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CANADIAN COMPETITION POLICY RECORD

CANADIAN COMPETITION LAW DEVELOPMENTS

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HISTORIC SUPREME COURT DECISION UPHOLDS FEDERAL COMPETITION LEGISLATION

On April 20, 1989, the Supreme Court of Canada issued its long awaited judgments in two cases testing the constitutional validity of the civil damage provisions of the *Combines Investigation Act*, as contained in s. 31.1 of that *Act* as it then was. The two cases were argued before the Supreme Court in May of 1988. The first, on appeal from the Ontario Court of Appeal, was *General Motors of Canada* v. *City National Leasing*. The second, on appeal from the Federal Court of Appeal, was *Québec Ready Mix Inc. et al.* v. *Rocois Construction Inc.*

The Supreme Court, in a judgment written by Chief Justice Dickson and concurred in by five other members of the Court, unanimously found that the federal legislation was valid. There were two constitutional questions stated by the Court:

a) Is the *Combines Investigation Act*...either in whole or in part within the legislative competence of the Parliament of Canada under ss. 91(2) of the *Constitution Act, 1867*, and
b) Is s. 31.1 of the *Act* within the legislative competence of the Parliament of Canada?

The Court quickly zeroed in on whether the legislation was valid under the so-called general trade and commerce head of federal jurisdiction. The Court noted that the general trade and commerce power is usually analysed in conjunction with the provinces' general authority over property and civil rights. In reviewing past decisions under the general trade and commerce head, Chief Justice Dickson stated:

> 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.

To uphold federal legislation under the general trade and commerce power, the Court adopted five general principles. Three of those principles arose from the judgment of Chief Justice Laskin in the *Vapour Canada* decision. Those three criteria are:

a) the impugned legislation must be part of a general regulatory scheme;
b) the scheme must be subject to continuing oversight by a regulatory agency; and
c) the legislation must be concerned with trade as a whole rather than a particular industry.

To those three criteria, Chief Justice Dickson added two others which he had ennunciated in the *Canadian National Transportation* case where the authority of the Attorney General of Canada to prosecute criminal matters under the *Combines Investigation Act* was in issue. The two additional factors are:

i) the legislation should be of a nature that the provinces jointly or separately would be constitutionally incapable of enacting; and
ii) failure to include one or more provinces or localities in the legislative scheme would jeopardize the successful operation of the scheme elsewhere in the country.

In considering the five criteria, Chief Justice Dickson stated:

> In total, the five factors provide a preliminary checklist 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 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.

Having set out the general principles, the Court then proceeded to analyze the constitutional questions stated by it in a three part analysis. The first step was to determine whether the impugned provision intruded upon provincial powers, and, if so, to what extent. The second issue facing the Court was to determine whether the *Act*, or a part of it, was valid federal legislation. If the legislation or provision is declared valid, the Court must then determine whether the impugned provision is so integral to the scheme that it could be upheld by virtue of its relationship, even though it intrudes upon provincial powers.

Does Section 31.1 Encroach on Provincial Powers?

The first issue the Court analyzed was whether the civil damage provision in the *Combines Investigation Act* encroached on provincial powers and to what extent. On this point the Court stated:

> As s. 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 provincial 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 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.

The Court then concluded this point by stating:

> 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*.

The Presence of a Regulatory Scheme in the Combines Investigation Act

The Court next analyzed whether the *Combines Investigation Act* contained a regulatory scheme as required to be upheld under the general trade and commerce power. The Court stated:

> 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*.

The Court concluded this analysis by stating:

> 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 of the marketplace. 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.

Having found the existence of a regulatory scheme, the Court then considered whether that scheme was valid under the remaining criteria or factors necessary under the general trade and commerce power. The Court found that the legislation met the criteria. They found the control over the enforcement process exercised by the Director of Investigation and Research and the Restrictive Trade Practices Commission met the requirement that there be "vigilant oversight of the administration of a regulatory scheme." With respect to the remaining criteria the Court stated:

> 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.

Chief Justice Dickson further stated:

> 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".

Having found the *Combines Investigation Act* to be a regulatory scheme under the factors identified for general trade and commerce legislation, the Court then turned to the question whether s. 31.1 was sufficiently integral to that scheme to be supportable as federal legislation. In discussing this point, Chief Justice Dickson stated:

> ...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.

In analyzing s. 31.1 in this light he stated:

> 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.

Having completed its analysis, the Court then found that the *Combines Investigation Act* was valid legislation under the general trade and commerce head of power, and that s. 31.1 was also validly enacted as part of that regulatory scheme.

This decision, by a majority of the Supreme Court of Canada, is undoubtedly the most significant constitutional decision in the 100-year history of competition legislation in Canada. For much of that century, combines legislation has been upheld only as an exercise of the federal government's criminal law power. Much of the efforts to amend the legislation have been designed to devise a scheme which could be supportable outside of the criminal law head. This case clearly establishes that not only can that be constitutionally accomplished, but that, in all likelihood, the scheme contained in the present legislation fits the bill.

The Supreme Court's decision is important from a competition law perspective for a number of reasons. First, the decision should clearly be applicable to the 1986 amendments to the legislation which created the Competition Tribunal. The general nature of the scheme, as well as the substantive provisions, have not been so altered as to raise serious doubt as to their constitutional validity. Second, the decision removes the uncertainty that plaintiffs have faced as to whether the civil damage provisions created by the amendments of 1975 could be relied upon to found a damage action. With that uncertainty removed, it may be that more plaintiffs will seek the use of the civil damage provisions, although certain financial disincentives still remain.

A third significant result of the decision is that it would appear to give the federal government considerable latitude to enact other competition-based provisions, whether substantive or procedural, to further an integrated market economy of Canada. Such provisions might include rules with respect to class actions or general provisions relating to marketing practices.

The decision also has significance for the federal government since the criteria enunciated by the Court to uphold general trade and commerce legislation is in no way tied to the subject matter of competition. It could equally be applied to other types of legislation. However, it must be remembered that the Court made it quite clear that the general applicability of competition legislation met one of the important hallmarks of the general trade and commerce power. The approach might not work where, as in the *Labatt's Special Light* case, the legislation attempted to regulate a particular industry or trade. Nevertheless, the decision has clearly breathed considerable life into the long dormant general trade and commerce power. And it may well signal a new well-spring of jurisdiction for the federal government in controlling the national economy.

L.A.W.H.