

Indexed as:

General Motors of Canada Ltd. v. City National Leasing Ltd.

**General Motors of Canada Limited, appellant (defendant);
v.
City National Leasing, respondent (plaintiff);
and
The Attorney General of Canada, intervener (intervener);
and
The Attorney General of Quebec, the Attorney General of
British Columbia, the Attorney General for Saskatchewan, the
Attorney General for Alberta, interveners.**

[1989] 1 S.C.R. 641

[1989] S.C.J. No. 28

File No.: 19724.

Supreme Court of Canada

1988: May 17, 18 / 1989: April 20.

**Present: Dickson C.J. and Beetz, McIntyre, Lamer,
Le Dain *, La Forest and L'Heureux-Dubé JJ.**

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

* Le Dain J. took no part in the judgment.

Constitutional law -- Division of powers -- Trade and Commerce -- Combines Investigation Act -- Private right action created if loss suffered because of conduct contrary to Part V of Combines Investigation Act or for non-compliance with order of court or commission -- Whether or not Combines Investigation Act intra vires Parliament under s. 91(2) -- Whether or not s. 31.1 creating private cause of action intra vires Parliament -- Combines Investigation Act, R.S.C. 1970, c. C-23, s. 31.1 -- Constitution Act, 1867, ss. 91(2), 92(13).

Respondent (CNL), a company leasing fleets of automobiles and trucks nation-wide in competition with other national fleet leasing companies, purchases the majority of its vehicles from franchised GM dealers, as opposed to GM itself. CNL's received interest rate

support in financing its GM purchases between 1970 and 1980 through a program offered by General Motors [page642] Acceptance Corporation. CNL alleged that during that time GM, directly or indirectly, had been paying "preferential" interest rate support to CNL's competitors in respect of their purchases of GM vehicles in addition to the interest rate support available to CNL. This exclusion of CNL from the preferential interest rate support program from 1970 to 1980 was alleged to be a practice of price discrimination contrary to s. 34(1)(a) of the Combines Investigation Act which gave rise to an action by CNL under s. 31.1. This section created a civil cause of action for certain infractions of the Act, notwithstanding the fact that the creation of civil causes of action lies within the domain of the provinces. CNL claimed that it lost profits equivalent to monies saved by its competitors, and that it was entitled to recover from GM damages equivalent to those lost profits with interest compounded. CNL also sued GM for breach of contract for damages arising after March 1980.

The motions court judge, on an application brought by GM, struck certain paragraphs of CNL's statement of claim as disclosing no cause of action as GM had never made an direct sales to CNL or its competitors. He then found s. 31.1 of the Act to be ultra vires Parliament as the right to sue was not truly necessary for the Combines Investigation Act, and finally, that s. 31 was not retroactive or retrospective, and therefore did not affect those transactions occurring before its proclamation in 1976. The Court of Appeal was not persuaded that CNL could not succeed in asserting a claim founded on s. 34(1) if the matter were to go to trial. The Court found s. 31.1 to be intra vires Parliament and held that s. 31(1) had no effect before its date of proclamation.

The constitutional questions stated by this Court queried: (1) whether the Combines Investigation Act, either in whole or in part, was intra vires Parliament under s. 91(2) of the Constitution Act, 1867, and (2) whether s. 31.1 was within the legislative competence of Parliament.

Held: The appeal should be dismissed. Both constitutional questions should be answered in the affirmative.

The Combines Investigation Act is valid under the federal trade and commerce power, in particular its [page643] "second branch" over "general" trade and commerce, and s. 31.1 is constitutionally valid by virtue of its being functionally related to the Act.

The Court has advanced several hallmarks of validity for legislation under the second branch of the trade and commerce power: (1) the impugned legislation must be part of a general regulatory scheme; (2) the scheme must be monitored by the continuing oversight of a regulatory agency; (3) the legislation must be concerned with trade as a whole rather than with a particular industry; (4) the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and (5) the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country. These indicia do not represent an exhaustive list of traits that will tend to characterize general trade and commerce legislation and the presence or absence of any of them is not necessarily determinative. On any occasion where the general trade and commerce power is advanced as a ground of constitutional validity, a careful case by case analysis remains appropriate.

The analysis to determine constitutionality of provisions such as s. 31.1 under the trade and commerce power involves the following steps. First, the court must determine whether the impugned provision can be viewed as intruding on provincial powers, and if so to what extent. Second, the court must establish whether the act (or a severable part of it) in which the impugned provision is found is valid; in cases under the second branch of s. 91(2) this will normally involve finding the presence of a regulatory scheme and then ascertaining whether the hallmarks articulated by the Court have been met by the scheme. If the scheme is not valid, that is the end of the inquiry. If the regulatory scheme is declared valid, the court must then determine whether the impugned provision is sufficiently integrated with the scheme that it can be upheld by virtue of that relationship. This requires considering the seriousness of the encroachment on provincial powers, in order to decide on the proper standard for such a relationship. If the provision passes this integration test, it is *intra vires* Parliament as an exercise of the general trade and commerce power. If the provision is not sufficiently integrated into the scheme of regulation, it cannot be sustained under the second branch of s. 91(2). In certain [page644] cases, some of these steps can be dispensed with if a clear answer to one of them resolve the issue.

Section 31.1 creates a civil right of action and, since the creation of civil actions generally lies within provincial jurisdiction under s. 92(13) of the Constitution Act, 1867, appears to encroach to some extent on an important provincial power. The encroachment, however, is not serious. Section 31.1 is only a remedial provision and such provisions are typically less intrusive vis-à-vis provincial powers. Section 31.1 does not create a general cause of action but rather one limited by the Act. Finally, the federal government is not constitutionally precluded from creating rights of civil action where such measures may be shown to be warranted. The inclusion of a private right of action in a federal enactment is not constitutionally fatal.

The Combines Investigation Act is valid federal legislation under the general trade and commerce power. The hallmarks incidental to this branch of the trade and commerce power have been met.

The Act is geared to eliminating activities that reduce competition in the market-place and embodies a complex, well-integrated scheme of economic regulation to achieve that end. It identifies and defines anti-competitive conduct, establishes an investigatory mechanism for revealing prohibited activities, and provides an extensive range of criminal and administrative redress. The Act is clearly concerned with the regulation of trade in general, rather than with the regulation of a particular industry or commodity. The regulatory scheme is subject to the oversight exercised by the Director and the Commission.

The Act is of national scope aimed at the economy as a single integrated national unit rather than as a collection of separate local enterprises. The provinces jointly or severally would be constitutionally incapable of passing this legislation. Finally, the failure to include one or more provinces or localities would jeopardize successful operation of the legislation in other parts of the country.

The regulation of competition falls within federal jurisdiction in its intraprovincial dimension and the Act therefore need not be read down so that s. 31.1 only applies to interprovincial trade. Because the regulation [page645] of competition is so clearly of national interest and because competition cannot be successfully regulated by federal legislation restricted to

interprovincial trade, the validity of the federal legislation must be determined without heed to the provincial legislation. Competition, however, is not a single matter and the provinces may deal with it in the exercise of their legislative powers in such fields as consumer protection, labour relations and marketing.

Section 31.1 intrudes on a provincial power but is sufficiently related to a valid legislative scheme to have constitutional validity conferred on it. The provision is functionally related to the general objective of the legislation, and to the structure and the content of the scheme. As one of an arsenal of remedies created by the Act, it serves to reinforce other sanctions of the Act and takes on meaning only by reference to them. The section provides a private remedy only for particular violations of the Act and does not create a private right of action at large. The intimate tie between the purpose of the Act and a privately initiated and privately conducted enforcement mechanism is a strong indication that s. 31.1 is enmeshed in the fabric in the Act.

Section 31.1 does not create a general action for damages. Recovery under this section can only be effected if loss or damage has occurred because of (i) conduct contrary to Part V of the Act or (ii) the failure of the defendant to comply with an order of the Commission or a court under the Act. The section is a core provision of the very pith and substance of the Act. Its use does not prevent the operation of the Act's other remedial mechanisms, and indeed, may supplement them.

Cases Cited

Applied: *Attorney General of Canada v. Canadian National Transportation, Ltd.*, [1983] 2 S.C.R. 206; *MacDonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134; considered: *Citizens' Insurance Company of Canada v. Parsons* (1881), 7 App. Cas. 96; distinguished: *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914; referred to: *Regional Municipality of Peel v. MacKenzie*, [1982] 2 S.C.R. 9; *Proprietary Articles Trade Association v. Attorney-General for Canada*, [1931] A.C. 310; *Attorney-General for Ontario v. Attorney-General of Canada (Canada Standards Trade Mark)*, [1937] A.C. 405; *Dominion Stores Ltd. v. The Queen*, [1980] 1 S.C.R. 844; *John Deere Plow Co. v. Wharton*, [1915] A.C. 330; *Attorney-General [page646] for Canada v. Attorney-General for Alberta (Insurance Reference)*, [1916] 1 A.C. 588; *In re the Board of Commerce Act, 1919, and the Combines and Fair Prices Act, 1919*, [1922] 1 A.C. 191; *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396; *The King v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434; *Attorney-General for British Columbia v. Attorney-General for Canada (Natural Products Marketing Reference)*, [1937] A.C. 377; *Canadian Federation of Agriculture v. Attorney-General for Quebec (The Margarine Reference)*, [1951] A.C. 179; *Murphy v. Canadian Pacific Railway Co.*, [1958] S.C.R. 626; *The Queen v. Klassen* (1959), 20 D.L.R. (2d) 406; *Caloil Inc. v. Attorney General of Canada*, [1971] S.C.R. 543; *Reference respecting the Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198; *R. v. Hoffman-La Roche Ltd.* (Nos. 1 and 2) (1981), 33 O.R. (2d) 694, *aff'g* (1980), 28 O.R. (2d) 164; *R. v. Miracle Mart Inc.* (1982), 68 C.C.C. (2d) 242; *BBM Bureau of Measurement v. Director of Investigation and Research*, [1985] 1 F.C. 173; *Seiko Time Canada Ltd. v. Consumers Distributing Co.* (1981), 34 O.R. (2d) 481, *aff'g* (1980), 29 O.R. (2d) 221; *Attorney General of Canada v. Québec Ready Mix Inc.*, [1985] 2 F.C. 40, *rev'g sub nom. Rocois Construction Inc. v. Québec Ready Mix Inc.*, [1980] 1 F.C. 184; *Henuset Bros. Ltd. v. Syncrude Canada Ltd.*

(1980), 114 D.L.R. (3d) 300; *Westfair Foods Ltd. v. Lippens Inc.*, [1987] 6 W.W.R. 629; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2; *Papp v. Papp*, [1970] 1 O.R. 331; *R. v. Zelensky*, [1978] 2 S.C.R. 940; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115; *Clark v. Canadian National Railway Co.*, [1988] 2 S.C.R. 680; *R. v. Thomas Fuller Construction Co. (1958) Ltd.*, [1980] 1 S.C.R. 695; *Nykorak v. Attorney General of Canada*, [1962] S.C.R. 331; *Jackson v. Jackson*, [1973] S.C.R. 205; *Zacks v. Zacks*, [1973] S.C.R. 891; *Cushing v. Dupuy* (1880), 5 App. Cas. 409; *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1967); *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373.

Statutes and Regulations Cited

Civil Code, s. 1053.

Combines Investigation Act, R.S.C. 1970, c. C-23, ss. 28, 29, 29.1, 30, 31.1(1), (2), 32, 32(1)(c), 32.2, 33, 34, 34(1)(a), (b), (c), 36, 36.1, 36.2, 36.3, 37.1.

Constitution Act, 1867, ss. 91(2), (27), 92(10), (13), (14), (16).

Copyright Act, R.S.C. 1970, c. C-30, ss. 20-24. [page647]

Ontario Rules of Practice, s. 126.

Patent Act, R.S.C. 1970, c. P-4, ss. 56-62.

Trade Marks Act, R.S.C. 1970, c. T-10, s. 7(e).

Authors Cited

Anisman, Philip and Peter W. Hogg. "Constitutional Aspects of Federal Securities Legislation", in Philip Anisman et al., *Proposals for a Securities Market Law for Canada*, vol. 3. Ottawa: Consumer and Corporate Affairs Canada, 1979.

Canada. Economic Council of Canada. *Interim Report on Competition Policy*. Ottawa: Queen's Printer, 1969.

Hogg, Peter W. *Constitutional Law of Canada*, 2nd ed. Toronto: Carswells, 1985.

Hogg, Peter W. and Warren Grover. "The Constitutionality of the Competition Bill" (1976), 1 *Can. Bus. L.J.* 197.

McDonald, Bruce C. "Constitutional Aspects of Canadian Anti-Combines Law Enforcement" (1969), 47 *Can. Bar Rev.* 161.

Safarian, A.E. *Canadian Federalism and Economic Integration*. Ottawa: Privy Council Office, 1974.

APPEAL from a judgment of the Ontario Court of Appeal (1986), 28 D.L.R. (4th) 158, allowing in part an appeal from a judgment of Rosenberg J. (1984), 12 D.L.R. (4th) 273. Appeal dismissed; both constitutional questions should be answered in the affirmative.

J. Edgar Sexton, Q.C., and Valerie A.E. Dyer, for the appellant.

John Sopinka, Q.C., and Kathryn I. Chalmers, for the respondent City National Leasing.

T.B. Smith, Q.C., Gaspard Côté, Q.C., Arnold Fradkin, and David Lucas, for the intervener the Attorney General of Canada.

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Robert Vick Farley, for the intervener the Attorney General of British Columbia.

Robert G. Richards, for the intervener the Attorney General of Saskatchewan.

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[Quicklaw note: Errata were published at [1989] 2 S.C.R., page iv. The changes indicated therein have been made to this document and the text of the errata as published in S.C.R. is appended to the judgment.]

The judgment of the Court was delivered by

1 DICKSON C.J.:-- The principal issue in this appeal is the constitutional validity of s. 31.1 of the Combines Investigation Act, R.S.C. 1970, c. C-23. Section 31.1 creates a civil cause of action for certain infractions of the Combines Investigation Act. It is this fact which makes the section constitutionally suspect: a civil cause of action is within the domain of the provinces to create. The essential question raised by this appeal is whether s. 31.1 can, nevertheless, be upheld as constitutionally valid by virtue of its relationship with the Combines Investigation Act. Answering this question requires addressing two issues: first, is the Act valid under the federal trade and commerce power, expressed in s. 91(2) of the Constitution Act, 1867; and second, is s. 31.1 integrated with the Act in such a way that it too is *intra vires* under s. 91(2).

2 For the reasons which follow, I have found s. 31.1 to be *intra vires* the federal Parliament. In answering the two aforementioned issues, I have decided, first, that the Combines Investigation Act is valid under the federal trade and commerce power, in particular, it is valid under the "second branch" of that power, the power over "general" trade and commerce. Second, I have found that s. 31.1 is constitutionally valid by virtue of being functionally related to the Act.

Legislation

3 Section 31.1 of the Act reads as follows:

31.1 (1) Any person who has suffered loss or damage as a result of

(a) conduct that is contrary to any provision of Part V, or

- (b) the failure of any person to comply with an order of the Commission or a court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the [page649] loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

4 Among the offences covered by Part V of the Act, referred to in s. 31.1(1)(a) above, are those set out in s. 34(1) which reads:

34. (1) Every one engaged in a business who

- (a) is a party or privy to, or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of a purchaser of articles from him in that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage that, at the time the articles are sold to such purchaser, is available to such competitors in respect of a sale of articles of like quality and quantity;
- (b) engages in a policy of selling products in any area of Canada at prices lower than those exacted by him elsewhere in Canada, having the effect or tendency of substantially lessening competition or eliminating a competitor in such part of Canada, or designed to have such effect; or
- (c) engages in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have such effect,

is guilty of an indictable offence and is liable to imprisonment for two years.

5 The following two constitutional questions were stated by the Court:

- (a) Is the Combines Investigation Act, R.S.C. 1970, c. C-23 (the "Act"), as amended, either in whole or in part, within the legislative competence of the Parliament of Canada under s. 91(2) of the Constitution Act, 1867?
- (b) Is section 31.1 of the Act within the legislative competence of the Parliament of Canada?

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I

Facts

6 General Motors of Canada Ltd. ("GM") manufactures automobiles and trucks. City National Leasing ("CNL") leases across Canada fleets of automobiles and trucks in competition with other national fleet leasing companies. CNL purchases the majority of its vehicles from franchised GM dealers, but does not purchase from GM directly. To finance purchases of GM vehicles between 1970 and 1980, CNL received interest rate support through a program offered by General Motors Acceptance Corporation ("GMAC"). CNL alleges that during that time GM, directly or indirectly, had been paying "preferential" interest rate support to competitors of CNL in respect of competitors' purchases of GM manufactured automobiles and trucks, in addition to the interest rate support available to CNL. It is further alleged that the exclusion of CNL from the preferential interest rate support program from 1970 to 1980 was a practice of price discrimination contrary to s. 34(1)(a) of the Act, giving CNL an action under s. 31.1. CNL claims that it lost profits equivalent to monies saved by its competitors, and that it is entitled to recover from GM damages equivalent to the lost profits and compound interest thereon. CNL also sued GM for breach of contract for damages arising after March 1980.

II

Judicial History

7 These proceedings originated in an application by GM before the motions court judge pursuant to r. 126 of the Ontario Rules of Practice. GM advanced three arguments before Rosenberg J., viz.: (i) that certain paragraphs of the statement of claim should be struck out as disclosing no cause of action because GM had never made any sales directly to CNL or to its competitors and thus s. 34(1)(a) of the Act did not apply; (ii) that s. 31.1 is ultra vires Parliament, being in pith and substance legislation in relation to matters within the [page651] exclusive legislative competence of the provinces under s. 92(13) and (16) of the Constitution Act, 1867; (iii) alternatively, if s. 31.1 is valid, it is not retrospective and therefore gives a cause of action only after its proclamation on January 1, 1976.

8 Rosenberg J. (reasons reported (1984), 12 D.L.R. (4th) 273) accepted GM's first argument and then advised counsel that in view of this finding there was no need to direct argument toward the ultra vires point, the constitutional issue being academic. He added, however, that, as much of the time at the hearing had been spent on this aspect, he would deal with some of the arguments regarding s. 31.1. After reviewing several authorities, in particular Attorney General of Canada v. Canadian National Transportation, Ltd., [1983] 2 S.C.R. 206; MacDonald v. Vapor Canada Ltd., [1977] 2 S.C.R. 134; and Regional Municipality of Peel v. MacKenzie, [1982] 2 S.C.R. 9, the judge concluded that the right of a private individual to sue is not truly necessary for the Combines Investigation Act to be effective and accordingly s. 31.1 of that Act is ultra vires the Parliament of Canada. At pages 281-82 he said that:

It is clear that s. 31.1 is not part of the complex scheme set up by the Act. It is not dependent on any finding by the Director or the Commission. For some 75 years the Act operated without such a provision. It cannot be justified as a necessary part of an administrative scheme set up by the Act.

The only possible justification for s. 31.1 is as legislation "necessarily incidental" or "truly ancillary" to other provisions in the Act or the regulation of trade and commerce.

. . .

I am of the view that the Peel v. MacKenzie case applies to the case at bar. The right of a private individual to sue is not truly necessary for the Combines Investigation Act to be effective. Section 31.1 is accordingly ultra vires the Parliament of Canada.

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9 On the third point of argument Rosenberg J. agreed with GM that s. 31.1 did not purport to be retroactive or retrospective and therefore could not affect transactions between 1970 and the date of proclamation of the section in 1976.

10 The Ontario Court of Appeal (Thorson, Robins and Tarnopolsky JJ.A.) (reasons reported (1986), 28 D.L.R. (4th) 158) allowed the appeal in part. On the first issue, whether certain paragraphs of the statement of claim should be struck out as disclosing no cause of action capable of being founded on s. 34(1)(a) of the Act, the Court was not persuaded that CNL could not hope to succeed in asserting a claim founded on s. 34(1) if the matter were to go to trial. With regard to the constitutional issue, the Court held that the motions court judge had erred in proceeding to make a finding after having indicated to counsel that he need not hear argument on the matter. The Court felt it had no choice but to disregard the reasons of the motions court judge for that finding. At the request of all counsel, however, the Appeal Court dealt with the issue of the validity of s. 31.1 of the Act and said at p. 159:

... we think it is sufficient to say that we find ourselves in agreement with the conclusion reached by the Federal Court of Appeal in *Pilote Ready Mix Inc. et al. v. Rocois Construction Inc.*, released November 21, 1985 (since reported 8 C.P.R. (3d) 145, 24 C.C.C. (3d) 158 sub nom. A.-G. Can. v. Quebec Ready Mix Inc. et al. and Rocois Construction Inc. et al. *mise-en-cause* [since reported also at (1985) 2 F.C. 40]; leave to appeal to S.C.C. granted C.P.R. and C.C.C. loc. cit.) There the Court held that s. 31.1 of the Combines Investigation Act is constitutionally valid legislation

of the Parliament of Canada, and with this conclusion we respectfully concur.

11 On the third and final issue, the Court agreed with the motions court judge that s. 31.1 could not be given operation so as to allow CNL to assert a claim for loss or damage, as a result of conduct contrary to s. 31(1)(a), in respect of transactions that occurred before January 1, 1976.

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12 This Court granted leave to appeal from the order of the Court of Appeal. The panel granting leave ordered that the appeal should be heard together with the appeal in Québec Ready Mix Inc. v. Rocois Construction Inc. Reasons in the latter appeal are being delivered concurrently herewith.

13 The Attorney General of Canada and the Attorneys General of Quebec, British Columbia, Saskatchewan and Alberta intervened in the appeal. The Attorney General for New Brunswick filed a notice of intention to intervene but later withdrew.

III

Arguments

14 In this Court the parties focussed their submissions on the constitutional validity of s. 31.1 under s. 91(2) of the Constitution Act, 1867, the trade and commerce power. The appellant GM, supported by the provincial Attorneys General, argued that the creation of a civil cause of action was a matter of provincial jurisdiction over property and civil rights granted to the provinces by s. 92(13) of the Constitution Act, 1867. GM argued vigorously against finding s. 31.1 valid under the trade and commerce power; s. 31.1, it was urged, did not satisfy any of the necessary indicia of valid trade and commerce legislation, nor could the civil action in s. 31.1 be characterized as necessarily incidental to a valid scheme regulating trade and commerce. The provision might be desirable to increase the effectiveness of the Combines Investigation Act, but its removal, GM argued, would not defeat the legislative purpose underlying the Act.

15 CNL and the Attorney General of Canada submitted that s. 31.1 was indeed within the constitutional competence of the federal government; properly characterized, s. 31.1 was clearly sustainable under the "general" branch of the federal trade [page654] and commerce power as economic legislation affecting the nation as a whole.

16 Quebec took a different approach from the other provinces. It concedes that the trade and commerce power does give the federal government power to regulate competition in the national economy and to create civil actions such as s. 31.1 to meet this goal, but contends that only international or interprovincial aspects of competition should be within the federal jurisdiction, while intraprovincial or local aspects of competition should fall under provincial jurisdiction. In effect, Quebec argues that s. 31.1 should be read down. In the two cases before the Court, this would probably mean that Québec Ready Mix would be non-suited, as that case seems to involve only contracts in Quebec City between

local construction groups, while the present case, that of GM, would go ahead, as both GM and CNL operated across the country.

17 The central issue before this Court, as indicated, is whether s. 31.1 of the Combines Investigation Act may be sustained under the "general" trade and commerce power of s. 91(2) of the Constitution Act, 1867. The overall validity of the Combines Investigation Act as a federal enactment has not been challenged. In numerous cases federal combines legislation has been upheld as valid under the federal power over criminal law. However, in claiming that s. 31.1 is valid legislation, CNL and the Attorney General of Canada argue in this appeal that in addition to being valid under the criminal law power, the Combines Investigation Act is also valid under the federal power over trade and commerce. This possibility was recognized by the Privy Council in the first case to uphold combines investigation legislation under the federal criminal power, *Proprietary Articles [page655] Trade Association v. Attorney-General for Canada*, [1931] A.C. 310, at p. 326:

The view that their Lordships have expressed makes it unnecessary to discuss the further ground upon which the legislation has been supported by reference to the power to legislate under s. 91, head 2, for "The regulation of trade and commerce." Their Lordships merely propose to disassociate themselves from the construction suggested in argument of a passage in the judgment in the Board of Commerce Case [[1922] 1 A.C. 191, 198] under which it was contended that the power to regulate trade and commerce could be invoked only in furtherance of a general power which Parliament possessed independently of it. No such restriction is properly to be inferred from that judgment. The words of the statute must receive their proper construction where they stand as giving an independent authority to Parliament over the particular subject-matter. But following the second principle noticed in the beginning of this judgment their Lordships in the present case forbear from defining the extent of that authority. They desire, however, to guard themselves from being supposed to lay down that the present legislation could not be supported on that ground.

18 To assess the claims made in this appeal it is necessary to begin by exploring the scope of s. 91(2) of the Constitution Act, 1867.

IV

The General Trade and Commerce Power

19 In *Canadian National Transportation*, supra, I had occasion to trace the history of s. 91(2) in the courts. It would be otiose to repeat that discussion here. For the purposes of this appeal it is sufficient to summarize the general principles that, in my view, have emerged from judicial consideration of s. 91(2) and which are relevant to the present appeal.

20 The leading case of *Citizens' Insurance Company of Canada v. Parsons* (1881), 7 App. Cas. 96, sets out the most frequently quoted statement of the scope of s. 91(2). Speaking for the Privy Council, Sir Montague Smith noted at p. 112 that if the words trade

and commerce were given their ordinary meaning, s. 91(2) conceivably granted [page656] very wide-ranging powers to the federal government:

The words "regulation of trade and commerce," in their unlimited sense are sufficiently wide, if uncontrolled by the context and other parts of the Act, to include every regulation of trade ranging from political arrangements in regard to trade with foreign governments, requiring the sanction of parliament, down to minute rules for regulating particular trades.

To limit the breadth of a literal interpretation of s. 91(2), Sir Montague Smith settled upon the following construction, at p. 113:

Construing therefore the words "regulation of trade and commerce" by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of parliament, regulation in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole dominion.

21 Sir Montague Smith continued, on the same page:

Having taken this view of the present case, it becomes unnecessary to consider the question how far the general power to make regulations of trade and commerce, when competently exercised by the dominion parliament, might legally modify or affect property and civil rights in the provinces, or the legislative power of the provincial legislatures in relation to those subjects

....

22 In *Canadian National Transportation*, supra, at p. 258, I suggested that Parsons had established three important propositions with regard to the federal trade and commerce power:

... (i) it does not correspond to the literal meaning of the words "regulation of trade and commerce"; (ii) it includes not only arrangements with regard to international and interprovincial trade but "it may be that ... (it) would include general regulation of trade affecting the whole dominion"; (iii) it does not extend to regulating the contracts of a particular business or trade.

23 Since Parsons, the jurisprudence on s. 91(2) has largely been an elaboration on the boundaries of [page657] the two aspects or "branches" of federal power: (1) the power over international and interprovincial trade and commerce; and (2) the power over general trade and commerce affecting Canada as a whole. The first branch has been the subject of considerable constitutional challenge and judicial scrutiny. The second branch, in contrast, has remained largely unexplored, terra incognita. In this appeal, however, it is under this

second branch of s. 91(2) that CNL and the Attorney General of Canada seek to uphold s. 31.1.

24 So far as I can gather, legislation has been upheld under the second branch by a final appellate court on only two occasions. In 1937 the Privy Council upheld a federal scheme creating a national trade mark to be used in conjunction with federally established commodity standards under the general trade and commerce power: *Attorney-General for Ontario v. Attorney-General of Canada (Canada Standards Trade Mark)*, [1937] A.C. 405. (But compare: *Dominion Stores Ltd. v. The Queen*, [1980] 1 S.C.R. 844, where this Court struck down federal products standards legislation.) The second occasion was in *John Deere Plow Co. v. Wharton*, [1915] A.C. 330, where the Privy Council located the regulation of federally incorporated companies within the general branch of s. 91(2), although they also upheld the legislation under the "peace, order and good government" power.

25 Aside from these two cases, at least until of late, the general trade and commerce power met with consistent rejection by the courts. Professor Hogg in the second edition of his work *Constitutional Law of Canada*, at pp. 447-48, notes that the courts refused to accept it as the basis for regulation of the insurance industry in the *Attorney-General for Canada v. Attorney-General for Alberta (Insurance Reference)*, [1916] 1 A.C. 588; prices and profits in *In re the Board of Commerce Act, 1919*, and the *Combines and Fair Prices Act, 1919* (the Board of Commerce case), [1922] 1 [page658] A.C. 191; labour relations in *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396; marketing in *The King v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434, and *Attorney-General for British Columbia v. Attorney-General for Canada (Natural Products Marketing Reference)*, [1937] A.C. 377; and the prohibition of margarine in *Canadian Federation of Agriculture v. Attorney-General for Quebec (The Margarine Reference)*, [1951] A.C. 179.

26 The treatment of the general trade and commerce power in the cases just mentioned was no doubt strongly influenced by earlier Privy Council decisions on s. 91(2) and in particular what Anglin C.J. referred to in *The King v. Eastern Terminal Elevator Co.*, *supra*, at p. 441, as "... their Lordships' emphatic and reiterated allocation of 'the regulation of trade and commerce' to ... [a] subordinate and wholly auxiliary function" As Professor McDonald observed in his article "Constitutional Aspects of Canadian Anti-Combines Law Enforcement" (1969), 47 *Can. Bar Rev.* 161, at p. 189:

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

At least until relatively recently the history of interpretation of the trade and commerce power has almost uniformly reinforced the federal paralysis which resulted from a series of Privy Council decisions in the years [page659] 1881-1896. The predominant view was that section 91(2) did not in any way go to either general commerce, contracts, particular trades or occupations, or commodities so far as those things might be intraprovincial. The test for the local nature of a transaction was abstractly legal, divorced from commercial effect.

27 Since 1949 and the abolition of appeals to the Privy Council, the trade and commerce power has, I think it fair to say, enjoyed an enhanced importance in such cases as *Murphy v. Canadian Pacific Railway Co.*, [1958] S.C.R. 626, upholding the validity of the federal Canadian Wheat Board Act; *The Queen v. Klassen* (1959), 20 D.L.R. (2d) 406 (Man. C.A.), upholding the application of the Canadian Wheat Board Act to intraprovincial transactions; and *Caloil Inc. v. Attorney General of Canada*, [1971] S.C.R. 543, upholding a federal scheme regulating the movement of imported gasoline. See also Reference respecting the Agricultural Products Marketing Act, [1978] 2 S.C.R. 1198.

28 In examining cases which have considered s. 91(2), it is evident that courts have been sensitive to the need to reconcile the general trade and commerce power of the federal government with the provincial power over property and civil rights. Balancing has not been easy. Following the initial articulation of the scope of the general trade and commerce power in *Parsons*, supra, the Privy Council briefly adopted what might be regarded as an overly inclusive interpretation of the power in *John Deere Plow Co. v. Wharton*, supra, before retreating to an overly restrictive stance to its interpretation in the *Board of Commerce*, supra, case. In *Wharton*, Viscount Haldane, at p. 340, speaking of federally-incorporated companies, sketched in broad terms the federal power to regulate trade and commerce under the second branch of *Parsons*:

[page660]

... if it be established that the Dominion Parliament can create such companies, then it becomes a question of general interest throughout the Dominion in what fashion they should be permitted to trade. [Emphasis added.]

29 In contrast, in the *Board of Commerce* case, the Privy Council rejected the trade and commerce power (without distinguishing between the two branches) as the basis for anti-combines legislation, holding that the trade and commerce power had no independent content and could only be invoked as ancillary to other federal powers. This view of the trade and commerce power was rejected some nine years later by the Privy Council in *Proprietary Articles Trade Association*, supra, in the passage quoted earlier.

30 With respect, in my view, neither the position articulated in *Wharton* nor that advanced in the *Board of Commerce* case correctly assesses the balance to be struck between ss. 91(2) and 92(13). *Wharton* is clearly overly expansive, sweeping all general

economic issues into the grasp of s. 91(2). On the other hand, the residual interpretation articulated in the Board of Commerce case fails to breathe life into the trade and commerce power and fails to recognize that provincial powers are a subtraction from the federal powers. The true balance between property and civil rights and the regulation of trade and commerce must lie somewhere between an all pervasive interpretation of s. 91(2) and an interpretation that renders the general trade and commerce power to all intents vapid and meaningless.

31 This Court took the first step towards delineating more specific principles of validity for legislation enacted under the general trade and commerce power in *Vapor Canada*, supra. In that case, s. 7(e) of the Trade Marks Act, R.S.C. 1970, c. T-10, was challenged as ultra vires Parliament. Section 7 prohibited certain commercial practices, including the making of false and misleading statements to discredit a competitor, passing off goods [page661] or services, and making use of false descriptions likely to mislead the public, under the general heading of unfair competition. The impugned subsection was a general catch-all provision, unrelated to the rest of the statute, which prohibited a person from doing "any other act" or adopting "any other business practice contrary to honest industrial or commercial usage in Canada". The respondent, Vapor Canada Ltd., supported by the Attorney General of Canada, argued that s. 7(e) could be sustained as legislation regulating general trade and commerce under s. 91(2).

32 The Court struck down the provision as ultra vires. Chief Justice Laskin, speaking for five members of the Court, proposed three hallmarks of validity for legislation under the second branch of the trade and commerce power. First, the impugned legislation must be part of a general regulatory scheme. Second, the scheme must be monitored by the continuing oversight of a regulatory agency. Third, the legislation must be concerned with trade as a whole rather than with a particular industry. Each of these requirements is evidence of a concern that federal authority under the second branch of the trade and commerce power does not encroach on provincial jurisdiction. By limiting the means which federal legislators may employ to that of a regulatory scheme overseen by a regulatory agency, and by limiting the object of federal legislation to trade as a whole, these requirements attempt to maintain a delicate balance between federal and provincial power. On the basis of these criteria, Laskin C.J. then rejected the general trade and commerce power as the constitutional foundation for s. 7(e).

33 Three members of the Court affirmed the Vapor Canada criteria in *Canadian National Transportation*. At issue in *Canadian National Transportation* [page662] was the authority of the Attorney General of Canada to conduct prosecutions under the Combines Investigation Act. Four members of the Court held that provincial authority over the administration of justice in s. 92(14) of the Constitution Act, 1867, did not preclude the federal government from conducting prosecutions of criminal offences. I was of the view that s. 92(14) did preclude the federal government from prosecuting criminal offences -- unless the offences could be upheld under a head of power other than s. 91(27). I then took the further position, in which Beetz and Lamer JJ. agreed in substance, that the section could be sustained as legislation relating to the general trade and commerce power and thus the federal government was competent to prosecute a violation of s. 32(1) of the Combines Investigation Act.

34 In reaching the conclusion that s. 32(1)(c) of the Combines Investigation Act was within the scope of the general trade and commerce power, and writing for the minority of the Court, I adopted Laskin C.J.'s three criteria in *Vapor Canada*, *supra*, but added two factors that I considered indicia of the valid exercise of the general trade and commerce power: (i) the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and (ii) the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country. These two requirements, like Laskin C.J.'s three criteria, serve to ensure that federal legislation does not upset the balance of power between federal and provincial governments. In total, the five factors provide a preliminary check-list of characteristics, the presence of which in legislation is an indication of validity under the trade and commerce power. These indicia do not, however, represent an exhaustive list of traits that will tend to characterize general trade and commerce legislation. Nor is the presence or absence of any of these five criteria [page663] necessarily determinative. As noted in *Canadian National Transportation*, *supra*, at p. 268:

The above does not purport to be an exhaustive list, nor is the presence of any or all of these indicia necessarily decisive. The proper approach to the characterization is still the one suggested in *Parsons*, a careful case by case assessment. Nevertheless, the presence of such factors does at least make it far more probable that what is being addressed in a federal enactment is genuinely a national economic concern and not just a collection of local ones.

On any occasion where the general trade and commerce power is advanced as a ground of constitutional validity, a careful case by case analysis remains appropriate. The five factors articulated in *Canadian National Transportation* merely represent a principled way to begin the difficult task of distinguishing between matters relating to trade and commerce and those of a more local nature.

V

Approach to Determining Constitutionality

35 Although a majority of this Court has never pronounced upon the validity of the Combines Investigation Act as a whole under the second branch of *Parsons*, lower courts have upheld sections of the Act, including s. 31.1, under the general trade and commerce power. In *R. v. Hoffman-La Roche Ltd.* (Nos. 1 and 2) (1981), 33 O.R. (2d) 694, the Ontario Court of Appeal (Martin J.A., Lacourcière and Weatherston JJ.A. concurring) affirmed the decision of Linden J. in the Ontario High Court of Justice (1980), 28 O.R. (2d) 164, and upheld s. 34(1)(c) of the Combines Investigation Act, which prohibits selling articles at unreasonably low prices, as legislation regulating general trade and commerce. In Quebec, the Superior Court declared s. 37.1 of the Act making [page664] it an offence to sell a product in excess of the advertised price valid under the second branch of s. 91(2) in *R. v. Miracle Mart Inc.* (1982), 68 C.C.C. (2d) 242. Section 31.4, prohibiting tied selling practices, was upheld under the general trade and commerce power by the Federal Court of Appeal in *BBM Bureau of Measurement v. Director of Investigation and Research*, [1985] 1 F.C. 173.

36 Section 31.1, in issue in this appeal, has been held ultra vires the Parliament of Canada by J. Holland J. in *Seiko Time Canada Ltd. v. Consumers Distributing Co.* (1980), 29 O.R. (2d) 221, at p. 250 (the Ontario Court of Appeal dismissed an appeal, though stating that the Court should not be taken as agreeing with the trial judge that s. 31.1 was invalid ((1981), 34 O.R. (2d) 481), and by Marceau J. in *Rocois Construction Inc. v. Quebec Ready Mix Inc.*, [1980] 1 F.C. 184. The subsection has been upheld, however, by the Alberta Court of Queen's Bench in *Henuset Bros. Ltd. v. Syncrude Canada Ltd.* (1980), 114 D.L.R. (3d) 300, by the Federal Court of Appeal in *Attorney General of Canada v. Québec Ready Mix Inc.*, [1985] 2 F.C. 40, by the Manitoba Court of Queen's Bench in *Westfair Foods Ltd. v. Lippens Inc.*, [1987] 6 W.W.R. 629, and by the Court of Appeal of Ontario in the instant case.

37 With the exception of *R. v. Hoffman-La Roche*, in each of the cases mentioned the constitutional analysis focussed on the impugned section of the Combines Investigation Act and not on the Act as a whole. In *R. v. Hoffman-La Roche*, Martin J.A., speaking for the court, held that the proper approach in determining whether s. 34(1)(c) could be sustained under the general power to regulate trade and commerce, was to characterize the statute as a whole.

[page665]

38 In *Canadian National Transportation*, supra, I considered the relevant approach for determining the constitutional validity of a section of the Combines Investigation Act under the general trade and commerce power at p. 270:

It is obvious at the outset that a constitutionally invalid provision will not be saved by being put into an otherwise valid statute, even if the statute comprises a regulatory scheme under the general trade and commerce branch of s. 91(2). The correct approach, where there is some doubt that the impugned provision has the same constitutional characterization as the Act in which it is found, is to start with the challenged section rather than with a demonstration of the validity of the statute as a whole. I do not think, however, this means that the section in question must be read in isolation. If the claim to constitutional validity is based on the contention that the impugned provision is part of a regulatory scheme it would seem necessary to read it in its context. If it can in fact be seen as part of such a scheme, attention will then shift to the constitutionality of the scheme as a whole.

The conclusion was then reached, on the basis of the above analysis, that s. 32(1)(c) was not an isolated provision but part of a regulatory scheme.

39 The approach just outlined was essentially that suggested by Laskin C.J. in *Vapor Canada*, supra, in the context of s. 7(e) of the Trade Marks Act (at p. 159):

Since s. 7(e) is not a trade mark provision, its inclusion in the Trade Marks Act does not stamp it with validity merely because that Act in its main provisions is quantitatively unchallenged. I come back to the question whether s. 7, and particularly s. 7(e), can stand as part of the scheme of the Trade Marks Act and other related federal legislation. If it can stand alone, it needs no other support; if not, it may take on a valid constitutional cast by the context and association in which it is fixed as complementary provision [sic] serving to reinforce other admittedly valid provisions. [Emphasis added.]

40 In this appeal, two basic approaches to determining the constitutional validity of s. 31.1 were [page666] argued before the Court. The appellant and most of the provincial Attorneys General advocated, as the first step, concentrating on the validity of the impugned section. If the impugned provision taken alone could not be said to fall within the general trade and commerce power, the focus of analysis would broaden to encompass the provision within its statutory context. The Attorneys General of Alberta and British Columbia took the position that considering the legislative context would not mean considering the entire Combines Investigation Act. They went so far as to contend that the constitutional validity of s. 31.1 could be determined without pronouncing on the validity of the Combines Investigation Act as a whole. The respondent adopted the same approach as the appellant. In the respondent's submission, however, s. 31.1 could be sustained under the trade and commerce power both when viewed in isolation and when considered in the legislative context of the Combines Investigation Act. The respondent advanced the position that the entire Combines Investigation Act constituted a valid exercise of the general trade and commerce power. In contrast to the approach adopted by the parties and the other interveners, the Attorney General of Canada maintained that the constitutional validity of s. 31.1 could only be assessed after pronouncing on the validity of the Combines Investigation Act as a whole. The Attorney General of Canada proposed analyzing the legislative framework established by the Combines Investigation Act before narrowing the analytical focus to the impugned provision on its own.

41 In my view, in circumstances such as exist in the case at bar, it will normally be necessary to consider both the impugned provision and the Act as a whole (or a significant part of it) when undertaking a constitutional analysis. This approach coheres with that undertaken in *Canadian National Transportation*, supra, and *Vapor Canada*, supra. The first step should be to consider whether and to what extent the impugned provision can be [page667] characterized as intruding into provincial powers. If it cannot be characterized as intruding at all, i.e., if in its pith and substance the provision is federal law, and if the act to which it is attached is constitutionally valid (or if the provision is severable or if it is attached to a severable and constitutionally valid part of the act) then the investigation need go no further. In that situation both the provision and the act are constitutionally unimpeachable. If, as may occur in some instances, the impugned provision is found to be constitutionally unimpeachable while the act containing it is not, then the act must be assessed on its own. In these instances, it is clear that the claim of invalidity should originally have been made against the act and not against the particular provision. In most cases like the present, however, it will be concluded that the impugned provision can be characterized, *prima facie*, as intruding to some extent on provincial powers: the question is to what

extent. I emphasize that in answering this initial question the court is considering the provision on its own and not assessing the act; thus the answer it reaches does not provide a conclusion with respect to the ultimate constitutional validity of the provision. The purpose is merely to ascertain the degree to which the provision could be said to intrude on provincial powers, so that this intrusion can be weighed in light of the possible justification for the section.

42 Such a justification will result from the impugned provision's relationship to valid legislation. Thus the next step in the process is to ascertain the existence of valid legislation. In considering cases argued under the general trade and commerce power, such as the present, this step involves ascertaining whether the act, or a severable part of the act which includes the impugned provision, contains a regulatory scheme. The presence of a scheme of legislation is one of the most basic characteristics, although not a *sine qua non*, of valid trade and commerce legislation. Most provisions upheld under the second branch of s. 91(2) will be connected to a regulatory scheme. In [page668] cases where a regulatory scheme is not found the court will then have to consider whether the legislation to which the provision is attached can nonetheless be supported by virtue of the existence of the other requirements for a valid exercise of the general trade and commerce power.

43 A regulatory scheme may be found in only a part of the act in question, if that part can stand alone, or it may be found in the entire act. The portion of the statute necessary to establish the existence of a regulatory scheme will not always be easy to discern. In those instances where a challenged provision, taken alone, comprehends a complete regulatory mechanism, the provision itself constitutes the appropriate starting point. In other cases, it will be necessary to examine the entire statute before a regulatory scheme may be identified. Once the presence of a regulatory scheme has been shown it will be necessary, using the factors outlined in *Vapor Canada*, *supra*, and *Canadian National Transportation*, *supra*, to determine its constitutional validity. Only after this has been done should the court turn to more careful consideration of the relationship between the particular impugned provision and the scheme.

44 The final question is whether the provision can be constitutionally justified by reason of its connection with valid legislation. As Laskin C.J. remarked in *Vapor Canada*, *supra*, inclusion of an invalid provision in a valid statute does not necessarily stamp the provision with validity. Here the court must focus on the relationship between the valid legislation and the impugned provision. Answering the question first requires deciding what test of "fit" is appropriate for such a determination. By "fit" I refer to how well the provision is integrated into the scheme of the legislation and how important it is for the efficacy of the legislation. The same test will not be appropriate in all circumstances. In arriving at the correct standard the court must consider the degree to which the provision intrudes on provincial powers. The case law, to which I turn below, shows that in certain [page669] circumstances a stricter requirement is in order, while in others, a looser test is acceptable. For example, if the impugned provision only encroaches marginally on provincial powers, then a "functional" relationship may be sufficient to justify the provision. Alternatively, if the impugned provision is highly intrusive vis-à-vis provincial powers then a stricter test is appropriate. A careful case by case assessment of the proper test is the best approach.

45 In determining the proper test it should be remembered that in a federal system it is inevitable that, in pursuing valid objectives, the legislation of each level of government will impact occasionally on the sphere of power of the other level of government; overlap of legislation is to be expected and accommodated in a federal state. Thus a certain degree of judicial restraint in proposing strict tests which will result in striking down such legislation is appropriate. I reiterate what I said on this general theme (although in a slightly different context) in *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 18:

The history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers. It is true that doctrines like interjurisdictional and Crown immunity and concepts like "watertight compartments" qualify the extent of that interplay. But it must be recognized that these doctrines and concepts have not been the dominant tide of constitutional doctrines: rather they have been an undertow against the strong pull of pith and substance, the aspect doctrine and, in recent years, a very restrained approach to concurrency and paramountcy issues.

The above comments also emphasize that the question in this appeal of how far federal legislation may validly impinge on provincial powers is one [page670] part of the general notion of the "pith and substance" of legislation; i.e., the doctrine that a law which is federal in its true nature will be upheld even if it affects matters which appear to be a proper subject for provincial legislation (and vice versa). On page 334 of his book *Constitutional Law of Canada* (2nd ed. 1985), Professor Hogg explains this in the following way:

The pith and substance doctrine enables a law that is classified as "in relation to" a matter within the competence of the enacting body to have incidental or ancillary effects on matters outside the competence of the enacting body.

I emphasize that these comments should not be seen as altering the balance of constitutional powers. Both provincial and federal governments have equal ability to legislate in ways that may incidentally affect the other government's sphere of power. I quote from Professor Hogg again, where at p. 336 he states: "I think it is plain both on principle and on authority that the provincial enumerated powers have exactly the same capacity as the federal enumerated powers to 'affect' matters allocated to the other level of government."

46 In the present appeal, the appellant focusses its attack on a particular section of the Act. The issue is not whether the Act as a whole is rendered ultra vires because it reaches too far, but whether a particular provision is sufficiently integrated into the Act to sustain its constitutionality. In numerous cases courts have considered the nature of the relationship which is required, between a provision which encroaches on provincial jurisdiction and a valid statute, for the provision to be upheld. In different contexts courts have set down slightly different requirements, viz.: "rational and functional connection" in *Papp v. Papp*, [1970] 1 O.R. 331; *R. v. Zelensky*, [1978] 2 S.C.R. 940, and *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; "ancillary", "necessarily incidental" and "truly necessary" in *Regional Municipality of Peel v. MacKenzie*, supra; "intimate connection", [page671] "an integral part" and "necessarily incidental" in *Northern Telecom Ltd v. Com-*

munications Workers of Canada, [1980] 1 S.C.R. 115; "integral part" in *Clark v. Canadian National Railway Co.*, [1988] 2 S.C.R. 680; "a valid constitutional cast by the context and association in which it is fixed as a complementary provision" in *Vapor Canada*, supra; and "truly necessary" in *R. v. Thomas Fuller Construction Co. (1958) Ltd.*, [1980] 1 S.C.R. 695. I believe the approach I have outlined is consistent with the results of this jurisprudence. These cases are best understood as setting out the proper test for the particular context in issue, rather than attempting to articulate a test of general application with reference to all contexts. Thus the tests they set out are not identical. As the seriousness of the encroachment on provincial powers varies, so does the test required to ensure that an appropriate constitutional balance is maintained. In surveying past jurisprudence it is to be expected that some example of patterns between the appropriate test of fit, and the head of power under which the federal legislation is valid, will be found. Such patterns exist not only because of a possible degree of similarity between the federal legislation which falls under any one head of power, but also for the reason that certain federal heads of power, for example, s. 92(10), are narrow and distinct powers which relate to particular works and undertakings and are thus quite susceptible to having provisions "tacked-on" to legislation which is validated under them, while other federal heads of power, for example, trade and commerce, are broad and therefore less likely to give rise to highly intrusive provisions.

47 The steps in the analysis may be summarized as follows: First, the court must determine whether the impugned provision can be viewed as intruding on provincial powers, and if so to what extent (if it does not intrude, then the only possible issue is the validity of the act). Second, the court must establish whether the act (or a severable part of it) is [page672] valid; in cases under the second branch of s. 91(2) this will normally involve finding the presence of a regulatory scheme and then ascertaining whether that scheme meets the requirements articulated in *Vapor Canada*, supra, and in *Canadian National Transportation*, supra. If the scheme is not valid, that is the end of the inquiry. If the scheme of regulation is declared valid, the court must then determine whether the impugned provision is sufficiently integrated with the scheme that it can be upheld by virtue of that relationship. This requires considering the seriousness of the encroachment on provincial powers, in order to decide on the proper standard for such a relationship. If the provision passes this integration test, it is intra vires Parliament as an exercise of the general trade and commerce power. If the provision is not sufficiently integrated into the scheme of regulation, it cannot be sustained under the second branch of s. 91(2). I note that in certain cases it may be possible to dispense with some of the aforementioned steps if a clear answer to one of them will be dispositive of the issue. For example, if the provision in question has no relation to the regulatory scheme then the question of its validity may be quickly answered on that ground alone. The approach taken in a number of past cases is more easily understood if this possibility is recognized.

VI

Does Section 31.1 Encroach on Provincial Powers?

48 The first step, therefore, in assessing the validity of s. 31.1 of the *Combines Investigation Act* is to determine whether the impugned provision can be seen as encroaching on provincial powers, and if so, to what extent. As section 31.1 creates a civil right of action it is not difficult to conclude that the provision does, on its face, appear to encroach on pro-

vincial power to some extent. The creation of civil actions is generally a matter within provincial jurisdiction under s. 92(13) of the Constitution Act, 1867. This provincial power over civil rights is a significant power and one that is not [page673] lightly encroached upon. In assessing the seriousness of this encroachment, however, three facts must be taken into consideration. The first is that s. 31.1 is only a remedial provision; its purpose is to help enforce the substantive aspects of the Act, but it is not in itself a substantive part of the Act. By their nature, remedial provisions are typically less intrusive vis-à-vis provincial powers. The second important fact is the limited scope of the action. Section 31.1 does not create a general cause of action; its application is carefully limited by the provisions of the Act. The third relevant fact is that it is well-established that the federal government is not constitutionally precluded from creating rights of civil action where such measures may be shown to be warranted. This Court has sustained federally-created civil actions in a variety of contexts: see *Nykorak v. Attorney General of Canada*, [1962] S.C.R. 331 (allowing the federal Crown to sue a private party for the loss of services of a member of the armed forces); *Jackson and Jackson*, [1973] S.C.R. 205; *Zacks v. Zacks*, [1973] S.C.R. 891 (upholding the corollary relief provisions of the Divorce Act respecting alimony, maintenance or custody); and *Multiple Access Ltd. v. McCutcheon*, *supra* (upholding a civil remedy against directors and officers of federally incorporated companies who engaged in insider trading). In the last mentioned case, at pages 182-83, the following passage, adopted by six of the seven members of the Court, appears:

One reservation with respect to the impugned sections of the federal act may be in the imposition of civil liability in s. 100.4(1). Does this imposition of civil liability in a federal statute so invade the provincial domain as to render the sections imposing liability *ultra vires*? This, in essence, was the argument of the appellants. But as Professors Anisman and Hogg point out: "Judicial decisions concerning a number of disparate matters such as federal elections, railways, federal corporations and even divorce have upheld Parliament's jurisdiction to provide civil relief in order to effectuate [page674] its legislative policies" ("*Constitutional Aspects of Federal Securities Legislation*" in *Proposals for a Securities Market Law for Canada* (1979), vol. 3, chap. III, at p. 192). In my opinion, ss. 100.4 and 100.5 have a general corporate purpose and a "rational, functional connection" with company law. The sections in my view are *intra vires* the Parliament of Canada.

49 It is clear that the inclusion of a private right of action in a federal enactment is not constitutionally fatal. The following excerpt from p. 415 of *Cushing v. Dupuy* (1880), 5 App. Cas. 409, a case cited by Sir Montague Smith at p. 113 in *Parsons*, *supra*, is apposite:

It was contended for the Appellant that the provisions of the Insolvency Act interfered with property and civil rights, and was therefore *ultra vires*. This objection was very faintly urged

...

It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property, and other civil rights, nor without providing some mode of special procedure for the vesting, realisation, and distribution of the estate, and the settlement of the liabilities of the insolvent.

In sum, the impugned provision encroaches on an important provincial power; however, the provision is a remedial one; federal encroachment in this manner is not unprecedented and, in this case; encroachment has been limited by the restrictions of the Act.

VII

The Presence of a Regulatory Scheme in the Combines Investigation Act

50 The second step in determining the validity of s. 31.1 is to establish whether the Act contains a regulatory scheme. The presence of a well-orchestrated scheme of economic regulation is immediately apparent on examination of the Combines Investigation Act. The existence of a regulatory scheme is in evidence throughout the entire Act.

[page675]

51 The Combines Investigation Act is divided into eight parts. Part I creates the Director of Investigation and Research, whose role is to investigate the possibility that companies are engaging in certain forms of anti-competitive conduct specifically proscribed by later parts of the Act. The Director has the power to require the Restrictive Trade Practices Commission, created by Part II of the Act, to conduct hearings into suspected violations of the Act. The Director is also in charge of enforcing the criminal provisions of the Act (Part V) by referring the matter to the Attorney General of Canada, and of enforcing the provisions relating to the civil violations of the Act by the exclusive right to apply to the Restrictive Trade Practices Commission for a remedial order (Part IV.1).

52 Part II establishes the Restrictive Trade Practices Commission. The role of the Commission is to conduct hearings into alleged violations of the criminal provisions of the Act, upon request of the Director. At the conclusion of the proceedings, the Commission is required to submit a written report to the Minister of Consumer and Corporate Affairs. The report must include an appraisal of the effect on the public interest of arrangements and practices disclosed in the evidence as well as recommendations on potential remedies. Part III contains general provisions regarding the conduct of inquiries and proceedings and the remuneration of staff.

53 Parts IV and IV.1 contain the remedial provisions of the Combines Investigation Act. Part IV, entitled Special Remedies, is, as its name implies, a list of remedies for anti-competitive conduct defined in the Act, including the reduction or removal of customs duties (s. 28), orders of the Federal Court to prevent the use of patents as a method of restraining trade (s. 29), interim injunctions against conduct proscribed under Part V of the

Act (s. 29.1), prohibition orders on repetition of conduct where a person has been convicted of an offence under Part V (s. 30), and the civil damages action at issue in this appeal (s. 31.1). Part IV.1 of the Act is entitled Matters Reviewable [page676] by the Commission. It grants the Commission the authority to issue remedial orders against a number of trade practices including exclusive dealing, market restriction and tied selling.

54 The penal provisions of the Act are enumerated in Parts V and VI. Part V proscribes as criminal certain practices including conspiracies to lessen competition (s. 32), bid-rigging (s. 32.2), assisting in the formation of a merger or monopoly (s. 33), illegal trade practices (s. 34), misleading advertising (s. 36), false representations of product performance tests and testimonials (s. 36.1) double ticketing (s. 36.2), and pyramid selling (s. 36.3). Part VI of the Act creates a number of offences for obstructing or failing to comply with an inquiry and establishes the enforcement procedure for the criminal provisions of the Act. Finally, Part VII contains general provisions of the investigation of monopolistic situations.

55 From this overview of the Combines Investigation Act I have no difficulty in concluding that the Act as a whole embodies a complex scheme of economic regulation. The purpose of the Act is to eliminate activities that reduce competition in the market-place. The entire Act is geared to achieving this objective. The Act identifies and defines anti-competitive conduct. It establishes an investigatory mechanism for revealing prohibited activities and provides an extensive range of criminal and administrative redress against companies engaging in behaviour that tends to reduce competition. In my view, these three components, elucidation of prohibited conduct, creation of an investigatory procedure, and the establishment of a remedial mechanism, constitute a well-integrated scheme of regulation designed to discourage forms of commercial behaviour viewed as detrimental to Canada and the Canadian economy.

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VIII

The Validity of the Regulatory Scheme

56 Having discerned the presence of a regulatory scheme in the Combines Investigation Act, it is necessary to consider the validity of the scheme under the general trade and commerce power in light of the criteria established in *Canadian National Transportation*, supra. Four criteria remain to be examined: (1) whether the regulatory scheme operates under the oversight of an agency, (2) whether the Act is concerned with trade in general, (3) whether the provinces would be constitutionally capable of enacting combines legislation, and finally, (4) whether the failure to include one or more provinces or localities would jeopardize the successful operation of the Combines Investigation Act.

57 The foregoing review of the Combines Investigation Act leaves no doubt that the scheme regulating anti-competitive activities operates under the watchful gaze of a regulatory agency. The regulatory mechanism is carefully controlled by the Director of Investigation and Research and to a lesser degree by the Restrictive Trade Practices Commission.

The authority to launch an inquiry into suspected anti-competitive conduct lies with the Director. The Director is required to initiate an inquiry whenever there is reason to believe either that a person has failed to comply with an order of the Commission or where an offence proscribed by the Act has been or is about to be committed, whenever the Minister of Consumer and Corporate Affairs so directs, and on application of six residents of Canada over the age of eighteen. The inquiry is conducted by the Director and his or her staff. If the Director concludes that there has been a violation of Part V of the Act, the Director may refer the matter to the Commission whose role is to hold proceedings and to report the outcome, including any remedial recommendations, to the Minister. It is clear that the Director exercises a significant degree of control over the operation of the Combines Investigation Act. In my view, the control over the entire process exercised by the Director and the Commission satisfies the requirement [page678] that there be vigilant oversight of the administration of a regulatory scheme.

58 I am also of the view that the Combines Investigation Act meets the remaining three indicia of Canadian National Transportation. These criteria share a common theme: all three are indications that the scheme of regulation is national in scope and that local regulation would be inadequate. The Act is quite clearly concerned with the regulation of trade in general, rather than with the regulation of a particular industry or commodity. Ryan J., in upholding the validity of s. 37.1 of the Act, in *Miracle Mart*, supra, described the Act in terms I agree with. At page 259 he said:

... s. 37.1 is part of, as I previously indicated, a complete regulatory scheme aimed at eliminating commercial practices which are contrary to healthy competition across the country, and not in a specific place, in a specific business or industry. [Emphasis in original.]

This generality of application distinguishes the Act from the legislation which was found ultra vires in *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914. In that case the legislation regulated a single trade or industry. As I noted earlier, the purpose of the Act is to ensure the existence of a healthy level of competition in the Canadian economy. The deleterious effects of anti-competitive practices transcend provincial boundaries. Competition is not an issue of purely local concern but one of crucial importance for the national economy.

59 Various factors underlie the need for national regulation of competition in the economy. Professors Hogg and Grover, in "The Constitutionality of the Competition Bill" (1976), 1 Can. Bus. L.J. 197, at pp. 199-200 (an abridged version of a paper written for the federal government's Department of Consumer and Corporate Affairs) provide a useful discussion of the diverse economic, geographical, and political factors which make it essential that competition be regulated on the federal level:

[page679]

It is surely obvious that major regulation of the Canadian economy has to be national. Goods and services, and the cash or credit which purchases them, flow freely from one part of the country to another without regard for provincial boundaries. Indeed, a basic concept of the federation is that it must be an economic union. An over-all national policy is the key to efficiency in the production of goods and services. Each province of the country is differently endowed with national resources, capital, labour and access to consumers. The result is that each province will be able to produce some products or services more efficiently than others. The introduction of an effective competition policy can be seen as one method to ensure that these differing regional advantages will accrue to the nation as a whole in terms of lower prices, better quality and variety and increased opportunities for Canadians. Any attempt to achieve an optimal distribution of economic activity must transcend provincial boundaries, for, in many respects,
Canada is one huge marketplace

The relative unimportance of provincial boundaries has become progressively more obvious as industry has tended to become more concentrated. Improved communications and transportation have increased the mobility of labour, capital and technology, as well as raw materials and the finished product

With respect to businesses which are confined to Canada, with few exceptions, any individual or corporation, including a provincially incorporated corporation, has the capacity to "walk across" provincial boundaries in order to buy or sell, lend or borrow, hire or fire. In the absence of artificial impediments, therefore, the market for goods and services is competitive on a national basis, and provincial legislation cannot be an effective regulator.

Among the materials filed in this appeal by the Attorney General of Canada was a study prepared by A. E. Safarian for the Government of Canada, entitled *Canadian Federalism and Economic Integration* (1974), which states a similar point at p. 58:

Competition policy can be used most effectively to support the common market if it is within federal power. With mobility of goods, it is quite unrealistic to attempt to maintain diverse provincial competition policies. The [page680] more competitive structure of industry in one or more provinces would tend to impose competitive conditions on the other provinces. In such circumstances, any provincial authority which was more tolerant of monopoly or combinations than other provincial authorities would be forced to resort to protection against interprovincial imports and might be tempted to subsidize interprovincial exports. By contrast, the point of a federal common market is precisely to allow consumers and producers anywhere in Canada free access to supplies and markets across Canada.

60 It is evident from this discussion that competition cannot be effectively regulated unless it is regulated nationally. As I have said, in my view combines legislation fulfills the three indicia of national scope as described in *Canadian National Transportation*: it is legislation "aimed at the economy as a single integrated national unit rather than as a collection of separate local enterprises", it is legislation "that the provinces jointly or severally would be constitutionally incapable of passing" and "failure to include one or more provinces or localities would jeopardize successful operation" of the legislation "in other parts of the country".

61 The above arguments also answer the claim of the Attorney General of Quebec that the regulation of competition does not fall within federal jurisdiction in its intraprovincial dimension and thus the Act should be read down so that s. 31.1 only applies to interprovincial trade. Quebec relies on two points to support its position. First, in the Interim Report on Competition Policy of the Canadian Economic Council, the Report which the federal government relies on to show that competition is exclusively federal, there is a passage at p. 108 that recognizes that the provinces have an important role to play in local competition laws:

We would like to make it emphatically clear that in recommending such a test we intend no implication whatever that the federal government should seek exclusive [page681] occupancy of the field of competition policy under civil law, or that only the federal government is competent to manage competition policy in Canada. On the contrary, while it is clear that a considerable proportion of Canadian economic activity crosses provincial and international boundaries, and would be impossible to subject effectively to any provincial competition policy, we believe that the provinces could play a most useful role in respect of other lines of activity under their existing constitutional powers. Their assumption of such a role would be a most welcome development. If the recommendations of this Report are largely framed in terms of federal legislation, this is because a federal presence is clearly indispensable and the federal government has hitherto been, to all intents and purposes, the sole active occupant of the field. But the door to provincial participation should be left widely ajar. Such activity by the provinces would be in many ways a natural extension of their already considerable activity in the field of consumer protection.

62 The second point is that provincial law, both Civil Code and common law, already provides some remedies for unfair competition, as in the *Quebec Ready Mix* case where the suit was brought under art. 1053 of the Civil Code, as well as s. 31.1 of the *Combines Investigation Act*. Quebec points out that in the United States, forty-three states have adopted competition acts to combat local restraints on trade, in co-ordination with the federal government.

63 The arguments made above offer a response to these points. They make it clear that not only is the Act meant to cover intraprovincial trade, but that it must do so if it is to be effective. Because regulation of competition is so clearly of national interest and because competition cannot be successfully regulated by federal legislation which is restricted to

interprovincial trade, the Quebec argument must fail. I also note that, contrary to the view of Marceau J. in the Trial Division of the Federal Court in *Quebec Ready Mix*, supra, at p. 208, that the presence of an already existing action in Quebec law does not argue for invalidating federal legislation. I would repeat what I said at p. 175 of *Multiple Access*, supra, (which words were [page682] also quoted by MacGuigan J. in the Court of Appeal's judgment in *Attorney General of Canada v. Québec Ready Mix*, supra, at p. 78): "The validity of the federal legislation must be determined without heed to the ... [provincial] legislation".

64 On the other hand, competition is not a single matter, any more than inflation or pollution. The provinces too, may deal with competition in the exercise of their legislative powers in such fields as consumer protection, labour relations, marketing and the like. The point is, however, that Parliament also has the constitutional power to regulate intraprovincial aspects of competition.

65 In sum, the Combines Investigation Act is a complex scheme of competition regulation aimed at improving the economic welfare of the nation as a whole. It operates under a regulatory agency. It is designed to control an aspect of the economy that must be regulated nationally if it is to be successfully regulated at all. As Linden J. of the Ontario High Court of Justice said, when discussing the Act in *R. v. Hoffman-La Roche*, supra, at p. 191:

It is part of a legislative scheme aimed at deterring a wide range of unfair competitive practices that affect trade and commerce generally across Canada, and is not limited to a single industry, commodity or area. The conduct being prohibited is generally of national and of international scope. The presence or absence of healthy competition may affect the welfare of the economy of the entire nation. It is, therefore, within the sphere of the federal Parliament to seek to regulate such competition in the interest of all Canadians.

66 I am therefore of the view that the Combines Investigation Act as a whole is *intra vires* Parliament as legislation in relation to general trade and commerce and I would reiterate the conclusion I reached in *Canadian National Transportation*, supra, at p. 278:

[page683]

A scheme aimed at the regulation of competition is in my view an example of the genre of legislation that could not practically or constitutionally be enacted by a provincial government. Given the free flow of trade across provincial borders guaranteed by s. 121 of the Constitution Act, 1867 Canada is, for economic purposes, a single huge marketplace. If competition is to be regulated at all it must be regulated federally. This fact leads to the syllogism cited by Hogg and Grover, *The Constitutionality of the Competition Bill* (1977), 1 Can Bus. L.J. 197, at p. 200:

... regulation of the competitive sector of the economy can be effectively accomplished only by federal action. If there is no federal power to enact a competition policy, then Canada cannot have a competition policy. The consequence of a denial of federal constitutional power is therefore, in practical effect, a gap in the distribution of legislative powers.

IX

The Validity of s. 31.1 of the Combines Investigation Act

67 Having found that the Combines Investigation Act contains a regulatory scheme, valid under s. 91(2) of the Constitution Act, 1867, the only issue remaining to be addressed is the constitutional validity of s. 31.1. As I have already noted, mere inclusion in a valid legislative scheme does not ipso facto confer constitutional validity upon a particular provision. The provision must be sufficiently related to that scheme for it to be constitutionally justified. The degree of relationship that is required is a function of the extent of the provision's intrusion into provincial powers. I have already discussed this issue and concluded that s. 31.1 intrudes, though in a limited way, on the important provincial power over civil rights. In this light, I do not think that a strict test, such as "truly necessary" or "integral", is appropriate. On the other hand, it is not enough that the section be merely "tacked on" to admittedly valid legislation. The correct approach in this case is to ask whether the provision is functionally related to the general objective of the legislation, and to the structure and the content of the scheme. A similar test has been applied in other cases, as I have noted, and I [page684] think it is also the proper test for the circumstances of this appeal.

68 The nature of this relationship is addressed in this last stage of constitutional analysis. If section 31.1 cannot be characterized as functionally related to the scheme of combines regulation, it will be ultra vires. Neither the respondent nor the Attorney General of Canada submitted that s. 31.1 could be sustained under a head of power other than s. 91(2).

69 I am of the opinion that the necessary link between s. 31.1 and the Act exists. Section 31.1 is an integral, well-conceived component of the economic regulation strategy found in the Combines Investigation Act. Even if a much stricter test of fit were applied -- for instance, one of "necessarily incidental" -- s. 31.1 would still pass the test. Under the test of "functionally related" the section is clearly valid.

70 Section 31.1 is one of the arsenal of remedies created by the Act to discourage anti-competitive practices. Section 31.1 simply serves to reinforce other sanctions of the Act. The other remedial responses include orders of the Restrictive Trade Practices Commission (Part IV.1), interim injunctions (Part IV), and criminal sanctions (Part V). Like the other remedies, s. 31.1 is intimately linked to the Combines Investigation Act. It takes on meaning only by reference to other provisions of the Act and has no independent content. As a result, the section is carefully bounded by the parameters of the Combines Investigation Act. It provides a private remedy only for particular violations of the Act and does not create a private right of action at large.

71 Section 31.1 of the Combines Investigation Act is also fundamentally integrated into the purpose and underlying philosophy of the Combines Investigation [page685] Act.

There is a close congruence between the goal of enhancing healthy competition in the economy and s. 31.1 which creates a private remedy dependent for its effectiveness on individual initiative. The very exercise of the remedy in s. 31.1 by a company against a competitor whose behaviour has transgressed the code of conduct established by the Act may be said to reflect and promote the spirit of competition informing the Combines Investigation Act. In my view, the intimate tie between the purpose of the Act and a privately initiated and privately conducted enforcement mechanism is a strong indication that s. 31.1 is enmeshed in the fabric in the Act.

72 It is important to note that s. 31.1 does not create a general action for damages. Before any person can recover under s. 31.1 he or she must have suffered loss or damage as a result of (i) conduct contrary to Part V of the Act or (ii) the failure of the defendant to comply with an order of the Commission or a court under the Act. Section 31.1(2) of the Act provides in part that in any action under subs. (1) against a person, the record of proceedings in any court in which that person was convicted of an offence under Part V or convicted of or punished for failure to comply with an order of the Commission or a court under the Act is, in the absence of any evidence to the contrary, proof that the person against whom the action is brought engaged in conduct that was contrary to a provision of Part V or failed to comply with an order of the Commission or a court under the Act. It seems to me that s. 31.1 is fully integrated into the Act, indeed, it is a core provision of the very pith and substance of the Act. As the Attorney General of Canada submits, the civil action for damages provided by s. 31.1 for an occurrence of the anti-competitive practices set out in s. 34(1)(a) is clearly as much a part of the legislative scheme regulating competition throughout Canada as is the criminal action for fines and imprisonment or the administrative action involving an inquiry or the reduction of customs duties. Together or apart, the civil, administrative, and criminal actions provide a deterrent against the breach of the competitive policies set out in the Act. In this respect s. 31.1 is part of a legislative [page686] scheme intended to create "a more complete and more effective system of enforcement in which public and private initiative can both operate to motivate and effectuate compliance" (per MacGuigan J. at p. 77 in *Québec Ready Mix*, supra).

73 The use by a party of the civil remedy in s. 31.1 does not prevent the operation of the other remedial mechanisms of the Combines Investigation Act. The right of action in s. 31.1 may be used to supplement the other remedial provisions in the Act. The civil cause of action may also be used by an aggrieved party when the public enforcement mechanism of the Act fails to react with sufficient alacrity. As Anisman and Hogg state in "Constitutional Aspects of Federal Securities Legislation", in *Proposals for a Securities Market Law for Canada* (1979), vol. 3, at p. 190:

... the availability of civil actions for damages by persons who suffer harm as a result of a violation both enhances the deterrent effect of the legislation and enables compensation to the plaintiff for his injury. Indeed, the public benefits of private actions derive largely from the economic interest of the plaintiff in obtaining compensation for the effects of the violation.

This, it seems to me, is an answer to the appellant's arguments that no public interest is being served by s. 31.1, only the private interest of the individual plaintiff, and that the Act can function adequately without the inclusion of a private right of action. Rosenberg J. ac-

cepted the latter argument at trial, commenting that the Act had operated for seventy-five years without a comparable provision. With respect, for the reasons just discussed [page687] and in view of the history of the provision, I find this argument unconvincing. Section 31.1 was added to the Combines Investigation Act as part of a package of amendments to the Act in 1975. These amendments were introduced to implement recommendations made by the Economic Council of Canada in its Interim Report on Competition Policy, released in July 1969. The Council proposed prevention and deterrence of anti-competitive activities, rather than convictions, as the primary goals of the enforcement of combines legislation. The Economic Council suggested that in addition to the significant deterrent role played by the threat of criminal sanctions, Parliament should consider including a private right of civil action in the Act's enforcement mechanism. The basic reasons given by the Economic Council for seeking to place some of the federal government's economic policy on a civil law basis were "to improve its relevance to economic goals, its effectiveness, and its acceptability to the general public" (p. 109 of the Interim Report). Resting the constitutional foundation on the criminal law power contributed, in the opinion of the Council, to the rigidity and "inflexibility of the law and its administration. Criminal offences must be proved beyond a reasonable doubt. Charges must be expressed and proven in the categorical manner specified in the statute."

74 The Economic Council made particular mention of American antitrust legislation which contains an action for damages at the suit of private parties who believe themselves to have been injured by anti-competitive behaviour. In the United States experience, the Economic Council noted, civil suits have provided an important element of deterrence. Black J. of the Supreme Court of the United States, in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1967), referred to the private civil damage action in that country's [page688] antitrust legislation, as "a bulwark of antitrust enforcement" at p. 139:

Both *Simpson* [*Simpson v. Union Oil Co.* 377 U.S. 13 (1964)] and *Kiefer-Stewart* [*Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211 (1951)] were premised on a recognition that the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behaviour in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct. *Kiefer-Stewart*, *supra*.

Although there are differences between s. 31.1 and the American civil action provisions, including the award of treble damages under American law, in my view the American anti-trust experience should not be overlooked.

75 The Economic Council also recommended expanding civil enforcement mechanisms generally to increase flexibility needed to combat business practices reducing competition.

To comply with these suggestions, a number of provisions were added to the Act in 1975 including all of Part IV.1, Matters Reviewable by the Commission.

76 While it is true that the Combines Investigation Act existed for decades without a provision equivalent to s. 31.1, I see no reason why remedies available for violations of the Act should be frozen in time. There is no constitutional impediment to amending the remedies provisions of the Combines Investigation Act to conform with changing economic realities.

[page689]

77 For these reasons, I conclude that s. 31.1 is an integral part of the Combines Investigation Act scheme regulating anti-competitive conduct. The relationship between the section and the Act easily meets the test for the section to be upheld. This finding should not be interpreted as authority for upholding all provisions creating private civil action that are attached to a valid trade and commerce regulatory scheme or any other particular type of scheme. Section 31.1 is carefully constructed and restricted by the terms of the Combines Investigation Act.

78 This conclusion rebuts the appellant's argument that s. 31.1 tilts the constitutional balance between the federal domain and the domain of the provinces in favour of Parliament. Satisfying all of the concerns which I have discussed ensures that the constitutional balance will not be upset. It is also worth mentioning that in itself s. 31.1 does not share the characteristics of provisions that were not upheld as exercises of the general trade and commerce power: (a) regulating a single trade, even though on a national basis (*Labatt Breweries*, supra); (b) regulating a series of individual trades by various regulations or trade codes applicable to each individual sector (*Re Anti-Inflation Act*, [1976] 2 S.C.R. 373); (c) controlling production in a local area (*Canadian National Transportation*, supra); (d) proscribing the ethical conduct of persons engaged in trade and unconnected to a general regulatory scheme governing trade relations (*Vapor Canada*, supra); (e) regulating contracts of a particular business or trade (*Parsons*, supra).

79 One of the arguments of the appellant and the interveners for holding s. 31.1 ultra vires was that the section is no different from s. 7(e) of the Trade Marks Act, which this court struck down in *Vapor Canada*, supra. I have already dealt with many of the concerns raised by this argument. Because of the reliance which the parties placed upon this [page690] case, however, I will consider its implications in greater detail.

80 In my view, there is no analogy to be drawn between s. 31.1 of the Combines Investigation Act and s. 7(e) of the Trade Marks Act. Section 7(e) provided:

7. No person shall

. . .

(e) do any other act or adopt any other business practice contrary to honest industrial or commercial usage in Canada.

The appellant points to the following passage from the reasons of Laskin C.J. as determinative of the constitutional validity of s. 31.1 (at p. 165):

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. Even on the footing of being concerned with practices in the conduct of trade, its private enforcement by civil action gives it a local cast because it is as applicable in its terms to local or intraprovincial competitors as it is to competitors in interprovincial trade.

81 I cannot agree that the implication of this passage is that s. 31.1 is not legislation in relation to trade and commerce. Section 31.1 differs in two significant respects from s. 7(e) of the Trade Marks Act. First, section 7(e) was entirely unconnected to trade or to trade marks. Section 7(e) was directed to the ethical conduct of persons engaged in trade or business and which did not apply to specific prohibited anti-competitive business practices but to "the entire range of business relationships in any activity whether the activity be it-self within or beyond federal legislative authority" (*Vapor Canada*, supra, at p. 164). Laskin C.J. noted the lack of connection between the entire [page691] s. 7 and the rest of the Trade Marks Act, remarking that the section (at pp. 141-42) "stands alone ... in not being concerned with trade marks or trade names". In my view the key to understanding the reasons for striking down s. 7(e) may be found in the following words from the passage of Laskin C.J. relied on by the appellants and quoted above: "such a detached provision cannot survive alone unconnected to a general regulatory scheme." Section 31.1 of the Combines Investigation Act, in contrast, is not a discrete provision inserted into a statute of entirely different content. It is simply one of a number of methods of confronting anti-competitive activities and of achieving the very purpose underlying the Combines Investigation Act. Unlike section 7(e) of the Trade Marks Act, s. 31.1 does not create a disparate cause of action unrelated to the general scheme of the Combines Investigation Act.

82 Second, s. 7(e) of the Trade Marks Act created a very broad and undefined cause of action for all acts described by the ambiguous phrase "contrary to honest industrial or commercial usage in Canada". Section 31.1 of the Combines Investigation Act is clearly limited to specific provisions found elsewhere in the Act. Rowbotham J., at p. 306 in *Henuset Bros. Ltd. v. Syncrude Canada Ltd.*, supra, came to the same view:

The question before me is similar to that posed in *MacDonald et al. v. Vapour Canada Ltd. et al.* (1976), 66 D.L.R. (3d) 1, 22 C.P.R. (2d) 1, [1977] S.C.R. 134, but the legislation to be considered differs in several very important aspects. Section 7(e) of the Trade Marks Act, R.S.C. 1970, c. T-10, even when read together with the other subsections and in con-

junction with s. 53 thereof, is vague and disjunctive. Section 31.1 of the Combines Investigation Act relates directly to Parts IV, IV.1 and V thereof by reference to conduct prohibited in those parts. Section 7(e) of the Trade Marks Act, either alone or in conjunction with the other subsections and with s. 53 thereof is not linked to any overall scheme for the regulation and control of offences which adversely [page692] affect the conduct of trade and commerce. Section 31.1 of the Combines Investigation Act, because of its connection with the parts referred to above, is a part of a comprehensive scheme for the regulation and control of anti-competitive trade practices

83 The other reasons Laskin C.J. offered for holding that s. 7(e) of the Trade Marks Act could not be upheld under the trade and commerce power stem from the fact that s. 7(e) was not part of a valid national scheme of regulation. Laskin C.J. pointed to the absence of public monitoring by the continuing oversight of a regulatory agency in s. 7(e), and the inability to demonstrate the provision had national scope. None of these concerns arises in the case of s. 31.1, since the Combines Investigation Act contains a regulatory scheme which operates under the scrutiny of a regulatory agency and which is national in scope. Laskin C.J. also referred to s. 7(e) as a detached provision directed at the ethical conduct of persons engaged in trade. Section 31.1 can no more be said to be directed at ethical conduct than can the entire Combines Investigation Act. Finally, Laskin C.J. noted that the private enforcement of s. 7(e) gave the provision a local cast because it could be applied to competitors in intraprovincial trade. In my view, the fact that federal legislation may have some ramifications on trade carried on solely within one province will not be fatal to the legislation's validity. Every general enactment will necessarily have some local impact and it would be absurd to strike down legislation for that reason alone. All of the provisions of the Combines Investigation Act are open to application on purely intraprovincial transactions. In fact, the Combines Investigation Act would not be effective competition legislation if it could not reach intraprovincial activities. The simple fact that s. 31.1 can be applied to transactions [page693] occurring entirely within a single province does not undermine the section's validity.

84 It is also important to recognize that while the Court in *Vapor Canada*, supra, struck down one civil cause of action, the Court did not preclude other federally created private actions from being sustained under federal heads of power. The Court did not strike down s. 7(e) simply because it was left to private enforcement. The right of civil action was created by s. 53 of the Trade Marks Act which provided:

53. Where it is made to appear to a court of competent jurisdiction that any act has been done contrary to this Act, the court may make any such order as the circumstances require including provision for relief by way of injunction and the recovery of damages or profits, and may give directions with respect to the disposition of any offending wares, packages, labels and advertising material and of any dies used in connection therewith.

The enforcement of the trade mark provisions of the Act were, and still are, left to suit by private actors. Enforcement of federal patents, Patent Act, R.S.C. 1970, c. P-4, ss. 56-62, as amended, and of copyrights, Copyright Act, R.S.C. 1970, c. C-30, ss. 20-24, is left to private action.

85 In sum, the facts of Vapor Canada, supra, are clearly distinguishable from those in the present appeal.

86 For all of the foregoing reasons I am of the view that s. 31.1 is intra vires Parliament by virtue of its relationship to the scheme of economic regulation found in the Combines Investigation Act.

X

Disposition

87 I conclude that the Combines Investigation Act, and s. 31.1 of the Act, are valid federal enactments in accordance with Parliament's power over trade [page694] and commerce affecting the entire nation. I would therefore dismiss the appeal with costs and answer the constitutional questions as follows:

Question 1. Is the Combines Investigation Act, R.S.C. 1970, c. C-23 (the "Act") as amended, either in whole or in part, within the legislative competence of the Parliament of Canada under s. 91(2) of the Constitution Act, 1867?

Answer. Yes.

Question 2. Is section 31.1 of the Act within the legislative competence of the Parliament of Canada?

Answer. Yes.

* * * * *

Errata, published at [1989] 2 S.C.R., page iv

[1989] 1 S.C.R. p. 646, line g-2 and at p. 674, line c-1 of the English version. Read "Cushing v. Dupuy (1880), 5 App. Cas. 409" instead of "Cushing v. Dupuy (1980), 5 App. Cas. 409".

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