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The concept of interstate commerce : A case study of judicial review in Canada, the United States and Australia *

"We must never forget that it is a constitution which we are expounding — a constitution intended to endure for ages to come, and consequently to be adopted to the various crises of human affairs."

MARSHALL, C. J.
in *McCulloch v. Maryland*

Introduction

A study of the commerce power in the three federations, Canada, United States and Australia is in fact a case study of constitutional interpretation. A reading of the appropriate sections in the constitutions concerned will give very little, if any, idea of the state of the law as it exists today. The dicta expounded in *Reference re. The Farm Products Marketing Act*,¹ *Wickard v. Filburn*² or *Armstrong v. Victoria* (N^o. 2)³ constitute a substantial evolution generally in the role of the constitution and particularly in the role of the commerce power in modern federalism.

Let us consider for a moment the basic terms of reference for constitutional interpretation regarding the commerce power in these three states. Legislation concerning the economic life within the boundaries of a federal state usually divides powers between the general and regional governments but this division of powers, as K. C. Wheare points out,⁴ is often stated in general terms making a precise delineation of legislative authority over any given topic extremely difficult.

If we consider with Prof. Wheare a number of specific topics such as banking, navigation and shipping, railways, insurance and marketing, civil aviation and labour conditions, we see that this division of

* *N.D.L'É.* : Essai rédigé sous la direction du professeur Patrice Garant dans le cadre du Cours de Droit constitutionnel comparé. Si le thème est classique il n'en demeure pas moins d'une grande actualité chez nous dans l'état actuel de la jurisprudence de la Cour suprême du Canada et la remise en question du partage des compétences constitutionnelles.

¹ [1957] S.C.R. 198 (in particular the functional approach adopted by KERWIN, RAND, LOCKE and NOLAN, J. J.) see bibliography for full references.

² 317 U.S. 111, 63 Sup. Ct. 82 (1942) (in particular Mr. Justice JACKSON's "substantial economic effect" test).

³ (1957) 99 C.L.R. 28.

⁴ K. C. WHEARE, *Federal Government*, p. 126.

powers was conceived differently in the three federal systems being studied. Thus, in the question of banking, exclusive control is given to the general government in Canada⁵, whereas in the United States and Australia it is divided between the general and state governments.⁶ Concerning "navigation and shipping" an interesting difference exists. While in Canada the central government has control of all navigation and shipping except intra-provincial navigation and shipping,⁷ in both Australia and the United States the central government's authority in this field extends only so far as is relevant to inter-state and foreign trade and commerce.⁸ The control of railways, however, is divided between general and regional governments in all three federations,⁹ as is insurance and marketing.¹⁰ Civil aviation is under the control

⁵ *Ibid.*, cf. *British North America Act* (hereinafter the *B.N.A. Act*) sec. 91 (15).

⁶ *Ibid.*, p. 126, cf. *United States Constitution* (hereinafter the *U.S. Const.*) art. 1 (viii) and (x). For judicial modification of the situation see: *Norman v. Baltimore and Ohio Railroad Co.*, 294 U.S. 240, *United States v. Bankers Trust Co.*, (1935) 294 U.S. 240, *Nortz v. United States*, 294 U.S. 317, *Perry v. United States*, 294 U.S. 330.

Australian Constitution, s. 51 (xii) and (xiii) and s. 115.

⁷ *B.N.A. Act*, s. 91 (10) and s. 92 (10).

⁸ WHEARE, *op. cit. supra*, footnote 4, p. 127; cf. *Australian Constitution*, s. 98 and jurisprudence: *Owners of S.S. Kalibia v. Wilson*, (1910) 11 C.L.R. 689; *Australian Steamships Ltd. v. Malcolm*, (1914) 19 C.L.R. 298. *U.S. Constitution*, art. 1 (viii) and jurisprudence: *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23 (1824); *The Daniel Ball*, 10 Wall. 557 (U.S. 1871); *U.S. v. Appalachian Power Co.*, 311 U.S. 377 (1940) for recent test of navigability. For state prescriptions governing navigable waters see: *Cooley v. Board of Wardens*, 53 U.S. 299 (1851); SCHWARTZ, *A Commentary on the Constitution of the United States*, Vol. 1, pp. 216-220 and pp. 265-266.

⁹ WHEARE, *op. cit. supra*, footnote 4, p. 127; cf. *B.N.A. Act*, s. 92 (10) and jurisprudence:

(i) *Montreal v. Montreal St. Ry.*, [1912] A.C. 333, 1 Olmstead 608.

(ii) *Toronto Corp. v. C.P.R.*, [1908] A.C. 54; 1 Olmstead 507.

(iii) *Toronto Ry. Co. v. Toronto*, [1920] A.C. 426, 2 Olmstead 131.

(iv) *The Queen v. Board of Transport Commissioners*, [1968] R.C.S. 118.

Australian Constitution, s. 51 (xxxi), (xxxii), (xxxiii), (xxxiv).

¹⁰ WHEARE, *op. cit. supra*, footnote 4, p. 127; cf. *B.N.A. Act*, s. 91 (2) and s. 92 (13). For insurance cases see:

(i) *Citizens Insurance Co. v. Parsons*, (1881) 7 App. Cas. 96.

(ii) *A-G of Canada v. A-G of Alberta*, (1916) 1 A.C. 588.

(iii) *In re. The Insurance Act of Canada*, [1932] A.C. 41.

For marketing cases see:

(i) *The King v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 343.

(ii) *Lawson v. Interior Tree, Fruit & Vegetable*, [1931] S.C.R. 357.

(iii) *Reference re. Natural Products Marketing Act*, [1937] A.C. 377.

(iv) *Shannon v. Lower Mainland Dairy Board*, [1938] A.C. 708.

(v) *Home Oil Distributors v. A-G. for B.C.*, [1940] S.C.R. 444.

(vi) *Canadian Federation of Agriculture v. A-G. for Quebec*, [1951] A.C. 519.

(vii) *P.E.I. Potato Marketing Board v. H. B. Willis Inc.*, [1952] 2 S.C.R. 392.

(viii) *Reference re. The Farm Products Marketing Act (Ontario)*, [1957] S.C.R. 198.

(ix) *Carnation Milk Case*, [1968] S.C.R. 239.

United States:

For insurance see development from *Paul v. Virginia*, 8 Wall. 168 (U.S. 1869), to *U.S. v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944); it

of the general government in Canada ;¹¹ in the United States and Australia a division exists.¹² Finally, the regulation of the hours and conditions of labour and rates of wages is shared between the general and regional governments in the United States and Australia¹³ while it forms part of the exclusive jurisdiction of the Provinces of Canada.¹⁴

The above examples are of interest for two reasons. First, they are much like the horse-and-buggy age which spawned them : of historical interest but long since re-adjusted to the modern economy and technology. Secondly, read in the light of modern judicial interpretation and their actual role in the modern state, they afford an excellent example of our thesis : the need for flexibility in constitutional interpretation with particular reference to the commerce power and the modern economy which it must regulate.

Fortunately, the founders of the three federal states being studied saw fit to include in the constitutions general dispositions which have proved to be the catalyst for constitutional evolution in the field of the commerce power. In Canada, the central government is given jurisdiction over the "regulation of trade and commerce."¹⁵ The United States Constitution announces that the Congress shall have power to "regulate commerce with foreign nations, and among the

is now established that insurance is "commerce" subject to Congressional power.

For marketing cases see :

- (i) *United States v. Butler*, 297 U.S. 1.
- (ii) *Mulford v. Smith*, (1939) 307 U.S. 38.
- (iii) *United States v. Rock Royal Co-operative*, (1939) 307 U.S. 569.
- (iv) *United States v. Wrightwood Dairy Co.*, (1942) 315 U.S. 110.

¹¹ *In re. Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54 ; II Olmstead 709.

¹² *United States* :

"As far as motor vehicles and airplanes have been concerned, there has been no question, since their invention, that they have been at least as much subject to the commerce power as the railroads have been." SCHWARTZ, *op. cit. supra*, footnote 8, p. 107. — See eg. *Rosenhan v. United States*, 131 F (2^d) 932 (10th — Cir. 1942) on plenary Congressional power over aeronautics.

Australia :

Aeronautics did not exist in 1900. S. 51 (1) has been applied : *The King v. Burgess*, (1936) 55 C.L.R. 608 ; *Australian National Airways Pty. Ltd. v. The Commonwealth*, (1945) 71 C.L.R. 29. The federal government has full power to regulate flying within the Commonwealth territories (s. 122) and the States have by their own Acts adopted the regulations applicable from time to time in those territories.

¹³ *United States* :

See for example : *American Federation of Labour v. Swing*, (312) U.S. 321 ; *Teamsters Union v. Hanke*, 399 U.S. 470 (1950). For emergency power of Congress, see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) and EDWARD S. CORWIN, "The Steel Seizure Case : A Judicial Brick without Straw", in McCLOSKEY, *Essays in Constitutional Law*, p. 257. *Australia* : Beyond the limits of a State, s. 51 (xxxv), s. 75 (v).

¹⁴ B.N.A. Act, s. 92 (13) ; see for eg. *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 327 ; III Olmstead 180.

¹⁵ B.N.A. Act, s. 91 (2).

several States . . ."¹⁶ The appropriate sections in the Australian constitution are 51 (1) and 92. Section 51 (1) reads :

"The parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to trade and commerce with other countries and among the states."

Section 92 states :

"On the imposition of uniform duties of customs, trade, commerce and intercourse among the states, whether by means of internal carriage or ocean navigation, shall be absolutely free."¹⁷

It is around these general provisions that judicial interpretation has centered in an effort to adjust the constitutions to modern reality. If a written constitution is, as Victor S. MacKinnon has suggested,¹⁸ merely a statement of overall intention to govern and administer for the achieving of certain ends, then it can hardly be interpreted without reference to the situation it is regulating. Furthermore, this situation can and will change ; so too must the emphasis of the constitution. In the words of Edward McWhinney,

"it is clear that the meaning and working content of the constitution is going to change as the society that it represents changes ; and that a reasonably close correlation will ensue between the law and society."¹⁹

Let us now examine what changes, if any, have been brought in the concept of inter-state commerce within Canadian, American and Australian federalism.

Part I — THE OLD COURTS

Section 1 — The intention of the framers

If, as MacKinnon maintains, grants of legislative power by a constitution are purposive and that it is the purpose of these grants which controls their interpretation,²⁰ perhaps as a starting point for our inquiry we should examine the original intention of the framers. We intend to do this, however, through the writings of the judges themselves, the judges of the early courts who lived through the gestation period of their respective constitutions.

In Canada, the early decisions of the Supreme Court, before the influence of the Judicial Committee had been felt, point unmistakably toward a pre-eminent position for federal legislation. Moreover, the

¹⁶ *U.S. Const.*, art. 1 (viii).

¹⁷ STERN, "The Commerce Power under the Australian Constitution", (1942) 42 *Columbia Law Review*, p. 660.

¹⁸ Victor S. MacKinnon, *Comparative Federalism : A Study in Judicial Interpretation*, p. ix.

¹⁹ Edward McWhinney, *Judicial Review in the English-Speaking World*, pp. 206-207.

²⁰ MacKinnon, *op. cit. supra*, footnote 18, p. x.

Supreme Court of Canada which decided *Severn v. The Queen*²¹ in 1878, *Valin v. Langlois*²² in 1879, *Fredericton v. The Queen*²³ and *Citizens Insurance Co. v. Parsons*²⁴ in 1880 was, as Bora Laskin has pointed out, "composed of judges for whom Confederation was a personal experience with an evident meaning."²⁵ Such was not the case with the Privy Council which could not be expected to display "the sensitivity for the *British North America Act* that is found in the early pronouncements of the Supreme Court."²⁶

The only disagreement among the members of the early court seems to be one of degree of federal pre-eminence. While the judges who tended to favour local legislation did not hesitate to add that federal legislation enacted to meet a national problem on a national level must prevail, those who denied provincial power would not accept local legislation even in the absence of a federal presence.

The first opportunity for the Supreme Court of Canada to interpret the *B.N.A. Act* arose out of charges brought against a liquor manufacturer who was licensed under federal customs legislation for violating an Ontario Act requiring brewers to purchase provincial licences before selling liquor by wholesale. The Supreme Court by a 4-2 majority found the Ontario Act invalid.²⁷ One of the reasons invoked was interference with the trade and commerce power of the federal authority. The interest of this case for our purposes is well expressed by Peter H. Russell :

"As a legal precedent this case is of little importance : the reasoning of the Supreme Court's majority on the 'trade and commerce' power was overruled by later decisions of the Privy Council. The real significance of the case is the indication it provides of the basic attitudes of the Senior Canadian jurists to the division of powers in Canadian federalism at a time when the main issues and events of Confederation must still have been fresh in their minds and when their interpretation of the *B.N.A. Act* was not yet fettered by Privy Council decisions."²⁸

Two years later the Supreme Court in *City of Fredericton v. The Queen*²⁹ again gave a wide interpretation to Parliament's power sustaining, unlike the Privy Council in the later *Russell case*,³⁰ the *Canadian Temperance Act* of 1878 under the trade and commerce power. Said Ritchie, C. J. :

²¹ 2 S.C.R. 70.

²² 3 S.C.R. 1.

²³ 3 S.C.R. 505.

²⁴ 4 S.C.R. 215.

²⁵ BORA LASKIN : "The Supreme Court of Canada : A Final Court of and for Canadians", in W. R. LEDERMAN, *The Courts and the Canadian Constitution*, p. 131.

²⁶ *Ibid.*

²⁷ *Severn v. The Queen*, (1878) 2 S.C.R. 70.

²⁸ Peter H. RUSSELL, *Leading Constitutional Decisions*, p. 65.

²⁹ (1880) 3 S.C.R. 505.

³⁰ (1881) 7 App. Cas. 829.

"The right to regulate trade and commerce is not to be overridden by any local legislation in reference to any subject over which power is given to the local legislature."³¹

Ritchie, a year earlier, had expressed his feelings on the clause which was to become the touchstone of so many Privy Council decisions :

"The terms 'property and civil rights', must necessarily be read in a restricted and limited sense, because many matters involving property and civil rights are expressly reserved to the Dominion Parliament."³²

Within a decade of the *Severn* decision, however, the Canadian Supreme Court was forced to retreat from its position under the pressure of *stare decisis*.³³ The Privy Council had entered the Canadian constitutional debate.³⁴ We nevertheless consider these early Canadian decisions of great interest and are not convinced that their doctrine lies permanently buried.

In the United States we find a similar initial reaction to the "commerce clause," what MacKinnon refers to as "creative flexibility." The United States Supreme Court was first confronted by the problem of interpreting the commerce clause in the *Steamboat Monopoly Case*, *Gibbons v. Ogden*³⁵ in 1824. The questions before the Court were momentous ones : what is interstate commerce, what is the extent of power to regulate it, what is the effect on the states of this grant of power to Congress. "It is not too much to say," writes Robert G. McCloskey, "that the future of America as a nation depended on the answers that were given to these questions."³⁶

Indeed, the future of the American nation was presaged by the answers supplied. Chief Justice Marshall, in a characteristic blend of boldness and restraint, answered the first question by saying that commerce was not restricted to buying and selling but included "every species of commercial intercourse" and that interstate commerce did not stop at state boundaries and added that Congress' power to regulate a subject, once established in interstate commerce, is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations

³¹ 3 S.C.R. 505 at pp. 540-541 quoted in LASKIN, *loc. cit. supra*, footnote 25, pp. 134-135.

³² *Valin v. Langlois*, (1879) 3 S.C.R. 1 at p. 15, quoted in LASKIN, *loc. cit. supra*, footnote 25, pp. 136-137.

³³ *Molson v. Lamb*, per RITCHIE, C. J., (1888) 15 S.C.R. 253 at p. 259. "In view of the cases determined by the Privy Council since the case of *Severn v. The Queen* was decided by this Court, which appear to me to have established conclusively that the right and power to legislate in relation to the issue of licences for the sale of intoxicating liquors by wholesale and retail belong to the local legislature, we are bound to hold that the *Quebec Licence Act* of 1878 and its amendments are valid and constitutional."

³⁴ *Citizens Insurance Co. v. Parsons*, (1881) 7 App. Cas. 96 ; *Hodge v. The Queen*, (1883) 9 App. Cas. 117 ; *Bank of Toronto v. Lamb*, (1887) 12 App. Cas. 575.

³⁵ 9 Wheat. 1, 6 L. Ed. 23 (1824).

³⁶ Robert G. McCLOSKEY, *The American Supreme Court*, p. 69.

other than are prescribed in the Constitution," yet declined to pronounce upon whether the states were excluded from acting in the commercial area. The die was cast. McCloskey observes :

"Perhaps only in the perspective of the future can it be understood how much these words meant ; a twentieth-century observer looking back on them is impressed because he knows that the definitions have proved elastic enough to justify all the extensive commercial enterprises in which the national government has since engaged."³⁷

Australia is an interesting case. Its constitution is younger than the other two being considered and its first generation of jurists only embarked upon its interpretation in the early years of the twentieth century. Furthermore, within its short lifetime the *Australian Constitution* has twice been subject to the pressures of war. It is with interest that we examine the first cases, decided under the very shadow of the Constitutional convention.³⁸

The period prior to 1920 has been called by Robert L. Stern that of "implied prohibitions and the discrimination test."³⁹ Briefly, this meant that federal authority over intrastate commerce was prohibited by the Constitution,⁴⁰ whereas the test developed in determining the validity of State regulation was whether the legislation discriminated between interstate and intrastate trade as such. Examples of discriminatory legislation would be a State law fixing a higher licence fee for selling liquor produced in another State than for selling home produced liquor⁴¹ or a State statute seeking to exclude undesirable immigrants as applied to an indigent from another State who was there held to be a pauper.⁴² On the other hand, a State could regulate ownership of property irrespective of any element of inter-State trade.⁴³

In the general realm of constitutional interpretation, the High Court at this early date seems to have accepted the flexible approach to the constitution. Thus in 1908 O'Connor, J., stated :

³⁷ *Ibid.*, p. 70.

³⁸ See BAILEY, "Interstate Free Trade : The Meaning of Absolutely Free", (1933) 7 *A.L.J.* 140.

³⁹ Robert L. STERN, *loc. cit. supra*, footnote 17, p. 660.

⁴⁰ "Section 51 (1) does not give power to regulate domestic trade and commerce. That is reserved to the states by section 107. The effect of sections 51 (1) and 107 together is that the regulation of domestic trade and commerce appears to be forbidden to the Commonwealth Parliament as effectively as if it had been so stated in express words." *Ibid.*, p. 661.

See : *Rex v. Barger*, (1908) 6 C.L.R. 38, 57 ; *A.-G. for N.S.W. v. The Brewery Employees' Union of the U.S.W.*, (1908) 6 C.L.R. 469 (holding the *Trade Marks Act* of 1905 invalid as an attempt to regulate intrastate trade) ; *Huddart Parker Co. Ltd. v. Moorhead*, (1909) 8 C.L.R. 330 (holding the *Australian Industries Preservation Act (Anti-Trust)* invalid insofar as it did not restrict its application in terms to inter-State and foreign commerce).

⁴¹ *Fox v. Robbins*, (1909) 8 C.L.R. 115.

⁴² *Ex parte Benson*, (1912) 16 C.L.R. 99.

⁴³ *Commonwealth v. New South Wales (Wheat Case)*, (1915) 20 C.L.R. 54.

"It must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve."⁴⁴

A similar sentiment was expressed in the *Railway Servants Case*.⁴⁵

Up to this point, we have attempted to outline the positions of the first courts vis-a-vis their new constitutions. Let us now examine what the future held in store for these "original" opinions.

Section 2 — "Property and civil rights" : enter their Lordships

As has already been pointed out, the early doctrine of the Canadian Supreme Court was neutralized by the intervention of the Privy Council. Granted, there was a brief period ending around the middle 1890's when their Lordships seemed to be championing the federal government's cause,⁴⁶ but this was short-lived. Interestingly enough it coincided with the dominance in the legislative arena of Sir John A. Macdonald and the Conservative Party, a time of railways and expansion and a need for a strong centralized administration.⁴⁷ This was followed by the period of the Liberal control under Laurier and later Mackenzie King, with their Quebec power base, a period of provincial educational crises, and cries for provincial autonomy.

All this notwithstanding, and we feel it cannot be ignored, the Privy Council soon attacked the federal commerce power, still being occasionally defended by Supreme Court rear guard actions.⁴⁸ What in fact happened has been well characterized by Alexander Smith in his statement, "The Dominion charter of legislative powers suffered from the evils of over-specification."⁴⁹

In *Citizens Insurance Co. v. Parsons* the first and most significant limitations to the scope of the "trade and commerce" clause was announced. Specifically, it was decided that the national Parliament could not under sec. 91 (2) regulate the contracts of a particular business or trade, such as the business of fire insurance in a province. More generally, Sir Montague Smith announced that the "trade and commerce" power embraced only international trade, inter-provincial trade and perhaps general trade affecting the whole of Canada. But the interesting aspect of the judgment lies in Prof. Smith's "evils of over-

⁴⁴ *Jumbunna Coal Mine No Liability v. Victoria Coal Miners' Association*, (1908) quoted by Sir John LATHAM — "Interpretation of the Constitution", in *Essays on the Australian Constitution*, ed. The Hon. Mr. Justice ELSE-MITCHELL, p. 9.

⁴⁵ (1906) 4 C.L.R. 488 at p. 534.

⁴⁶ *Russell v. The Queen*, (1882) 7 App. Cas. 829.

⁴⁷ McWHINNEY, *op. cit. supra*, footnote 19, p. 70.

⁴⁸ *In re, Prohibitory Liquor Laws*, 24 S.C.R. 170, per SEDGEWICKJ, at p. 231.

Hudson v. Norwich, 24 S.C.R. 145.

⁴⁹ Alexander SMITH, *The Commerce Power in Canada and the United States*, p. 176.

simplification." The Committee decided that the very existence of other specific, enumerated powers in sec. 91 and elsewhere in the Act reduced the importance of the general commerce provision. Thus Sir Montague Smith initiated the attack saying :

"If the words [regulation of trade and commerce] had been intended to have the full scope of which in their literal meaning they are susceptible, the specific mention of several of the other classes of subjects enumerated in sec. 91 would have been unnecessary : as 15 banking ; 17 weights and measures ; 18 bills of exchange and promissory notes ; 19 interest ; and even 21 bankruptcy and insolvency." ⁵⁰

The flood-gates had been opened. In *Bank of Toronto v. Lambe* ⁵¹ the relevance of American decisions was repudiated as well as the position of the Canadian Supreme Court in the *Severn Case*. The authority of the *Fredericton Case* was rejected in the *Local Prohibition Case*. ⁵² Here the Judicial Committee founded its opinion upon a municipal by-law case, *Toronto v. Virgo*, ⁵³ a position attacked by Bora Laskin.

"Equating a federal constitution with a municipal by-law is one of the Privy Council's more serious lapses. Besides being at odds with common sense, it is in conflict with the Privy Council's own assertion in *Hodge v. The Queen* that the provincial legislatures — and, it follows, the Dominion Parliament are not delegates. A municipal corporation undoubtedly is." ⁵⁴

The result of this decision was to make the general power of the Dominion into a purely secondary source of authority to be invoked in cases falling neither within the enumerations of section 92 nor within those of section 91. This idea was again made clear in *A.-G. of Canada v. A.-G. of Alberta*. ⁵⁵

What of the Canadian Supreme Court in this period? The answer is quite simply that it was busy applying *stare decisis*. The abovementioned Insurance Reference provides a good opportunity to examine the Court's shift since *de Parsons Case*. Now in 1916 Mr. Justice Duff rejected the attempt to support the *Dominion Insurance Act* of 1910 under the federal general power. "I do not think," said the learned justice, "that the fact that the business of insurance has grown to great proportions affects the question in the least." ⁵⁶ He maintained this position in *The King v. Eastern Terminal Elevator Co.* ⁵⁷ Here the majority of the Court threw out the *Canada Grain Act* of 1912 which provided a broad national scheme for regulating the marketing, grading, storing and shipping of Canadian grain. They reasoned that even though most of the grain affected by the Act was

⁵⁰ (1881) 7 App. Cas. at p. 112, quoted in RUSSELL, *op. cit. supra*, footnote 28, p. 79.

⁵¹ (1887) 12 App. Cas. 575.

⁵² [1896] A.C. 348.

⁵³ [1896] A.C. 98.

⁵⁴ LASKIN, *loc. cit. supra*, footnote 25, p. 135.

⁵⁵ (1916) 1 A.C. 588.

⁵⁶ 48 S.C.R. 260 at p. 304.

⁵⁷ [1925] S.C.R. 434.

involved in export trade, still the Act would also incidentally affect grain involved only in intra-provincial trade and hence it must be considered *ultra vires*. The state of the federal commerce power at this point was well summarized by Idington, J. in *In re. Board of Commerce Act* as "the old forlorn hope, so many times tried unsuccessfully upon this court and the court above."⁵⁸ The "evils of over-specification" had done their work. Prof. Smith concludes :

"The resulting restrictive interpretation went much beyond a mere subtraction from the clause of those enumerated powers which otherwise would have been included within it, for once the courts had decided that the clause did not mean literally everything it said they proceeded to doubt whether it could be trusted to say anything at all."⁵⁹

Section 3 — "Laissez-faire" and "Due process"

The judicial battle which raged in the United States from the Civil War period up to the Court Revolution of 1937 was concerned, not as in Canada with a simple choice in modes of judicial interpretation, but rather with the idea of laissez-faire and substantial due process. In a liberal era and amid rapidly developing economy, the Court appropriately concerned itself with the individual, the old issue of federalism now becoming subordinate to the "higher" issue of economic control.⁶⁰ The proof is that there was no consistent pattern regarding federal or states' rights in the decisions of the period.

Between 1877 and 1886 there were some fourteen cases in which state regulations of commerce were held invalid, most of them for the reason that the subject in question was national in character. Thus the *Philadelphia and Reading Rail Road Case* (1873)⁶¹ impaired states' powers to tax interstate business activity by outlawing freight tonnage taxes on interstate shipments. *The Pensacola Telegraph Case* (1877)⁶² precluded states from granting telegraph monopolies while the *Wabash Case* (1886)⁶³ effectively forbade the states to regulate interstate railroad rates.

The federal authority was no less under fire. In 1890 the Congress passed the *Sherman Act* to protect trade and commerce against unlawful restraints and monopolies. Five years later, the Court held that this law did not and could not forbid monopolies in manufacturing because manufacturing was not a part of interstate commerce and effected interstate commerce only "indirectly."⁶⁴ The following year in *Cincinnati*,

⁵⁸ [1922] 1 A.C. 191 at p. 208.

⁵⁹ SMITH, *op. cit. supra*, footnote 49, p. 177.

⁶⁰ McCLOSKEY, *op. cit. supra*, footnote 36 at p. 126.

⁶¹ *Ibid.*, p. 124.

⁶² *Pensacola Telegraph v. Western Union Co.*, (1878) 96 U.S. 1.

⁶³ *Wabash, St. Louis and Pacific Ry. Co. v. Illinois*, (1886) 118 U.S. 557, 7 S. Ct. 4.

⁶⁴ *United States v. E. C. Knight Co.*, (1895) 156 U.S. 1.

New Orleans and Texas Pacific Railway Co. v. I.C.C. (1896)⁶⁵ the Court decided that the federal Act establishing the Interstate Commerce Commission for regulating the railroads did not endow the Commission with the power to fix railroad rates. We must agree with McCloskey who concludes :

"In the face of these decisions handcuffing national authority and in the face of the line of decisions already discussed which correspondingly restricted state control of commerce, it is a little hard to think of 'nationalist' or 'localist' considerations as dominant in the Court's value scale. The inescapable implication is, on the contrary, that the Court's chief concern was to defend the principle of *laissez-faire* and that both nationalist and localist doctrine were being pressed to subserve that end."⁶⁶

Another device used by the Court prior to 1930 was the liberty guaranteed by the due process clause. This included the liberty to contract and, except for business affected with a public interest, governmental interference with such essential economic relationships as prices and wages was an infringement of that liberty.⁶⁷

Nevertheless, as people began to suffer from this unrestrained freedom of the *laissez-faire* era there was an outcry and legislative reaction chiefly in the anti-trust field as well as acts relating to railroads. We have already seen what fate befell the *Interstate Commerce Act* of 1887 and the *Sherman Act* of 1890. Yet in the early years of the twentieth century the Court began to respond by widening the scope of interstate commerce. There were notable exceptions such as the *Hammer v. Dagenhart*⁶⁸ decision, yet a trend can be established. The majority of the decisions in the general period 1900–1930 upheld application of the commerce power, extending it to intrastate acts relating to interstate commerce.⁶⁹ In the railway cases it was decided that intrastate rates could be controlled by the Federal Government because of their competitive relation to interstate rates,⁷⁰ that intrastate trains were subject to federal safety legislation because of the danger to interstate traffic on the same rails,⁷¹ and that maximum hours could be prescribed for employees engaged in intrastate work connected with the movement of interstate trains.⁷² In the anti-trust cases it was held

⁶⁵ 162 U.S. 184, 16 S. Ct. 700.

⁶⁶ McCLOSKEY, *op. cit. supra*, footnote 36, p. 127.

⁶⁷ Robert L. STERN, "The Problems of Yesteryear — Commerce and Due Process", in Robert G. McCLOSKEY, *Essays in Constitutional Law*, p. 153.

⁶⁸ (1918) 247 U.S. 251.

See also : *Employers' Liability Cases*, (1908) 207 U.S. 463 ; *Adair v. U.S.*, (1908) 208 U.S. 161. These two cases held that even some railroad labour activities were not sufficiently related to interstate commerce to be subject to the commerce power.

⁶⁹ Robert L. STERN, "The Commerce Clause and the National Economy (1933–46)" 59 *Harvard Law Review* 645, 883.

⁷⁰ *Houston & Texas Ry. v. U.S.*, (1914) 234 U.S. 342.

⁷¹ *Railroad Comm'n of Wisconsin v. Chicago B. & Q.R.R.*, (1922) 257 U.S. 563.

⁷² *Southern Ry. v. U.S.*, (1911) 222 U.S. 20.

See also for railway cases : *Minnesota Rate Case*, (1913) 230 U.S. 352 ; *Baltimore and Ohio R.R. v. I.C.C.*, (1911) 221 U.S. 612 ; *Clerks*, (1930) 281 U.S. 548.

that although mining and production were not interstate commerce, strikes by employees in productive industry would be subject to the federal commerce power when the intent or necessary effect of the interference with production was "to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets."⁷³ Two other decisions of importance were *Stafford v. Wallace*⁷⁴ and *Chicago Board of Trade v. Olsen*.⁷⁵ In the latter case, the Court "refused to permit local incidents of great interstate movement, which taken alone were intrastate, to characterize the movement as such."⁷⁶

The lines were drawn for the Court battle of the 1930's.

"With the earlier anti-trust cases and the *Adair* decision substantially overruled, the line of authority opposing the New Deal legislation consisted of the child labour case and the many dicta in opinions dealing with state legislation. On the other side were *Gibbons v. Ogden*, the railroad cases, the later anti-trust cases, *Stafford v. Wallace* and *Chicago Board of Trade v. Olsen*."⁷⁷

Section 4 — The Doctrine of Political Restraints and the *McArthur Case*

As has already been pointed out with Australia, we are dealing with a much shorter time span and an entirely twentieth century experience. The judicial fluctuations and trends are correspondingly less pronounced than in Canada or the United States. Nevertheless, they do exist.

A state at war tends to centralize instinctively and the judicial reflection of this in Australia seems to have been initiated by the *Engineers Case*⁷⁸ in 1920. Here the High Court repudiated the doctrine of "implied prohibition"⁷⁹ discussed above and substituted the idea of political restraint.

"If it be conceivable that the representatives of the people of Australia as a whole would ever proceed to use their national powers to injure the people of Australia considered sectionally, it is certainly within the power of the people themselves to resent and reverse what may be done. No protection of this Court in such a case is necessary or proper."⁸⁰

⁷³ *Coronado Coal Co. v. United Mines Workers*, (1925) 268 U.S. 295 at 310.

See also for anti-trust: *Swift Co. v. U.S.*, (1905) 106 U.S. 375; *Standard Oil Co. v. U.S.*, (1911) 221 U.S. 1; *U.S. v. American Tobacco Co.*, (1911) 221 U.S. 106.

⁷⁴ (1922) 258 U.S. 495.

⁷⁵ (1923) 262 U.S. 1.

⁷⁶ *Ibid.*, p. 35.

⁷⁷ STERN, *loc. cit. supra*, footnote 69, p. 652.

⁷⁸ *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.*, (1920) 28 C.L.R. 129.

⁷⁹ The doctrine was borrowed from American cases involving inter-governmental immunity from taxation as well as from cases involving state "police powers" and the Tenth Amendment. STERN, *loc. cit. supra*, footnote 17, p. 662.

⁸⁰ (1920) 28 C.L.R. 129 at 151 quoted in *ibid.*, p. 662, footnote 15.

This doctrine, not finally accepted in the United States until *Helvering v. Gerhardt*⁸¹ in 1938, permitted any Commonwealth regulation which would achieve a permissible aim.

The scope of "a permissible aim" was clarified in *McArthur v. Queensland*.⁸² The Court decided that a transaction which by itself may be intra-State, could nevertheless fall within the category of inter-State commerce, because by reason of its association it is part of the larger, inter-State aspect of commerce. It went on to declare that an inter-State transaction did not lose its inter-State character solely because it arose out of an intra-State contract, and that "commerce" had to be considered as identical in meaning for both sections 51 (1) and 92. This is clearly a wide interpretation of the federal power.⁸³

Under the *McArthur* doctrine the High Court adopted a practical approach to the definition of inter-State commerce, or the doctrine of "business question." In the *Petrol Case*⁸⁴ Isaacs, J., defined inter-State commerce in terms of the "current of commerce" theory, an idea which we have already seen emerging in the United States.⁸⁵ In this approach, strict legalism was rejected and the character of a transaction was to be determined from a "business point of view." Stern warns, however, that this "business question" doctrine of the Australian High Court was not as broad as the later American doctrine of conclusiveness of legislative fact findings in the economic sphere, which we shall see appear in *U.S. v. Darby*.⁸⁶

Indeed, the High Court was beginning already to undermine the federal authority in litigations involving State legislation. A State statute seeking to regulate trade practices of farm produce agents was upheld as to agents dealing with produce shipped in inter-State trade.⁸⁷ The Court held valid an inspection law authorizing the inspector to prohibit cattle from out-of-State regions where he had reason to believe an infectious disease existed.⁸⁸ We see also an indirect repudiation of the *McArthur* doctrine in the *Transport Cases*.⁸⁹ In *Willard v. Rawson*,⁹⁰

⁸¹ (1938) 304 U.S. 405.

⁸² (1920) 28 C.L.R. 530.

⁸³ *Ibid.*, at p. 549.

⁸⁴ *Commonwealth and Commonwealth Oil Refineries v. South Australia*, (1926) 38 C.L.R. 408.

⁸⁵ "The 'current of commerce' theory defines interstate commerce in terms of all of the incidents and facilities of the commerce itself. Thus, although a particular event or situation when considered alone is intrastate, when viewed with reference to its association with a larger movement, it becomes an essential but subordinate part of interstate commerce. STERN, see *Stafford v. Wallace*, (1922) 258 U.S. 496, 518.

⁸⁶ (1941) 312 U.S. 100.

⁸⁷ *Roughly v. New South Wales*, (1928) 42 C.L.R. 162.

⁸⁸ *Ex parte, Nelson No. 1*, (1928) 42 C.L.R. 209 ; but, cf. *Tasmania v. Victoria*, (1934-35) 52 C.L.R. 157.

⁸⁹ For example, *Duncan v. Green Star*, (1935) 53 C.L.R. 493 ; *Bessell v. Dayman*, (1934-35) 52 C.L.R. 215 ; *Gilpin v. Comm'r for Rd. Transport*, (1934-35) 52 C.L.R. 189 ; *Rex v. Vizzard*, (1933) 50 C.L.R. 30.

⁹⁰ (1933) 48 C.L.R. 316.

where a State statute requiring all owners of motor vehicles using State highways to register and pay a nominal fee was in question Justice Evatt formulated the following test for section 92 : (1) the absence from a questioned statute of actual discrimination is not determinative of constitutionality ; (2) but such absence may serve to negative any definite relationship between the protected interstate trade and the State law and may tend to support a conclusion that section 92 has not been infringed ; (3) in order to establish an infringement of section 92, the mere adverse effect on persons engaged in interstate commerce of the necessary operation of the State legislation is insufficient ; and (4) to invalidate the State act, it must be shown that it is legislation "pointed directly at the act of entry, in course of commerce, into the second State."⁹¹ The direct repudiation of the *McArthur* doctrine seemed now to be only a matter of time. Indeed, in *Rex v. Vizzard*,⁹² concerning a provision requiring the licensing of public motor vehicles using state highways, the government intervened asking the Court to reverse the *McArthur* Case and to hold section 92 operative as against the Commonwealth as well as the states. Although the majority of the Court was prepared to concur the Chief Justice declined to cast the deciding vote and the *McArthur* doctrine stood. For how long, we shall see shortly.

Part II — THE NEW COURTS

Section 1 — The Court revolutions

We now enter the modern era with all the problems of mid-twentieth century economies. As we shall see, it is a time when not only the constitutions but the very judicial process of interpreting them has been questioned. In the context of the economic and social chaos of the 1930's could laissez-faire and due process or Lord Atkins "water-tight compartments" continue to mould modern federalism ? The answer became increasingly evident and the solution was that experienced by any society intent on survival — revolution or at the least, evolution. In the United States where the issue was between individual and State the latter would not wait for the slower option but demanded the more dramatic. The Supreme Court with its instinct for self-preservation complied. In Canada and Australia the issue was rather between two levels of government. With parties more evenly matched the solution could not be imposed but had to be negotiated. The Courts followed suit but cautiously, so cautiously in fact that in Canada we had to wait until 1957 for any real indication of a trend, whereas in Australia the High Court seems to have settled down to an "atomistic" approach. Let us, then, examine the judges' role in the shaping of modern federalism through their ideas of interstate commerce.

⁹¹ STERN, *loc. cit. supra*, footnote 17, p. 672.

⁹² (1933) 50 C.L.R. 30.

Section 2 — A quiet revolution

The Court revolution in Canada, like most Canadian-spawned revolutions, is as yet somewhat ill-defined. Suffice it to say, however, that there are slight indications to the effect that the Canadian Supreme Court is now prepared to assert its independence, judicially as always, from the confusing and oppressive dicta of the Privy Council.

The debate since 1896 has concerned, as we have pointed out, the method by which to interpret our nineteenth century constitution. As McWhinney mentions, the Judicial Committee thoughtfully left Canadian jurists with an option between the liberal course of interpretation, regarding the *B.N.A. Act* as a constitution, Lord Sankey's "living tree"⁹³ or the narrower view of the Act as a simple piece of legislation, subject to the strict rules of statutory interpretation and jealously guarding its "water-tight compartments."⁹⁴ The weight of the Committee's decisions definitely opts for the latter approach, implying at the same time a narrow construction of sec. 91 (2). Nevertheless, even their Lordships could not entirely ignore the economic chaos of the 1930's and in *Proprietary Articles Trade Association v. A.-G. for Canada*⁹⁵ we see Lord Atkin, most significantly discredit the notion put forward by Viscount Haldane in the *Board of Commerce Case*⁹⁶ and repeated in the *Snider Case*⁹⁷ that the power to regulate trade and commerce was a subordinate one which could only be invoked when used in support of some other federal power.⁹⁸

Rather than explore the Judicial Committee's somewhat incidental approach to the federal commerce power in such cases as the *Aeronautics* or *Radio Cases*, we feel it of more interest to concentrate on the Supreme Court's more recent declarations.

As early as 1931 the Court had reserved its application of the rigid approach in *The King v. Eastern Terminal Elevator Co.* by declaring *ultra vires* a B.C. *Product Marketing Act* because a substantial portion of the product subject to its provisions would be shipped outside the province. The Act therefore interfered with inter-provincial and export trade.⁹⁹

The case which seems the most significant and which hopefully presages future direction is *Reference re. The Farm Products Marketing*

⁹³ *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 at p. 136.

⁹⁴ "While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure". Per Lord ATKIN in *A.-G. for Canada v. A.-G. for Ontario*, [1937] A.C. 326, 354.

⁹⁵ [1931] A.C. 310.

⁹⁶ *Re, The Board of Commerce Act and The Combines and Fair Prices Act*, (1919), [1922] 1 A.C. 191.

⁹⁷ *Toronto Electric Commissioners v. Snider*, [1925] A.C. 409.

⁹⁸ RUSSELL, *op. cit. supra*, footnote 28, p. 87.

⁹⁹ *Lawson v. Interior Tree, Fruit & Vegetable Committee of Direction*, [1931] S.C.R. 357.

Act¹⁰⁰ decided in 1957. The question revolving about provisions of Ontario's *Farm Products Marketing Act* was in fact decided on the basis of indirect taxation. The important element of this case, however, was the Court's pragmatic view of the commerce jurisdiction. The order of reference had instructed the Court to assume that the statute and regulations extended only to "intra-provincial" transactions. Chief Justice Kervin and Justices Rand, Locke and Nolan seized this opportunity to abandon the mechanical application of categories of intra-provincial and extra-provincial and attempt a definition of what kind of activity is inherently extra-provincial. In the words of the four justices, we recognize an idea already prevalent in the United States¹⁰¹ and suggested in Australia.¹⁰² Said Rand, J. :

"That demarcation [of the two classes of trade] must observe this rule, that if in a trade activity, including manufacture or production, there is involved a matter of extra-provincial interest or concern its regulation thereafter in the aspect of trade is by that fact put beyond Provincial power [...]. The Dominion power implies responsibility for promoting and maintaining the vigour and growth of trade beyond Provincial confines, and the discharge of this duty must remain unembarrassed by local trade impediments."¹⁰³

Mr. Justice Rand then goes on to repudiate the argument so often invoked that trade was somehow related to "property and civil rights."

"Local trade has in some cases been classed as a matter of property and civil rights and related to head 13 of s. 92, and the propriety of that allocation was questioned. The production and exchange of goods as an economic activity does not take place by virtue of positive law or civil right; it is assumed as part of the residual free activity of men upon or around which law is imposed. It has an identity of its own recognized by head 2 of s. 91 I cannot agree that its regulation under that head was intended as a species of matter under head 13 from which by the language of s. 91 it has been withdrawn. It happened that in *The Citizens Insurance Company of Canada v. Parsons*; *The Queen Insurance Company v. Parsons*, (1881) 7 A.C. 96, assuming insurance to be a trade, the commodity being dealt in was the making of contracts, and their relation to head 13 seemed obvious. But the true conception of trade (in contradistinction to the static nature of rights, civil or property) is that of a dynamic, the creation and flow of goods from production to consumption or utilisation as an individualized activity."¹⁰⁴

Despite this apparent step forward by the four judges in the Ontario Reference, the Court is obviously not yet ready to follow their lead. The check was applied recently in *Carnation Company Ltd. v. Quebec Agricultural Marketing Board et al.* (1968).¹⁰⁵ Martland, J. for the

¹⁰⁰ [1957] S.C.R. 198.

¹⁰¹ For ex., *N.L.R.B. Jones and Laughlin Steel Corp.*, (1937) 301 U.S. 1; *U.S. v. Darby*, (1941) 312 U.S. 100; *Wickard v. Filburn*, (1942) 317 U.S. 111.

¹⁰² *McArthur v. Queensland*, (1920) 28 C.L.R. 530; *Commonwealth and Commonwealth Oil Refineries v. South Australia*, (1926) 38 C.L.R. 408, per Isaacs J. referring to the "current of commerce" theory.

¹⁰³ Quoted in RUSSELL, *op. cit. supra*, footnote 28, pp. 107-108.

¹⁰⁴ *Ibid.*, pp. 108-109.

¹⁰⁵ [1968] S.C.R. 238.

Court set about the sometimes tortuous task of reconciling precedents ; in this case, the Privy Council's decision in *Citizen's Insurance Company of Canada v. Parsons*,¹⁰⁶ the Canadian Supreme Court's ruling in *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*,¹⁰⁷ the Supreme Court's and Committee's decisions in *Reference as to the Validity of The Natural Products Marketing Act, 1934 as amended*,¹⁰⁸ the Privy Council's ruling in *Shannon v. Lower Mainland Dairy Products Board*¹⁰⁹ and the Supreme Court's 1957 decision discussed above.¹¹⁰

From what has been seen of these cases, it might be expected that the justice had set himself a complex task. Just for the sake of illustration, it would seem that any attempt to reconcile the dictum of Sir Montague Smith in the *Parsons Case* and the words of the four justices in the *Ontario Reference* is stretching *stare decisis* to its breaking point — if not beyond. Nevertheless, an attempt was made in the *Carnation Case*. The issue before the Court in this case was the validity of three orders brought down by the Quebec Agricultural Marketing Board approving a joint marketing plan with respect to Carnation Company Ltd. and its suppliers of milk and after arbitration establishing a price which the appellant company had to pay its producers for the milk it bought from them. On the grounds that the major portion of milk processed by it was exported from the province, the appellant company took the position that the orders of the Marketing Board — approving the plan and determining the price to be paid by the appellant — were invalid because they constituted the regulation of trade and commerce within the meaning of S. 91 (2) of the *B.N.A. Act*.

Naturally, the appellant company relied upon the dicta of the four justices in the *Ontario Reference* to support their claim whereas counsel for the respondent expressed the view that the four judges were not in harmony with earlier decisions of the Court and the Privy Council. The time was ripe for a definitive break with past doctrine. Unfortunately, the Court was not. It therefore befell Mr. Justice Martland to seek a thread of consistency throughout the decisions mentioned above. The doctrine singled out was that announced by Sir Montague Smith in the *Parsons Case* when he stated :

"It is enough for the decision of the present case to say that, in their [Lordships'] view, its [the dominion parliament] authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the *contracts of a particular business or trade*, such as the business of fire insurance *in a single province*." ¹¹¹

¹⁰⁶ (1881) 7 App. Cas. 96.

¹⁰⁷ [1931] S.C.R. 357, 2 D.L.R. 193.

¹⁰⁸ [1936] S.C.R. 398, [1937] A.C. 377.

¹⁰⁹ [1938] A.C. 708.

¹¹⁰ *Reference, re, The Farm Products Marketing Act, R.S.O. 1950, Chapter 131 as amended*, [1957] S.C.R. 198.

¹¹¹ (1881) 7 App. Cas. 96 at p. 113.

This idea was reiterated by Lord Atkin in 1937¹¹² when, while considering the federal *Natural Products Marketing Act*, 1934, he stated : "But the regulation of trade and commerce does not permit the regulation of individual forms of trade or commerce confined to the Province."¹¹³ The following year in *Shannon v. Lower Mainland Dairy Products Board*¹¹⁴ he was to again express this concept.

"It is now well settled that the enumeration in s. 91 of the regulation of trade and commerce as a class of subject over which the Dominion has exclusive legislative powers does not give the power to regulate for legitimate Provincial purposes particular trades or businesses so far as the trade or business is confined to the Province."¹¹⁵

With this authority behind him, Martland, J. then attempted to graft it on to the 1957 Court decision :

"While I agree with the view of the four judges in the *Ontario Reference* that a trade transaction, completed in a province, is not necessarily, by that fact alone, subject only to provincial control, I also hold the view that the fact that such a transaction incidentally has some effect upon a company engaged in interprovincial trade does not necessarily prevent its being subject to such control."¹¹⁶

What is at issue, in effect, is the question as to whether the criterion for federal power should remain restricted to matters "in relation to" the regulation of trade and commerce excluding the regulation of a particular trade or business confined to a particular province, or whether the American example should be followed with its preoccupation with the "effect" of any particular action or piece of legislation.

With the *Ontario Reference* decision and despite the *Carnation Case*, the door is now open for a rejection of the property and civil rights argument and for a wider view of trade and commerce through the flow of commerce and incidents of trade doctrines. Future development along these lines seems the most realistic approach, but only time will tell if the Court will dare heed such heresy. We use the word "heresy" advisedly here for we have already seen how the Supreme Court, in its early days, gave great importance to the federal commerce power. Are modern exigencies forcing the Court back to its initial interpretations, interpretations which, we have maintained, might well have been more in tune with the intention of the framers than later Privy Council decisions ? The question is an interesting one.

Section 3 — Mr. Justice Jackson and "Substantial economic effect"

Whereas the Canadian revolution might seem timid and as yet ill-defined, the American counterpart was characteristically bold and precise

¹¹² *Reference as to the Validity of The Natural Products Marketing Act, 1934, as amended*, [1937] A.C. 377.

¹¹³ *Ibid.*, at p. 387.

¹¹⁴ [1938] A.C. 708.

¹¹⁵ *Ibid.*, at p. 718.

¹¹⁶ *Carnation Company Ltd. v. Quebec Agricultural Marketing Board et al.*, [1968] S.C.R. 238 at p. 253.

in the objectives it sought to attain. In Canada, the battle had raged over provincial and federal jurisdictional rights in the commerce field. The United States Supreme Court had, as we have seen, prior to 1930 occupied itself with questions of laissez-faire and substantial due process. However, when the smoke cleared after the Court Revolution of 1937, constitutional laissez-faire was to use McCloskey's evocative phrase, "as dead as mutton."

In the economic chaos of the 1930's the chief issue was the extent of the regulatory power of Congress under the commerce clause. The Court could depend on the early doctrine of the *Shreveport Rate Case*¹¹⁷ to uphold the idea that Congress could regulate intrastate transactions which "directly" affected interstate commerce. However, processes only "indirectly" affecting such commerce, notably production, were excluded. In the early years of the New Deal a see-saw struggle took place within the Court itself between the "liberals" Brandeis, Stone and Cordozo and the conservative coalition of Van Devanter, McReynolds, Sutherland and Butler with Hughes, C. J. and Roberts acting as "swing-men." Faced with the New Deal legislation the Court vacillated. In *Home Building and Loan Association v. Blaisdell*¹¹⁸ and *Nebbia v. New York*¹¹⁹ legislation was upheld both times by a five to four majority. On the other hand in *Panama Refining v. Ryan*¹²⁰ and *Railroad Retirement Board v. Alton Ry.*¹²¹ legislation was defeated in the latter case by invoking "due process." In 1935, the liberals joined a unanimous Court in disallowing the *National Industrial Recovery Act*.¹²² The "direct-indirect" test was invoked. Wrote Justices Brandeis and Stone :

"To find immediacy or directness here is to find it almost everywhere. If centripetal forces are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our federal system."¹²³

Justices Brandeis, Stone and Cordozo notwithstanding, the tension between the crying economic need for strong centralized regulatory control and the Court's retreat behind legalistic distinctions reached the cracking point in *Carter v. Carter Coal Co.*¹²⁴ where it was held that labour relations in the coal industry had only an indirect effect upon interstate commerce, even though a coal strike might halt not only all interstate shipments of coal but a large proportion of the interstate movement of everything else as well.

The coup came finally in *N.L.R.B. v. Jones and Laughlin Steel Corp.*¹²⁵ which established the power of Congress to regulate labour

¹¹⁷ *Houston E. & V.T. Ry. v. United States*, (1914) 234 U.S. 342, 34 Sup. Ct. 833.

¹¹⁸ (1934) 290 U.S. 398.

¹¹⁹ (1934) 291 U.S. 502, 54 Sup. Ct. 92.

¹²⁰ (1934) 293 U.S. 388.

¹²¹ (1935) 295 U.S. 330.

¹²² *Schechter Corp. v. United States*, (1935) 295 U.S. 495, 55 Sup. Ct. 651.

¹²³ (1935) 295 U.S. 495 at 554 quoted in WHEARE, *op. cit. supra*, footnote 4, p. 136.

¹²⁴ (1936) 298 U.S. 238.

¹²⁵ (1937) 301 U.S. 1, 57 Sup. Ct. 615.

relations in factories which receive raw materials and ship the goods they produce into other states. What had happened to the "direct-indirect" effect test? Surely Mr. Justice Jackson pronounced its epitaph in stating: "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."¹²⁶

If there was still any doubt it was certainly dispelled a few years later in *Wickard v. Filburn* where once again Mr. Justice Jackson announced what seems to be the accepted position while slamming the door on earlier tests.

"Even if appellee's activity be local and though it may not be regarded as commerce, it may still whatever its nature be reached by Congress if it exerts a *substantial economic effect* on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect'."¹²⁷

In terminating this review of the present American situation, let us just point out that there is evidence here, as well as with the Canadian Court, that the judges are returning to the earliest decisions discussed in Part 1, Section 3 of the present paper. Thus in the *Mandeville Farms Case*,¹²⁸ Mr. Justice Rutledge alludes to Chief Justice Marshall's "necessary and proper" doctrine. The principle laid down in *McCulloch v. Maryland*¹²⁹ that

"let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."

is evoked by Mr. Justice Stone in the *Darby*¹³⁰ and *Wrightwood Dairy*¹³¹ cases and Mr. Justice Jackson in *Wickard v. Filburn*.¹³²

Section 4 — Dixon C. J. — legalism by no means devoid of realism

"It may be that the Court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism."¹³³

These words of Sir Owen Dixon while being sworn in as Chief Justice might lead us to wonder if the "revolution" had indeed reached Australia or if perhaps the High Court has been satisfied with a more anglo-saxon evolution.

¹²⁶ *United States v. Women's Sportswear Manufacturers Ass'n*, 336 U.S. 460 at 464.

¹²⁷ 317 U.S. at 125 (emphasis supplied).

¹²⁸ 334 U.S. 219 at p. 232.

¹²⁹ (1819) 4 Wheat. 316.

¹³⁰ *United States v. Darby*, (1941) 312 U.S. 100.

¹³¹ *United States v. Wrightwood Dairy*, (1942) 315 U.S. 110.

¹³² (1942) 317 U.S. 111.

See also: *United States v. South-Eastern Underwriters*, (1944) 322 U.S. 533, per Mr. Justice BLACK; *North American Co. v. S.E.C.*, (1946) 327 U.S. 686.

¹³³ McWHINNEY, *op. cit. supra*, footnote 19, p. 79.

On close examination, however, we see that with *James v. Commonwealth* in 1936, a turning point was reached, although the direction of the turn was toward expanded individual rights rather than, as in the United States, a wider central power. Essentially what was decided here was that the guarantee of personal freedom found in S. 92 applied to the Commonwealth as well as the states. On appeal to the Privy Council, a Commonwealth statute prohibiting the delivery of dried fruits for carriage from one state to another unless licensed by State Dried Fruits Boards, and also giving the Commonwealth minister the power of quota determination was disallowed as prohibiting the right guaranteed by S. 92, that of "freedom at the frontier." Thus, "applicable to both states and Commonwealth in their concurrent exercise of the commerce power was the ruling permitting regulation, control and assistance, but prohibiting restriction."¹³⁴

The first problem which arises is what constitutes restriction. The issue seems to be whether a particular statute facilitates or impedes commerce under S. 92. Having abandoned the test of political restraint for guaranteeing individual rights, the Court was forced to fall back on the Constitution. We see here the first indication of a legalistic trend. But this was not all. The Australian Court has adopted the approach of examining the "real object" of a statute rather than its "effect." Therefore, the effect can be restrictive to inter-State trade yet if the object is a valid exercise of regulatory power over either inter-State commerce or some other permissible field, the restriction is regarded as a necessary incident to the end.¹³⁵ We can see how the Court has literally pointed itself into a corner by creating distinctions which must be applied continuously, to wit, "essentials," "non-essentials" and "incidents" of inter-State trade.

The complexity of the problem begins to become evident in the light of Prof. Ross Anderson's rendition of Dixon, C. J.'s test :

"A law which imposes a restriction or burden or liability by reference to or in consequence of a fact or an event or a thing itself forming part of trade, commerce, or intercourse among the States, or forming an essential attribute of that conception, essential in the sense that without it you cannot bring into being the particular example of trade, commerce or intercourse among the States, contravenes s. 92 if it creates a real prejudice or impediment to inter-State transactions."¹³⁶

With all due respect, this seems to be complicating the process of federalism excessively. For a detailed analysis of the above test and its application, we refer the reader to Prof. Anderson's article.¹³⁷ Simply, as example, let us point out that the essence of inter-State trade seems

¹³⁴ STERN, *loc. cit. supra*, footnote 17, p. 674.

¹³⁵ *Ibid.*, pp. 675-676.

¹³⁶ ROSS ANDERSON, "Freedom of Inter-State Trade: Essence, Incidence and Device under Section 92 of the Constitution", (1959) 33 *The Australian Law Journal*, p. 294.

¹³⁷ *Ibid.*

to be the movement of something from one State to another, be it the movement of goods, as in the marketing cases,¹³⁸ of persons,¹³⁹ of transport as in the road and airlines cases,¹⁴⁰ of verbal communication,¹⁴¹ of intangibles such as bank credit.¹⁴² A contract which by its terms requires the movement of some article from one State to another has been held to be of the essence of inter-State trade.¹⁴³ On the other hand, Dixon, C. J., along with McTiernan and Webb, J. J. in the *Second Hughes & Vale Case*¹⁴⁴ supplied examples of the "incidental" (hence capable of regulation without hindrance by S. 92): hours during which an inter-State journey is made, the equipment carried on transport vehicles for handling or securing the goods, the axle-weight of the vehicle, the height or width of the load, lighting of the vehicle, the relations of carrier to consignor and consignee, the keeping of records.¹⁴⁵ In a later case, the occupation of premises, the making of profits and the use of petrol in carrying out an inter-State transport business were qualified as "incidents" to inter-State trade and not hindered by S. 92.

Prof. Anderson maintains that the concept of the essence of inter-State trade, commerce or intercourse is a narrow one. Nevertheless, the High Court has not, as has its American counterpart, admitted the doctrine of conclusiveness of legislative determination¹⁴⁶ (the realization that as to economic policy, the legislature is superior as a fact-finding body to the judiciary). Stern attributes the High Court's reticence to withdraw from the field of review to a reaction in the face of past reasoning which recognized the power to prohibit as well as to regulate.¹⁴⁷

Is this mechanical approach realistic or is it a somewhat unsophisticated attitude in the face of the modern economy? Certainly the High Court's refusal to acknowledge the extensive economic material submitted in the *Bank Nationalization Case*¹⁴⁸ justifies the question. On the one hand we have Prof. Anderson writing :

"That is to say the test of invalidity enables the Court to be as properly "legalistic", to adhere as closely to the traditional processes of 'legal reasoning' as Dixon, C. J., has always believed it should.

¹³⁸ See : *James v. State of Australia*, (1927) 40 C.L.R. 1 ; *James v. The Commonwealth*, (1936) 55 C.L.R. 1.

¹³⁹ Eg. : *R. v. Smithers ; ex parte Benson*, (1912) 16 C.L.R. 99 ; *Gratwick v. Johnson*, (1945) 70 C.L.R. 1.

¹⁴⁰ Eg. : *Australian National Airways Pty. Ltd. v. The Commonwealth*, (1945) 71 C.L.R. 29 ; *Hughes & Vale Pty. Ltd. v. State of New South Wales*, (N° 2), (1955) 93 C.L.R. 127.

¹⁴¹ Eg. : *Hospital Provident Fund Pty. Ltd. v. Victoria*, (1953) 87 C.L.R. 1 at p. 15.

¹⁴² Eg. : *The Commonwealth v. Bank of New South Wales*, (1949) 79 C.L.R. 497.

¹⁴³ *Commonwealth Freighters Pty. Ltd. v. Sneddon*, (1959) A.L.R. 550 at p. 552.

¹⁴⁴ (1955) 93 C.L.R. 127.

¹⁴⁵ ANDERSON, *loc. cit. supra*, footnote 136, p. 295.

¹⁴⁶ *United States v. Darby*, (1941) 312 U.S. 100.

¹⁴⁷ STERN, *loc. cit. supra*, footnote 17, p. 675.

¹⁴⁸ *Bank of New South Wales v. Commonwealth*, (1948) 76 C.L.R. 1.

Furthermore, the test, though legalistic, is realistic in the sense that the consequential limitation of the area of s. 92, as well as the pervading aura of legalism itself, prevents the pressures on the Constitution and on the position of the Court as its ultimate guardian from becoming unduly strong."¹⁴⁹

On the other hand, we have McWhinney who maintains that the effect of the High Court's treatment "has been to impose on both Commonwealth and State governments, in the name of freedom of trade, commerce and intercourse among the States, an effective legal barrier against social and economic planning legislation."¹⁵⁰ It does seem in fact that Australian constitutional review is similar to that practised in the United States prior to 1936 and that, as McWhinney suggests, S. 92 has been converted into an "Australian due process clause."

Can this approach be explained by the Australian context? Perhaps, as Prof. Anderson suggests, the economic and geographical disparities between the States and regions would only be aggravated by uniform taxation or commercial legislation.¹⁵¹ It does seem, however, that faced with a modern economic situation the Court will have to become more lenient toward both State and Commonwealth social and economic legislation.

Conclusion

About the American experience traced above, Mr. Justice Stone has written :

"Great as the practical wisdom exhibited in all the provisions of the constitution, and important as were the character and influence of those who secured its adoption, it will, I believe, be the judgment of history that the commerce clause and the wise interpretation of it, perhaps more than any other contributing element, have united to combine the several states into a nation."¹⁵²

When summing up the judicial treatment of the commerce power in Canada, the United States and Australia, and worse still, when attempting to make value judgments on the subject, one becomes automatically embroiled in the continuing debate surrounding federalism itself : to centralize or not to centralize, that is the question.

The writers are only too aware of the distinctions to be made between the three federal systems being considered — and the socio-political realities which they attempt to express. The American economy has become a monolith and the American judiciary is its accomplice. Furthermore, let it not be thought that this trend is entirely accepted. "Today," writes Edward S. Corwin, on American federalism, "the

¹⁴⁹ ANDERSON, *loc. cit. supra*, footnote 136, p. 299.

¹⁵⁰ McWHINNEX, *op. cit. supra*, footnote 4, p. 81.

¹⁵¹ ANDERSON, "The State and Relations with the Commonwealth", in ELSE-MITCHELL, *op. cit. supra*, footnote 44, p. 108.

¹⁵² (1928) 14 A.B.A. J. 428 at p. 430, quoted in SMITH, *op. cit. supra*, footnote 49, p. ix.

question faces us whether the constituent States of the system can be saved for any useful purpose and thereby saved as the vital cells that they have been heretofore of democratic sentiment, impulse and action." ¹⁵³ Charles Black asks if there really is any implied limitation to the two great peace time national powers — the power over interstate and foreign commerce and the power to tax. The answer to this question, he suggests, will also answer the question "whether there is any but an illusory legal basis to the American concept of federalism." ¹⁵⁴

In Canada, of course, constitutional theorists are as Canadian as the beaver and just as industrious. Has the history of Canadian judicial interpretation been, in fact, as MacKinnon suggests, one of judicial mis-interpretation restricting unnecessarily the Dominion's powers in relation to trade and commerce ¹⁵⁵ or has the staunch upholding of provincial autonomy, spearheaded by the Judicial Committee, resulted in the preservation of the essential condition of the Canadian confederation, as L.-P. Pigeon would have us believe? ¹⁵⁶

Finally, should the Australian High Court abandon altogether its purely mechanical conception of the judicial office, the fiction that judges never make law but simply apply it, and recognize frankly the "essentially creative role of a Supreme Court exercising judicial review under a written and rigid constitution?" ¹⁵⁷

The answers to these questions have in the past and will continue to be answered by the Courts themselves. We have attempted to show, particularly with the American example, how the Courts tend to react, albeit at times sluggishly, to the socio-economic trends around them. The future trend is predictable. In the United States, *Wickard v. Filburn* ¹⁵⁸ is the answer to the world's greatest economy. In Canada, despite Lords Watson and Haldane, the Supreme Court seemed ready in 1957 with the dicta of the four "liberals" in the *Farm Products Marketing Case*; but the time is not already ripe for a definitive break with past doctrine. ¹⁵⁹ As for Australia, the *McArthur* doctrine ¹⁶⁰ is alive if not altogether well and we trust to the ingenuity of the common law lawyer if ever the need for more central authority in commerce matters arises.

Generally, the argument has been that a constitution is a living thing and that the role of judicial review is to continue to breathe life into it. Let us close where we began, asserting with Prof. Paul A. Freund and indirectly with the great Chief Justice Marshall:

¹⁵³ Edward S. CORWIN, "The Passing of Dual Federalism", in *Essays in Constitutional Ltd.*, ed. McCLOSKEY, p. 209.

¹⁵⁴ Charles L. BLACK, *Perspectives in Constitutional Law*, p. 20.

¹⁵⁵ MACKINNON, *op. cit. supra*, footnote 18, p. 4.

¹⁵⁶ Louis-Philippe PIGEON, "The Meaning of Provincial Autonomy", in LEDERMAN, *op. cit. supra*, footnote 25, p. 46.

¹⁵⁷ McWHINNEY, *op. cit. supra*, footnote 4, p. 94.

¹⁵⁸ (1942) 317 U.S. 111.

¹⁵⁹ [1957] S.C.R. 198; *Carnation Milk Case*, [1968] S.C.R. 238.

¹⁶⁰ *McArthur v. Queensland*, (1920) 28 C.L.R. 530.

"In its most enduring and memorable work, the Court [U.S. Supreme Court] has been careful not to read the provisions of the Constitution like a last will and testament, lest indeed they become one. Instead the justices have been guided by the basic canon of Marshall, calculated to turn the mind away from canons: 'This provision is made in a constitution, intended to endure for ages to come, and consequently to be adopted to the various crises of human affairs'." ¹⁶¹

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¹⁶¹ Paul A. FREUND, "The Supreme Court of the United States", (1951) 29 *Can. Bar Rev.*, 1080 at pp. 1086-1087 in part quoting MARSHALL, C. J., in *McCulloch v. Maryland*.

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