted a favourable prognosis, since Down's Syndrome in itself is not a lethal defect. The child was apparently not affected by additional genetically related handicaps, although there was evidence that if she had the operation there was a possibility that she would suffer heart trouble as a result and that she might die within two or three months.[26] Nevertheless, the Court of Appeal found a favourable prognosis upon surgical treatment, and accordingly found such treatment to be ordinary care and mandatory. Templeman L.J. observed that "it devolves on this court in this particular instance to decide whether the life of this child is demonstrably going to be so awful that in effect the child must be 'condemned' to die, or whether the life of this child is still so imponderable that it would be wrong for her to be condemned to die".[27] The Court of Appeal favoured likely continuation of the child's life, but noted that there "may be cases . . . of severe proved damage where the future is so certain and where the life of the child is so bound to be full of pain and suffering that the court might be driven to a different conclusion".[28]

McKenzie J. in the Supreme Court of British Columbia in *Dawson* repeated the test of tolerating a child's death without treatment where "the future is so certain and where the life of the child is so bound to be full of pain and suffering",[29] and rejected its applicability on the evidence. It does not follow that it would have been similarly rejected, however, upon the evidence found in the Provincial Court. The judge in that court found that Stephen Dawson "has no cognitive awareness and no means of communicating with others",[30] and found the facts "clearly distinguishable"[31] from those present in the English case *In re B*. Of assistance were a number

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[25] *Supra*, footnote 3.

[26] Per Templeman L.J., *ibid.*, at p. 1423.

[27] *Ibid.*, at p. 1424.

[28] *Ibid.* The unsuccessful prosecution in *R.* v. *Arthur, supra*, footnote 4, may have been such a case, since the Crown reduced the charge from murder to attempted murder when its forensic expert witness, the Home Office consultant pathologist, changed his evidence at trial to accept that the child at birth was doomed to inevitable and imminent death; see The Times, November 5, 1981.

[29] *Supra*, footnote 20, at pp. 623 (D.L.R.), 633 (W.W.R.), 187 (B.C.L.R.).

[30] *Supra*, footnote 16, at pp. 611 (W.W.R.), 166 (B.C.L.R.).

[31] *Ibid.*, at pp. 613 (W.W.R.), 169 (B.C.L.R.).

of decisions of superior courts in the United States, and most prominently the decision in *Quinlan*.

This was cited at some length in the Provincial Court judgment, including the following observations by Hughes C.J. of the New Jersey Superior Court:[32]

> The evidence in this case convinces us that the focal point of decision should be the prognosis as to the reasonable possibility of return to cognitive and sapient life, as distinguished from the forced continuance of that biological vegetative existence to which Karen [Quinlan] seems to be doomed.

Having found a vegetative state and lack of cognitive awareness in Stephen Dawson, the judge felt able to equate him to Karen Quinlan, in the sense that he would never achieve the condition to which she would never achieve, and decided his case comparably in requiring maintenance by comfort measures only and rejecting aggressive or heroic means of intervention. These factual findings are clearly contentious, but if they are accepted as prevailing in a particular case, the legal conclusions drawn from them may also be accepted.

McKenzie J. followed Templeman L.J. in making the certainty of a life bound to be full of pain and suffering a condition for non-treatment by aggressive means, but this begs an important clinical question of whether the patient's neurological system is sufficiently organized to feel pain and to experience suffering. The *Quinlan* approach may be preferred in that it centres initially upon the neurological system itself, and seeks a present or prospective capacity to experience "cognitive and sapient life", which may consist in a sense of self and an awareness of others. The test may not require means to communicate with others, but only the lesser capacity to perceive or sense the effect of others. The approach reflects growing concentration upon the brain as the centre of human personality and experience, expressed in "brain death" criteria for termination of human life,[33] and "brain life" criteria to determine the commencement of human personhood and prenatal rights to protection.[34] Only when a capacity or potential to experience human life in this neurological sense has been shown does the issue arise of whether such life will be afflicted by unrelievable pain and suffering.

Accordingly, it may appear that when a child has no potential for cognitive, sapient existence but will persist in only a vegetative state, and when a child has sufficient neurological function to be conscious of pain

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[32] *Supra*, footnote 12, at p. 669.

[33] See Law Reform Commission of Canada, Working Paper 23, Criteria For the Determination of Death (1979), and the Report of the United States President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Defining Death (1981).

[34] See K. Martyn, Technological Advances and *Roe* v. *Wade*: The Need to Rethink Abortion Law (1982), 29 UCLA Law Rev. 1194, at pp. 1207 *et seq*.

and suffering and has the likelihood of experiencing little more in life than such chronic affliction, the employment of what are variously described as artificial, mechanical, invasive, aggressive or heroic means necessary to sustain life may be extraordinary care, which there is no legal duty to undertake or afford. Comfort or palliative measures such as warmth, sanitary care and in most cases nutrition will set the limits of the ordinary treatment which there is a duty to provide, occupying the services more of nursing than of medicine. Nutrition may be contraindicated for a child with intestinal blockage in whom surgery cannot be performed because of organic abnormalities or, for instance, intolerance to anesthetic, even though intravenous feeding may offer a tolerable short-term route of nutrition. Similarly, while antibiotics may normally be ordinary treatment, they may be extraordinary where their use, for instance to relieve pneumonia, will merely set the scene for an agonizing or vegetative death from another cause shortly thereafter.

Where without treatment a child may continue to live in pain which treatment may relieve, such treatment is the ordinary legal entitlement of the child which a parent must provide. Further, more positively, where with treatment a child may survive to be conscious of a life of human experience, even with handicaps and dependence upon others for the discharge of basic functions and the prospect of comfort in life, treatment may be ordinary and required. Where treatment would be ordinary for a child normal except in regard to a particular condition for which treatment is indicated, such treatment may not be withheld solely on account of handicap. In particular, when surgical removal of intestinal blockage would be ordinary care of a normal child, it cannot be withheld solely because a given child is affected by Down's Syndrome. If the child suffers additional multiple handicaps, however, surgery may be contra-indicated and not required. Indeed in the *Dawson* case, the Provincial Court judge determined that, in view of a strongly adverse prognosis, undertaking surgical replacement of a blocked shunt would constitute cruel and unusual treatment, in violation of section 12 of the Canadian Charter of Rights and Freedoms.[35]

Determination of ordinary care is limited in principle by reference to medical services to which there is reasonable access. This may exclude services at the pioneering edge of research, such as artificial hearts and newly developed drugs, and services which are particularly costly or dependent upon skills of scarcely available personnel. Historically, distinctions existed between duties to furnish services accessible to the wealthy, the middle classes and poor people dependent upon charitable health care, and between care expected to be provided by residents of areas possessing good hospitals and health services and by residents of less

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[35] *Supra*, footnote 16, at pp. 618 (W.W.R.), 172 (B.C.L.R.).

well-served rural and remote areas. Such distinctions may to a degree survive and, with increasingly constrained public health budgets and physicians charging outside or above the levels covered by provincial health insurance plans, may revive in significance. A uniform reference base for determining the scope of ordinary care may be found, however, in health services routinely supplied and funded under provincial health insurance plans, and in levels and types of standard medical services provincial health administrations are able to make available. Public resources in Canadian provinces may afford a more reliable guide to ordinary care than individual willingness or ability to expend private means.

The duty to provide ordinary as opposed to extraordinary care may relate to Criminal Code[36] duties to provide medical care binding not only parents under section 197, but also physicians and others under section 199, and particularly under the criminal negligence provision of section 202. Section 199 renders one who "undertakes to do an act" legally bound to do it if omission is or may be dangerous to life. In the absence of an express undertaking to provide extraordinary care, the assumption of a health care responsibility may be confined to undertaking provision of only ordinary care. Similarly, while criminal negligence includes omitting to do anything one has a legal duty (section 202(2)) to do, such legal duty may be limited to the duty to provide only ordinary medical care. Accordingly, no homicide liability would arise under section 205(5)(b) where death results when extraordinary care has been withheld.

The Paediatric Dimension

The reasoning above is not specific to paediatric care. It may be derived from cases such as *Quinlan* which involved adults, and may be applied by autonomous patients and regarding dependent patients such as the elderly and those afflicted after achieving the personality development of normal adolescence. At issue, however, is how the principles reviewed above are to be applied in the context of neonatal and paediatric care. Crucial decisions determining individual cases may be made by provincial health ministries, by hospital medical committees and administrators, by individual physicians, by parents and by courts. The proper role and the interaction of such decision-making agencies merit attention.

At the level of provincial ministries, it may be determined that a particular medical means, device or strategy is too costly to provide in routine cases, or of unproven or discredited effect, and that its provision will not be funded or otherwise facilitated. This may render it extraordinary care *per se*, which a parent may seek if it is otherwise legitimate[37] through

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[36] *Supra*, footnote 9.

[37] Unproven drug or other "therapies" may raise problems of legitimacy; see M.V. Ainsworth and T. Wall, Laetrile: May the State Intervene on Behalf of a Minor (1982), 30 U. of Kansas L. Rev. 409, and *Custody of a Minor* 379 N.E. 2d 1053 (Mass. Sup. J. Ct., 1978).

private expenditures in private or public facilities, or for instance in facilities applying research or comparable funding. Further, individual hospitals may implement treatment policies made by collaboration of medical staff and administrators, drawing upon institutional experience and principles of resource allocation to provide particular neonatal services by predetermined criteria. It may be decided, for instance, to offer only comfort or palliative measures including oxygen but no surgical interventions or intensive care to prematurely born children weighing under, say, 600 grams. Subject to constitutional obligations of non-discrimination on grounds of age or mental or physical disability,[38] such a policy may supersede an individual physician's clinical judgment on appropriate neonatal management of a particular child by governing available resources.

Attending physicians themselves may exercise judgment according to the child's clinical prognosis, and conclude that, because in the child's condition death is irresistible and imminent[39] or because an identified treatment would not assist functioning, a particular form of care should not be given. A parent may seek a second opinion, of course, from another physician or, where circumstances permit, from another facility. Once clinical assessment determines what treatment is indicated, however, anything more is extraordinary care which a parent cannot command.

The key question in non-treatment cases such as *In re B.* and *Dawson*, however, is how to resolve issues raised when parents wish to decline medical care which attending physicians assess to be indicated and ordinary for their children. The inclination to defer to parental preference is very powerful indeed, conditioned perhaps by the realization that parents more than others will have to live with the consequences of decisions in their homes, memories and consciences. In the case *In re B.*, for instance, the surgeon scheduled to operate on the child spoke to the parents, who stated that in view of the fact that the child was mongoloid they did not wish to have the operation performed. The surgeon observed in court:[40]

> I decided therefore to respect the wishes of the parents and not to perform the operation, a decision which would, I believe (after about 20 years in the medical profession), be taken by the great majority of surgeons faced with a similar situation.

Similarly in the *Dawson* case, McKenzie J. observed of the neurosurgeon

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[38] Section 15 of the Charter of Rights and Freedoms, prohibiting such discrimination, comes into force in mid-April, 1985.

[39] The Beth Israel Hospital in Boston has been influential in defining the condition of imminent death when in the ordinary course of events death probably will occur within a period not exceeding two weeks; see M.T. Rabkin, G. Gillerman and N.R. Rice, Orders Not to Resuscitate (1976), 295 New England J. Medicine 364, at p. 365.

[40] *Supra*, footnote 3, at p. 1423.

originally scheduled to replace the blocked shunt before the parents withheld consent that:[41]

> On medical grounds he thinks the surgery should be done but on the second level, taking in the moral and the ethical considerations raised by the parents' attitude, he thinks that surgery would be 'an extraordinary surgical intervention'. He thinks there is no hope for improvement after surgery—that is, he [the boy] will live but will remain in his preoperative state.

Where a physician contests parental refusal of care, taking a more sanguine view of a child's future than a parent accepts, the option clearly exists of taking the matter to a provincial officer such as British Columbia's Superintendent of Family and Child Service, or a quasi-public officer such as the director of a local children's aid society. That officer may initiate care or protection proceedings in a provincial or family court, in order to relocate the child under guardianship which will result in consent being given to treatment. Alternatives may exist to recourse to such officers and courts, although physicians may be reluctant to invoke them. In emergency, provincial hospital acts or regulations permit medical treatment to be given in order to save life, a limb or a vital organ. Such treatment may be regarded either as legitimate nonconsensual care, or as based upon implied consent, although the latter explanation may appear specious when parents of a dependent child expressly deny consent.

Further, section 45 of the Criminal Code[42] provides:

> Every one is protected from criminal responsibility for performing a surgical operation upon any person for the benefit of that person if
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> (a) the operation is performed with reasonable care and skill, and
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> (b) it is reasonable to perform the operation, having regard to the state of health of the person at the time the operation is performed and to all the circumstances of the case.

It may be questioned whether this would justify imposing treatment over a competent patient's objection,[43] but it may cover necessary medical treatment parents are mandated to provide under section 197 of the Code and the requirements of provincial child protection laws. Section 45 may be limited to a person "performing a surgical operation", but comparable protection may be afforded to others under the common law defence of necessity to save human life accommodated by section 7(3) of the Code.[44]

The same necessity justification may regularize what otherwise would be civil battery at common law. Operating upon a child without parental consent is not an assault or battery of the parents, but may in principle be a wrong, actionable *per se*, against the child. Whether a rescuer would bear

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[41] *Supra*, footnote 20, at pp. 615 (D.L.R.), 623 (W.W.R.), 178 (B.C.L.R.).

[42] *Supra*, footnote 9.

[43] B. Starkman, A Defence to Criminal Responsibility for Performing Surgical Operations: section 45 of the Criminal Code (1981), 26 McGill L.J. 1948.

[44] *Morgentaler* v. *The Queen*, [1976] 1 S.C.R. 616, (1975), 53 D.L.R. (3d) 161.

liability for battery of the individual at risk whose life or health the rescuer saves or reasonably attempts to save by rendering ordinary medical care may, however, be doubted. A legal presumption of the child's implied consent to life-preserving care may reinforce a medical necessity justification, by application of the historic doctrine *volenti non fit injuria*.[45] Further, if more than nominal damages were sought, the question would be raised of what compensation might be due to a child caused to live which otherwise would have died. Compensatory damages are intended, so far as money is able, to put the plaintiff in the position in which the plaintiff would have been had the alleged wrong not occurred, but Anglo-American courts almost uniformly[46] reject a child's so-called "wrongful life" action. As was observed in *Gleitman* v. *Cosgrove*:[47]

> The infant plaintiff would have us measure the difference between his life with defects against the utter void of nonexistence, but it is impossible to make such a determination. This Court cannot weigh the value of life with impairments against the nonexistence of life itself. . . . [T]he infant plaintiff makes it logically impossible for a court to measure his alleged damages because of the impossibility of making the comparison required by compensatory remedies.

Thus, treating a child to save its life or health without parental consent and over parental objection may be a wrong against neither parents nor child. Only if such treatment were clearly extraordinary care which parents could legitimately decline would it be legally questionable. Deliberate or negligent imposition of a life of unrelievable pain might attract exemplary if not compensatory damages, and sanctions for unconstitutional infliction of cruel and unusual treatment might be applicable.[48]

If no offence results from rendering ordinary medical care to a needy child without parental consent, and if indeed the parents may commit an offence against the Criminal Code or provincial child protection and welfare legislation by declining to provide or consent to such care, the question arises of what role parental consent serves.

Clearly, parental consent may legitimate the speculative invasiveness of extraordinary treatment. Beyond that, courts reflect a general disposition of physicians to claim to respect the decision-making function of

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[45] Recognition of a necessity defence raises the question of whether there is a duty to act in the face of the child's need, even over parental opposition. It may be submitted, however, that necessity is a shield to physicians, but not a sword to be used against them; see Glanville Williams, Down's Syndrome and the Doctor's Responsibility (1981), 131 New Law J. 1040.

[46] An exceptional case is *Curlender* v. *Bio-Science Laboratories* 106 Cal. App. 3d 811 (Ct. App., 1980); see also, however *Turpin* v. *Sortini* 643 P. 2d 954 (Ca. S.C., 1982), and *Harbeson* v. *Parke-Davis, Inc.* 656 P. 2d 483 (Wash. S.C., 1983).

[47] 227 A. 2d 689, at p. 692 (N.J.S.C., 1967) recently followed in *McKay* v. *Essex Area Health Authority*, [1982] Q.B. 1166, [1982] 2 All E.R. 771 (C.A.). For contradictory argument, see A.M. Capron, The Continuing Wrong of 'wrongful life', in A. Milonsky and G.J. Annas, Genetics and the Law II (1980), p. 81.

[48] Under s. 24 of the Charter of Rights and Freedoms, Constitution Act, 1982, part I.

parents, compatibly with maintenance of minimum safeguards for children's welfare. Courts have taken two views of the parental decision-making approach they require to be taken, whether modelled upon how parents should act or upon how courts exercise their own *parens patriae* power. McKenzie J. in *Dawson* approved an observation of Asch J. in the New York case *In the Matter of Eugene Weberlist*[49] that:

> In this case, the Court must decide what its ward would choose, if he were in a position to make sound judgment.

McKenzie J. said:[50]

> This last sentence puts it right. It is not appropriate for an external decision maker to apply his standards of what constitutes a livable life and exercise the right to impose death if that standard is not met in his estimation. The decision can only be made in the context of the disabled person viewing the worthwhileness or otherwise of his life in its own context as a disabled person.

Accordingly, parental decision-makers under this "substituted judgment" test must put themselves into the position of their disabled charges, and interpret the world and assess the future as they would. The difficulty of acting according to this supposition may appear acute, although it may have been attempted by the Massachusetts Supreme Judicial Court regarding a severely handicapped elderly adult with a mental age of two years eight months in the *Saikewicz* case.[51] Chemotherapy to prolong his life was declined by the court, on the ground that he would not appreciate the added life span, and would object to suffering the inexplicable pain and discomfort of the therapy were it to be administered. On balance it may appear, however, that the court was really applying an objective test.

Attempts to speculate about the likely subjective preference of a newborn child may strain credibility, and appear to present an exercise in unreality. The approach may retain a distinctive role for parents, who can speculate on behalf of their young child in the context of the family environment in which the child might be raised, but the willingness of courts to set aside parental decisions may confirm that, despite their rhetoric respecting the parental role, courts recognize that parental decisions must be measured against objective standards.

The second view of how parents should act acknowledges this in clear terms. McKenzie J. in *Dawson* also cited extensively and approvingly from the judgment of Templeman L.J. in *In re B.*, who observed that:[52]

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[49] 360 N.Y.S. 2d 783, at p. 787 (N.Y.S.C., 1974).

[50] *Supra*, footnote 20, at pp. 620-621 (D.L.R.), 630 (W.W.R), 184 (B.C.L.R.).

[51] *Superintendent of Belchertown State School* v. *Saikewicz*, 370 N.E. 2d 417 (Mass. Sup. J. Ct., 1977).

[52] *Supra*, footnote 3, at pp. 1423-1424, cited *Re Superintendent of Family and Child Service and Dawson*, *supra*, footnote 20, at pp. 622 (D.L.R.), 631-632 (W.W.R.), 185-186 (B.C.L.R.).

> The question which this court has to determine is whether it is in the interests of this child to be allowed to die within the next week or to have the operation in which case if she lives she will be a mongoloid child, but no one can say to what extent her mental and physical defects will be apparent . . . The judge [at trial] was much affected by the reasons given by the parents and came to the conclusion that their wishes [to decline treatment] ought to be respected. In my judgment he erred in that the duty of the court is to decide whether it is in the interests of the child that an operation should take place.

An objective interests-based decision avoids the pretence of expressing what is claimed to be the infant's wish (except in the sense that most persons wish that their own interests be served) and is amenable to evidence and argument. An interests-based determination clearly places a greater burden upon assessments of medical evidence, which, as the two *Dawson* cases show, may differ greatly within a single experience. A determination based upon interests may relate quite comfortably to the distinction between ordinary and extraordinary care which involves the patient's prognosis. The assessments which are implicit in drawing this distinction are best handled by reference to objective criteria.

The two approaches, related respectively to the patient's claimed subjective wish and the patient's objectively perceived interests, reflect a greater distinction which has divided United States jurisprudence. The *Quinlan* decision favoured an extra-judicial decision-making process operated through agreement of a person familiar with and caring for an incompetent patient who can speak the words the patient would want spoken, a representative of the attending health-care team, and an appropriate ethics committee, probably based in the treating hospital. This joint family-medical advisor process was favoured in Provincial Court in the *Dawson* case. In contrast, however, a number of United States cases have determined that decisions are properly made in courts, or in accordance with the objective, evidence-based criteria courts apply.[53] The *Saikewicz* case required judicial intervention in all cases involving the withholding or withdrawal of life-sustaining treatment from an incompetent person,[54] although the judgment may have been influenced by the particular subject's isolation from family, and complete dependence upon institutional personnel who were eager to apply painful procedures of uncertain effectiveness.

United States courts have frequently recognized patients' rights to decline life-sustaining treatment, under the constitutionally protected right of privacy. Some, indeed have gone further to conclude that:

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[53] See for instance *In re Spring* 405 N.E. 2d 115 (Mass. Sup. J. Ct., 1980) and *Eichner* v. *Dillon* 426 N.Y.S. 2d 517 (N.Y.S.C., 1980).

[54] The court observed that "such questions of life and death seem to us to require the process of detached but passionate investigation and decision that forms the ideal on which the judicial branch of government was created. Achieving this ideal is our responsibility and that of the lower court, and is not to be entrusted to any other group purporting to represent the 'morality and conscience of our society' no matter how highly motivated or impressively constituted": *supra*, footnote 51, at p. 435.

> An incompetent's right to refuse treatment should be equal to a competent's right to do so. No court has denied an individual this right because of incompetency to exercise it.[55]

The inference is that it may fall to others, such as family members, to invoke the refusal rights of incompetents on their behalf. This was the inference drawn by the Provincial Court judge in *Dawson*, who was apparently influenced by this reasoning to uphold the parents' decision.

In the event, however, this view did not prevail. Until Canadian courts generally recognize a constitutional or other right of privacy embracing medical treatment decisions, and apply the Charter of Rights and Freedoms to accord the mentally handicapped the same rights to autonomous private decision-making as competent persons enjoy, exercised through others with special affinity towards them, it may appear that courts will continue to claim to superintend parental decisions to withhold or withdraw life sustaining treatment of infants. This is not to say, of course, that every case need be litigated. Once courts have established workable guidelines to show how the distinction between ordinary and extraordinary care is to be drawn, and to show whether parents may have vitiating adverse interests which must cause them to be replaced as decision-makers on behalf of their handicapped children, criteria and procedures of decision-making may be more clear.

Until then, difficulties may be eased by ensuring that courts are promptly accessible, and strive with the assistance of sound advocacy to achieve a cohesive and instructive jurisprudence. It cannot be pretended, however, that courts will eventually become quiescent in this field. On the contrary, activist groups have been much involved in pressing for and sponsoring such litigation. Pro-life groups applied forceful pressure for the *Arthur* murder prosecution in England and for federal governmental reaction to the "Baby Doe" case in the United States, and the British Columbia Association for the Mentally Retarded was heavily involved in the *Dawson* appeal to the British Columbia Supreme Court. It may be reasonable to anticipate that the *Dawson* cases will in time be succeeded by a number of related cases through which Canadian jurisprudence will develop and become clarified.

BERNARD M. DICKENS*

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[55] *In the Matter of the Welfare of Bertha Colyer* 660 P. 2d 738, at p. 744 (Wash. S.C., 1983), quoted *Re S.D.*, *supra*, footnote 16, at pp. 614 (W.W.R.), 169 (B.C.L.R.).

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STATUTORY INTERPRETATION—A PLEA FOR LINGUISTIC SANITY.—In *The Queen* v. *Roche*[1] the Supreme Court of Canada was faced with the task of determining when the presumption of section 233(3) of the Criminal Code[2] would arise. Three conditons are mentioned in the section: failure to stop, offer assistance, and to give one's name and address. The issue is whether the accused must fail to do all three of these things before the presumption will arise, or whether failure to do any one of them is sufficient. At trial the latter view was taken. On appeal to the County Court of Vancouver the former view was preferred. The British Columbia Court of Appeal upheld the County Court.[3] The Supreme Court decided the issue in favour of the approach taken in the original trial: the presumption arises when any one of the three conditions is satisfied.

The result makes eminently good sense. Section 233(3) refers to the same three conditions found in section 233(2), which creates the offence.[4] Sub-section (2) has been interpreted "disjunctively" by most courts.[5] A person can commit an offence by failing to stop (with intent . . .) or by failing to offer assistance (with intent . . .) or by failing to give his name and address (with intent . . .). Given this disjunctive interpretation of the offence and the difficulty of proving the requisite intent, it makes good sense to interpret the presumption sub-section as providing assistance toward proving intent whenever the other necessary elements of the offence have been established. Since the other elements may be established by proving any *one* of the failures, the presumption would be of little use if it in turn would apply only when there was evidence of *all three* failures. Indeed, as pointed out by Craig J.A. in his dissenting judgment in the Court of Appeal, if there were proof of all three failures, a presumption would be unnecessary, for "the inference of intent would, probably, be irresistible".[6] The presumption sub-section makes sense on its face if it facilitates proof of intent. The need for such assistance is most acute when

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[1] (1983), 145 D.L.R. (3d) 565, [1983] 5 W.W.R. 289 (S.C.C.).

[2] R.S.C. 1970, c. C-34, s. 233(2), (3). The sub-sections state:

(2) Every one who, having the care, charge or control of a vehicle that is involved in an accident with a person, vehicle or cattle in charge of a person, with intent to escape civil or criminal liability fails to stop his vehicle, give his name and address and, where any person has been injured, offer assistance, is guilty of
(a) an indictable offence and is liable to imprisonment for two years, or
(b) an offence punishable on summary conviction.

(3) In proceedings under subsection (2), evidence that an accused failed to stop his vehicle, offer assistance where any person has been injured and give his name and address is, in the absence of any evidence to the contrary, proof of an intent to escape civil and criminal liability.

[3] *R.* v. *Roche*, [1982] 2 W.W.R. 1, (1981), 64 C.C.C. (2d) 6 (B.C.C.A.).

[4] *Supra*, footnote 2.

[5] See, for example, references in *R.* v. *Roche*, *supra*, footnote 1, at pp. 567-568 (D.L.R.), 291 (W.W.R.).

[6] *Supra*, footnote 3, at pp. 7 (W.W.R.), 12 (C.C.C.).

the accused has *not* failed to do each and every one of the three things required by the Code. Therefore the presumption makes the best sense if it arises whenever there is evidence of failure to do one of the three required acts.

While this conclusion is sensible, the reasons of the Court of Appeal and the Supreme Court will undoubtedly perpetuate an unfortunate linguistic and logical blunder. Consider the following passage from McFarlane J.A.'s majority judgment for the Court of Appeal:[7]

> It may seem, prima facie, inconsistent and illogical to *apply the word "and" disjunctively in subs. (2) but conjunctively in subs. (3).* This prima facie inconsistency disappears, however, in my opinion, on a comparison of the syntax of the two subsections. I think the correct meaning of subs. (2) is that Parliament intended an accused should be guilty of an offence unless all of the described statutory duties be performed, provided, of course, that intent to escape liability be proved. On the other hand, I find no absurd, unintelligible or meaningless result when the word "and" in subs. (3) is read conjunctively, as prima facie it should be in accord with its usual normal meaning.

This passage was summarized by Lamer J. in the Supreme Court judgment:[8]

> It would appear from this passage that McFarlane J.A. was of the view that, since a literal reading of s. 233(3) does not lead to an "absurd, unintelligible or meaningless result", the enumeration contained therein should be construed as being conjunctive and the word "and" given its *primary meaning.*
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> This, in my view, is the proper approach when a section is not open to more than one interpretation. Indeed, when such is the case, the courts need not interpret the section and should not seek out the object of the section in order to ascertain whether it has been frustrated by the draftsmen and then *give the words of the section an unusual meaning.* But when the section is capable of more than one interpretation, then the approach taken by Craig J.A. is, in my opinion, the correct one.

Craig J.A. had dissented in the Court of Appeal. After pointing out that "although subs. (2) is phrased conjunctively, this court has held that it should be interpreted disjunctively",[9] he had gone on to argue that subsection (3), which is also phrased conjunctively, likewise should be interpreted disjunctively in order to realize the intention of the legislature.

Although it is not entirely clear from these passages, it appears that both the Supreme Court and Craig J.A. were willing in this instance to give the words of the sub-section a secondary or unusual meaning for the sake of reaching a sensible result. The secondary meaning is given to the word "and" which, in the circumstances, is taken to mean what we normally intend by "or". Although the majority of the Court of Appeal differed in result, it too was willing to countenance the possibility of reading "and" disjunctively in appropriate circumstances, such as in sub-section (2). The

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[7] *Ibid.*, at pp. 5 (W.W.R.), 9-10 (C.C.C.), (emphasis added).

[8] *Supra,* footnote 1, at pp. 569 (D.L.R.), 293 (W.W.R.), (emphasis added).

[9] *Supra,* footnote 3, at pp. 7 (W.W.R.), 11 (C.C.C.).

majority reached the position it did because of the specifics of the case, not because of a general refusal to read "and" disjunctively. Both the Court of Appeal and the Supreme Court, then, appear willing to concede that in some statutes "and" can legitimately be interpreted to mean "or".

This is a highly dangerous approach to statutory language. The words "and" and "or" are basic connectives which establish the logical structures of the propositions in which they occur. If we are willing to allow these words to lose the clarity and certainty they have in both logic and common usage, the very backbone on which precise communication is possible is destroyed. If someone in ordinary life uses the word "and", but has a disjunctive sense in mind, he has either made a slip of the tongue, an error of logic or a grammatical mistake. We often know what he means from the context, but we are never tempted to think that sometimes "and" means "or". These words have adequately differentiated meanings in ordinary language, and along with "not" and a few other special words, are absolutely vital to precision in language. How could you be sure you were ordering a hamburger *and* a milkshake if you could not rely on the meaning of "and"? Why should the law be any different? If anything, the law should be even *more* careful about the use of such words.

If we insist on the ordinary meanings of these special words of logic, how can we account for the honest differences of opinion over section 233? Is it possible to get a sensible interpretation of this section without defiling the logic embedded in the language? The answer is yes. Grammatical structures such as those found in this section are ambiguous. But they are not ambiguous because "and" and "or" are sometimes interchangeable. Consider the following simplified version of section 233(2):[10]

(1) A is guilty if he fails to stop, give his name, and offer assistance.

With slight changes in inflection and emphasis this can be read so as to make guilt dependent on satisfaction of any one condition or satisfaction of all three simultaneously. The statement is ambiguous. It must be "interpreted" before it can be applied. But what is the basis of the ambiguity? What are we interpreting? The Court of Appeal, with the acquiescence of the Supreme Court, seemed to think it was interpreting the word "and". The source of the ambiguity is not the logical connective, however. "And" is not ambiguous in ordinary language, and yet (1) is. The problem lies in the word "fails".[11] This is a word of negation. (1) in effect says that A is guilty if he does *not* do certain things. "Not" is also a precise term of logic and language. The syntax of the sentence, however, does not make the

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[10] S. 233(2) has been chosen for illustration because it is generally agreed that it is disjunctive in spite of its wording, and it can be simplified to a greater degree than can 233(3). The same analysis applies to 233(3), however, since it too contains "fails to . . . ", followed by a conjunction of three conditions.

[11] Cf. *R.* v. *Laing* (1945), 85 C.C.C. 249, at p. 250 (Ont. H.C.).

scope of the negation (or A's failure) clear. Exactly what is being negated? On the one hand the negation (or A's failure) may apply to stopping, giving his name, and offering assistance *as a single group* of acts. The sentence then reads as:

(2) A is guilty if he fails to (stop, give his name, and offer assistance).

On the other hand the negation (or A's failure) may apply to each of the three acts individually. On this understanding the sentence would read as:

(3) A is guilty if he not only fails to stop, but also both fails to give his name and fails to offer assistance.

(3) makes it clear that guilt only arises in this context if A fails to do each and every one of the three things. It may be a clumsy expression, but it is otherwise well-formed and grammatical. (2) however, is not a well-formed English sentence. Yet its sense is clear. If you have a duty which has three necessary parts and you fail to do one of those parts, you have failed to do your duty. The three things are parts of a single whole. What must A do? He has a three-part duty. He must stop, give his name, and offer assistance. If he fails to do any one of these he has failed to do what is required of him and he is guilty of an offence.

There are, then, ways of avoiding the ambiguity. (3) captures what lawyers call the "conjunctive" sense, and (2) captures the "disjunctive" sense. Although (2) does not contain the word "or", the understanding of it as disjunctive does not depend on a Pickwickian sense of either "and" or "disjunctive". As any student of elementary logic knows, the negation of a conjunction of two or more propositions is equivalent to the disjunction of the negations of those propositions. In other words, when you distribute the negation (or failure) to the three parts of the single duty in (2), the "and" must be *replaced* by an "or". "Not (A and B)" is equivalent to "Not A or not B". "And" does not mean "or". The logical operation of moving the negation from outside the parentheses to each of the components inside is permissible only if "and" is removed and "or" put in its place. The permissibility of the move depends on the precision of the words, not on their having secondary meanings. Applying elementary logic to (2) yields:[12]

(4) A is guilty if he fails to stop, or fails to give his name, or fails to offer assistance.

This is well-formed, grammatical, and unquestionably disjunctive.

The ambiguity of section 233(2) and (3) comes not from the ambiguity of "and" and "or", but from the structure of the sentence which does not

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[12] Cf. *R.* v. *Adler*, [1981] 4 W.W.R. 379, at p. 381 (Sask. C.A.). In this case the Saskatchewan Court of Appeal carefully wrote out the correct form with the negation distributed. It is uncertain whether the court was aware of the logical transformation it employed. Both the Court of Appeal and the Supreme Court in *Roche* referred to *Adler* without appreciating the logic.

make the distribution of "fails to" clear. Does it apply to the three acts individually or only as a group? The former is the "conjunctive" sense and the latter is the "disjunctive" sense. To decide which should be accepted, the section must be "interpreted" using all of the principles, fictions, and good sense the court can muster. This massive degree of interpretation would have been unnecessary if the draftsmen had noticed that there was a negative followed by more than one condition. Simply writing out the intended distributive pattern would have avoided the problem. (3) and (4) illustrate patterns which could have been used.[13]

Since the draftsmen did not write out the intended distributive pattern, sub-sections (2) and (3) are ambiguous. The simple solution is to identify the problem as one of syntactic ambiguity, bring the normal interpretive arguments to bear, and produce *restructured* versions of the passages which give the logical connectives their normal meanings while solving the ambiguities. For example, the resulting interpretation of section 233(3) might then be:

> 233(3) In proceedings under sub-section (2), evidence that an accused failed to stop his vehicle, or that he failed to offer assistance where any person has been injured, or that he has failed to give his name and address is, in the absence of any evidence to the contrary, proof of an intent to escape civil and criminal liability.

With respect to the issues before the court, this interpretation is adequate.[14] It is significantly less ambiguous than the original, it leaves the normal logic of "and" and "or" untouched, and it is relatively easy to justify, since it merely expresses one of the two obviously possible meanings of the original.

Identifying the problem solely in the word "and", as the courts did in *Roche*, does not allow for a similarly satisfactory solution. Simply reading "and" as "or" in the original sentence in no way diminishes the ambiguity. It is still not clear how the negation (or failure) should be distributed to the three parts, and until that is resolved the ambiguity will remain. In addition to this failure, there are a number of important negative effects that flow from locating the ambiguity in one of the few words in our language which has a precise use. To treat "and" as the sole problem is to suggest that everything is up to judges who are free to turn the law upside down if that makes sense to them. The confidence of ordinary citizens cannot be

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[13] To be perfectly clear, sentence 4 would need to be modified slightly to prevent the "or" from being interpreted as being *exclusive*. This is easily done by adding a phrase such as ". . . or fails to do more than one of these acts". In ordinary language "or" has two distinct but individually precise meanings, one "inclusive" ("A or B, or both") and the other "exclusive" ("A or B, but not both"). Neither makes "or" equivalent in meaning to "and".

[14] If one were drafting the section from scratch it would probably be wise also to ensure that "or" is not read as being exclusive. See *supra*, footnote 13.

maintained when they see courts apparently denying even the simple logic of "and" and "or". Legislative draftsmen must have nightmares about judges interchanging logical connectives. And to top it off, judges themselves cannot feel too confident in approaching statutes if they believe that sometimes "and" and "or" are interchangeable, so that simple propositional logic cannot be relied upon. The syntactic solution suggested in this comment has none of these drawbacks. The grammatical ambiguity in these two sub-sections is something most people can understand, and the solution can be seen as one obviously possible reading of the section. Under these conditions, judicial interpretation will not be destructive of public and professional trust in the courts. Normal citizens can see the need for this interpretation, draftsmen can reaffirm their determination to be careful with sentence structures, and judges themselves can feel confident in applying their ordinary knowledge of grammar and logic.

In the simple case of *Roche*, then, there are no good grounds for violating the normal meanings of the logic-words used in the statute. It is easy to imagine other cases, however, in which there appear to be no simple alternatives to interpreting the words of logic. The syntactic ambiguity found in *Roche* made it easy to maintain the purity of the word "and". But what would happen if there were no such escape route? Imagine a case in which there are no problems of syntax or grammar and there is no way in which the substantive words of the statute can be interpreted so as to avoid nonsense or absurdity.[15] If a court perceived itself to be in such a position, the temptation to read "and" as meaning "or", or find some other unusual meaning in the words of logic would be great. If a court is *ever* justified in granting such words peculiar meanings, this would be the case. Would it be justified?

Consider the case of *Federal Steam Navigation Co. Ltd.* v. *Department of Trade and Industry*.[16] The Oil in Navigable Waters Act, 1955[17] provided that if the oil was discharged from a ship in circumstances set out in the Act, "the owner or master of the ship shall . . . be guilty of an offence . . .". The House of Lords, by a majority, decided that both an owner and a master could be convicted in respect of a single prohibited discharge. One of the majority judges, Lord Salmon, observed:[18]

> There is high authority for the view that the word "or" can never mean "and" although it is sometimes used by mistake when "and" is intended . . . On the other hand, there is also . . . high authority . . . that "or" is quite commonly and grammatically used in a conjunctive sense . . .

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[15] See, for example, *R.* v. *Oakes*, [1959] 2 Q.B. 350, [1959] 2 All E.R. 92 (C.C.A.); *Brown and Co.* v. *Harrison*, [1927] All E.R. Rep. 195, (1927), 43 T.L.R. 633 (C.A.).

[16] [1974] 2 All E.R. 97, *sub. nom. R.* v. *Federal Steam Navigation Co. Ltd*, [1974] 1 W.L.R. 505 (H.L.).

[17] 3 and 4 Eliz. 2 (U.K.).

[18] *Supra*, footnote 16, at pp. 113 (All E.R.), 523 (W.L.R.).

> I do not, however, attach any real importance as to whether the one school of thought or the other is right on this interesting grammatical point. In *Brown & Co.* v. *T. & J. Harrison* [[1927] All E.R. Rep. 195] the Court of Appeal agreed with MacKinnon J. as to the effect of the relevant statutory provision. MacKinnon J. reached his conclusion by holding that the word "and" should be substituted for the word "or". The Court of Appeal reached their conclusion by holding that the word "or", on its true construction, meant "and". The result was the same.

In this passage we see that even when there is no viable alternative to focussing on the logical connectives, the court still can avoid finding secondary meanings if it so chooses. It can decide that there was a drafting error. However, since the end result in the particular case is the same no matter which alternative is accepted, Lord Salmon thought it unnecessary to decide whether there had been a drafting error, or whether the word "or" meant "and" in the circumstances. This has the effect of allowing the court to find secondary meanings for the words of logic.

Now, it may be unnecessary to make the choice in order to decide whether the correct decision was reached, but the method used to reach the conclusion is nonetheless important. Reasons for judgment play a number of important roles in our legal system. Two of these are especially noteworthy here. First, the stated reasons for judgment can help reconcile the losing party and, indeed, all of society, to the result. Reasons are a significant part of maintaining acceptance of the judicial system since they contribute not just to the *fact* but also the *appearance* of justice. Secondly, reasons for judgment play an essential role in our system of judicial precedent. Indifference between two ways of solving a problem encourages, indeed it may authorize, a similar indifference in later cases. When we consider these two roles for stated reasons, it will become clear that we cannot be indifferent between viewing a particular use of a logical connective as being mistaken and viewing it as embodying a secondary meaning.

The appearance of justice surely suffers whenever a court intentionally and explicitly twists basic elements of our language. To say that black means white on certain unusual occasions casts a veil of uncertainty over all uses of the words. The social rules of language include rules for recognizing and handling errors and slips, but they do not to the same degree include rules for generating or incorporating drastic meaning-shifts without at least implied consent. As a result, when we find as important a body as a court dramatically shifting the meanings of simple words, we either grow uneasy about *all* legal language, or we begin to distrust the courts. At the same time, if the court presented its argument in terms of a drafting *error*, most people would not have the same sense of uneasiness. We all make errors in speaking and writing, and in a complicated document like a statute it would not be at all surprising to find a few slips. The ordinary rules of language accustom us to errors and corrective measures, but not to the drastic shift of meaning which would be necessary to convert "and" into "or".

The role of reasons as providing material for precedent points to the same conclusion. If courts treat the two approaches to the problem as being

interchangeable, this sets a pattern for later decisions, which are then more likely to do the same. Even if we suppose that the two approaches will always *justify* the same conclusions, it does not follow that, as a practical matter, the same results will be *reached* no matter which method is used. A finding that a passage in a statute is a mistake is a very serious interference or intervention in the normal functioning of a statute. The seriousness of the matter cannot be disguised in any way. The court openly acknowledges that it is acting creatively, going beyond the strict confines of the specific words of the statute. The openness of this procedure acts as a check on judicial excess, helping to ensure that radical departure from the written words will be a last resort. The method of "interpretation", which finds unusual secondary meanings, does not ensure the same degree of control or care. Courts are constantly interpreting statutes, and the cases under consideration differ from the common or garden-variety interpretation problems only in degree. This makes it easier for the court to ignore or perhaps simply overlook the seriousness of the interference and the degree of creativity involved. The radical nature of the step is disguised by characterizing it as an application of a somewhat unusual, but not unheard-of, secondary meaning. As MacKinnon L.J. said of this method in *Sutherland Publishing Co. Ltd.* v. *Caxton Publish Co. Ltd.*,[19] "That is a cowardly evasion. In truth one word is substituted for another." If a court is going to take the serious step of substituting words in a statute, it should have the courage to express this openly, and then defend it. Finding secondary meanings obscures the process, and may make the need for justification of the result less obvious to all concerned.

Rather than impute unusual secondary meanings to words like "and" and "or", judges and lawyers would be better advised to maintain the purity of the logical backbone of our language and our law. This will reduce confusion, clarify argument, and assist public relations. If, as in *Roche*, the grammar of a statute produces ambiguity when there are no problems with the substantive words and all of the logical terms are given their normal senses, the court should clarify the syntax. Finding secondary meanings in the words of logic will only foster confusion. As a last resort, when the syntax is precise, the substantive words have been interpreted as much as the law allows, and the statute still is absurd or makes no sense, the court can find that there was a drafting error. Then even the precise words of logic may be fair game. But should this occur the court would at least be acknowledging that it is going beyond the written words and explicitly changing them. Some may not agree with the result, but what the court is doing would be clear. Our understanding of the logical underpinnings of statutory language, which makes precise communications possible, would not be threatened.

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[19] [1938] Ch. 174, at p. 201, [1937] 4 All E.R. 405 at p. 421 (C.A.).

The arguments presented in this comment have two clear implications for the practice of statutory interpretation. First, when it is evident that interpretation is necessary, it *must* be determined whether the problem is in any way related to a defect or ambiguity in the grammatical or syntactic structure of the relevant passages. This is an essential step, requiring great sensitivity and care, for any syntactic ambiguity in a sentence will make it extremely difficult, and in many cases impossible, to resolve satisfactorily the case by reference only to secondary meanings and drafting errors. In *Roche* all levels of court ignored or inadequately analyzed the syntax of the statute. As a result they were driven to accept a counter-intuitive meaning for the word "and", seriously undermining the very basis of precise language while generating an interpretation which, when stated, contains the same ambiguity of the original.

Second, courts should uniformly resist the temptation to find unusual secondary meanings in those words which form the logical structure of our language. Nothing is gained, and much is lost, by needlessly interchanging basic logical connectives and operators. Analysis of syntax and substantive words, backed up by the possibility of finding drafting errors, gives the courts all the mechanisms they need to resolve problems of interpretation without fostering suspicion, confusion, and uncertainty.

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