Osgoode Hall Law Journal

Volume 3, Number 2 (April 1965)

Article 52

Regina v. Campbell (1964)2 O.R. 487, 46 D.L.R. (2D) 83

W. P. Grant

Case Comment

REGINA V. CAMPBELL (1964) 2 O.R. 487, 46 D.L.R. (2D) 83—CONSTITUTIONAL LAW — PROHIBITION OF DEALER RESALE PRICE MAINTENANCE — WHETHER VALID FEDERAL CRIMINAL LEGISLATION — WHETHER VALID LEGISLATION UNDER REGULATION OF TRADE AND COMMERCE—COMBINES INVESTIGATION ACT (CAN.), S. 34—In 1950, for the purpose of making Canadian anti-combines law a more effective instrument for the encouraging and safeguarding of our free economy, the MacQuarrie Committee was appointed to make recommendations. As a result of an Interim Report in 1951 by the Committee, the Parliament of Canada enacted amendments to the Combines Investigation Act,[1] one of which was section 34, as follows:

> 34 (1) In this section "dealer" means a person engaged in the business of manufacturing or supplying or selling any article or commodity.
>
> (2) No dealer shall directly or indirectly by agreement, threat, promise, or any other means whatsoever, require or induce or attempt to require or induce any other person to resell an article or commodity, ... (b) at a price not less than a minimum price specified by the dealer or established by agreement.

The problem of whether or not this section is valid legislation by the Parliament of Canada raises two obvious issues. Firstly, is section 34 proper criminal legislation within s. 91(27) of the British North America Act, or is it an unwarranted interference with provincial rights in respect of contracts and property rights under s. 92 (13) and s. 92(16) of that Act? A third issue which is discussed below relates to the possibility of s. 34 being proper federal legislation under s. 91(2)—the Trade and Commerce head.

In the recent decision of *Regina v. Campbell*[2] the Ontario Court of Appeal answered the first two of these constitutional issues, holding by a 3-2 majority that section 34 was valid as Criminal law and did not improperly infringe Property and Civil Rights. The possible validity of section 34 under the Trade and Commerce power was not dealt with. Briefly, the facts in this case are as follows: an American based company which manufactured and supplied surgical blades, established the accused, Campbell, as sales-promoter in Toronto in the position of manager of a branch office. In such capacity, he supervised various retail merchants who made contracts of sale with hospitals. These contracts were according to a standard form provided by the company, and began with the words, "Subject to the approval of Bard-Parker Company . . . we agree to purchase from the dealers . . ."; the contract form also provided that the retailer might allow a discount of 20% off the "current printed list price" (in the company's catalogue) if a certain quantity of blades were purchased. A

1 R.S.C. 1952, c. 314.
2 *R. v. Campbell* [1964] 2 O.R. 487, 46 D.L.R. (2d) 83.

completely separate agreement between the company and the retailer allowed the latter a 5% rebate in return for the submission to the company of a complete record of sales.

On an indictment under s. 34(2)(b) of the Combines Investigation Act, accused was convicted of aiding and abetting the company in the offence and this was upheld by a majority of the Court of Appeal. Since the company had knowledge of sales and prices, it was decided that the company might exert control or pressure over dealers regarding price (even though in *fact* there was no threat to exert pressure!). Also, since the contract was subject to company approval, the Court held that the company had control over retail prices.

Speaking for the majority on the constitutional issue, Schroeder, J.A. held s. 34 to be *intra vires* the Parliament of Canada on the basis that its essential nature is to "safeguard the public against the evil consequences of the commercial activities therein described, since their effect was to impose restraints upon free and equal competition", a practice which in the opinion of Parliament, "ought to be suppressed in the public interest".[3] Since the "pith and substance" of such legislation is criminal, it is thereby valid within s. 91(27) of the B.N.A. Act. Applying the *Proprietary Articles Trade Association*[4] case, which upheld the validity of the 1927 Combines Investigation Act as being *intra vires* the Parliament of Canada pursuant to s. 91(27), Schroeder, J.A. also held that, since the "pith and substance" of s. 34 came within the enumerated heads of s. 91, it was "not material that s. 34 affected property and civil rights in the Provinces".

On the other hand, Porter, C.J.O., speaking for the minority on this issue, decided that Parliament has not the power under the B.N.A. Act to create a crime relating to the trade practice defined in s. 34 by attaching a penalty to a breach of that section. Admitting that Parliament does have "plenary powers" to create crimes which may affect provincial rights, he considers that this wide scope which is allowed to Parliament is subject to limitation under the B.N.A. Act. In his approach to the question of the validity of s. 34, Porter, C.J.O. considers various factors. He states that:

> The mere fact that persons might have been induced to enter into a contract or to act upon a promise to establish a policy as to prices, does not, per se, imply restraint upon competition or harm to the public in any other way. Much would depend at any particular time upon the general state of the economy, the presence or absence of monopolistic concentrations of such a character that the interest of the public might become adversely affected, or the fact that any agreements in question are so widely accepted by the particular trade as a whole that the competitive factor becomes substantially weakened.
> . . . What may be a detrimental trade practice at one time may cease to be, due to the impact of new forms of competition or many other factors.[5]

---

[3] *Id.* at 119 (D.L.R.).
[4] [1931] 2 D.L.R. 1.
[5] P. 94 D.L.R.

Porter, C.J.O., then analyzed the *Proprietary* case and decided that Lord Atkin's decision to the effect that the domain of criminal jurisprudence can be ascertained by whatever the State prohibits, notwithstanding the true nature and substance[6] of the legislation enacted, should be confined to the facts of that case. In that legislation,[7] the essential element of a criminal combine is that it has operated, or is likely to operate to the detriment or against the interest of the public. The mere agreement to fix a price is not an offence under the section. It must be a fixing of the price which does or is likely to operate to the detriment or against the interest of the public, so that, in a prosecution under this section "the Court would have to determine the issue as to whether there was in fact detriment or likelihood of detriment to the public".[8]

What limitation should be imposed on the power of Parliament to make trade practices criminal? Porter, C.J.O., suggests the following limitation: if the legislation comes under an exclusive head of s. 91, and does not infringe on s. 92, then it is valid, even apart from any question of harm to the public. But, secondly, if the legislation also comes under an exclusive head of s. 92 (as does s. 34 in *Campbell*), then regard must be had to the circumstances "in their relation to the legislation to determine whether there has been a colourable attempt, or in truth and substance an encroachment, or whether there has been a genuine attempt to amend the law".[9]

Generalizing on the authorities mentioned, particularly the *Board of Commerce*[10] case, Porter, C.J.O. deduces the main purpose of criminal law as being to "protect the public against injury by the wilful wrongdoing of others". And so, the constitutional validity of criminal legislation would depend on the manner in which the statute is framed "either by its terms defining offences implicitly harmful or by making provision for proof of such". Since s. 34 does not define a practice which by implication was harmful during the period covered by the charge before the court, nor required proof of harm, it does not meet the above requirement and, hence, is (in the dissenting opinion of the court) *ultra vires,* the Parliament of Canada.

Thus it appears that the judiciary is still not in agreement as to the criterion to be applied to decide in what circumstances Parliament can create a crime out of some trade practice. It is well established[11] that some anti-combines legislation is necessary to ensure the existence of an effective degree of competition. Competition is assumed to be the "mainspring and regulator of our free enterprise

---

[6] A criterion used by Lord Haldane in the *Board of Commerce* case [1922] 1 A.C. 191.

[7] Combines Investigation Act, R.S.C. (1927), c. 26, s. 2(a) which defines a combine.

[8] *R. v. Campbell* (1964) 46 D.L.R. (2d) 83, 97 (for the purpose of criminal prosecution).

[9] *Id.* at 99.

[10] [1922] 1 A.C. 191.

[11] See: D. G. Blair, *Combines, Controls or Competition* (1953) 31 C.B.R. 1083 at 1084.

system".[12] The problem facing us is the *form* of such legislation. In order to understand what it is we are trying to preserve, we must have a basic understanding of the meaning of competition.

A consideration in establishing a criterion is the fact that in Canada, the maintenance of competition is a much larger issue than the effective operation of anti-trust laws.[13] Since the B.N.A. Act does not easily permit unified, national economic policies to be translated into law where these policies deal directly with prices and products, the judge must translate into legal norms the community sense of the limits to be placed on business activity that may be harmful to competition. With this in mind, a strong objection to the decision in *Campbell* may be raised: why should a businessman, exercising his apparently normal rights, be accused of and convicted of a crime when his activities come within s. 34 of the Combines Investigation Act?

It is clear[14] that agreements in restraint of trade which result in public detriment ought to be prohibited by law. But should "restrictive trade practices", as such, be made crimes punishable by fine and imprisonment? The essence of a crime is *mens rea*—a guilty intent. But in anti-combines legislation, the crime is the agreement[15] to suppress competition, and the intention to accomplish this constitutes the *mens rea;* in other words, the court finds guilt not in intent, but in *result.* In s. 2(a)(vi) of the Combines Investigation Act, "combine" is defined generally as a "merger, trust or monopoly which . . . has operated or is *likely to operate* to the detriment or against the interest of the public . . .".

Why is it expedient to make crimes of acts which appear to have been done innocently? Because of the B.N.A. Act, of which s. 91(27) gives to Parliament legislative authority over "The Criminal Law . . . including the Procedure in Criminal Matters". Since anti-combines legislation obviously interferes with property and civil rights, it is upheld as valid on the ground that it is genuine criminal law, or necessarily incidental or ancillary to it. This is the ground used in the *Proprietary*[16] case by Lord Atkin who distinguished the prior *Board of Commerce*[17] case (which had held previous anti-combines legislation *ultra vires* the Dominion Parliament) on that ground in the following words:

> If Parliament genuinely determines that commercial activities which can be described as 'operating or likely to operate to the detriment of or against the interest of the public' are to be suppressed in the public interest . . . then there is no reason why Parliament should not make them crimes.[18]

---

[12] *Id.* at 1084.
[13] M. Cohen, *Background, Main Features and Problems of MacQuarrie Committee Report,* 30 C.B.R. 551.
[14] H. Hansard, Q.C., *Combines, Criminal Law, and the Constitution,* 30 C.B.R. 566.
[15] *R. v. Container Materials Ltd. et al.* (1940) 4 D.L.R. 293.
[16] [1931] A.C. 310.
[17] [1922] 1 A.C. 191.
[18] *Op cit.* at p. 323.

The point of objection is this: In order to assume jurisdiction over matters that otherwise belong to the provincial field, Parliament has chosen to make crimes of acts and situations that would not ordinarily have been regarded as criminal, and in so doing, has confronted the business and industrial community with the continuing threat of being prosecuted and treated as criminals for things done entirely without a guilty intent.

Regarding the third issue mentioned in the opening part of this article, could resale price maintenance be controlled by legislation justified under s. 91(2)—the "Regulation of Trade and Commerce" power of Parliament? In *R. v. Campbell,* it was contended by the accused that it could not, and Porter, C.J.O. agreed with him, although the majority of the Court of Appeal did not find it necessary to consider this contention. The basis for his Lordship's finding was the *Natural Products Marketing Act* case[19] which involved federal legislation purporting to set up a general regulatory scheme for natural products under the authority of s. 91(2). He quotes Lord Atkin who, in holding such legislation *ultra vires* the Parliament of Canada, said:

> Parliament cannot acquire jurisdiction to deal in the sweeping way in which these enactments operate with such local and provincial matters by legislating at the same time respecting external and interprovincial trade, and committing the regulation of external and interprovincial trade and the regulation of trade which is exclusively local and of traders and producers engaged in trade which is exclusively local to the same authority.[20]

Although in this case it was not applied, the "necessarily incidental" doctrine should not be forgotten. Generally, Parliament, in legislating in relation to a subject committed to its authority (where the *substance* of such legislation concerns that subject), might reach out to include provincial matters which are ancillary or necessarily incidental thereto. And in this area it has been said recently[21] that "one would have thought that no more appropriate occasion for the application of the necessarily incidental rule could arise than where extra-provincial and local elements are inextricably intermingled ... Parliament has been precluded from exercising an admitted power on the ground that such exercise would necessarily embrace matters in themselves local and private. Yet it is said that where the authority of Parliament exists it dominates. It is a hollow paramountcy that must yield to provincial authority".

A test to differentiate between legislation justifiable under s. 91(2) or s. 92(13) was put forth by Anglin, J. in the *Board of Commerce* case,[22] which is as follows:

---

19 *Reference re Natural Products Marketing Act, 1934* [1937] 1 D.L.R. 691.
20 *Ibid* at p. 695.
21 Alexander Smith, *The Commerce Power in Canada and the United States,* (Toronto, 1963), at p. 143.
22 *In Re The Board of Commerce Act and The Combines and Fair Prices Act, 1919* (1920) 60 S.C.R. 456.

> Is it as primarily dealt with in its true nature and character, in its pith and substance, as a question of general interest throughout the Dominion, or is it from a provincial point of view of a local or private nature?

This case involved federal legislation designed to control and regulate prices of certain clothing commodities, allegedly not sold at reasonable prices, and thereby allegedly encouraging unfair profits among a certain group of retailers. Such legislation was held to be invalid under s. 91(2), having regard to the authority conferred upon the federal Board to interfere with proprietary rights of producers, holders, and consumers of any of the articles to which the Act applied, and with regard to the authority to prescribe the conditions of contracts relating to such articles.

In the Privy Council report, upholding the invalidity of the legislation, Viscount Haldane adds:[23]

> It can be only under necessity in highly exceptional circumstances . . . that the liberty of the inhabitants of the Provinces may be restricted by the Parliament of Canada and that the Dominion can intervene in the interests of Canada as a whole. For, normally, the subject matter to be dealt with would be one falling within s. 92 . . . It may well be, if Parliament had, *by reason of an altogether exceptional situation,* capacity to interfere, then s. 91(2) would apply so as to enable Parliament to oust the exclusive character of the Provincial powers unders s. 92.

In *R. v. Campbell,* could it be said that such an "exceptional situation" exists? If so, then perhaps s. 34 could be justified under s. 91(2). Before this can be decided, a quotation from the *Farm Products Marketing Act* case[24] may be relevant. That case held valid certain provincial legislation which authorized a comprehensive pool marketing scheme for the distribution, among producers, of money received from the sale of regulated products supplied. The basis of its validity was its sole applicability to transactions within the Province, with no power over exports. Kerwin, C.J. said:

> The concept of Trade and Commerce, the regulation of which is confided to Parliament, is entirely separate and distinct from the regulation of mere sale and purchase agreements. *Once an article enters into the flow of interprovincial or external trade,* the subject matter and all its attendant circumstances cease to be a mere matter of local concern.[25]

This concept of a "current", "flow", or "stream" of commerce "involves the recognition of the phenomenon that elements, in themselves local, may be integrated into a sequence so as to constitute a current of commerce across provincial or international lines".[26] The majority (including Kerwin, C.J.) generally took a liberal view that intra-provincial activity and provincial authority are not coextensive, as opposed to the more orthodox minority view that since the scheme was set up for intra-provincial transactions, validity necessarily followed.

---

23 [1922] 1 A.C. 191 (italics added).
24 *Reference Re The Farm Products Marketing Act, R.S.O. 1950, c. 131* (1957) S.C.R. 198.
25 *Id.* at 205 (italics added).
26 *Id.* at 160.

The liberal approach of the *Farm Products Marketing Act* case (although not cited) was carried forward in *Regina v. Klassen*,[27] decided in the Manitoba Court of Appeal. The case is relatively simple, yet it serves to illustrate what influence the new pragmatic approach may achieve. The validity of the Canadian Wheat Board Act, the purpose of which was to regulate the marketing of grain in interprovincial and foreign trade, was upheld even as applied to a feed mill which was an entirely local enterprise from beginning to end, on the basis that the exercise of control over feed mills is necessarily incidental to the scheme of the Act.

So now to the problem at hand: Can resale price maintenance be controlled by legislation authorized under s. 91(2)? On Anglin, J.'s test, is it a subject of which the primary aspect is not local and private in nature, but is of general interest throughout the Dominion? On the one hand, it seems to be essentially a matter of contract which the Province should control; yet, if the practice of maintaining resale prices were so widespread and prevalent in a certain trade as to justify its regulation in this respect, Parliament might well assume jurisdiction in the public interest. Also, in this case, Viscount Haldane's "exceptional situation" might justify federal intervention in the interests of Canada as a whole. But how would it have to be "exceptional"? Perhaps in the sense that this manner of carrying on sales contracting is such a deviation from the usual way of exercising civil rights that federal intervention would be justified?

Another consideration for the possible validation of s. 34 under s. 91(2) is Kerwin, C.J.'s idea of the "flow of interprovincial or external trade" which would put legislation in respect of an article involved in such a flow out of provincial hands, and justify federal legislation which would regulate the article's movement and "all its attendant circumstances". This consideration may be relevant to the facts of *R. v. Campbell* and with respect to s. 34. Accused was the *Canadian* agent for an *American* company which supplied *goods manufactured in the United States* to retailers in Canada for resale, supposedly throughout various provinces, (although the case is unclear in this respect). Whether or not these conditions would justify federal legislation prohibiting resale price maintenance would depend, of course, on various factors such as the extent of trade (which, seemingly, would have to be interprovincial; nevertheless, the goods do cross Ontario's border initially), and whether or not such regulation would be exclusively in the general interest of the Dominion. It is unfortunate that the decision in *R. v. Campbell* did not go on to consider the possibility of justification under Trade and Commerce.

What does the future hold for the liberal view of the flow of interprovincial or external trade as justification for federal legislation

[27] (1959) 29 W.W.R. 369.

under the commerce head? The possibilities are well summed up in the following passage:

> The view in question represents a break with the past. The formalism, the atmosphere of unreality, which pervade the previous decisions are absent. Constitutional adjudication is achieved not by the application of a mechanical formula but by the elemental process of examining the facts.[28]

Also:

> Parliament has been denied adequate regulatory control over business, trades, industry and related activities—has been denied adequate control over the economic life of the nation. This lacuna is due to the restrictive judicial approach to the interpretation of the commerce clause. In Canada 'the federal commerce power' has not been 'as broad as the economic needs of the nation'. Whether the influence of recent developments is to be permitted to rectify this state of affairs, only the future will tell.[29]

W. P. GRANT