Proprietary Articles Trade Association v. Attorney General of Canada, 1931

In 1929 the federal government referred to the Supreme Court of Canada the question of the validity of the Dominion's anti-combines legislation after doubts as to the constitutionality of the legislation had been raised by counsel and judges in the provincial courts. The Supreme Court unanimously declared the legislation intra vires. The Proprietary Articles of Trade Association which had been charged with an infraction of the anti-combines legislation appealed this decision to the Privy Council. It was joined in this appeal by the governments of Ontario and Quebec.

Although counsel for the Dominion had cited the federal commerce power as one of the possible constitutional supports for the legislation, this was not the grounds upon which the Privy Council rested its opinion that the legislation was valid. It was Parliament's power to legislate in relation to criminal law (section 91 [27]) which Lord Atkin used to sustain the main provisions of the legislation. To support those sections which could not be characterized as criminal law the remedies which were designed to enforce the anti-combines policy through reductions of customs duty and revocation of patents he cited the Dominion's taxation power (section 91 [3]), its power in relation to patents (section 21 [22]), and its power over customs and excise laws (section 122).

In this case Lord Atkin removed the limit which Viscount Haldane had imposed on the federal criminal law power in the Board of Commerce Act case. He denied that the criminal quality of an act can be discerned by intuition. The only test was whether penal consequences were attached to behaviour. This would seem to permit the federal Parliament under its criminal law power to prohibit any kind of activity. It remained for the Supreme Court of Canada in the Margarine case of 1949\(^1\) to restore some limits to the scope of this power. In that case Justice Rand indicated that peace, order, security, health and morality were the public purposes normally served by criminal law as contrasted with a purely economic interest such as the protection of dairy farmers from competition with oleomargarine. Another notable feature of Lord Atkin's treatment of the criminal law power is the introduction of a "due process" requirement for the proper exercise of this power. He distinguished the anticombines legislation condemned in the Board of Commerce Act case from the legislation upheld in this case on the grounds that the earlier legislation did not employ the traditional machinery of criminal justice whereby a conviction can be obtained only by producing evidence before the ordinary courts that the behaviour of the accused satisfies a statutory definition of criminal activity.

While the commerce power was not invoked in this case to sustain this extremely important piece of national economic legislation, Lord Atkin's references to section 91(2) indicated a considerable expansion in the Judicial Committee's construction of that power. He took care to guard against the possibility of interpreting his judgment in this case as implying the elimination of the federal commerce power as a possible support for national anti-combines legislation. More positively, and most importantly, he discredited the notion put forward by Viscount Haldane in the Board of Commerce case\(^2\) and repeated in the Snider\(^3\) case that the power to regulate trade and commerce was a subordinate one which could only be invoked when

---

\(^2\) See above p. ***.
used in support of some other federal power. He cautiously avoided, however, any attempts at defining the extent of the commerce power as an independent source of legislative authority.

This case also demonstrates how the failure of the trade and commerce power to develop as a significant source of national legislative capacity in the fields of economic management and regulation could be in large measure compensated by other elements in the division of powers. In this case the criminal law power emerged as the principal support for federal anti-combines measures. Parliament's power to incorporate national companies, as indicated in the John Deere Plow case, is capable of providing the central government with some means of affecting the operations of national business agencies. Further, the exceptions to section 92(10) establish a broad field for federal control over interprovincial transportation and communications systems as well as public works, while the banking, currency, interest and taxation powers in section 91 arm the federal government, constitutionally, with the major instruments of monetary and fiscal management. Thus it would be wrong to attribute what some regard as the undue degree of decentralization in Canada's federal system solely to the effects of judicial review. It is necessary to look to extra-constitutional factors to explain the failure of federal authorities to exercise fully all the powers at their disposal. ~

---

PROPRIETARY ARTICLES TRADE ASSOCIATION v. ATTORNEY GENERAL OF CANADA

In the Privy Council. [1931] A.C. 310; II Olmsted 668.

Judgment: January 29, 1931


The judgment of their Lordships was delivered by

LORD ATKIN: This is an appeal from the Supreme Court of Canada on a reference by the Governor in Council under s. 55 of the Supreme Court Act, R.S.C. 1927, c. 35. The questions submitted to the Court were:

1. Is the Combines Investigation Act, R.S.C. 1927, c. 26, ultra vires the Parliament of Canada either in whole or in part, and if so, in what particular or particulars or to what extent?
2. Is s. 498 of the Cr. Code ultra vires the Parliament of Canada, and if so, in what particular or particulars or to what extent?

The Supreme Court answered both questions in the negative.

The appellants are the Proprietary Articles Trade Association, who had been found by a commission appointed under the Combines Investigation Act to have been party to a combine as defined in the Act, and had been admitted to be heard on the reference under s. 55(4) of the Supreme Court Act. The other appellants are the Attorney-General for the Province of Quebec and the Attorney-General for the Province of Ontario. The reference involved important questions of constitutional law within the Dominion, and their Lordships have had the assistance of full and able argument in which all the numerous relevant authorities were brought to their notice. After careful consideration of the arguments and the authorities their Lordships are of opinion that the decision of the Supreme Court is right.

In determining judicially the distribution of legislative powers between the Dominion and the Provinces made by the two famous ss. 91 and 92 of the B.N.A. Act two principles have to be observed. First, the accepted canon of construction as to the general effect of the sections must be maintained. This is that the general powers of legislation for the peace, order and good government of Canada are committed to the Dominion Parliament, though they are subject to the exclusive powers of legislation committed to the Provincial Legislatures and enumerated in s. 92. But the Provincial powers are themselves qualified in respect of the classes of subjects enumerated in s. 91, as particular instances of the general powers assigned to the Dominion. Any matter coming within any of those particular classes of subjects is not to be deemed to come within the classes of matters assigned to the Provincial Legislatures. This almost reproduces the express words of the sections, and this rule is well settled.

The second principle to be observed judicially was expressed by the Board in 1881, "it will be a wise course ... to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand.":

Citizens Ins. Co. v. Parsons ((1881) 7 App. Cas. 96, 109). It was restated in John Deere Plow Co. v. Wharton ((1914), 18 D.L.R. 353, 358): "The structure of ss. 91 and 92, and the degree to which the connotation of the expressions used overlaps render it, in their Lordships' opinion, unwise on this or any other occasion, to attempt exhaustive definitions of the meaning and scope of these expressions. Such definitions, in the case of language used under the conditions, in which a constitution such as that under consideration was framed, must almost certainly miscarry." The object is as far as possible to prevent too rigid declarations of the Courts from interfering with such elasticity as is given in the written constitution.

With these two principles in mind the present task must be approached.

The claim of the Dominion is that the Combines Investigation Act and s. 498 of the Cr. Code can be supported as falling within two of the enumerated classes in s. 91, viz., (2) "The Regulation of Trade and Commerce," and (27) "The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters." Reliance is also placed on (3) "The Raising of Money by any Mode or System of Taxation," (22) "Patents of Invention and Discovery" and on the general power of legislating for peace, order and good government. The appellants, on the other hand, say that the Act and the section of the Code violate the exclusive right of the Provinces under s. 92 to make laws as to (13) "Property and Civil Rights in the Province," and (14) "The Administration of Justice in the Province."

~ Lord Atkin then reviewed the legislative history of both the section in the Criminal Code which makes combinations in restraint of trade criminal offenses and the legislation providing for the investigation and prosecution of trade combinations. He also set down the main provisions of the Board of Commerce and Fair Prices Act of 1919 which had been rules...
vires by the Privy Council in the Board of Commerce case.

Their Lordships have dealt at some length with the provisions of the Acts of 1919, inasmuch as the appellants relied strongly on the judgment of the Board, in the Board of Commerce case, ((1921), 60 D.L.R. 513), which held both Acts to be ultra vires. Unless there are material distinctions between those Acts and the present, it is plainly the duty of this Board to follow the previous decision. It is necessary therefore to contrast the provisions of the Acts of 1919 with the provisions of the Act now in dispute. The judgment above referred to was given in November, 1921, and on June 13, 1923, there was passed the Combines Investigation Act, 1923 (Can.), c. 9, which repealed the two Acts of 1919 and enacted provisions which were substantially those of the present Act. The Act of 1923 was revised in 1927 and appears substantially in the original form in the revised Act -- the Combines Investigation Act, R.S.C. 1927, c. 26. By this Act "combines" are defined as combines "which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers or others," and which "are mergers, trusts or monopolies, so-called" or result from the acquisition by any person of any control over the business of any other person or result from any agreement which has the effect of limiting facilities for production, manufacture or transport or of fixing a common price, or enhancing the price of articles or of preventing or lessening competition in or substantially controlling production or manufacture, or "otherwise restraining or injuring trade or commerce."

By the Act the Governor in Council may name a Minister of the Crown to be charged with the administration of the Act, and must appoint a Registrar of the Combines Investigation Act. The Registrar is charged with the duty to inquire whether a combine exists, whenever an application is made for that purpose by six persons supported by evidence, or whenever he has reason to believe that a combine exists, or whenever he is directed by the Minister so to inquire. Provision is made for holding further inquiry by commissioners appointed from time to time; and the Registrar and a commissioner are armed with large powers of examining books and papers, demanding returns and summoning witnesses. The proceedings are to take place in private unless the Minister directs that they should be public. The Registrar is to report the result of any inquiry to the Minister, and every commissioner is to report to the Registrar who is to transmit the report to the Minister. Any report of a commissioner is to be made public unless the commissioner reports that public interest requires publication to be withheld, in which case the Minister has a discretion as to publicity.

By s. 32 "Every one is guilty of an indictable offence and liable to a penalty not exceeding ten thousand dollars or to two years imprisonment, or if a corporation to a penalty not exceeding twenty-five thousand dollars, who is a party or privy to or knowingly assists in the formation or operation of a combine within the meaning of this Act. (2) No prosecution for any offence under this section shall be commenced, otherwise than at the instance of the Solicitor General of Canada or of the attorney general of a province." By subsequent sections, refusal to obey orders as to discovery and other interference with an investigation are made offences for the most part subject to summary conviction and appropriate penalties are imposed.

Under a group of sections, 29-31, entitled "Remedies" powers are given as in previous Acts for the Governor in Council to reduce customs duties, and for the Exchequer Court to revoke licences where the duties are used to facilitate a combine or when the holder of a patent uses it so as unduly to limit the manufacture, or enhance the price of any article. Power is given to the Minister to remit to the Attorney-General of a Province any returns made in pursuance of the Act or any report of the Registrar, or any commissioner; and if no action is taken thereon by the Attorney-General of the Province, the Solicitor-General (representing the Dominion) may take the appropriate action.

In their Lordships' opinion s. 498 of the Cr. Code and the greater part of the provisions of the Combines Investigation Act fall within the power of the Dominion Parliament to legislate as to matters falling within the class of subjects, "the Criminal Law including the Procedure in Criminal Matters" (s. 91(27)). The substance of the Act is by s. 2 to define, and by s. 32 to make criminal combines which the Legislature in the public interest intends to prohibit. The definition is wide, and may cover activities which have not hitherto been considered to be criminal. But only those combines are affected "which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers, or others;" and if Parliament genuinely determines that commercial activities which can be so described are to be suppressed in the public interest, their Lordships see no reason why Parliament should not make them crimes. "Criminal law" means "the criminal law in its widest sense": Attorney General for Ontario. v. Hamilton Street Railway ((1903), 7 Can. C.C. 326). It certainly is not confined to what was criminal by the law of England or of any Province of 1867. The
power must extend to legislation to make new crimes. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality -- unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle. It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of "criminal jurisprudence;" for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished. Their Lordships agree with the view expressed in the judgment of Newcombe, J. ([1929] S.C.R. 409, 422) that the passage in the judgment of the Board of Commerce case to which allusion has been made, was not intended as a definition.

In that case their Lordships appear to have been contrasting two matters -- one obviously within the line, the other obviously outside it. For this purpose it was clearly legitimate to point to matters which are such serious breaches of any accepted code of morality as to be obviously crimes when they are prohibited under penalties. The contrast is with matters which are merely attempts to interfere with provincial rights, and are sought to be justified under the head of "criminal law" colourably and merely in aid of what is in substance an encroachment. The Board considered that the Combines and Fair Prices Act, 1919, came within the latter class, and was in substance an encroachment on the exclusive power of the Provinces to legislate on property and civil rights. The judgment of the Board arose in respect of an order under Part II of the Act. Their Lordships pointed out five respects in which the Act was subject to criticism. It empowered the Board of Commerce to prohibit accumulations in the case of non-traders; to compel surplus articles to be sold at prices fixed by the Board; to regulate profits; to exercise their powers over articles produced for his own use by the householder himself; to inquire into individual cases without applying any principles of general application. None of these powers exists in the provisions now under discussion. There is a general definition, and a general condemnation; and if penal consequences follow, they can only follow from the determination by existing Courts of an issue of fact defined in express words by the statute. The greater part of the statute is occupied in setting up and directing machinery for making preliminary inquiries whether the alleged offence has been committed. It is noteworthy that no penal consequences follow directly from a report of either commissioner or Registrar that a combine exists. It is not even made evidence. The offender, if he is to be punished, must be tried on indictment, and the offence proved in due course of law. Penal consequences, no doubt, follow the breach of orders made for the discovery of evidence; but if the main object be intra vires, the enforcement of orders genuinely authorized and genuinely made to secure that object are not open to attack.

It is, however, not enough for Parliament to rely solely on the powers to legislate as to the criminal law for support of the whole Act. The remedies given under ss. 29 and 30 reducing customs duty and revoking patents have no necessary connection with the criminal law and must be justified on other grounds. Their Lordships have no doubt that they can both be supported as being reasonably ancillary to the powers given respectively under s. 91(3) and affirmed by s. 122 the raising of money by any mode or system of taxation and under s. 91(22) "Patents of Invention and Discovery." It is unfortunately beyond dispute that in a country where a general protective tariff exists persons may be found to take advantage of the protection, and within its walls form combinations that may work to the public disadvantage. It is an elementary point of self-preservation that the Legislature which creates the protection should arm the executive with powers of withdrawing or relaxing the protection if abused. The same reasoning applies to grants of monopolies under any system of patents.

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(2) for "The Regulation of Trade and Commerce."

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

If then the legislation in question is authorized under one or other of the heads specifically enumerated in s. 91, it is not to the purpose to say that it affects property and civil rights in the Provinces. Most of the specific subjects in s. 91 do affect property and civil rights but so far as the legislation of Parliament in pith and substance is operating within the enumerated powers there is constitutional authority to interfere with property and civil rights. The same principle would apply to s. 92(14), the administration of justice in the Province, even if the legislation did, as in the present case it does not, in any way interfere with the administration of justice. Nor is there any ground for suggesting that the Dominion may not employ its own executive officers for the purpose of carrying out legislation which is within its constitutional authority, as it does regularly in the case of revenue officials and other matters which need not be enumerated.