federal provincial relations in the field of consumer protection

Louis J. Romero

Prepared for CONSUMER RESEARCH COUNCIL
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CONSUMER RESEARCH COUNCIL

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FEDERAL-PROVINCIAL RELATIONS IN THE FIELD OF CONSUMER PROTECTION

by

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CONSUMER RESEARCH COUNCIL
CONSEIL DE RECHERCHE EN CONSOMMATION

MESSAGE DU PRÉSIDENT

Le Conseil de recherche en consommation, créé en 1974 par suite d'une réorganisation des fonctions du Conseil canadien de la consommation, est un organisme de recherche indépendant financé par le ministère de la Consommation et des Corporations. Il s'est vu confier le mandat suivant:

1. informer le Ministre et le Ministère sur les travaux de recherches en consommation entrepris dans les universités canadiennes et ailleurs, ainsi que sur les sources d'information en ce qui a trait aux questions particulières d'intérêt aux consommateurs;
2. examiner les propositions de recherches en consommation;
3. faire entreprendre des recherches en consommation, évaluer des recherches accomplies et décider de leur publication, de leur diffusion et de leur présentation au Ministre.

Au cours de la première année de ses activités, le Conseil a dressé un bilan des recherches en cours au Canada dans le domaine de la consommation. Des recherches ont également été commandées et des colloques ont été tenus en vue de définir les priorités en matière de recherches. En 1975, grâce à un budget de $145,000, des recherches ont été commandées dans les domaines suivants:

Les Professions

Les voies de recours

Les Relations fédérales-provinciales en matière de protection du consommateur

L'information sur les produits et les préférences des consommateurs

Le consommateur et la politique alimentaire canadienne

Accessibilité à l'information gouvernementale

Les entreprises comme groupe d'intérêt au Canada: la politique de concurrence de 1971 à 1975

L'application de la Loi relative aux enquêtes sur les coalitions de 1960 à 1975

Les Pratiques de facturation dans le crédit à la consommation

L'étude comparative de la publicité au Canada

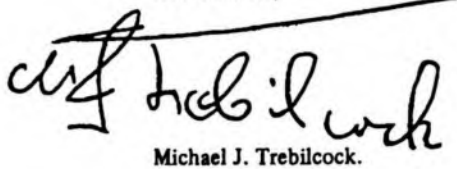
La méthodologie d'évaluation de l'efficacité des programmes de consommation

Les Coopératives de consommation dans les Maritimes.

Ces études sont actuellement l'objet d'un examen par le Conseil en vue de leur publication.

En mars 1976, en raison de la limitation des dépenses du gouvernement, les activités du Conseil ont été suspendues.

Le Président,



Décembre 1976

Michael J. Trebilcock.

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PURPOSE AND SCOPE OF THIS PAPER

Since the middle sixties the federal and provincial governments in Canada have become quite active in the field of consumer protection. During the initial period of growth of consumer protection legislation and programs, there were sufficient areas and consumer needs to engage the separate activities of both levels of government. But with the continued growth in the number of statutes and consumer services, the possibility of duplication of effort and conflict between both levels of government has increased considerably.

The purpose of this paper is to explore the many problems that arise from the division of jurisdiction to deal with consumer protection between the federal and provincial governments, and to discuss ways in which many of these problems could be dealt with.

Chapter one of this paper describes in some detail the growth of federal and provincial consumer protection legislation and programs during the last fifteen years. The description contained in that chapter is complemented by the materials contained in the appendix* to this paper where I have collected the organizational charts and latest budgets of the different consumer affairs departments, as well as lists of the Acts they administer.

The overlap and possible conflict of the consumer protection activities of the federal and provincial governments is due in part to the fact that both levels of government have jurisdiction to be active in the field of consumer protection, and our courts have not provided clear guidelines for the division of the field.

Chapter two of this paper starts with some basic and well settled principles of constitutional law and it proceeds to an analysis of the jurisdiction of both levels of government to pass legislation dealing with consumer credit and unfair trade practices. This analysis leads to the conclusion that when our courts have attempted to give to one level of government exclusive jurisdiction to deal with a certain subject, they have not succeeded in giving clear guidelines as to the extent and limits of the exclusive jurisdiction. More often our courts have allowed both levels of government to pass legislation dealing with the same subject matter. This has increased the possibilities of overlapping, duplicative and conflicting legislation and programs.

Chapter three analyzes and evaluates the mechanisms and procedures which have been used in the past by both levels of government in order to co-ordinate their consumer protection activity.

Chapter four contains some proposals for new machinery aimed at increasing the communication, co-ordination and co-operation between federal and provincial officials in charge of consumer protection. The chapter concludes with a discussion of several ways in which federal-provincial co-ordination and co-operation could take place in the future.

* Available on request.

CHAPTER I

GROWTH OF CONSUMER PROTECTION LEGISLATION AND AGENCIES

For several centuries the common law and civil law in force in the Canadian provinces and federal and provincial statutes have contained principles and rules dealing with consumer protection. But the late 1960's and early 1970's witnessed an enormous growth in the number of statutes directly aimed at protecting the Canadian consumer.[1]

After 1964 several provincial legislatures passed different versions of *Unconscionable Transaction Relief Acts.*[2] In 1967 and 1968 several provinces enacted legislation aimed at controlling direct sellers[3] and at regulating the disclosure of the cost of consumer credit and associated credit problems.[4] Since then we have seen provincial legislation dealing with such diverse subjects as prohibition of cut-off clauses[5] and disclaimers on implied warranties in sales contracts,[6] pyramid sales,[7] collection practices,[8] credit reporting,[9] automobile dealers,[10] mortgage brokers,[11] unfair trade practices[12] and travel services.[13]

At the federal level a number of legislative developments have taken place since 1964: regulations have been passed under the *Bank Act*[14] requiring the disclosure of interest charged in bank loans. A new part entitled "Orderly Payment of Debts" has been added to the *Bankruptcy Act.*[15] A new part dealing with consumer notes has been added to the *Bills of Exchange Act.*[16] A new section dealing with the publication of false advertisements has been added to the *Combines Investigation Act*[17] and, at the moment of writing, all the sections of that Act dealing with advertising and trade practices are being amended and expanded.[18] In addition the federal Parliament has passed legislation dealing with motor vehicle safety,[19] hazardous products,[20] and packaging and labelling.[21]

Several factors have contributed to this growth of consumer protection legislation. One has been the progressive realization by federal and provincial legislators that the growth in consumer credit and personal consumption which has taken place since the Second World War has brought with it a considerable increase in the number of consumer problems.

The awareness of these problems was increased by a number of legislative hearings and the preparation of reports on different consumer problems, which took place during the sixties.[22] The law which through centuries had been developed by the judges and legislatures was not considered adequate to deal with the new problems faced by consumers, and this led to the passing of new legislation aimed at dealing with a number of specific consumer problems.

A second factor accounting for the growth of consumer protection legislation has been the realization by politicians that consumer protection is a popular subject which keeps them in the public's eye at a fraction of the cost of other government programs, such as those dealing with highways, housing or welfare. A third factor contributing to the growth of consumer protection legislation has been the tendency of provincial officials and politicians to emulate one another. When one province introduced a bill or passed an Act dealing with consumer protection, other provinces have often been eager to follow the precedent by introducing or passing in their own legislatures exact copies or slightly changed versions of the original legislation.[23]

Contemporaneously with this growth of consumer legislation in the sixties, some concern was shown at various levels about the co-ordination of different government programs which in separate ways were dealing with consumer protection.

In July 1966 the federal government requested the Economic Council of Canada

> In the light of the government's long-term economic objectives, to study and advise regarding: (a) the interests of the consumer particularly as they relate to the functions of the department of The Registrar General: . . .[24]

The Economic Council of Canada released an interim report in July 1967 which among other things stated:

> [The] function of protecting and enhancing the consumer interest is widely diffused throughout the federal government, reflecting a piecemeal and *ad hoc* development of programs in the past. At the present time a lack of co-ordination between work of different departments and gaps in consumer protection are evident in several areas. The recommendations which follow are designed both to close these gaps and to lead to a more efficient administration of consumer programs through improved co-ordination of functions.[25]

As a consequence of this report, the former Department of the Registrar General was transformed into the new Department of Consumer and Corporate Affairs.[26]

With the exception of Ontario, provincial governments took some time to co-ordinate and consolidate the various consumer programs pursued by their different departments. For several years some of the new consumer protection statutes passed after 1964 were administered by the provincial Departments of the Attorney General or the Departments of the Provincial Secretary.

In Ontario following the recommendations of the Select Committee of the Ontario Legislature on Consumer Credit,[27] which had been studying its subject for more than two years, *An Act to Provide for the Duties of the Consumer Protection Bureau*[28] was introduced in 1966 along with the *Consumer Protection Act.*[29] A new Department of Financial and Commercial Affairs was inaugurated on November 24, 1966, and it embraced consumer protection as one of its main functions. Manitoba opened its Department of Consumer and Corporate Services in 1970, Saskatchewan established a Department of Consumer Affairs in 1972, while British Columbia and Alberta established their respective departments in the middle of 1973.[30]

I have included in the appendix* to this paper an organizational chart for each of the provincial and federal Departments of Consumer Affairs as well as the departments' estimates of expenditure for the financial year 1975-76. A number of observations may be derived from a study of the materials contained in this appendix. In the first place there is considerable difference in the structures of the provincial departments. Some of them such as those of Alberta, Manitoba, Ontario and Quebec deal both with consumer and corporate affairs like their federal counterpart, while other departments such as those of British Columbia and Saskatchewan deal only with consumer matters.

There is considerable difference in the responsibilities of the different departments; for example, the Manitoba Department is responsible for the office of "the rentals man", the British Columbia Department administers the Cemeteries Act, while the Saskatchewan Department is responsible for a program dealing with the status of women. Because of the

* Available on request.

heterogeneous nature of the different departments it is difficult to draw many conclusions from a comparison of the size of the different budgets. It is important to observe the commitment of the federal government to consumer protection, as shown by the allocation of $22.3 million to the Consumer Affairs Program out of a total budgetary estimate of $52.8 million for the Department of Consumer and Corporate Affairs. These figures should be compared with 1975-76 estimates of $2.56 million for the British Columbia Department of Consumer Services, and $2.38 million for the Business Practices Division of the Ontario Ministry of Consumer and Commercial Relations.

Another significant difference which will appear from an analysis of the budgets of the departments, as well as from the list of legislation for which they are responsible, is the different emphasis placed on enforcement and administration of consumer protection programs by the different provinces. Some provincial governments are willing to spend sufficient money to hire personnel and to be active in the different areas of consumer protection, while the budgets of other departments when compared with their legislative responsibilities indicate that the officials must be overworked and that the degree of enforcement of consumer legislation must vary considerably from province to province.

The efforts of the federal and provincial departments are mainly aimed at the enforcement of consumer legislation, handling of consumer complaints and consumer education. The enforcement function is discharged through prosecutions under the Acts, and at the provincial level through the licensing and bonding of certain merchants and their employees. Consumer complaints are handled by officers who normally attempt to provide mediation services. The consumer education function is basically discharged through the preparation of literature for distribution among consumers and public speaking engagements of officials of the department.

Until recently there have been enough problems in the field of consumer protection to accommodate the simultaneous increase of federal and provincial activity in the area. But the sheer growth in recent years of the consumer protection endeavors of both levels of government has been such that their activities have begun to overlap and this has increased the likelihood of duplication and the need for co-ordination. At the same time the competition between the federal and provincial departments for control of the new area into which they could expand has become keener. These problems have been increased by the absence of clearly defined constitutional guidelines which could separate the areas of responsibility of the two levels of government.

CHAPTER II

THE B.N.A. ACT AND CONSUMER PROTECTION

The proliferation of consumer protection legislation and agencies described above has taken place against the background of the distribution of powers contained in the *British North America Act.*[31] The federal and provincial governments have passed legislation, set up programs and hired employees to work in those areas where they have claimed to have jurisdiction to pass laws. Some understanding of the constitutional rules dealing with the division of legislative powers and their ambiguities is necessary in order to appreciate present and future problems of federal-provincial relations in the area of consumer protection.[32]

An initial point to keep in mind in a discussion of the Canadian constitution is that the fathers of Confederation rejected a unitary form of government for the new Dominion and instead adopted a federal one. According to D.V. Smiley:

> [T]here would be broad agreement among constitutional scholars that a federal constitution has these characteristics:
>
> 1. The totality of governmental powers which can legally be wielded within a territory are divided by a written constitution between a central and two or more regional governments.
> 2. Those parts of the constitution which delineate governmental powers are not subject to interpretation or amendment by the unilateral action of either level of jurisdiction.
> 3. At least one of the legislative chambers of the federal government is chosen by popular election.
> 4. Individual residents of the federation are directly subject to the laws of both the central and the regional governments.[33]

Many of the problems discussed in this paper arise from the very nature of our constitution that requires a division of legislative and administrative powers between the federal and provincial governments.

In this chapter, I will commence by discussing some well-established principles of constitutional law applicable to the division of powers between the federal and provincial governments. I will then proceed to analyse this division of powers in two areas of consumer protection where new legislation is being introduced at the moment of writing, i.e., consumer credit and trade practices.

A. SOME PRINCIPLES USED TO DECIDE ON THE CONSTITUTIONALITY OF LEGISLATION

As stated by the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada:

> Federal states exist because there is a political will to unite for certain purposes and to remain apart for others. Consequently one of the most complex aspects of a federal constitution is the division of powers between central and local authorities in a manner which will reflect the political will and political reality.[34]

A division of powers between the two levels of government is an essential feature of a federal constitution. It is this basic fact of divided jurisdiction which raises many of the frustrations and challenges of federal-provincial relations in Canada. In constitutional disputes the argument has often been advanced that in order to deal in a comprehensive and effective manner with a certain problem, all the powers to deal with it should lie in one level of government. This type of argument, which often has considerable strength from an administrative point of view, strikes at the basic federal nature of our constitution. As Duff, J. stated in one of his judgments:

> The argument that because the Dominion has authority to legislate in relation to this subject, in several, it may be many, aspects, it therefore has authority to appropriate the whole subject to itself, is one which in various forms has been often advanced, and always rejected. It really amounts to this, that it would have been simpler and more convenient if the subject had in terms been committed to exclusive jurisdiction of the Dominion Parliament.[35]

The compromise reached by the fathers of Confederation between the need for unity and the need to maintain the diversity of the different provinces was crystallised in sections 91 and 92 of the *British North America Act*. These two sections purported to allocate between the federal parliament and the provincial legislatures the powers to pass legislation. This apportionment was made by the inclusion in section 91 of twenty-nine categories in relation to which Parliament could pass legislation, and the inclusion in section 92 of sixteen categories in relation to which the provincial legislatures could pass laws.

In section 91 the Parliament of Canada is first given a general power "to make Laws for the Peace, Order and Good Government of Canada." The section goes on to provide that the general power is "in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces." It then enumerates thirty-one[36] specific heads of exclusive federal power among which are included the powers to legislate with respect to the regulation of trade and commerce,[37] banks and banking,[38] weights and measures,[39] bills of exchange and promissory notes,[40] interest,[41] bankruptcy and insolvency,[42] patents and copyrights,[43] and criminal law.[44]

Section 92 of the *B.N.A. Act* gives the provinces the exclusive power to legislate in respect of sixteen heads of power among which are property and civil rights,[45] local works and undertakings,[46] administration of justice in the province,[47] and matters of a merely local or private nature in the province.[48]

The provincial power to legislate on matters of property and civil rights can be considered the general provincial power,[49] parallel to the general federal power to pass legislation for the Peace, Order and Good Government of Canada. As Professor Lederman has recently reminded us,[50] the words "property and civil rights" had a well-settled meaning at the time of Confederation. This expression had been used in the *Quebec Act* of 1774[51] to include all the private civil law of the province of Quebec. The enumeration of specific federal heads in section 91 was aimed at detracting from the wide meaning of the expression "property and civil rights."

Under our Constitution any new piece of federal consumer legislation will have to be justified as falling within one of the thirty-one heads of power of section 91, while any provincial statute will have to be validated as falling within one of the sixteen heads of power of section 92. As the history of constitutional litigation extending for more than a century indicates, the

application of the two lists of powers to new legislation passed since 1867 has not been an easy task. In 1940 the Rowell-Sirois Report stated:

> No amount of care in phrasing the division of powers in a federal scheme will prevent difficulty when the division comes to be applied to the variety and complexity of social relationships. The different aspects of life in a society are not insulated from one another in such a way as to make possible a mechanical application of the division of powers. There is nothing in human affairs which corresponds to the neat logical divisions found in the Constitution. Therefore, attempts to exercise the powers allotted to the Constitution frequently raise questions as to its meaning in relation to particular circumstances.[52]

For over a century Canadian courts and the Privy Council have grappled with the problem of characterising or classifying federal and provincial statutes as falling within one or more of the heads of section 91 or section 92 of the *B.N.A. Act.* Almost all statutes passed by Parliament or the legislatures have several facets, aspects or characteristics which could allow them to be classified in principle both under the heads of power of section 91 and section 92.[53]

For example, in 1943 the Saskatchewan Legislature passed a statute entitled *The Moratorium Act.*[54] This statute attempted to deal with some of the economic hardships which residents of the province could suffer because of their dependence on agriculture. The Saskatchewan Act empowered the Lieutenant-Governor in Council to postpone the payment of debts or to prohibit any form of process or civil suit to enforce those debts, for a maximum period of two years. These powers could be exercised to deal with certain areas of the province affected by a bad crop or with the financial problems encountered by a single individual. When the constitutionality of the Act was challenged[55] the lawyer acting for the federal government argued that the Saskatchewan statute dealt with insolvency, one of the specific heads of power given to the Dominion under section 91, and therefore was *ultra vires* the Saskatchewan legislature. On the other hand the lawyers for the province argued that the statute dealt with the relationship between debtor and creditor, a matter which fell under property and civil rights. As the statute dealt with the power to sue in the province, it was also contended that it fell within another head of section 92, i.e., the administration of justice in the province. As the Act dealt with the specific problems of the agricultural community, it was also argued that it was a matter of a merely local or private nature in the province.[56]

Another statute which could have been initially classified under different heads of provincial and federal power was the *Ontario Securities Act.*[57] This Act prohibited the furnishing of false information in a prospectus, and provided certain penalties to be applied to violators. The Criminal Code contained some provisions punishing the making of or publishing of false statements in a prospectus.[58] The Supreme Court of Canada was asked to decide whether the Ontario statute was unconstitutional as dealing with criminal law, one of the exclusive legislative powers given to Parliament under section 91, or whether it merely dealt with matters of property and civil rights in the province.

In order to solve the problems of conflicting characterization of statutes, the courts have developed a series of principles and rules of varying degrees of refinement and subtlety. Professor Lederman has explained some of the judicial techniques used to classify a particular statute, in the following manner:

> The first step towards solution is to construe the challenged statute itself carefully to be sure of having determined its full meaning, that is, the full range

of features by any one of which or by any combination of which it may be classified. A rule of law expresses what should be human action or conduct in a specified factual situation, hence the consequences of observing and enforcing the rule are among its vital aspects of meaning. As Lord Maugham said in the Alberta Bank Taxation Case of 1939, in a case of difficulty one must look at the effects of the legislation: "For that purpose the Court must take into account any public general knowledge of which the Court would take judicial notice, and may in a proper case require to be informed by evidence as to what the effect of the legislation will be." Unless this is done, the classification process might well be purely formal or grammatical.

In any event, having thus determined the full range of features of the challenged statute, we find the usual situation, that federal aspects and provincial aspects are both present and compete to control characterization of the statute for purposes of determining the power to enact it. To resolve this competition, the courts must now assess the relative importance of the respective federal and provincial features of the statute in contrast one with the other. Accordingly, criteria of relative value enter the picture. If the judges find a clear contrast, if for instance they deem the federal aspects clearly more important than the provincial ones, then the conclusion is that power to pass the statute is exclusively federal. For the purpose of distributing legislative power then, the challenged statute is decisively classified by its leading feature, by its more important characteristic, by its primary aspects, by its pith and substance. These are synonymous phrases. And if, on the other hand, the provincial features are deemed clearly more important than the federal ones, the power to pass the law in question is exclusively provincial. In this way exclusive power can be assigned to the federal parliament or provincial legislature in spite of the purely logical ambivalence of the challenged statute because of its different aspects.

But, what if the contrast between the federal and provincial features respectively of the challenged law is not so sharp that one can be selected as the leading feature? What if both seem to be leading features? Take, for example, a law making dangerous driving of automobiles an offence with penalties. Because of its power over the civil right to drive and over highways as local works, it is important that a provincial legislature be able to pass such a law in aid of its responsibility for the safe and efficient circulation of traffic on the highways. But likewise it is important that the federal parliament under its general criminal law power should be able to pass such a law in aid of its responsibility to forbid and punish grave and dangerous anti-social conduct of all kinds.

In these circumstances, federal and provincial laws are permitted to operate concurrently, provided they do not conflict in what they prescribe for the persons subject to them. In the words of Lord Dunedin, two propositions are established: "First, that there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires*, if the field is clear; and secondly, that if the field is not clear, and in such domain the two legislations meet, then the Dominion legislation must prevail.

To sum up, for a concurrent field to be found by interpretation, the following conditions must obtain: (1) the provincial and federal categories of power concerned must overlap logically in their definitions; (2) the challenged law must be caught by the overlap, that is, it must exhibit both provincial and federal aspects of meaning; and (3) the provincial and federal aspects of the challenged law thus manifest must be deemed of equivalent importance or value.[59]

The result of the two possible approaches to characterization of a statute has been summarized elsewhere by Professor Lederman in the following manner:

In the course of judicial decision on the British North America Act, the judges have basically done one of two things. First they have attempted to define

> mutually exclusive spheres for federal and provincial powers, and they have had considerable though partial success in doing this. But, where mutual exclusion did not seem feasible or proper, the courts have implied concurrency of federal and provincial power in the overlapping area, with the result that either or both authorities have been permitted to legislate, provided in the latter event that their statutes did not in some way conflict one with the other in the common area.[60]

By using the first approach the Supreme Court of Canada held[61] that the leading feature of the *Moratorium Act* of Saskatchewan was that it dealt with insolvency, an exclusive head of power conferred on the federal government by section 91(21) of the *B.N.A. Act.* As the power to pass statutes in the field of insolvency was exclusively federal the Saskatchewan statute was *ultra vires* and therefore invalid.

By applying the second judicial technique described by Professor Lederman above, the Supreme Court of Canada held in *Smith v. The Queen*[62] that securities regulation was a concurrent field, and, as the provisions of the *Ontario Securities Act* and the *Criminal Code* did not conflict, they were permitted to operate concurrently in the same area.

The judicial techniques described above are not magic formulae leading us to easy solutions to the problem of characterization of legislation. We are still faced with the difficulty of deciding when to apply the first technique and conclude that the impugned statute has a predominant aspect, and when to apply the second one and conclude that the provincial and federal aspects are equally strong. In addition, even if we conclude that a certain statute has a predominant aspect, we may disagree as to which aspect is the strongest, i.e., the federal or provincial one.

The difficulty of this whole process is illustrated by a recent Quebec decision on the constitutionality of provincial consumer protection legislation. In *Kelloggs v. Attorney General of Quebec*[63] the Quebec Court of Appeal split two to one, the majority holding that the provincial regulations had a predominant federal feature while the minority held that the provincial features were the most important ones.

The issue in that case was the constitutional validity of regulations passed under the *Quebec Consumer Protection Act*[64] which prohibited the use of cartoons on television programs aimed at children.[65] Two of the judges of the Quebec Court of Appeal concluded that the main feature of the impugned regulations was the control of the contents of television advertising and that the jurisdiction to legislate and pass regulations in this field was exclusive to the federal government.

Turgeon J.A. wrote a dissenting judgment in which he upheld the validity of the provincial regulations. According to him the regulations dealt with the use of cartoons in all types of media, not only television. Therefore, the main feature of the regulations was the protection of a certain group of consumers in the province, and not the regulation of the contents of television programs.

Unfortunately the majority did not articulate many reasons why the total control of television advertising should be the exclusive prerogative of the federal government. It merely relied on a previous judgment which had held that Parliament had the power to regulate the

intellectual content of television.[66] But that case had not held that, in the proper exercise of the powers granted under section 92 of the *B.N.A. Act*, the provinces could not regulate television advertising. In fact, the provinces have been regulating television advertising of liquor for years, and several previous cases have held the provinces had the power to do so.[67]

Some other reasons could have been advanced by the majority in support of their conclusion. In the first place the federal regulation of broadcasting in Canada has been justified by the general power of Parliament to pass laws for the peace, order and good government under section 91.[68] In other fields where the federal jurisdiction has been based on the same general power the provincial jurisdiction has been completely excluded.[69] But these are old cases decided before the Supreme Court of Canada expanded the concurrent field doctrine which allows federal and provincial legislation to overlap. The same results would have been achieved by use of the doctrine that upholds the paramountcy of the federal legislation in case of conflict with a provincial Act.[70]

It could have been argued that broadcasting was an indivisible undertaking which because of the very nature of the television industry should be subjected to exclusive federal regulation. But, arguably, the Quebec regulations in question were not aimed at control of broadcasting in the province; they had an incidental effect on television advertising, but they seemed to be aimed at the attainment of a valid provincial goal.[71]

B. CONSUMER CREDIT AND THE CONSTITUTION

We saw in chapter one that in the 1960's most Canadian provinces passed legislation requiring lenders and vendors to disclose the cost of credit both on a percentage basis and in dollars and cents.[72] The Speech from the Throne read on September 30, 1974, indicated the intention of the federal government to introduce amendments to some of the federal Acts which regulate interest.[73] The federal government's plans were explained by the Minister of Consumer and Corporate Affairs in a speech delivered on April 28, 1975, wherein he stated:

> So, as a first step, we hope to bring about a standard system of disclosure of annual interest rates. This system will apply to every lender for the protection of every borrower . . . and to every transaction, ranging from mortgages to finance company loans to retail credit transactions . . . when I say credit, by the way, I refer to cash loans, charge accounts or any transaction where the consumer winds up owing money.[74]

This new initiative of the federal government raises important issues in the area of constitutional law and federal-provincial relations. What are the bases for the federal and provincial powers to pass legislation dealing with consumer credit? How far can the federal and provincial governments go in passing legislation in this area?

1. The Barfried Enterprises Case

Section 91(19) of the *B.N.A. Act* assigns to Parliament the exclusive power to pass legislation dealing with interest. Based on this head of power Parliament first passed the *Interest Act* in 1880 and the *Small Loans Act* in 1906. Before 1963 a few provinces had adopted some provisions of the English *Money Lenders Act*,[75] which allowed the courts to open and rewrite certain loan contracts "where the cost of the loan is excessive and the transaction is harsh and unconscionable." The remaining provinces had not been too enthusiastic about the adoption of this type of legislation, for they held considerable doubt about its constitutionality. After all, the

Unconscionable Transaction Relief Act was a provincial Act which appeared to deal with usurious rates of interest, while interest was one of the heads of federal legislative power under section 91 of the *B.N.A. Act.* From a mere reading of the Ontario statute[76] it seemed obvious that the legislative draftsmen had been aware of the constitutional problems. The use of the impressive label "unconscionable transactions" appeared to be aimed at accomplishing a double objective: to avoid the use of the word "usury" and to characterize the Act as one dealing with safe provincial matters – unconscionability and contracts. For the same reason the statute avoided the use of the word "interest" as much as possible and in its place it used the expression "cost of the loan" which was neutral from a constitutional point of view.

All these doubts were set aside in 1963 when the Supreme Court of Canada upheld the validity of the provincial legislation in the *Barfried Enterprises*[77] case, which allowed the provinces to regulate contracts of loans and expanded their jurisdiction to pass legislation dealing with consumer credit.

The facts giving rise to the Barfried case were quite simple. In 1959 a Mr. R.D. Sampson issued a mortgage for $2,250 in favour of Barfried Enterprises Ltd., as security for a loan for that amount. The rate of interest to be paid by Mr. Sampson was a mere 7 per cent, but in addition he was required to pay the lenders in advance a bonus of $750 and a commission of $67.50. The sum actually received by Mr. Sampson was $1,432.50 while he was required to repay $2,250. Mr. Sampson applied for and was granted relief under the *Unconscionable Transactions Relief Act,*[78] but on appeal the Act was declared unconstitutional in a unanimous decision of five judges of the Ontario Court of Appeal.[79] This decision in turn was overruled by the Supreme Court of Canada. In the Supreme Court a majority of five judges upheld the validity of the Ontario statute, while two other judges dissented.[80] The reasons for the majority are contained in a judgment delivered by Judson J. for himself and three other judges; Cartwright J. while agreeing with the decision of the majority gave reasons of his own.

The judgment of the Supreme Court of Canada in the Barfried Enterprises case, while the most important constitutional law case in the area of consumer protection, is extremely difficult to understand and its effect on the distribution of legislative powers remain unclear. The case has been discussed at length elsewhere,[81] but some understanding of this decision is necessary to appreciate the present constitutional confusion in the field of consumer credit. In the pages that follow I will discuss the judgment of the majority by dealing with the possible avenues of analysis which were open to the Supreme Court before reaching a decision on the case. In doing this I will follow Professor Lederman's explanation of the judicial techniques used to characterize an impugned statute.[82]

After construing the Ontario Act and determining all its features, the Supreme Court of Canada could have reached one of two basic conclusions: one would have been that the challenged statute had a predominant aspect, a leading feature, while the other conclusion would have been that the provincial and federal features of the Act were equally important.

If the first conclusion had been reached and the predominant feature was provincial, the Ontario statute would have been held *intra vires,* while if the federal aspect was the predominant one, the Ontario Act would have been unconstitutional.

On the other hand if the second conclusion had been reached and the court was unable to select a leading feature, the provincial Act would have been held valid as long as it did not conflict with a federal statute.

If the court had reached the second conclusion, i.e., if it had held that a provincial Act had equally important federal and provincial aspects the majority would have had to deal with a difficult problem, i.e., the conflict between the provincial Act in question and a federal Act. Section 2 of the *Interest Act*[83] states as follows:

> 2. Except as otherwise provided by this or by any other Act of the Parliament of Canada, any person may stipulate for, allow and exact, on any contract or agreement whatsoever, any rate of interest or discount that is agreed upon.

As the two dissenting judges stated,[84] even if the provincial Act had original validity, there was a direct conflict between section 2 of the federal Act and section 2 of the provincial Act. *The Interest Act* permitted any person to stipulate and exact any rate of interest or discount, while section 2 of the provincial Act allowed a court to change the stipulated rate of interest and prevented the recovery of the interest or discount originally agreed upon.

I would suggest that it was the desire to avoid this conflict in order to save the provincial legislation that led Judson J. to adopt the first conclusion by holding that the Act had a predominant provincial aspect.

But not all the difficulties were over. How could the court hold that the provincial aspect (contracts) of the Ontario statute was more important than the federal aspect (interest), when in fact the Act gave the judges the power to reopen and rewrite a money lending contract? The Ontario Act defined "cost of the loan" as including "interest, discount, subscription, premium, dues, bonus, commission, brokerage fees and charges."[85] Were not all these items part of the interest charged for the loan and, therefore, was not the federal aspect of the Act at least as important as the provincial one? The predominance of the provincial aspect of the Act was assured by the court's adoption of a very narrow definition of interest. If, as the court held, bonuses, commissions, fees, charges, etc., were not interest, the federal aspect of the statute was minimal, the provincial aspect was predominant, and therefore the Act was constitutional. As a result, the Supreme Court of Canada concluded that the *Unconscionable Transactions Relief Act* was constitutional as dealing basically with contracts, that the word "interest" in section 91(19) of the B.N.A. Act referred only to charges which accrue from day to day, and that it did not cover bonuses or most of the other items included in the definition of "cost of loan" in the Ontario Act.

What were the consequences of this decision of the Supreme Court of Canada? In the first place, the emphasis placed by the court on the contractual aspect of the Ontario Act has encouraged the provinces to pass legislation dealing with contracts notwithstanding that the provincial Acts may have an incidental effect on areas of federal jurisdiction. The judgments of the majority recognized and stressed the wide constitutional powers of the provinces under "property and civil rights" to pass consumer protection legislation. Referring to the *Unconscionable Transactions Relief Act* Judson J. stated:

> The Act deals with rights arising from contract and is prima facie legislation in relation to civil rights and, as such, within the exclusive jurisdiction of the province under section 92(13). Is it removed from the exclusive provincial legislative jurisdiction by section 91(19) of the Act, which assigns jurisdiction over interest to the federal authority? In my opinion, it is not legislation in relation to interest but legislation relating to annulment or reformation of contract on the grounds set out in the Act, namely, (a) that the cost of the loan is excessive, and (b) that the transaction is harsh and unconscionable. The wording of the statute indicates that it is not the rate or amount of interest

which is the concern of the legislation but whether the transaction as a whole is one which it would be proper to maintain as having been freely consented to the debtor. If one looks at it from the point of view of English law it might be classified as an extension of the doctrine of undue influence. As pointed out by the Attorney General for Quebec, if one looks at it from the point of view of civil law, it can be classified as an extension of the doctrine of lesion dealt with in articles 1001 to 1012 of the Civil Code. The theory of the legislation is that the court is enabled to relieve a debtor, at least in part, of the obligations of a contract to which in all the circumstances of the case he cannot be said to have given a free and valid consent. The fact that interference with such a contract may involve interference with interest as one of the constitutent elements of the contract is incidental. The legislature considered this type of contract as one calling for its interference because of the vulnerability of the contract as having been imposed on one party by extreme economic necessity. The court in a proper case is enabled to set aside the contract, rewrite it and impose the new terms.[86]

Cartwright J. stated:

The *Unconscionable Transaction Relief Act* appears to me to be legislation in relation to Property and Civil Rights in the Province and the Administration of Justice in the Province, rather than legislation in relation to interest. Its primary purpose and effect are to enlarge the equitable jurisdiction to give relief against harsh and unconscionable bargains which the courts have long exercised; it affects, but only incidentally, the subject matter of interest specified in head 19 of section 91 of the British North American Act.[87]

Another important consequence of this judgment is that it appears to give constitutional validity to provincial Acts dealing with the disclosure of the cost of consumer credit.[88] In the first place, the disclosure legislation can be characterized as legislation dealing with loan contracts. The Acts are concerned with the knowledge and consent of one of the parties to the contract, and they require fair disclosure of the terms before the contract is entered into. If the provincial legislation required the disclosure of "interest" in the very narrow sense ascribed to this term by Judson J., arguably this is a merely incidental effect of valid provincial legislation in relation to contracts. In addition when the legislation required the disclosure of bonuses, fees, and other financial charges which do not accrue periodically, it was dealing with matters which, according to the Barfried decision, are not interest and fall within the jurisdiction of the provinces.

In several Canadian provinces the officials in charge of enforcing the cost of credit disclosure legislation require banks to comply with the provincial Acts. Is the provincial legislation valid when it purports to regulate bank loans, in the face of disclosure regulations passed under the federal *Bank Act?*[89] Bank officials, for public relations reasons, may be unwilling to challenge the application of the provincial Acts to them; but it seems clear from a constitutional point of view that, at least in a case of conflict,[90] the federal disclosure provisions will prevail. In a case decided in 1894[91] it was held that a provision of the *Bank Act* dealing with warehouse receipts was valid and prevailed over conflicting provincial legislation on the same subject. There was no doubt that the provincial legislation dealt with a matter falling within the head of "property and civil rights" but as the court stated,

[s.] 91 expressly declares that, "notwithstanding anything in this Act", the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes; which plainly indicates that the legislation of that Parliament, so long as it strictly relates to these matters, is to be of paramount authority.[92]

The Privy Council went on to hold that the word "banking" included in section 91(5) was "an expression which is wide enough to embrace every transaction coming within the legitimate business of the banker." Therefore, it would appear that if the provincial disclosure legislation is ever challenged as conflicting with the regulations passed under the *Bank Act*, the latter regulations will prevail.

An interesting consequence of the decision of the Supreme Court of Canada in the *Barfried Enterprises* case was that it appeared to put in doubt the constitutional validity of the *Small Loans Act*[93] which had been in force for many years. Section 2 of the Act defines "cost" as follows:

> "Cost" of a loan means the whole of the cost of the loan to the borrower whether the same is called interest or is claimed as discount, deduction from an advance, commission, brokerage, chattel mortgage and recording fees, fines, penalties or charges for inquiries, default or renewals or otherwise . . .

Since the Supreme Court of Canada held in the Barfried case that "interest" in the constitutional law sense did not include a bonus or other charges which do not accrue on a periodic basis, it would seem to follow that Parliament had no jurisdiction to deal with those items included in the definition of cost of a loan which do not fall within the narrow definition of interest.

Professor Jacob Ziegel has suggested that even after the decision in the *Barfried Enterprises* case it is still arguable that Parliament has the power to deal with bonuses and other charges as necessarily incidental to the effective exercise of its power to regulate interest.[94] However, the adoption of this argument by a court would amount to a virtual overruling of the *Barfried* case as it would use the "necessarily incidental doctrine" to allow Parliament to recover the jurisdiction it had lost to the provinces by virtue of the *Barfried* case. This, I would suggest, would be an improper application of the "necessarily incidental doctrine." The *rationale* of this doctrine seems to be based on efficiency. In order to achieve the effective implementation of a legislative program by one of the levels of government, the doctrine allows it to exercise a minor and ancillary power originally allocated to the other level of government. The doctrine has never been applied to allow the wholesale assumption of plenary powers by a level of government in order to solve some of the difficulties of divided jurisdiction.[95]

After considering the many uncertainties created by the *Barfried Enterprises* case it is interesting to note that the controversy which gave rise to the decision could have been solved by the application of the *Small Loans Act*. The definition of "loan" in section 2 of the Act stated that:

> if after deducting all payments . . . made by the borrower to the money lender . . . the amount retained by the borrower is fifteen hundred dollars or less, the transaction or transactions shall be deemed to have resulted in a loan of the amount so retained by the borrower notwithstanding that normally a loan for a larger sum has been made.[96]

As the amount advanced to Mr. Sampson was only $1,432.50, this loan fell within the scope of the *Small Loans Act*. Mr. Sampson could have refused to make any payments beyond the amount actually advanced to him, plus the maximum amount of interest allowed by the *Small Loans Act*. If he was sued for the difference he could have argued illegality and relied on the *Small*

Loans Act as a defence. In the Proceedings of a Special Joint Committee on Consumer Credit, the Superintendent of Insurance stated:

> Unfortunately, that loan never came to our attention until long past six months from the time it was made, and since action under the *Small Loans Act* must be taken by summary conviction, it has to be taken within six months of the making of the loan. Barfried Enterprises Ltd., of course, was an unlicensed lender.[97]

Given the confused state of this area of constitutional law after the decision of the Supreme Court of Canada in the *Barfried Enterprises* case, it does not seem idle to speculate that we would be in a better position today if Mr. Sampson had relied on the *Small Loans Act* and avoided any further litigation. The decision of the Supreme Court of Canada has not provided any clear guidelines to the federal and provincial governments as to the extent and limits of their respective jurisdictions, and therefore it has increased both the likelihood of conflict between the two levels of government and the need for some kind of agreement to avoid this conflict.

2. The Time-Price Doctrine

As the facts in the *Barfried* case involved credit extended by a lender and not credit granted by a vendor, the Supreme Court did not need to deal with the validity of the "time-price doctrine."[98] For many years it has been assumed in England, the United States and Canada that interest was charged only in cash loans, i.e., in money lending transactions *strictu sensu*, and not in conditional sales contracts or other time-sale agreements where the buyer was allowed to pay the price in instalments.

In 1827 the English Court of King's Bench adopted this narrow interpretation of the word "interest" in a case dealing with the possible application of a usury statute.[99] Lord Tenterden C.J. stated:

> The case which is now presented to the consideration of the court, arises out of the contract for the sale of an estate and not for the loan of money. The agreement was founded partly upon what was considered the present price of the estate and partly upon what was considered its price if paid for at a future date. The only difficulty has been occasioned by calling the difference between these two prices interest; but it is our duty to look, not at the form of the words but at the substance of the transaction . . . it appears to me that in substance this was a contract for the sale of the estate at the price of £20,800, to be paid by instalments. In that there was no illegality.[100]

The expression "time-price" is derived from the rationalization contained in the judgment quoted above. A merchant is free to set any price he wants for his wares. He in fact sets two prices: one price for immediate payment in cash, and another price ("time-price") if the buyer is going to have the benefit of paying in instalments over a period of time. The difference between the cash price and the time-price is not considered interest.

This doctrine has been applied both in England and the United States in order to confine usury legislation to loans of money and to avoid applying it to instalment sales. In Canada the distinction has been applied to the power of Parliament to pass legislation dealing with interest, and any Act based on that power has not been extended to cover time-sales contracts.

The following examples of the application of this doctrine may clarify its meaning. If a consumer borrows $500 from a small loan company, this loan falls under the provisions of the

Small Loans Act,[101] which sets a maximum rate of interest that can be charged on all loans under $1,500. If the same consumer purchases some goods for $500 from a department store, uses the credit facilities provided by the store and pays the purchase price over a period of time, the transaction is not considered to be a loan; it does not fall under the provisions of the *Small Loans Act* and there is no ceiling on the finance charges which the department store may exact. Let us assume now that a consumer buys some goods from a dealer who does not finance his own time-sales, and that the dealer assigns his conditional sales contract to a sales finance company. Any finance charges payable by the consumer to the finance company are not considered to be interest in a constitutional law sense, and are not subject to federal legislation dealing with interest.

As has often been stated,[102] the distinction between the charges in a loan transaction and the charges in a time-sale transaction cannot be justified in economic terms. In both cases the consumer is paying what in economic terms amounts to interest; in the case of a time-sale the consumer has to pay interest on the amount of the sale price he is in fact borrowing. As the *Crowther Report* states:

> Every acquisition of goods on credit is in essence two transactions rolled into one, namely a sale and a loan ... where the finance of a vendor credit transaction is provided by a party other than the seller, the loan aspect is obvious ... less evident is the case where it is the seller himself who extends credit, by agreeing to accept payment by installments. Here the sale and lending aspects are telescoped into one. The transaction appears to be a single transaction, but is in reality a sale for cash effected by means of a loan. This concept is fundamental. What the seller is doing is advancing money to pay himself the price, thereby converting the buyer's obligation *qua* buyer for the sale price into an obligation *qua* borrower to repay a loan.[103]

The time-price doctrine has been applied for all these years not because of its conceptual necessity, but for functional and practical reasons. For centuries lender credit was the most important form of credit, and no need was felt to control financial charges in instalment sales. It was also much easier to enforce rate control in the case of loans than in the case of sales. In the case of a loan, it was easy to calculate the true rate of interest by relating the amount actually advanced by the lender to the total amount to be repaid by the borrower. In the case of cash sales, given the merchant's freedom to set the price of his goods, it was considerably easier to hide the financial charges by including them in the price of the goods. It is doubtful whether this difficulty in enforcing disclosure of cost of credit in time-sales contracts is encountered in modern days.[104] In the first place the financing of instalment sales to a great extent is no longer done by sellers but by sales finance companies which specialize in performing this economic function. Secondly, provincial authorities have been enforcing this type of disclosure for a number of years and it has not proven to be an impossible task.

No Canadian case has dealt with the application of the time-price doctrine to constitutional law. The doctrine has been followed in practice, and the federal statutes dealing with interest have not been applied to transactions involving vendor credit. It is a moot point whether the Supreme Court of Canada after narrowing down the concept of interest in the *Barfried Enterprises* case would be willing to confine it even more by limiting the meaning of interest and, consequently, the federal jurisdiction to financial costs in lender credit transactions.

Even if the time-price doctrine were to be upheld by the Supreme Court of Canada, could Parliament claim the power to pass legislation dealing with vendor credit as necessarily incidental

to the effective use of its powers to pass legislation in the area of lender credit? I think this would be an unreasonable use of the "necessarily incidental" doctrine. As Duff J. has stated:

> [D]ivision of legislative authority is the principle of the British North America Act, and if the doctrine of necessarily incidental powers is to be extended to all cases in which inconvenience arises from such a division that is the end of the federal character of the union. That is not the true solution; the true solution lies as Lord Herschell said in the Fisheries case . . . in the exercise of good sense by the legislatures concerned.[105]

The absence of a decision on the validity of the time-price doctrine adds to the present confusion in the area of consumer credit. Should the federal government limit its legislation to the area of lender credit? Should it deal in a comprehensive manner with all aspects of lender and vendor credit and incur the risks both of a constitutional challenge to its legislation and of alienating the provinces? Could an agreement be reached by the federal and provincial governments whereby the enforcement of uniform legislation is divided between both levels of government? These issues are canvassed in chapter 4 of this paper. For the moment I would like to stress that problems in federal-provincial relations arise from the very nature of a federal constitution which is based on a division of powers, from the interconnection of all aspects of life in a modern technological society, and from the difficulty or impossibility of drawing clear boundaries between the powers of the federal and provincial governments.

C. THE CONSTITUTIONALITY OF THE TRADE PRACTICES LEGISLATION AND THE NEW PROVISIONS OF THE COMBINES INVESTIGATION ACT

A new series of constitutional law problems of a different nature arises with regard to the legislation dealing with trade practices which is being passed by both the federal and provincial governments. At the time of writing, both Ontario and British Columbia have in force trade practices legislation.[106] The same type of Act has recently been passed by the Alberta legislature,[107] while Manitoba and Saskatchewan are committed to the introduction of similar legislation. The new *Trade Practices Acts* differ both in philosophy and basic approach from most of the consumer protection legislation passed by the provinces in the past. Instead of allowing the unprincipled operator to engage in an undesirable practice and doing something about it later through the use of its licensing and bonding powers, the officials in charge of the new Acts will have the power to obtain cease-and-desist orders to prevent the continuance of the undesirable practice when the person or business refuses to stop it.[108] They may also enter into assurances of voluntary compliance, whereby any offenders undertake to discontinue the practice and to take some specific steps in order to compensate the people who have been affected by the unfair practices.[109] In addition, the Acts contain provisions making it an offence to fail to comply with the cease-and-desist orders, with a written undertaking of voluntary compliance or in general to contravene the Act or the regulations,[110] and provide penalties for such offences. Both the Ontario and British Columbia statutes provide for the definition of unfair trade practices in three ways: the Acts contain very wide definitions of what constitutes unfair or deceptive trade practices, they contain lists of specific practices which are considered to be unfair or deceptive, and in addition they allow the Lieutenant Governor-in-Council to add by regulation any new practices that may develop after the passing or amending of the Acts.[111]

At the federal level the *Combines Investigation Act*[112] has contained for several years some provisions dealing with false and misleading advertising. These prohibitions of certain types of undesirable advertising can be considered a prohibition of certain fraudulent or deceptive trade

practices. At the moment of writing Parliament has just passed Bill C-2, "an Act to amend the Combines Investigation Act... ." In addition to expanding the scope of the advertising provisions of the *Combines Investigation Act*, Bill C-2 has added a series of new sections dealing with certain consumer related practices such as double ticketing, pyramid selling, referral selling, bait and switch selling, and promotional contests.[113]

A considerable amount of overlap between the *Combines Investigation Act* and the *Trade Practices Act* and other provincial legislation will occur now that Parliament has adopted the amendments to the federal Act. This legislative overlap will give rise to substantial problems at the level of administration and enforcement. I will deal with some of these problems in a later chapter, but here I intend to discuss some of the constitutional problems raised by the enactment of the new legislation. Two specific issues will be dealt with under this heading: first, do the two levels of government have jurisdiction to enter the field, i.e., do the federal and provincial trade practices statutes have initial validity?; secondly, even if both the federal and provincial legislation can be justified as the proper exercise of the respective powers conferred on the two levels of government by the *B.N.A. Act*, do they conflict with each other?

1. Initial Validity of Provincial Trade Practices Legislation

A great number of cases have recognized the power of provincial legislatures to pass laws regulating business in the province.[114] This jurisdiction has basically been seen as a specific application of the exclusive powers of the provinces to pass legislation dealing with "property and civil rights in the province", "generally all matters of a merely local or private nature in the province", and even "shop, saloon, tavern, auctioneer and other licences in order to the raising of a revenue for the provincial, local or municipal purposes."[115]

The limits of this provincial power have been drawn in the context of claims by the Dominion to pass legislation with regard to inter-provincial and international trade under section 91(2) of the B.N.A. Act.

In the course of their analysis of the constitutional bases of the provincial powers to regulate business in the province, the courts have talked indistinctly about the provincial power to pass legislation dealing with contracts, the power to regulate trades or professions, and the power to regulate "intra-provincial trade", meaning by this the production, processing and distribution or marketing of agricultural and other products in the province. These three concepts of regulation of contracts, regulation of professions or trades, and regulation of "trade in commodities" seem to overlap, but for the purpose of analyzing the initial validity of the provincial trade practices legislation I will consider them separately.

a) *Contracts*

Based on section 91(13) ("property and civil rights in the province") Canadian provinces have exclusive jurisdiction to pass legislation with regard to all traditional private law matters such as contracts, torts and property. While Parliament has jurisdiction to regulate inter-provincial trade and inter-provincial undertakings, it does not have jurisdiction to regulate what we could call "inter-provincial contracts" or "inter-provincial torts", i.e., contracts entered into or torts committed by persons in different provinces. In this type of case a separate set of rules known as conflicts of law or private international law will determine which provincial law will apply.[116] There are only two cases in which Parliament has jurisdiction to deal with contracts or torts: one of them is when a specific narrow area of private law, such as Bills of Exchange or Patents and

Copyrights, has been assigned to Parliament by section 91 of the B.N.A. Act. Another is when by the application of the doctrine of the ancillary or necessarily incidental power, Parliament has to deal with a minor matter of property and civil rights for the effective exercise of one of its other legislative powers.[117]

The distinction between the provincial jurisdiction to legislate with regard to contracts and the federal jurisdiction to legislate with regard to inter-provincial trade was graphically illustrated by Kerwin C.J.C. in the *Farm Products Marketing* case:

> It seems plain that the province may regulate a transaction of sale and purchase in Ontario between a resident of the province and one who resides outside its limits; that is, if an individual in Quebec comes to Ontario and there buys a hog, or vegetables, or peaches, the mere fact that he has the intention to take them from Ontario to Quebec does not deprive the legislature of its power to regulate the transaction, as is evidenced by such enactments as the Sale of Goods Act, R.S.O. 1950, c. 345. That is a matter of the regulation of contracts and not of trade as trade and in that respect the intention of the purchaser is immaterial. However, if the hog be sold to a packing plant or the vegetables or peaches to a cannery, the products of those establishments in the course of trade may be dealt with by the legislature or by parliament depending, on the one hand, upon whether all the products are sold or intended for sale within the province or, on the other, whether some of them are sold or intended for sale beyond provincial limits.[118]

Kerwin C.J.C. uses the example of the Ontario Sale of Goods Act, and there is hardly any doubt that legislation such as the *Frustrated Contracts Act*[119] or the *Contributory Negligence Act*[120] are clearly within provincial jurisdiction.

In the recent case of *Interprovincial Cooperatives Ltd. and Dryden Chemicals Ltd.* v. *The Queen*[121] Pigeon J. stressed the limitation of the provincial powers to legislate on contractual matters:

> It has been determined in *Citizens Insur. Co. of Can. v. Parsons* (1881-82), 7 App. Cas. 96, C.R. [8] A.C. 406, that the power to regulate by legislation the contracts of a particular business or trade is within the scope of provincial legislative authority over property and civil rights. However, where business contracts affect interprovincial trade, it is no longer a question within provincial jurisdiction. The matter becomes one of federal jurisdiction. Such is the substance of our recent judgment in *Burns Foods Ltd. v. A.G. Man.*, [1974] 2 W.W.R. 537, 40 D.L.R. (3d) 731 (Can.).[122]

The judgments in this case stress the territorial limits of provincial jurisdiction and it would seem to follow that the provincial trade practices Acts cannot be used to raise barriers to inter-provincial trade. But what would be their constitutional basis if they are limited to the regulation of retailing within the province? Can the trade practices legislation be justified as falling within the provincial jurisdiction to legislate in the area of contracts or torts?

An analysis of the new legislation will indicate that the provinces appear to be extending traditional private law doctrines such as those dealing with misrepresentation and unconscionability.

Section 2(a) of the Ontario Act deals with "false, misleading or deceptive consumer representation" while section 2(b) deals with unconscionable consumer representations. For

centuries the common law has attached civil consequences to certain representations, both when they become part of a contract and when they do not. If the representation becomes part of the contract a person may sue for breach of express warranty; while if the representation does not become a contractual term a person may sue and obtain some remedies in the case of fraudulent misrepresentation, negligent misrepresentation and, to a limited extent, even in the case of innocent misrepresentation.[123] The new legislation, however, is not content with granting the civil remedies of rescission and damages *ex post facto*, i.e., when the evil has been done and when a contract tainted by an unfair practice has been entered into; but it provides the machinery for prevention, for stopping the unfair practice before the harm is done. This is the part of the new legislation wherein it extends the basic common law approach to the treatment of misrepresentation. As we saw in the discussion of the *Barfried* case,[124] the Supreme Court of Canada was willing to uphold the validity of the Ontario statute as an Act aimed at enlarging the traditional legal doctrines of undue influence, and the powers of the courts of equity to grant relief in the case of harsh and unconscionable bargains. It would be inconsistent with this approach to confine the jurisdiction of the provinces to the regulation of contracts *strictu sensu* through the use of traditional remedies and to prevent them from passing legislation creating new machinery to deal with practices which lead to contracts and flow from them. In any case, for centuries courts have used injunctions to prevent a breach of contract or the commission of civil wrongs, and this constitutes an important precedent for the cease-and-desist order, which to a great extent is a new name for an injunction issued by administrative tribunals or officials.

It is arguable that the provincial legislatures are not limited to the use of traditional contractual remedies for the regulation of contracts. The provincial jurisdiction to regulate the insurance industry has been based to a great extent on the theory that insurance is a contract entered into in one of the provinces,[125] and all provinces have established administrative machinery to deal with the insurance industry.

b) *Particular Trades*

The constitutional validity of the trade practices legislation may also be based on the powers of the provinces to regulate particular trades within the province. From an early date the courts have held that the words of section 91(2), giving the Dominion powers to regulate trade and commerce, did not encompass the power to regulate particular trades, businesses or professions.

In the *Parsons* case[126] it was suggested that the words of section 91(2) may have been used by the draftsmen of the *B.N.A. Act* in the same sense as "regulation of trade" in Article VI of the *Act of Union*[127] between England and Scotland. This Article required that after the Union all parts of the United Kingdom should be under the same "prohibitions, restrictions and regulation of trade." In spite of this requirement of uniformity, the Parliament of the United Kingdom had regulated specific trades in one part of the United Kingdom only, without it being supposed that Parliament had violated the articles of Union. Therefore it would seem to follow that the words "regulation of trade" did not cover regulation of "trades."

This principle has been upheld in subsequent cases.[128] For example, in 1913, while analyzing the meaning of subsection 2 of section 91, Idington J. stated:

> I do not think the B.C. insurance agent following his trade or calling, falls any more within the scope of this subsection than the farmer, or fishermen, or blacksmith, or grocer or anybody else following his trade; not even the lawyer following his honest trade and undoubtedly having much to do with commerce.[129]

In the same case Anglin J. said referring to section 91(2) of the *B.N.A. Act:*

> I think that under it Parliament is not empowered to regulate the conduct of any single trade or business in the provinces or to prescribe the condition on which it may be carried on.[130]

In an appeal of this case to the Privy Council the decision of the Supreme Court of Canada was upheld. After analyzing a series of cases Viscount Haldane stated:

> Their Lordships think that as a result of these decisions, it must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation by licencing system of a particular trade in which Canadians would otherwise be free to engage in the province . . .[131]

In cases dealing with companies incorporated by the Dominion, it has often been stated that they have to comply with provincial legislation aimed at particular trades or businesses in the provinces. In a case decided in 1931[132] Viscount Dunedin, referring to the *Parsons* case, stated:

> The principle laid down was clear. It is within the power of the Dominion legislature to create the person of the company and endow it with powers to carry on a certain class of business, to wit, insurance; and nothing that the provinces can do by legislation can interfere with the status so created; but nonetheless the provinces can by legislation prescribe the way in which insurance business or any other business shall be carried on in the provinces. The great point of the case is the clear distinction drawn between the question of the status of the company and the way in which the business of the company shall be carried on.[133]

The *Trade Practices Acts* deal with the regulation of particular businesses within the provinces, i.e., those businesses engaged in the supplying of consumer products and services. All the businesses or trades engaged in advertising, retailing or providing goods or services to consumers in the province are required to abstain from any practices or representations which are false, misleading, deceptive or unconscionable. As long as the provincial trade practices legislation is aimed at attaining this goal within the province and does not conflict with valid federal legislation, its constitutionality seems to be assured as regulation of specific businesses or trades within the province.

The provincial *Trade Practices Acts* contain offence provisions which allow the imposition of fines or imprisonment on persons who violate the Acts or the orders made under them. The constitutionality of these provisions can be justified under section 92(15), in addition to 92(13) and 92(16) of the *B.N.A. Act.* Section 92(15) authorizes the provinces to pass laws dealing with:

> The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section.

As the concluding words of this subsection indicate the provincial jurisdiction to create offences and impose punishment is an ancillary one, which must be justified under another head of jurisdiction of section 92. To put it another way, the provinces have jurisdiction under section 92(15) to create offences for the enforcement of valid legislation, and the validity of this legislation will have to be based on one of the heads of section 92 other than 92(15).

2. Initial Validity of the New Sections of the Combines Investigation Act

The validity of several of the old provisions of the *Combines Investigation Act* has been upheld as falling under the jurisdiction of Parliament to legislate on criminal law under section 91 of the B.N.A. Act.[134] In several of these cases dealing with the constitutionality of combines legislation, the judges have made some comments about the extent and limits of the federal criminal law power. This is an important issue in the area of consumer protection. Can Parliament pass valid legislation on any of the areas of consumer protection presently regulated by the provinces by merely prohibiting certain acts or conduct and attaching penal consequences to them?

An initial federal attempt to pass legislation dealing with competition was frustrated in the *Board of Commerce* case.[135] The Privy Council held that the federal legislation there in question could not be justified as constituting legislation in relation to trade and commerce or criminal law. In the course of his judgment Viscount Haldane showed some awareness of the danger to provincial jurisdiction inherent in a wide construction of the powers of Parliament to pass laws with regard to criminal law. He attempted to draw some limits on the federal law power in the following manner:

> It is one thing to construe the words "criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters," as enabling the Dominion Parliament to exercise exclusive legislative power where the subject matter is one which by its very nature belongs to the domain of criminal jurisprudence. A general law, to take an example, making incest a crime, belongs to this class. It is quite another thing, first to attempt to interfere with a class of subjects committed exclusively to the provincial legislature and then to justify this by enacting ancillary provisions, designated as new phases of dominion criminal law which require a title to so interfere as basis for their application.[136]

However, this narrow approach to the interpretation of the criminal law power was subsequently abandoned by the Privy Council. Some years later the Privy Council had to consider the validity of the *Combines Investigation Act* and section 498 of the *Criminal Code*. While upholding the validity of both pieces of combine legislation as dealing with criminal law, the Privy Council disassociated itself from the statement quoted above on the limits of the criminal law power.

> [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" . . . it certainly is not confined to what was criminal by the law of England or of any province in 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 this 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 consequence? 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 crime 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.[137]

In *Attorney General of British Columbia* v. *Attorney General of Canada*,[138] the Privy Council had to consider the validity of another section of the *Criminal Code* which penalized certain acts of unfair competition such as discriminatory discounts or rebates and unreasonably-low selling prices to destroy competition. The section in question was upheld as valid criminal law. Lord Atkin stated:

> The basis of [the P.A.T.A.] decision is that there is no other criteria of "wrongness" than the intention of the legislature in the public interest to prohibit the Act or omission made criminal . . . the only limitation on the plenary power of the Dominion to determine what shall or shall not be criminal is the condition that parliament shall not in the guise of an acting criminal legislation in truth and in substance encroach on any of the classes of subjects enumerated in section 92. It is no objection that it does in fact affect them. If a genuine attempt to amend the criminal law, it may obviously affect previously existing civil rights. The object of an amendment of the criminal law as a rule is to deprive the citizen of the right to do that which, apart from the amendment, he could lawfully do. No doubt the plenary power given by section 91(27) does not deprive the provinces of their right under section 92(15) of affixing penal sanctions to their own competent legislation. On the other hand, there seems to be nothing to prevent the Dominion, if it thinks fit in the public interest, from applying the criminal law generally to acts and omissions which so far are only covered by provincial enactments.[139]

Courts have not been able to establish any precise set of criteria to limit the federal criminal law power. The only limiting device is the doctrine of colorability, referred to in the quotation above, whereby Parliament has been prevented from pursuing *ultra vires* goals by passing legislation which appears to be criminal law. In the *Reciprocal Insurer's* case[140] a provision of the *Criminal Code* making it an offence to carry on the business of insurance without a licence granted by the federal government was declared unconstitutional. The regulation of the insurance business had been held to fall within the jurisdiction of the provinces, and by using the form of the criminal law Parliament was attempting to do indirectly what it could not do directly, i.e., to pursue an *ultra vires* legislative purpose.

In the *Margarine* case[141] it was held that a section in a federal statute which prohibited the manufacture or sale of margarine was aimed at the regulation of intra-provincial trade, and that it was not a valid *bona fide* exercise of the criminal law power. The judgment of Rand J. contains a classic statement with regard to the scope of the criminal law power.

> A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interest; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened . . . is the prohibition enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality; these are the ordinary though not exclusive ends served by the law . . .[142]

In 1961 the constitutionality of the resale price maintenance sections of the *Combines Investigation Act* was challenged in *Regina* v. *Campbell*.[143] The Supreme Court of Canada seemed

so certain of the validity of the challenged provisions on the basis of the criminal law power that it dismissed the appeal without hearing the argument of the lawyers for the federal government.

The cases cited above dealt with the extent of the criminal law power and the constitutionality of the competitive offences contained in the old Combines Investigation Act. The amendments to that Act now adopted by Parliament[144] not only expand the content of the old offences, but they contain new sections which prohibit a series of unfair or unconscionable practices. In addition a new section grants the right to sue and recover damages to any person who has suffered loss or damage as a result of violation of the new sections.[145]

Can these new provisions be justified on the basis of the federal law power to pass criminal law legislation? Are the sections which prohibit and punish double-ticketing, referral selling, sales above advertised price, pyramid sales, etc., a *bona fide* exercise of the criminal law power? Or, are these sections a colorable attempt to enter an exclusively provincial area?

The "evil or injurious or undesirable effect upon the public against which the law is directed"[146] may be seen as the detrimental effect of these practices both on the competitive forces in the market place and on the economic well being of individual consumers. Both the new sections and the old ones dealing with fraudulent and misleading advertising have a "competition aspect" as well as a "consumer protection aspect." They can be seen as measures aimed both at protecting reputable businessmen from unfair competition and at providing a setting where the free play of market forces can take place. At the same time honesty and fairness at the retail level will allow consumers to exercise their enlightened judgment in the choice of products and services, and this in turn will increase the efficiency of the market in allocating scarce resources to the production of those goods and the supply of those services for which consumer demand is greater. Therefore, there is a link between the new trade practices provisions and the federal anti-combines legislation which has been upheld as a valid exercise of the criminal law power.

In addition the new trade practices sections are clearly drafted in the language and style used by criminal law legislation. The new sections merely describe and forbid certain practices and attach certain penalties for their violation. Therefore, I would conclude that the new trade practices sections of the *Combines Investigation Act* are a valid exercise of the federal criminal law power.

Even if the validity of the new sections were upheld as not constituting a colorable attempt to pursue an *ultra vires* legislative purpose, significant problems arise with the new section 31.1 which allows the recovery of damages. Can this provision be sustained on the same constitutional basis as the other provisions of the Act? In an article dealing with constitutional law problems in the area of combines legislation, Professor Bruce C. McDonald stated in 1969:

> There seems to be no strong reason why a civil action could not be conferred even under the criminal law power, and indeed there is authority indicating that it can . . .[147]

As Professor McDonald recognizes,[148] this is quite an unusual proposition. The traditional view in this area was expressed by Duff J. in the following words:

> The characteristic rules of the criminal law . . . are concerned primarily not with rights, with their creation, conditions of their exercise, or their extinction; but with some evil or some menace . . . which the law aims to prevent or suppress through the control of human conduct.

> Fraud, for example, may be of such a character as to constitute an actionable wrong or a criminal offence. The law in relation to civil rights . . . is primarily concerned with the victim's right of reparation while the criminal law deals with the fraud as such as something deserving a punishment at the hands of the state.[149]

As section 31.1, granting rights to damages for breach of the provisions of the *Combines Investigation Act*, has by now been adopted by Parliament, there is a great likelihood that the constitutionality of that section will be challenged. In that case the courts probably will have to analyze the validity of the section not only under the criminal law power but also under the power of Parliament to pass laws dealing with "the regulation of trade and commerce" and "the Peace, Order and Good Government of Canada."[150] The adoption of one or both of these headings as the basis of the *Combines Investigation Act* would have quite important consequences in the form the legislation could take, the methods of enforcement that could be adopted and the tribunals which could administer it.

As we saw in the discussion of cases dealing with the constitutionality of the combines legislation, the courts have based its validity on the federal criminal law power, but they have not decided that it could not be based on the trade and commerce power. In fact, in the *P.A.T.A.* case[151] Lord Atkin stated:

> 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 section 91(2) for "the regulation of trade and commerce" . . . they desire . . . to guard themselves from being supposed to lay down that the present legislation could not be supported on that ground.[152]

The trend of cases dealing with the federal power to pass legislation for the regulation of trade and commerce led Professor Gosse to state in 1962:

> There is a good possibility that the present legislation would now be held valid by the Supreme Court under head two although forty years ago there would have been no likelihood of such a finding.[153]

The powers of Parliament under section 91 (2) were first analyzed by Sir Montague Smith in 1881 in the *Parsons* case where he stated, in words that have often been quoted in subsequent judgments:

> Construing therefore the words "regulation of trade and commerce" by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of inter-provincial concern and it may be that they would include general regulation of trade affecting the whole dominion.[154]

Subsequent cases have established beyond doubt the jurisdiction of Parliament to pass legislation in matters of international and inter-provincial trade.[155] If the combines legislation were based on the federal power to regulate inter-provincial trade, it has been argued that the effect of the legislation would be severely curtailed, as it could not reach purely intra-provincial transactions. However, in *Caloil Inc.* v. *A.G. Canada*,[156] a federal prohibition on the transportation and sale of imported oil west of the Ottawa Valley was upheld by the Supreme Court of Canada even though it affected purely local transactions. This decision of the Supreme Court confirms the decision of the Manitoba Court of Appeal in *R.* v. *Klassen*,[157] which upheld the imposition of a quota system on a local feed mill engaged exclusively in intra-provincial trade,

as an incident to the regulation of inter-provincial and international trade in grain. Therefore it would appear that if the validity of the combines legislation is based on 91(2) of the *B.N.A. Act*, it will apply to purely intra-provincial transactions.

The interesting question at this moment is whether the Supreme Court of Canada will be willing to base the *Combines Investigation Act* on the general trade and commerce power which Sir Montague Smith described in the *Parsons* case as "the general regulation of trade affecting the whole dominion."[158] The exact meaning of these words have remained obscure for a long time,[159] but they were used in a recent decision, the *Vapor* case[160] to uphold the validity of certain provisions of the *Trade Marks Act*,[161] which forbid certain unfair business practices. This case has been appealed to and heard by the Supreme Court of Canada but at the time of writing the Court has not announced its decision. If the Supreme Court of Canada were willing to adopt the reasoning of the federal court, the judgment would have considerable implications for combines legislation and trade practices.

The provision of the *Trade Marks Act* upheld in the *Vapor* case, on the basis of the federal general trade and commerce power, is quite broad. It states:

> 7. No person shall . . .
>
> (e) do any other Act or adopt any other business practice contrary to honest industrial or commercial usage in Canada.

The type of conduct contemplated and forbidden under section 7 of the *Trade Marks Act* amounts to unfair competitive acts, and, if the section is upheld on the basis of the general trade and commerce power, not only will this improve the argument for basing the whole *Combines Investigation Act* on the same power but the jurisdiction of Parliament to set up a more flexible administrative machinery to deal with trade practices across Canada will be recognized.[162] If this power is then exercised, the possibility of overlapping, duplication, and conflict between provincial and federal legislation will be greatly increased.

Addendum

After this paper had been written and submitted the Supreme Court of Canada released the reasons for judgment in the *Vapor* case. In a judgment written by Laskin C.J. the Supreme Court allowed the appeal and held that section 7(e) of the *Trade Marks Act* was not valid federal legislation.

The Supreme Court rejected the contention that section 7(e) could be justified as legislation in relation to criminal law. It referred to section 53 of the *Trade Marks Act* that gives the courts wide powers to grant civil remedies, such as damages and injunctions, where they find a violation of the Act. The court then stated:

> Assuming that s. 7(e) (as, indeed, the other subparagraphs of s. 7) proscribe anti-social business practices, and are thus enforceable under the general criminal sanction of s. 115 of the Criminal Code respecting disobedience of a federal statute, the attempt to mount the civil remedy of s. 53 of the *Trade Marks Act* on the back of the Criminal Code proves too much, certainly in this case. The principle which would arise from such a result would provide an easy passage to valid federal legislation to provide and govern civil relief in respect of numerous sections of the Criminal Code and would, in the light of the wide scope of the

federal criminal law power, debilitate provincial legislative authority and the jurisdiction of provincial Courts so as to transform our constitutional arrangements on legislative power beyond recognition. It is surely unnecessary to go into detail on such an extravagant posture. This Court's judgment in *Goodyear Tire and Rubber Company of Canada Ltd.* v. *The Queen*, [1956] S.C.R. 303, upholding the validity of federal legislation authorizing the issue of prohibitory order in connection with a conviction of a combines offence, illustrates the preventive side of the federal criminal law power to make a conviction effective. It introduced a supporting sanction in connection with the prosecution of an offence. It does not, in any way, give any encouragement to federal legislation which, in a situation unrelated to any criminal proceedings, would authorize independent civil proceedings for damages and an injunction.

I point out also that s. 115 of the Criminal Code is, so to speak, a "default" provision, coming alive when no "penalty or punishment" is expressly provided, and I cannot subscribe to the proposition that s. 115 can be a base upon which to support the validity, under the federal criminal law power, of a completely independent civil remedy, which lies only at the behest of private parties claiming some private injury.

The court referred to previous cases that had dealt with section 7 of the *Trade Marks Act* and concluded that section 7(e) did not deal with trade marks, trade names, patents or copyrights and could not be justified on the federal jurisdiction to pass legislation dealing with those subjects.

Could section 7(e) be upheld as a valid exercise by Parliament of its powers to pass laws dealing with "the general regulation of trade affecting the whole dominion"? On this point the Supreme Court of Canada stated:

> The plain fact is that s. 7(e) is not a regulation, nor is it concerned with trade as a whole nor with general trade and commerce. In a loose sense every legal prescription is regulatory, even the prescriptions of the Criminal Code, but I do not read s. 91(2) as in itself authorizing federal legislation that merely creates a statutory tort, enforceable by private action, and applicable, as here, to the entire range of business relationships in any activity, whether the activity be itself within or beyond federal legislative authority. If there have been cases which appeared to go too far in diminution of the federal trade and commerce power, an affirmative conclusion here would, in my opinion, go even farther in the opposite direction.
>
> What is evident here is that the Parliament of Canada has simply extended or intensified existing common and civil law delictual liability by statute which at the same time has prescribed the usual civil remedies open to an aggrieved person. The Parliament of Canada can no more acquire legislative jurisdiction by supplementing existing tort liability, cognizable in provincial Courts as reflective of provincial competence, than the provincial legislatures can acquire legislative jurisdiction by supplementing the federal criminal law: see *Johnson* v. *Attorney General of Alberta*, [1954] S.C.R. 127.
>
> One looks in vain for any regulatory scheme in s. 7, let alone s. 7(e). Its enforcement is left to the chance of private redress without public monitoring by the continuing oversight of a regulatory agency which would at least lend some colour to the alleged national or Canada-wide sweep of s. 7(e). The provision is not directed to trade but to the ethical conduct of persons engaged in trade or in business, and, in my view, such a detached provision cannot survive alone unconnected to a general regulatory scheme to govern trading relations going beyond merely local concern. Even on the footing of being concerned with practices in the conduct of trade, its private enforcement by civil action gives it a local cast because it is as applicable in its terms to local or intraprovincial competitors as it is to competitors in interprovincial trade.

A careful reading of this case will indicate that the court was concerned with limiting its remarks to those necessary to decide the controversy before it, without making major pronouncements on the scope of the federal powers in question. However, a number of consequences may be drawn from the judgment.

In the first place the language of the judgment seems to cast some doubt on the argument that the new damages section of the *Combines Investigation Act* can be justified on the basis of the federal criminal law power. Section 31.1 of the *Combines Investigation Act* grants the right to recover damages to any person who has suffered loss as a consequence of conduct contrary to any provision of Part V of the Act. It should be noticed that the right to damages is granted irrespective of whether there have been prior proceedings under the Act. To use the language of the Supreme Court of Canada quoted above, the new section 31.1 of the *Combines Investigation Act* constitutes "federal legislation which in a situation unrelated to any criminal proceedings would authorize independent civil proceedings for damages." It is clear from the judgment that this type of legislation cannot be justified on the federal criminal law power.

The judgment also casts substantial doubts on the argument that the new damages section could be justified as "regulation of trade and commerce." As indicated above any aggrieved person who considers he or she has suffered loss because of a violation of the provisions of Part V of the *Combines Investigation Act* may rely on section 31.1 and sue for damages. This seems to be the type of provision enforceable by private action and unconnected to a regulatory scheme to which the Supreme Court referred in the paragraph quoted above.

A second consequence to be derived from this judgment is that it seems to indicate the course that should be followed by the federal government if it wishes to explore its jurisdiction under section 91(2) of the *B.N.A. Act.* In several parts of its judgment the Supreme Court referred to the need for "regulatory administration" of any valid legislation based on that head of federal power. The mere creation of a regulatory scheme will not be sufficient to justify new federal legislation under section 91(2) of the *B.N.A. Act.* As the Supreme Court stated:

> regulation by a public authority taking the matter in question out of private hands, must still meet a requirement, if federal regulatory legislation is to be valid, of applying the regulation to the flow of interprovincial or foreign trade.

But the whole judgment indicates the court's concern that the federal power to regulate trade and commerce be exercised through administrative agencies and not through new causes of action to be used by private litigants.

Any federal trade practices legislation in the future should be closely related to "criminal proceedings" or to the regulation of inter-provincial or international trade by a regulatory agency.

3. Possible Overlap of Federal and Provincial Legislation

Writing in 1974 Professor LeDain (as he then was) stated:

> One of the most important developments in Canadian constitutional law in the last twenty-five years or so has been the increasing recognition of the valid co-existence and concurrent operation of provincial penal provisions which have a solid basis in regulatory jurisdiction with similar or overlapping criminal law prohibitions. This development has been most marked in the field of highway

> traffic offences, although it has not been confined to this field. What has been involved is the extent to which the existence and exercise of the federal criminal law power may inhibit provincial regulatory jurisdiction by rendering invalid or inoperative provincial prohibition with penal consequences or other restrictive measures, such as licence suspension, deemed necessary for the enforcement of provincial laws.[163]

This willingness of our courts to permit federal and provincial laws to operate concurrently was shown in three cases decided in 1960 and which have been discussed at length in the Canadian legal literature.[164] In *O'Grady* v. *Sparling*[165] a section of the *Manitoba Highway Traffic Act*[166] prohibiting careless driving was held to be valid and operative even though a section of the *Criminal Code*[167] forbade and punished criminal negligence in the operation of a motor vehicle. In *Stephens* v. *The Queen*[168] another provision of the *Manitoba Highway Traffic Act*,[169] which prohibited failure to remain at the scene of an accident, was upheld although the *Criminal Code*[170] contained a section punishing failure to stop at the scene of an accident with intent to escape civil or criminal liability. In *Smith* v. *The Queen*[171] a section of the *Ontario Securities Act*[172] prohibiting and punishing the furnishing of false information on a prospectus was declared valid and operative despite the presence in the *Criminal Code* of a section prohibiting the making, circulating or publishing of false statements in a prospectus to induce persons to become shareholders in, advance money for, or to enter into any security for the benefit of the company.

It is important to note that, in the three cases mentioned above, the provincial statutes were not classified as criminal law. Had they been characterized as criminal law they would have been held *ultra vires* and beyond the powers of the provincial legislature. Although the provincial statutes contained penalties for violation of their provisions, they derived their constitutional validity from other heads of section 92 which have been interpreted to allow the provinces to set up regulatory schemes to deal with highways and securities. Having satisfied the first test of initial validity, the provincial statutes had to pass a second test dealing with their possible conflict with federal legislation. I will deal later on with the meaning of conflict in this context, but for present purposes I want to stress the willingness of Canadian courts to allow provincial and federal statutes to operate concurrently in the same area and even to deal with the same behavior. As Judson J. stated in the *O'Grady* case:

> Even though the circumstances of a particular case may be within the scope of both provisions (and in that sense they may be overlapping) that does not mean that there is conflict . . . both provisions can live together and operate concurrently.[173]

Given this judicial trend to allow concurrency of federal and provincial legislation, it is not difficult to predict that in case of constitutional challenge it is likely that both the *Combines Investigation Act* and the provincial *Trade Practices* legislation will be upheld as valid and will be allowed to operate concurrently, even if there is a considerable amount of overlap between them. Even a superficial reading of the provisions of the provincial and federal legislation under discussion will show that they all forbid and punish the same type of acts and practices.

Let us compare some of the general prohibitions of the Ontario and the British Columbia Acts with section 36 of the *Combines Investigation Act.*

The Business Practices Act (Ontario)[174]

Section 3 – No person shall engage in an unfair practice.

Section 2 – For the purpose of this Act, the following shall be deemed to be unfair practices,

(a) a false, misleading or deceptive consumer representation.

The Trade Practices Act (B.C.)[175]

Section 2(1) For the purposes of this Act a deceptive act or practice includes

(a) any oral, written, visual, descriptive or other representation, including non-disclosure.

(b) any conduct having the capability, tendency or effect of deceiving or misleading a person.

The Combines Investigation Act[176]

Section 36(1) No person shall . . . by any means whatever

(a) make a representation to the public that is false or misleading in a material respect.

Many instances of overlap can be observed by a comparison of the specific types of unfair and unconscionable practices enumerated in both provincial statutes and the new provisions of the federal Act. A few examples will suffice: both provincial Acts include in their list of specific practices "a representation that a specific price advantage exists if it does not",[177] while the federal Act prohibits "the making of a materially misleading representation to the public concerning the price at which a product or like products have been or will be ordinarily sold."[178] Section 37 of the federal *Act* forbids the practice known as "bait and switch selling", while the provincial Acts make the "bait" part of the practice a specific deceptive or unfair trade practice.[179]

Violators of the provincial Acts are subjected to a fine of no more than $5,000 in British Columbia or $2,000 in Ontario or to imprisonment for no more than one year or to both fine and imprisonment,[180] while any person who violates the federal Act is liable on conviction on indictment to imprisonment not exceeding five years, or on summary conviction to a fine in the discretion of the court, or to imprisonment for not more than one year or both.[181]

Obviously the fact that the same behaviour or practices may fall under the provisions of the federal and the provincial Acts raises a problem of "double jeopardy" or "double punishment", as conceivably the same person could be tried and punished for the same act twice – once under the provincial statute and once under the federal Act. This problem does not seem to have influenced our Supreme Court judges when they decided the above mentioned cases and they seem to have trusted the sense of fairness of the provincial authorities which were in charge of the enforcement of both the federal and provincial Acts. As Dean Friedland has stated:

> [T]he general solution to the problem raised by successive prosecution involving federal and provincial law has nothing to do with constitutional law. Constitutional considerations would only arise if a province attempted to provide, by legislation, that a prosecution for a federal offence should be barred. The solution should be dictated by general principles of criminal law . . .[182]

Dean Friedland goes on to advocate possible legislation at the provincial and federal level to deal with this type of problem.[183]

In his article on this subject Professor Laskin (as he then was) wrote:

> [T]his danger of an administrative impass or struggle for priority over the body of the accused is generally unlikely in Canada where the police and local crown attorney are charged with enforcement of federal criminal law as well as provincial penal law.[184]

It is suggested that, given the fact that the provisions of the *Combines Investigation Act* are not enforced by the provincial authorities and that Dean Friedland's proposals have not been adopted, there is a great likelihood that the dangers of double jeopardy and "struggles for priority" will become a reality once enforcement of the amended *Combines Investigation Act* and the provincial *Trade Practices Act* go ahead with full force.

4. Possible Conflict Between Federal and Provincial Legislation

In all the general statements about the possibility of federal and provincial Acts operating concurrently in the same field, there is always the caveat that this common operation will be permitted only in those cases where the two Acts do not conflict; but that if they do the federal Act will be paramount,[185] In this section I will deal with the meaning of the word "conflict" in this context.

A series of tests have been suggested by legal scholars and judges to determine when there is conflict between federal and provincial legislation. But just as our Supreme Court has in recent years shown a willingness to uphold the validity of federal and provincial statutes dealing with the same type of problem, the court has also shown an unwillingness to declare the provincial statute inoperative because of conflict. This tendency has resulted in a narrowing or virtual abandonment of some of the traditional tests of conflict which had been proposed before 1963. One of the considerations which has motivated our judges in narrowing down the test of conflict is contained in a judgment of Fauteux J. delivered in 1966:

> When a question of conflict arises with respect to the criminal law power of parliament and the provincial regulatory power, it appears to me that one must be mindful that broadly as the criminal law power of parliament has been construed – as is illustrated by the classic statement of Lord Atkin in P.A.T.A. . . . – it has never been authoratively suggested that the construction of this power could be validly extended to a point leading to the gradual and eventual absorption or virtual extinction of the provincial regulatory power. Indeed, both these powers must be rationalized in principle and reconciled in practice whenever possible.[186]

In the pages that follow I will examine some of the tests of conflict which have been suggested, and whether they apply to the federal and provincial trade practices legislation.

a) *Contradictory Dispositions*

The first test of conflict is the one contained in the judgment of Martland J. in the case of *Smith* v. *The Queen* wherein he stated:

> The fact that both provisions prohibit certain acts with penal consequences does not constitute a conflict. It may happen that some acts might be punishable under both provisions and in this sense that these provisions overlap. However, in such a case there is no *conflict in the sense that compliance with one law involves breach of another.*[187] (emphasis added)

The case which is often cited as an example of this type of conflict is *Royal Bank* v. *Larue*,[188] where under a valid provincial law a certain creditor was held to be a secured creditor, but under the *Bankruptcy Act*[189] he was held to be an unsecured creditor. In this type of direct conflict between a provincial and federal act the federal one is held to prevail.

There does not seem to exist any conflict in this narrow sense between the provisions of the *Combines Act* and the provincial *Trade Practices Acts*.

b) *Duplication*

Writing in 1963 Professor Lederman suggested that another type of conflict occurred in the case of "a provincial statute that literally or in substance duplicates the provisions of the federal statutes in the field."[190] This statement was based to a great extent on pre-1963 cases. According to this test the duplication would occur in the case of a provincial statute which dealt with the same problem and in the same manner as a federal Act.

In *O'Grady* v. *Sparling*,[191] the judges were at pains to point out that the provincial statutes dealt with "inadvertent negligence" while the criminal code dealt with "advertent negligence"; therefore there was no conflict in the sense of duplication, and the provincial statute could co-exist with the federal one. In *Smith* v. *The Queen*[192] the court was still able to find a very subtle distinction between the provisions of the *Ontario Securities Act*[193] and the *Criminal Code*.[194] This argument was raised again before the Supreme Court of Canada in the case of *Mann* v. *The Queen*[195] where it was argued that a "careless driving" provision contained in the *Ontario Highway Traffic Act*[196] duplicated the new offence of "dangerous driving" contained in the *Criminal Code*, but again the Supreme Court of Canada was able to find another tenuous difference between "careless driving" and "dangerous driving." As Professor LeDain has stated:

> What this case suggested is that in the interest of a full and uninhibited penal power in the exercise of provincial regulatory jurisdiction with respect to highway traffic the court would be prepared, if necessary, to recognize the valid co-existence of virtually identical provisions.[197]

As we saw above, although the provisions of the *Combines Investigation Act* and the *Trade Practices Acts* overlap, they are not co-extensive; and it is unlikely after the *Mann* case that the provincial legislation will be declared inoperative because it duplicates the provisions of the federal Act.

c) *Operating Incompatibility*

This phrase was coined by Professor Laskin to designate a test of statutory conflict.[198] It is in part derived from the judgment of Judson J. in the *O'Grady* case wherein he stated that "both provisions can live together and operate concurrently."[199] According to this test there will be conflict and the federal statute will prevail when the side-by-side application or enforcement of the provincial and federal statutes create serious confusion or "administrative chaos."

In 1974 the Supreme Court of Canada in the *Ross* case[200] upheld provincial legislation in circumstances where there would appear to be "operating incompatibility." The provincial provision in question in this case was one contained in the *Ontario Highway Traffic Act*[201] which provided for the automatic suspension of the driver's licence of a person convicted of certain driving offences under the *Criminal Code*.[202] This provision was alleged to conflict with a section

of the *Criminal Code* which permitted the sentencing judge to make an order prohibiting the offender to drive "at all times or at such times and places as may be specified in the order." By the exercise of the powers granted under this section of the *Code*, Mr. Ross was forbidden to drive for six months except "in the course of employment and going to and from work." But Mr. Ross' licence was automatically suspended by the provincial statute, and thereby he was prevented from driving legally to and from work. If there was ever a situation calling for the application of the "operating incompatibility" test, this was the one. By the application of the *Criminal Code* Mr. Ross was forbidden to drive except in the course of employment and going to and from work, while by the application of the provincial Act he was in fact prevented from driving.

A majority of the Supreme Court of Canada held there was no conflict between the two statutes. In the course of delivering a judgment for the majority, Pigeon J. stated:

> In terms, the Criminal Code merely provides for the making of prohibitory orders limited as to time and place. If such an order is made in respect of a period of time during which a provincial licence suspension is in effect, there is, strictly speaking, no repugnancy. Both legislations can fully operate simultaneously. It is true that this means that as long as the provincial licence suspension is in effect, the person concerned gets no benefit from the indulgence granted under the federal legislation.[203]

Given the unwillingness of the Supreme Court of Canada to apply the "operating incompatibility" test in the *Ross* case, it seems unlikely that this test will be applied to the *Trade Practices* legislation when they and the amended *Combines Investigation Act* get into full operation. No doubt some practical problems will arise when the same offenders can be subjected to cease-and-desist orders under the provincial Acts and injunctions, and prohibition orders or dissolution orders under the federal one. If the federal and provincial orders contain prohibitions of different lengths, probably no conflict will exist, just as no conflict was found in the *Ross* case between a federal partial prohibition to drive and a provincial cancellation of a driver's licence which amounted to a total prohibition from driving.

An interesting issue, however, will arise if the same person is ordered by the federal and provincial administrators to do two inconsistent things. Strictly speaking, this situation would not call into operation the test suggested by Martland J. in the *Smith* case. This test deals with the case where in compliance with one law involves breach of another and it would make the conflicting provincial prohibition inoperative. In the situation under discussion it would not be a conflict between laws, but a conflict between the terms of the orders issued under non-conflicting laws. In the *Ross* case the dissenting judges[204] dealt with this type of conflict, and they were willing to declare inoperative the provincial section dealing with automatic suspension of the driver's licence in a case where the sentencing magistrate chose to use the discretion granted to him by the *Code* and allowed the accused to drive at certain times. If we apply this type of reasoning to our hypothetical case of an injunction issued under the powers granted by the *Combines Investigation Act* and an incompatible cease-and-desist order, the injunction will prevail.

d) *Parliament's Intention*

In the course of his judgment in the *Ross* case, Pigeon J.[205] dealt with another test which had been discussed in previous cases.[206] It was argued in the *Ross* case that when Parliament allowed the sentencing judge to impose only a partial prohibition to drive, it had intended that there should not be any other provincial legislation in the concurrent field. If such tacit negative

implication could have been found in the *Ross* case, the provincial suspension would have been in conflict with it. But Pigeon J. stated:

> In my view it should be said in the present case that Parliament did not . . . purport to deal generally with the right to drive a motor vehicle after a conviction for certain offences.[207]

Even if the Supreme Court of Canada was not willing to apply this "negative implication" argument to the legislation in question in the *Ross* case, it is still open to Parliament to state expressly its intention to deal comprehensively with a certain subject and to pre-empt any provincial legislation on it. This intention to occupy the whole field is not evident in the new trade practices provisions of the *Combines Investigation Act.* On the contrary, some of the new sections recognize the existence of provincial jurisdiction in the area.[208] For example, both sections 36.3 and 36.4 which forbid pyramid selling and referral selling respectively contain a clause that states:

> (4) This section does not apply in respect of a scheme of pyramid selling [or referral selling] that is licensed or otherwise permitted by or pursuant to an Act of the legislature or province.

The analysis of the provincial and federal trade practices legislation contained above will indicate that it is quite likely that in case of challenge the federal and provincial legislation will be held to be constitutional, and that there will be few cases of a direct conflict between the provisions of the statutes. The discussion in this chapter of both the uncertainties that exist in the area of jurisdiction to legislate on consumer credit and the great amount of overlap between the federal and provincial trade practices legislation points to the need for more co-operation and co-ordination of the activities of both levels of government. If the constitutional division of powers in the area of consumer credit is unclear, can some measure of clarity be achieved by an agreement between two levels of government to divide the field? If the *B.N.A. Act* as interpreted by our courts allows a considerable amount of overlap of provincial and federal trade practices legislation, can some order in the implementation of the legislation be achieved by agreements between Ottawa and the provinces?

CHAPTER III

MECHANISMS AND PRESENT STATE OF FEDERAL-PROVINCIAL RELATIONS IN THE FIELD OF CONSUMER PROTECTION

The introduction of federal and provincial Acts to deal with trade practices and consumer credit has brought into focus the importance of federal-provincial relations in the field of consumer protection. But this interdependence of federal and provincial legislation and programs is not limited to the field of consumer protection; in fact, it occurs in many other areas of government activity. As A.H. Birch has stated:

> Whereas the guiding principles of eighteenth and nineteenth century federalism was the independence of state and federal authorities, the guiding principle of mid-twentieth century federalism is the need for cooperation between them.[209]

The political science literature of the last twenty years has analyzed in detail the failure of traditional institutions such as political parties, Parliament, the Senate and the Cabinet to serve as channels for the co-ordination of federal and provincial efforts and the resolution of federal-provincial conflicts.[210] This has led to a process of direct negotiations between members of the executive branches of the federal and provincial governments, which Professor Donald Smiley has named "executive federalism."[211]

In the area of consumer protection contacts have been established between the federal and provincial governments through a number of formal and informal channels. The formal channels of communications have been maintained both through the attendance of federal officials at inter-provincial meetings of consumer affairs administrators and through *ad hoc* federal-provincial conferences and meetings called to deal with specific problems. In addition to communications through these formal channels, contact between federal and provincial officials has been maintained by means of personal visits, telephone calls and correspondence.

A. FORMAL CONFERENCES

One of the first federal-provincial meetings to deal with matters of consumer protection was held in Ottawa on December 19-20, 1966. This was a meeting of ministers responsible for Consumer Affairs and their officials; it was chaired by the then Registrar General, the Honourable Mitchell Sharp. The main subject for discussion in this meeting was consumer credit and interest disclosure. This meeting was followed by another federal-provincial conference held on April 3, 1967, when the main subject of discussion was again consumer credit.

In 1968 Ontario convened an Inter-provincial Conference on Consumer Credit which was held in Toronto from June 10-13. This conference was followed by a Federal-Provincial Meeting on Trust Companies and Consumer Affairs held on October 28-30, 1968.

By 1970 a consensus had developed among provincial officials that it would be useful to them to hold both an annual inter-provincial meeting of deputy ministers and administrators working on consumer affairs, and a meeting of ministers responsible for Consumer Affairs to be held every other year. In 1970 the meeting of officials was held in Toronto on April 20-21, while the ministers' meeting was held on November 27-29 of the same year. Since then meetings of officials have been held every year,[212] while ministers' conferences have not been held with the originally planned regularity.[213] From the very beginning federal officials were invited to attend

all the sessions of the inter-provincial meetings, and these sessions provided an informal forum for the discussion of problems of federal-provincial relations.

According to some of the participants the original inter-provincial conferences were not very well structured, but they provided a setting for the exchange of information and ideas among some officials and a good learning experience for others. The discussion in those first conferences focused on specific consumer problems and the way they were being dealt with by the provincial and federal officials. At present, a different format has been adopted at the inter-provincial conferences. Under it three seminars on different subjects are held simultaneously, thereby allowing officials to choose the subject in which they are particularly interested.

I mentioned that in the past federal officials have been invited to attend the inter-provincial meetings of officials, and they have often participated in the discussion of both specific consumer problems and problems of federal-provincial relations. One development that has taken place in recent years is that the difficulties and conflicts of federal-provincial relations have come up more and more frequently in the discussion of specific areas of consumer protection, and provincial officials have felt somewhat embarrassed in discussing these problems in front of their federal counterparts. As a consequence, in the last two years federal officials have been invited to attend only certain sessions of the inter-provincial meetings. Needless to say, this break with tradition has displeased some of the federal officials and it is one of many factors that have contributed to the deterioration of federal-provincial relations in this area. I will make some recommendations on this matter in the next chapter of this paper.

One of the subjects which often came up for discussion in the initial conferences was the need for federal-provincial co-operation on the subject of "cut-off" clauses and promissory notes. The participants in those conferences considered it desirable to allow consumers to raise objections against finance companies which were assignees of conditional sales contracts, the same defences consumers could have raised against claims for non-payment by the sellers. Through the use of a number of legal devices[214] finance companies were able to obtain payment from consumer buyers even in cases where those consumers had a valid claim against the conditional sellers. In order to prevent finance companies from being insulated from buyer-seller disputes, it was considered necessary to pass legislation dealing both with Bills of Exchange and disclaimer clauses contained in conditional sales contracts. This required the co-ordinated action of Parliament, which has jurisdiction to deal with Bills of Exchange[215] and, the provincial legislatures, which have the jurisdiction to deal with clauses in contracts.[216] This initial attempt to co-ordinate federal and provincial legislative efforts proved successful, and Parliament amended the *Bills of Exchange Act* in 1970[217] while most of the provincial legislatures passed provisions dealing with "cut-off" clauses.[218] This common approach in dealing with a consumer problem constitutes a useful precedent which hopefully will be followed in the future.

We have seen that special federal-provincial conferences to deal with particular subjects were held before the custom of holding annual inter-provincial administrators' conferences was established. Federal-provincial conferences and meetings have continued to be held on an *ad hoc* basis to deal with specific problems. For example, during the last three years several conferences have been organized by federal officials to deal with the subject of house warranties. These conferences have been attended by provincial officials and representatives of the building industry. At other times less formal federal-provincial meetings have been held to deal with matters of pressing concern. One of these meetings was held in the fall of 1974 in Edmonton to discuss the effects of the proposed new *Bankruptcy Act*[219] on the Orderly Payment of Debts Plans which

were being administered by some of the provinces. At the moment of writing, some attempts are being made to arrange a federal-provincial meeting to discuss consumer credit and the effect of the federal initiative on the provincial legislation and programs on the subject.

B. INFORMAL CONTACTS

In addition to the more formal conferences and meetings where representatives of all the provinces and the federal government are invited, direct contact between federal officials and officials of individual provinces is maintained through personal visits, telephone conversations and correspondence. For example, a delegation of federal officials has visited the provincial capitals twice in 1975 to discuss the federal initiatives in the area of consumer credit. At times the provincial deputy ministers have sent to their federal counterparts for comment copies of provincial legislation after it had been introduced in their legislatures. The amount of informal contact depends to a great extent on the personalities and friendships of the officials involved and on the degree of importance that the different provincial governments place on consumer protection. At any given time only a limited number of provinces have been active in the field of consumer protection and even these provinces attach different degrees of importance to their various Acts and programs. The amount and kind of informal contact with federal officials therefore will change from province to province.

C. PRESENT STATE OF FEDERAL-PROVINCIAL RELATIONS

The continued existence of some channels of communication between federal and provincial officials and the successful co-operation in the area of "cut-off" clauses and consumer notes should not lead us to believe that federal-provincial relations are cordial and harmonious. In fact at the time of writing there is a considerable amount of reticence and misgivings between consumer protection officials of the federal and provincial governments.

Provincial officials see recent federal initiatives as threats to their legislation and programs. They state that the provinces took the initiative and passed legislation on consumer credit and trade practices. Provincial officials view with suspicion federal plans to enter or take over these areas which, according to them, are best administered by the provinces.

In the eyes of provincial consumer affairs administrators the federal authorities should concentrate their efforts in those areas of national importance in which they have jurisdiction, such as competition and banking, instead of using most of their energies and resources to deal with minor problems at the local level which could be handled better by provincial authorities. As one provincial official put it to me, "The federal people should worry about national T.V. advertising, combines, the practices of banks, health and safety and other expensive programs which could not be handled by any single province and where uniformity is needed. We can deal better than they can with the practices of the corner grocery store."

Several provincial officials referred to *Box 99* as an example of federal activity in an area which could be handled better by the provinces. Many Canadian consumers write to *Box 99* in Ottawa with their complaints and federal employees handle the complaints and try to achieve a satisfactory settlement of any dispute. According to provincial officials the settlement of disputes is difficult to achieve through correspondence to and from Ottawa. In addition, many of these disputes are related to contracts or other areas where the provinces have or claim to have exclusive jurisdiction.

At present both levels of government are reassessing the real value of their dispute-settling programs and a consensus seems to be developing that it would be more efficient to use their limited resources on more consumer education and increased enforcement of consumer protection legislation rather than on trying to settle consumer complaints.

Generally speaking, provincial officials claim that it is difficult for the federal authorities to direct and administer consumer protection programs from Ottawa. They claim that the federal officials are concerned with the uniform application of their Acts across the country and therefore they are unable to identify and deal quickly with new local problems.

A common complaint of provincial officials is the lack of meaningful consultation by the federal authorities. Although federal officials have made efforts to discuss their new legislative plans with provincial authorities, these discussions have been seen by many provincial administrators as token gestures made to avoid the accusation of lack of consultation. They see the present federal efforts to consult with the provinces as mere attempts to inform the provinces about the unilateral moves of the federal government. It seems clear that provincial officials would like to participate at the early stages of policy development, and that they would like to discuss the effects of any new federal initiative on provincial legislation and programs. They point out that the delegations of federal officials that have visited the provinces to discuss consumer credit were willing to deal with technical matters, but that they were not prepared to discuss at the time the possible co-ordination of federal and provincial credit legislation or any possible co-operation in the administration of the legislation.

The federal officials see consumer protection in contemporary Canada as one of the basic government services to which all Canadians from coast to coast are entitled. However, the commitment to consumer protection, the willingness to pass legislation and to allocate resources to its enforcement varies considerably from province to province. Therefore federal officials see it as their duty to move into the areas where they have jurisdiction or a claim to it in order to maintain certain minimum standards of consumer protection throughout the country. For example, only three provinces have passed *Trade Practices Acts* and it is not likely that all the provinces will pass legislation in this area. As the federal government has jurisdiction on this matter, federal officials feel obliged to use their powers in order to ensure similar protection of all Canadians throughout the country.

In the eyes of federal officials the administration of federal legislation by provincial authorities in the past has contributed to the unequal protection of consumers across the country. For example, consumers in Ontario and Quebec, the two most populous provinces, cannot take advantage of the Orderly Payment of Debts Scheme[220] because their provincial governments have not asked for the proclamation of Part X of the *Bankruptcy Act* in their provinces.[221] The enforcement of federal statutes by provincial authorities in areas other than consumer protection has given rise to two additional problems in the past. One is the request of funds by the provinces as payment of the costs incurred in enforcing the federal legislation. This has led to the federal government paying the costs of the programs while the provincial authorities get all the credit for them. In addition, when difficulties have been encountered in the administration of federal programs, provincial politicians have been quick to point out to the public that the problems are arising in an area of federal responsibility and that any blame should go to the federal authorities.

Federal officials state emphatically that the discharge of their responsibilities requires the enforcement of legislation at the local level on all types of businesses. The provision of federal

statutes dealing with weights and measures, packaging and labelling, product standards and safety, and misleading advertising have to be enforced on all firms irrespective of whether they are doing business in one or several provinces.

On the matter of consultation federal officials indicate that "consultation should be a two-way street." Many provincial officials expect to be consulted by the federal authorities, but they go ahead and introduce legislation and set up programs which directly affect the activities of the federal government without any attempt at consultation. At the same time many provincial governments are always interested in the administration of federal legislation or the delegation of federal powers, but they guard jealously any provincial jurisdiction.

After many hours of discussion of federal-provincial relations with officials of both levels of government, I have been impressed by the pervasive sense of grievance shared by them and by their pessimism as to the prospects of improvement of those relations. What are some of the reasons for the present condition of federal-provincial relations in this area?

In a study of federal-state relations in the United States, Edward W. Weidner has drawn a distinction which throws some light on the present state of federal-provincial relations in Canada.

> [T]wo broad categories of values are immediately noticeable in a federal system. There are those values that attach to units of government or agencies or individuals within the unit and there are those values that attach to programs or types of substantive policies. The latter may be called principled, programmatic, or organization goals; the former may be called expediency or conservation goals. Programmatic goals are normally those concerned with adequate standards of public service – minimum standards in health and welfare, better public education, a more extensive system of interstate highways, more service to farmers, and so on. Expediency goals refer to the preservation and extension of influence of individuals, agencies, or units of government – for example, the defense of state government against "encroachment" from Washington, the desire of an individual for more power for its own sake, or the protection of an agency from supervision by those deemed unfriendly to it.[222]

After having interviewed at length most of the participants, it is my distinct impression that many of the problems of federal-provincial relations in the field of consumer protection can be attributed to the conflicting expediency goals of both levels of government.

Discussions between federal and provincial officials held in the past have often dealt with "principled goals", such as the best method of attaining disclosure of the cost of credit in all types of consumer transactions, or the best method of implementing a house warranty program. But very often any principled proposals have been evaluated in terms of "expedience" or "conservation" goals, i.e., how would this new proposal affect my Minister, my department and my career?

It is a fact of political life that politicians are interested in getting credit for their programs and in increasing their popularity and status in the eyes of the voters. Consumer protection is a subject with popular appeal which provides lots of press coverage and publicity.

In addition the federal government is interested in making its presence felt at the local level in the provinces. Mainly as a reaction to developments that were taking place during the early sixties,[223] the federal authorities are interested in maintaining direct links with the residents of all the provinces, especially those of Quebec.

Provincial politicians see the publicity given to the consumer affairs programs or activities of the federal government as threats to their status and prestige, and they often assume that when the federal government gets credit for its activities in the province it does so at the expense of the provincial government. Therefore a certain amount of rivalry and competition for consumer attention has developed. For example, provincial politicians and officials place great importance on the fact that any cheques sent to creditors under the Orderly Payment of Debts schemes[224] administered by the provinces are issued by the provincial governments and the name of the consumer affairs departments are printed on every cheque. On the other hand, federal administrators have ensured that any stationery used by Consumer Help Offices[225] in the provinces as well as some signs in the offices themselves indicate that the project is sponsored and financed by the federal government.

As the importance placed on consumer protection programs changes from province to province, the degree of rivalry between both levels of government changes accordingly. As Richard Simeon has stated:

> To the extent both levels of government are interventionist in their behaviour, the likelihood of conflict is increased. When one level is relatively quiescent few clashes are likely if the other is innovative.[226]

Federal and provincial officials often see any initiative by the other level of government as a possible threat to their personal careers and professional success. For example, the proposed federal legislation on consumer credit jeopardizes the provincial programs dealing with the subject, and the status of the provincial governments' employees engaged in enforcing them.

Writing in 1939 about "Difficulties of Divided Jurisdiction", J.A. Corry stated:

> The higher officials in any government department are presumably able men to whom their job is a career – or at least, their best present prospect for a career. They can scarcely be satisfactory civil servants unless they find, in their work, the main expression of their personality. We all try, in one way or another, to put our stamp on our environment. The readiest objective yardstick for reassuring ourselves and impressing our superiors is expansion of an activity for which we supply the driving power . . . The official employed by the province knows that his calculable future is in the hands of the province. (The same argument applies equally to the Dominion officials.) If he is capable and ambitious, he must try to master uncertainties which interfere with his control of the situation. The actions and attitudes of Dominion officials are among those uncertainties. Thus there is a powerful incentive for him to try to extend his authority as far as possible over any disputed borderland between them. He must use the faith that is in him to secure an administrative policy which furthers and vindicates his judgment. That is to say, when the ideas of the Dominion officials do not jibe with his, he must fight for the adoption of his own. If he merely assents to the proposals of Dominion officials, he is inviting the province to search for another official who will have originality. He wants credit for his contribution to the administration of the activity. The only way he can be certain of receiving it is to be able to show that he and his staff are really responsible for the achievement. Or the reverse – when things go badly, there is a strong temptation to "pass the buck" and justify it to himself by saying that, if he had had complete control, things would not have reached this condition.[227]

Are these interests irreconcilable? Will they lead necessarily to friction and conflict? Or are there other reasons that may motivate the participants to reach some kind of accommodation and working arrangement?

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Are these interests irreconcilable? Will they lead necessarily to friction and conflict? Or are there other reasons that may motivate the participants to reach some kind of accommodation and working arrangement?

Before making some proposals for new machinery for federal-provincial relations in the next chapter, I will analyze some of the reasons that could motivate the participants to use the proposed mechanisms for the discussion, negotiation and settlement of conflicting principled and expediency goals.

CHAPTER IV

REASONS FOR IMPROVEMENT OF FEDERAL-PROVINCIAL RELATIONS AND PROPOSALS FOR NEW MACHINERY

A. REASONS FOR IMPROVING RELATIONS

Writing about federal-provincial relations in Canada, Richard Simeon stated:

> Canadian observers from the authors of the Rowell-Sirois Report to the present have frequently lamented the lack of formal procedures for co-ordination, and have advanced a number of suggestions for improved machinery. But it seems clear that the smooth operation of the decision process depends more on the attitudes and perspectives of the participants than on the existence of formal machinery.[228]

We have seen in the last chapter that many of the difficulties in federal-provincial relations arise not only out of the participants' perception of themselves and other officials but also out of genuinely conflicting goals. What types of considerations may influence these officials' attitudes and perspectives in the future so that they are motivated to use the machinery proposed in this chapter? Different Canadian authors have described the work of federal-provincial committees which in the past have met regularly, settled many disputes and negotiated some solutions to common problems.[229] But many of these committees dealt with fiscal and technical matters where the interests at stake were very different from those present in consumer protection, and it would be naive to assume that because those committees have achieved a certain measure of success the same motivating factors would automatically operate in the field of consumer protection.

Following Weidner's distinction between principled and expediency goals,[230] we can point out a number of principled reasons why better federal-provincial relations are a desirable goal in the area of consumer protection. Needless to say, the mere existence of some rational reasons for better federal-provincial relations is no guarantee for their improvement, as there may be more important expediency reasons that could militate against that improvement.

A basic reason for better relations between both levels of government is simply the need to draw some jurisdictional boundaries. We have seen that neither the *B.N.A. Act* nor our courts have provided any good guidance as to the limits of federal and provincial jurisdiction in the field of consumer protection. In the absence of clear constitutional guidelines, it would be desirable to have the two levels of government agree to divide the common fields, and to use creatively their exclusive powers for the most efficient operation of our federal system of government. Any negotiations dealing with the division of the jurisdiction will be strongly influenced by expediency considerations. But it seems clear that in the absence of major constitutional change,[231] the Canadian federal system will have to be aided by intergovernment agreements as to the extent to which each level of government will use their respective powers.

As Professor Lederman has stated:

> Why would the country not be sufficiently governed if the federal government and the respective provincial governments each simply went about its own business properly, within the ambit of its own written list of powers and responsibilities, without reference to the other level of government? The answer

is that the country would decidedly not be well-governed if this were attempted. Indeed I question whether Canada could be held together and governed at all, today, by this approach.[232]

All governments in Canada are committed to federalism, a system that has permitted ten very different provinces to form a country for more than a century. After the failure in 1971 of the ambitious attempt to solve many of the problems of Canadian federalism through the adoption of a new Constitution,[233] the only method of making federalism work seems to be the frustrating and often irrational one of attempting to co-ordinate the activities of both levels of government.

A closely related reason for the need for more articulation between both levels of government is the desirability of avoiding duplication of efforts and waste of limited resources. We have seen in chapter two that the same conduct of behavior may amount to a violation of both federal and provincial statutes. It would be only rational to develop some methods of consultation whereby the overlapping of federal and provincial legislation is avoided at the stage of legislative drafting. If this avoidance of overlapping legislation is not achieved, it would be desirable to develop some working arrangements dealing with the enforcement of the overlapping statutes. This type of arrangement could lead to financial savings by cutting down the number of administrators needed for the enforcement of legislation. Budgetary consideration may become more important in the near future as there are some signs that the present rate of growth of the consumer affairs departments and programs is not likely to be maintained in the years ahead. All the officials I interviewed indicated the increasing difficulty they were encountering with their respective treasury boards and the unwillingness of these boards to allocate funds for the hiring of permanent staff.[234] It is quite likely that the initial period of rapid growth of the consumer affairs departments will be followed by a period of consolidation and reassessment of programs and priorities. In this new phase it will make sense to have a look at the areas where there is a duplication of federal and provincial consumer services in order to avoid waste and to put to the best use the limited resources of the departments.

A third reason for better federal-provincial co-operation is to avoid frustrating each other's policies. For example, in the area of consumer credit, finance companies have often argued that the goal of cost of credit disclosure cannot be achieved as long as the provinces impose one method of calculating and disclosing the cost of vendor credit and some types of lender credit, while the federal government imposes a different method of calculating and disclosing the interest charged by banks and mortgage lenders. Another area where federal and provincial Acts and regulations could run at cross purposes is that of labelling of consumer products, where both the federal governments and the provinces have passed legislation.[235]

A closely related reason for improved federal-provincial relations is the imaginative use of exclusive legislative powers to solve consumer problems that need joint federal and provincial action. A good precedent of this type of joint effort is provided by the legislation dealing with "cut-off" clauses and consumer notes described above.[236] Two areas where the protection of the Canadian consumer appears to require a joint federal-provincial approach are the regulation of credit cards[237] and electronic payment systems.[238] The federal government appears to have jurisdiction to pass legislation dealing with both subjects,[239] but they are closely related to issues of the law of sales and creditors' rights which fall within provincial jurisdiction. Therefore, any federal initiatives in the two areas will affect consumer rights under provincial law and it would be desirable that provincial and federal representatives participate in the study of the implications for consumers of any new legislation on these matters.

A number of expediency or conservation reasons for the improvement of federal-provincial relations could be advanced. These reasons are related to "the preservation and extension of influence of individuals, agencies or units of government."[240] A first reason of this type for the improvement of federal-provincial relations is the need felt by federal and provincial officials to reduce the uncertainty in the environment in which they work. As Professor Corry stated, any provincial official

> must master the uncertainties which interfere with his control of the situation. The actions and attitudes of Dominion officials are among those uncertainties. Thus there is a powerful incentive for him to try to extend his authority as far as possible over any disputed borderland between them.[241]

Professor Corry assumes that the need to reduce uncertainty would almost inevitably lead to friction and conflict. However in some cases it could lead to compromises and agreements to divide the borderland, especially when the take-over by one level of government of a whole area is impossible or impracticable. If some arrangement could be worked out in the areas of consumer protection into which each level of government would expand, this agreement would reduce the uncertainty in which officials have to operate. They could direct more of their time and energies to the preparation of legislation and the implementation of programs that could benefit the Canadian consumer rather than spending an inordinate amount of their time and efforts worrying about and planning new strategies to counteract the latest initiative of the other level of government.

A second expediency reason for a better understanding of both levels of government could be that the field of consumer protection is wide enough to accommodate the activities of federal and provincial politicians and officials. Although federal-provincial rivalry will never be eliminated, a consensus could develop about the need to share the field so that both federal and provincial politicians get credit for their consumer protection programs and federal and provincial officials can exercise their creative and administrative talents. The development of this consensus will have to be based in turn on both the belief in the legitimacy of federal and provincial activity in the different areas and the expanding nature of the field.

Some provincial officials still view as illegitimate the federal initiatives in consumer credit and trade practices. The provincial officials took the initiative in these areas and they still see the federal officials as late-comers trying to get into areas that are presently regulated by the provinces. However, as we saw in chapter two, there is plenty of constitutional authority giving the federal government jurisdiction to pass legislation and establish programs dealing with consumer credit and trade practices. At the present time not much can be gained by the provinces taking a belligerent stance in the hope of forcing the federal government to abandon the field. At the same time the present climate of federal-provincial relations could be considerably improved if the federal government would make a move that, in fact, recognizes the legitimacy and continued existence of provincial credit legislation presently in force and the provincial programs that are now in operation.

The development of a consensus to share the field of consumer protection will take place if there is an agreement on the possibility of future growth in the field, on the existence of sufficient areas where both levels of government can expand in the future. Some officials seem to suspect that after the passing of comprehensive trade practices legislation most consumer protection problems will be handled by passing regulations under those Acts and by expanding the administrative

machinery necessary to enforce them. If this belief on the limitation in the number of possible new statutes is in fact shared by officials of both levels of government, it may in part explain the present race to pass legislation and occupy as many areas as possible. At the same time the occupation of these areas could be seen as tactical steps aimed at creating assets which could later be given up in exchange for desired consessions. Even if the number of possible new consumer protection statutes is limited (which is a matter where opinions may differ), it seems fair to say that the efforts of governments to implement legislation, increase consumer education and mediate consumer disputes have merely stratched the surface, and that a majority of Canadians remain ignorant about the consumer protection efforts of the federal and provincial governments. Therefore, I would suggest that there are enough possibilities at the level of administration and enforcement to occupy the possible growth in activity of both levels of government. In any case, as indicated above, it seems likely that the growth of the consumer affairs departments will be slowed down in the near future and this may increase federal and provincial officials' willingness to share the field.

A third expediency reason for better articulation of federal and provincial legislation and programs is simply to avoid political embarrassment. Politicians and administrators are not only interested in gaining credit and enhancing their status. They are also interested in avoiding scandals or censure. If the present trend of overlapping statutes and programs continues, both levels of government will be exposed to increasing criticism from businessmen and taxpayers. Businessmen need some degree of certainty and predictability in the laws to which they are subjected in order to organize their affairs accordingly. If they are subjected to different provincial and federal Acts drafted in general terms[242] and dealing with the same activity it is likely that they will make their complaints heard. The likelihood will be increased if some businesses are charged with violation of federal and provincial legislation dealing with the same problem such as in the case of disclosure of cost of credit or trade practices. These cases of "double jeopardy" will likely lead to criticism of both levels of government as wasting taxpayers' money. This in turn may lead to a drastic resolution of the conflict by outsiders who do not share the concerns of consumer affairs officials. As Professor Donald V. Smiley has stated:

> Program officials know that if they do not resolve intergovernment disputes "within the guild" these conflicts will be settled by outsiders who are motivated by different considerations than those which prevail within the specialized groups... [I]t is in the interest of the program specialists to maintain their relative importance.[243]

B. PROPOSALS FOR NEW MACHINERY FOR FEDERAL-PROVINCIAL RELATIONS

In my interviews with consumer protection officials I discussed the methods and procedures presently used for the meeting of federal and provincial representatives to discuss issues of mutual concern. There seems to be a consensus among officials that the present machinery has developed in an *ad hoc* and haphazard manner, that it is rather wasteful and lags behind present needs. Many of the participants would like to see a more structured system of regular federal-provincial meetings and I have incorporated some of their suggestions into the following proposals.

1. Before the annual inter-provincial administrators' conferences are held, the organizers should ask provincial officials for suggestions of specific areas of federal-provincial relations where difficulties are being encountered or where better co-operation could be achieved. These suggestions and proposals could be included in an agenda for a special session of the interprovincial conference.

2. In this special session on federal-provincial relations, provincial representatives could discuss the areas of main concern and any proposals for the solution of problems or improvement of co-operation. These sessions, which would be attended only by provincial officials, could be useful for the clarification of issues and the exploration of proposals and solutions. Probably only a few provinces would be particularly interested in discussing certain subjects with the federal authorities, either because of the special importance they place on that subject or because they are more active in consumer protection than the rest of the other provinces. Nevertheless, it is important that all provincial officials should be entitled to attend the session on federal-provincial relations and the subsequent meeting with federal officials. The attendance at all the meetings of the less-interested provinces may provide them with a learning experience which may prove useful if those provinces later become active in the area under discussion. In addition, the attendance of these provinces will avoid the danger of bilateral negotiations which in other fields have generated a great amount of resentment.[244]

   There is very little likelihood that these sessions will be used for preparing a common front for "ganging up on Ottawa."[245] This is because at any given time the provincial participants will have different priorities and they will differ considerably in their social and political philosophies.

3. One of the results of these inter-provincial sessions should be a list of subjects to be discussed with federal officials as well as some tentative proposals. These proposals could be expanded into working or position papers to be circulated among all the interested provinces and they should be sent with a proposed agenda to federal consumer affairs officials.

4. Federal officials could continue to attend all the regular sessions of the inter-provincial administrators conference except the session discussing federal-provincial matters. Federal and provincial officials should take advantage of their presence at the inter-provincial conference to fix a mutually convenient date for a new meeting to discuss federal-provincial issues. Ideally this subsequent meeting would be held not later than four or six weeks after the inter-provincial one.

5. Upon receipt of the list of subjects and proposals or working papers from the provinces, federal officials would add to the list any new matters they would like to discuss with the provinces and prepare and send back to the provinces any working papers, background materials and proposals of their own. Several of the officials I interviewed stressed the importance of getting some information in advance as to the scope and range of the desired discussions. They would appreciate receiving working papers and proposals indicating the direction any discussions could take so that they can prepare for the meeting.

6. The federal-provincial meeting to be held a few weeks after the inter-provincial conference should be attended only by deputy ministers and their top administrators or program experts. Hopefully, the attendance of officials with similar experiences and doing the same type of work will facilitate the interchange of ideas and negotiations at these meetings. As D.V. Smiley has stated:

> The attitudes, procedures and values common to particular groups of program specialists . . . provide common standards to which officials from federal and provincial levels defer.

> Membership in such groups almost always involves not only the sharing of a body of knowledge and techniques but also adherence to a common set of standards and objectives related to the public policies with which the group is professionally concerned. What Seymour Lipset has said of bureaucracies generally applies to this federal-provincial complex of specialists: "Inherent in bureaucratic structures is a tendency to reduce conflicts to administrative decisions by experts, and thus over time bureaucratization facilitates the removing of objects from the political arena. Constant emphasis on the need for objective criteria as a basis for the settlement of conflicts enables bureaucracies to play major mediating roles."[246]

The main purpose of the meeting of federal and provincial officials should be to clarify their goals and positions, to explore the areas where there is agreement and those where there is none, and, with regard to the latter, to explore ways in which differences could be reconciled. The deputy ministers and officials should be able to explore proposals and agree among themselves without committing their governments. In many cases they will have to take any tentative agreement back to be approved by their respective ministers. It will be important that the participants to these federal-provincial meetings agree on the next step to be taken after the meeting. In some cases an exchange of correspondence outlining an understanding will be all that is required. In other cases subsequent meetings may be necessary.

7. It will be important for federal and provincial participants to agree in advance about the procedure to be followed in federal-provincial meetings, as in many cases the manner in which negotiations are structured may give some advantage to one or more of the participants.[247] As suggested above, the agenda of the meetings could be set up by mutual agreement. The meetings could be chaired on an alternate basis by federal and provincial representatives. The ideal situation would be if by mutual agreement the meetings could be chaired by a representative of one of the provinces that has less interest at stake in the negotiations.

   One of the criticisms of federal-provincial meetings raised by provincial officials is that too many of them are held in Ottawa. An effort should be made to hold the proposed meetings in different cities across the country depending in part on the provinces that indicate their intention to participate in the meetings.

8. Several officials have criticized the ministerial conferences that have been held in the past as an exercise in public relations where very few important issues were discussed or agreed upon. However, these conferences may help new ministers to become more familiar with consumer protection matters and with the problems of interprovincial and federal-provincial relations. In addition they seem to generate goodwill and this may facilitate future communication and agreement among the participants. Therefore, I would recommend the renewal of federal-provincial ministerial conferences to be held if possible after the officials' meetings.

C. POSSIBLE ACCOMPLISHMENTS IN FEDERAL-PROVINCIAL RELATIONS

The new machinery and procedure proposed above could be used to improve both the communication and the co-operation between the federal and provincial governments.

1. Improvement of Communications

Several of the officials I interviewed agreed that the present machinery used for the sharing of information about the attitudes and overall planning of both levels of government has not been conducive to improving federal-provincial relations. There have been too many people involved in the discussion of too many separate areas, such as orderly payment of debts, consumer credit, trade practices, etc. It is hoped that regular meetings of a few top officials will facilitate the exchange of information on overall policy planning and the views of the different participants on their respective jurisdictions. This is not to suggest that improved communication *per se* would be conducive to an improvement of federal-provincial relations. As Richard Simeon has stated:

> [E]ven with perfect information the governments would continue to share often conflicting goals . . .[248]

But good communications can be considered a necessary though not sufficient condition for harmonious federal-provincial relations.

The exchange of working papers with specific questions and proposals on a few chosen areas may help to avoid some of the problems arising out of the present system of consultation. Many misunderstandings presently arise because federal and provincial officials attach different meanings to the word "consultation." While for some officials "consultation" means giving advance notice of their intention to take some initiative and listening politely to any comments that are made, for others it means to participate and negotiate at the early stages of policy development.

It is hoped that through the discussion of specific issues a better understanding will be reached as to the exchange of information and amount of negotiation that can be expected in the different areas of consumer protection. Perhaps in certain areas of legislative activity that can be properly reached by both levels of government, an agreement to exchange information and to discuss issues at an early planning stage can be reached more easily than in areas that fall within the exclusive legislative competence of one level of government. At the same time there should be some frank discussion as to the rules on confidentiality of the different governments and how far the officials are able to go in releasing information. Some officials I talked to stated that they did not have the authority to release copies of statutes or regulations before they were introduced for first reading or published in the *Gazette* respectively.

2. Improvement of Co-ordination

A better system of communication is not a goal in itself but a means to better co-operation at the legislative and administrative levels.

Just as with regard to the exchange of information, there is no guarantee that the creation of new machinery will increase federal-provincial co-ordination and co-operation. It is always possible that one or more of the participants may decide that they will better achieve their particular goals through independent action rather than through a co-operative approach. But for a series of reasons analyzed above, it is possible that some measure of agreement could be reached in the future on the drafting of legislation and administration of programs.

a) *Co-ordination of Legislation*

The type and degree of co-operation at this level will probably differ depending on whether the legislation falls within a common field which can be reached by both levels of

government, or whether a proposed Act falls within the exclusive legislative jurisdiction of one level of government.

With regard to areas of overlapping jurisdiction, great benefits could be derived if an agreement could be reached on the division of the area before the legislation is passed. This type of arrangement has been worked out in other subjects such as agriculture, where by section 95 of the *B.N.A. Act* the federal and provincial governments share concurrent powers. The Departments of Agriculture of the two levels of government have been able to develop working arrangements whereby they divide the field and provide different programs and services to Canadian farmers.

Agreements on division of common areas would be facilitated if a consensus could be developed on the type of activity which each level of government can do best. All the provincial officials I interviewed agreed that the federal government should continue to be active in areas dealing with food, drugs, health and safety. They would not object to federal legislation on upholstered and stuffed goods, an area presently regulated by the provinces[249] but which would fit better within the present federal schemes. Provincial officials state that they would not object to the federal take-over and strict enforcement of many provisions which lie dormant in provincial statutes. They give as an example the new section of the *Weights and Measures Act*[250] that makes it an offence to tamper with odometers. The provincial *Motor Vehicles Acts* contained some sections which forbid the same practice but not many prosecutions were started under these provisions as the provincial officials in charge of enforcing them were not able to perform the investigatory police work required to obtain the necessary evidence. Several provincial officials were quite happy to see the federal take-over of this area and the success of the RCMP in securing convictions under the new federal provisions.

A legislative device which could be used in the future in concurrent fields is the adoption of conditional legislation whereby a certain conduct or practice is not prohibited if it is permitted or sanctioned by the other level of government.[251] We have already seen that this device was used in the new sections of the *Combines Investigation Act* dealing with pyramid selling and referral selling.[252]

Another type of conditional legislation could be used for the co-ordination of federal and provincial programs. Federal consumer legislation could contain a provision stating that it will come into force only upon proclamation. The legislation or parts of it could then be proclaimed only in those provinces where it is deemed necessary. This type of approach could be used by the federal government to ensure minimum standards of consumer protection across the country. The federal statute could go into force in those provinces without equivalent legislation, but it would not be proclaimed in the provinces which are active in the area. A Canadian precedent for this type of approach is contained in section 198 of the *Bankruptcy Act*[253] and, as we have seen by the use of this section, Part X of that Act has gone into force only in certain provinces.

Consumer protection statutes in the United States contain similar provisions for the integration of federal and state legislation. Under these provisions which are often included in federal statutes any state legislation will prevail if it affords consumers equivalent or greater protection than the federal statute. For example, the *Magnuson-Moss-Warranty-Federal Trade Commission Improvement Act* that regulates warranties given by manufacturers of consumer products contains a section that states as follows:

> If, upon application of an appropriate State agency, the Commission determines . . . that any requirement of such State covering any transaction to which

> this title applies (A) affords protection to consumers greater than the requirements of this title and (B) does not unduly burden interstate commerce, then such State requirement shall be applicable . . . to the extent specified in such determination for so long as the State administers and enforces effectively any such greater requirement.[254]

Another example of the use of this type of device is contained in section 305 of the U.S. *Consumer Credit Protection Act* which states:

> The Secretary of Labor may by regulation exempt from the provisions of section 303(a) garnishments issued under the restrictions on garnishment which are substantially similar to those provided in section 303(a).[255]

As indicated above this legislative approach can be used only in areas of concurrent jurisdiction; it cannot be used to grant initial jurisdiction to the other level of government.

In the areas of exclusive jurisdiction we have seen that some co-operative efforts have succeeded in the past[256] and that comprehensive consumer protection with regard to credit cards and electronic payment systems may require a co-ordinated approach by both levels of government.[257]

Another way in which federal-provincial co-operation could increase the protection of Canadian consumers is if the provinces would complement federal health and safety legislation by attaching strict civil liability to the violation of those statutes. Several federal statutes such as the *Hazardous Products Act*,[258] the *Motor Vehicle Safety Act*,[259] or the *Food and Drug Act*[260] set product standards and provide for penalties to be applied to any violators. If a product does not comply with those statutes and it causes physical damage or personal injury, it would be little consolation to the consumer to know that the manufacturer will be subjected to a prosecution and probably a fine. The consumer would be more interested in being compensated for his loss or injury. Some Canadian and English judges have granted damages for losses arising out of breach of statutory standards on the basis of the presumed intention of the legislature.[261] But the federal health and safety statutes mentioned above are silent on this point. Even if the intention of Parliament to create a civil cause of action for breach of those statutes was clear, it is doubtful whether it has the jurisdiction to do so in the case of legislation based on the federal criminal law power.[262] A consumer could succeed in recovering damages if a court finds that the manufacturer was negligent. But this finding does not follow automatically from the breach of statutory standards, and the law could be considerably simplified if the provinces would pass legislation making manufacturers strictly liable for losses arising out of their breach of federal health or safety standards. This type of provincial legislation would increase certainty and it could simplify the enforcement efforts of the federal government, as the clear liability to consumers would act as an incentive on manufacturers to comply with statutory standards.

As Professor Linden has stated:

> An additional deterrent lash to manufacturers may spur greater efforts toward conformance with the legislation. The task of the judge and jury in assessing the reasonableness of the manufacturer's conduct is a trying one. Sometimes there is no evidence, other times there is a welter of technical and frequently conflicting testimony to sift. Were liability to be premised on a finding of adulteration or other violation simpliciter, the job of judging would be simplified, predictability would increase and, as a beneficial concomitant of this, tort settlements might become more common. In most cases, producers are able to pass the cost of

liability on to their customers through slightly increased prices. In any event, some of the benefits of general deterrence and better resource allocation might be achieved.[263]

b) *Co-ordination of administration*

A second area of possible agreement between federal and provincial officials is in the administration and enforcement of overlapping federal and provincial statutes. If the same act or conduct could amount to a violation of federal and provincial statutes, it could be advantageous to both levels of government to have an agreement dividing the type of conduct or activity that each level will prosecute. For example, we have seen in chapter two that certain types of misleading advertising could violate the provisions of the federal *Combines Investigation Act* and the provisions of the provincial *Trade Practices Act.* To avoid duplication of efforts, federal and provincial officials could agree on the type of advertising each level of government would monitor and control. Even if no agreement on the division of areas of enforcement is reached, some kind of notification procedures will have to be developed in order to avoid federal and provincial officials initiating investigations and prosecuting the same firms for the same act or representation.

At the same time the trade practices provisions of the *Combines Investigation Act* could be fully enforced in those provinces without equivalent legislation in order to achieve minimum standards of consumer protection across the country.

Another method of federal-provincial co-operation could be to reach agreements whereby the legislation of one level of government is enforced by the other. We have seen that Part X of the federal *Bankruptcy Act* is administered by provincial officials,[264] and that some dissatisfaction has been expressed with regard to this type of arrangement.[265] But the experience of Part X may prove useful and some of the difficulties encountered in the past can be taken into account in future negotiations.

The use of this device could present a way out of the current impasse in the field of consumer credit. If the federal government proceeds with its announced plans to pass comprehensive legislation dealing with all types of vendor and lender credit, a compromise with the provinces could be reached by delegating to the provinces the enforcement of all or part of the new consumer credit legislation. A new federal Act will have the advantage that it will impose uniformity of legislation across the country, as well as the same method of disclosing the cost of all types of credit. The provinces already have experienced personnel and direct access to the provincial registries of conditional sales and chattel mortgages which will facilitate the control of all types of consumer lenders.

CONCLUSION

In the writing of this paper I have kept in mind the admonition by Professor Smiley that:

> [D]espite the vast amount of incantation both from Canadian scholars and Canadian officials about the need for federal-provincial coordination and the alleged association between such coordination and rationality, the increasing sophistication of these governments leads directly to conflict of a somewhat intractable kind.[266]

It is true that consumer protection is a rather minor area of federal-provincial relations and that the strategies of the different participants may be determined by comprehensive government policies or directives designed to deal with all aspects of intergovernment relations. But it is just as likely that because consumer protection is a rather narrow and specialized field, the participants may be allowed to develop co-operation and working arrangements in order to achieve a highly co-ordinated scheme of consumer protection for all Canadians.

As several writers have indicated, federal-provincial conflicts often arise out of genuine contradictory interests and not merely out of a lack of information or the absence of formal procedures for co-ordination.

In the field of industrial relations our general approach in solving the conflicting interests of labour and management has been to oblige them to get together and negotiate in good faith. There are many cases of strikes and lock-outs, but by and large this system of free collective bargaining seems to provide the best solution to industrial disputes. In the field of federal-provincial relations the original commitment to sit down and negotiate will have to come from the participants themselves.

As I have tried to show in this paper, the need for federal-provincial agreements in the area of consumer protection arises out of the very nature of our federal Constitution which is based on a division of powers. The problems of consumer protection arise out of the complexities of our modern society and require the co-ordinated use of the legislative powers of both levels of government. Only time will tell whether the federal and provincial participants will make an honest and sincere attempt to make federalism work in the field of consumer protection.

FOOTNOTES

[1] For a general discussion of the goals of consumer protection see: J.S. Ziegel, *The Future of Canadian Consumerism*, (1973), 51 Can. B. Rev. 91.

[2] British Columbia, *Consumer Protection Act*, S.B.C. 1967, c.14, s.s. 17-20; *The Trade Practices Act*, S.B.C. 1974, c.96, s. 3; Alberta, *The Unconscionable Transactions Act*, R.S.A. 1970, c.377; Saskatchewan, *The Unconscionable Transactions Relief Act*, s.s. 1967, c.86; Manitoba, *The Unconscionable Transactions Relief Act*, R.S.M. 1970, c. U-20; Ontario, *The Unconscionable Transactions Relief Act*, R.S.O. 1970, c.472, *Consumer Protection Act* S.Q. 1971, c.74 s. 118; Quebec *Civil Code* art. 1001-02, 1040c; New Brunswick, *The Unconscionable Transactions Relief Act*, R.S.N.B. 1973, c. U-1; Nova Scotia, *The Unconscionable Transactions Relief Act*, R.S.N.S. 1967, c.319; Prince Edward Island, *The Unconscionable Transactions Relief Act*, S.P.E.I. 1964, c.35; Newfoundland, *The Unconscionable Transactions Relief Act* R.S.N. 1970, c.382.

[3] British Columbia, *The Consumer Protection Act*, S.B.C. 1967, c.14, as amended, Part II s.7; Alberta, *The Direct Sales Cancellation Act*, R.S.A. 1970, c.110, as amended; Saskatchewan, *The Direct Sellers Act*, R.S.S. 1965, c.331, as amended; Manitoba, *The Consumer Protection Act*, R.S.M. 1970, c. 200, as amended; Ontario, *The Consumer Protection Act*, S.O. 1971, c.74, as amended, Division V; New Brunswick, *The Direct Sellers Act*, R.S.N.B. 1973, c. D-10; Nova Scotia, *The Direct Sellers Act*, S.N.S. 1969, c.5; To be replaced upon proclamation, by *The Direct Sellers' Licensing and Regulations Act* S.N.S. 1975, c.9; Prince Edward Island, *The Direct Sellers Act*, S.P.E.I., 1970, c.96 as amended.

[4] British Columbia, *The Consumer Protection Act*, S.B.C. 1967, c.14 as amended, s.s. 11-14; Alberta, *The Credit and Loan Agreements Act*, R.S.A. 1970, c.73 as amended; Saskatchewan, *The Cost of Credit Disclosure Act*, S.S. 1967, c.85; Manitoba, *The Consumer Protection Act*, R.S.M. 1970, c. C-200 as amended, s.s. 13 and following; Ontario, *The Consumer Protection Act* R.S.O. 1970, c.82 as amended, s.s. 36 and following; Quebec, *Quebec Civil Code* art. 1561a; New Brunswick, *Cost of Credit Disclosure Act*, R.S.N.B. 1973, c. C-28; Nova Scotia, *Consumer Protection Act 1967*, S.P.E.I. 1967, c.16, as amended; Newfoundland, *The Consumer Protection Act*, R.S.N. 1970, c.256.

[5] British Columbia, *Consumer Protection Act*, S.B.C. 1967, c.14, as amended, s.15; Alberta, *Conditional Sales Act*, S.A. 1971, c.18, s.18 1(2); Saskatchewan, *Cost of Credit Disclosure Act*, S.S. 1967, c.85, as amended, s.16A; Manitoba, *Consumer Protection Act*, R.S.M. 1970, c. C-200, as amended, s.67. Ontario, *Consumer Protection Act*, R.S.O. 1970, c.82, as amended, s.42A; Quebec, *Consumer Protection Act*, S.Q. 1971, c.74, as amended, s.19; New Brunswick, *Cost of Credit Disclosure Act*, R.S.N.B. 1973, c. C-28, s.22; Nova Scotia, *Consumer Protection Act*, R.S.N.S. 1967, c.53, as amended, s.20B; Prince Edward Island, *Consumer Protection Act 1967*, S.P.E.I. 1967, c.16, as amended, s.20A.

[6] British Columbia, *Sale of Goods Act*, R.S.B.C. 1960, c.344, as amended S.A. 1971 c.52 s.1; c.84, s.17; *Consumer Protection Act*, S.B.C. 1967, c.14, as amended, s.21; Alberta, *The Sale of Goods Act*, R.S.A. 1970, c.327, s.55; *The Farm Implements Act*, R.S.A. 1970, c.136 as amended, s.9; Saskatchewan, *Agricultural Implements Act*, S.S. 1968, c.1, as amended, s.26; Manitoba, *Farm Machinery and Equipment Act*, S.M. 1970, c. F-40, as amended, s.17; *Consumer Protection Act*, R.S.M. 1970, c. C-200, s.58; Ontario, *Consumer Protection Act*,

R.S.O. 1970, c.82, as amended, s.44a; Nova Scotia, *Consumer Protection Act*, R.S.N.S. 1967, c.53, as amended, s.20c 2.

[7] British Columbia, *Fair Sales Practices Act*, S.B.C. 1973, c.32 Part II, (to be amended to *Pyramid Distributors Act* by Bill 10, 1975); Alberta, *The Franchises Act*, S.A. 1971, c.38, as amended, s.11; Saskatchewan, *The Pyramid Franchises Act*, S.S. 1972, c.98; Manitoba, *The Consumer Protection Act*, R.S.M. 1970, c. C-200, as amended, s.60(2); Ontario, *The Pyramidic Sales Act*, S.O. 1972, c.57; Quebec, *Consumer Protection Act*, S.Q. 1971, c.74.

[8] British Columbia, *Debt Collection Act*, S.B.C. 1973, c.26; Alberta, *The Collection Agencies Act*, R.S.A. 1970, c.55; Saskatchewan, *The Collection Agents Act*, S.S. 1968, c.11 as amended; Manitoba, *The Consumer Protection Act*, R.S.M. 1970, c. C-200, as amended; Ontario, *The Collection Agents Act*, R.S.O. 1970, c.71, as amended; Quebec, *Collecting Agents Act*, R.S.Q. 1964, c.43, (see Bill 26, *The Collection Agents Act* 1974, which, if passed, will be a marked departure from the 1964 Act); New Brunswick, *Collection Agencies Act*, R.S.N.B. 1952, c.31 as amended; Nova Scotia, *The Collection Agencies Act*, R.S.N.S. 1967, c.38, as amended; *The Collection Act*, R.S.N.S. 1967, c.39.

[9] British Columbia, *Personal Information Reporting Act*, S.B.C. 1973, c.139; Saskatchewan, *The Credit Reporting Agencies Act*, S.S. 1972, c.23; Manitoba, *The Personal Investigations Act*, S.M. 1971, c. P-33; Ontario, *The Consumer Reporting Act*, S.O. 1973, c.97; Quebec, *Consumer Protection Act*, S.Q. 1971, c.74; Nova Scotia, *Consumer Reporting Act*, S.N.S. 1973, c.4; Prince Edward Island, *Consumer Reporting Act*, S.P.E.I. 1974, c.67; Newfoundland, *The Credit Reporting Agencies Act*, S.N. 1973, Act No. 76.

[10] British Columbia, *Motor Vehicle Act*, R.S.B.C. 1960, c.253 as amended, s.s.2, 29-35; Alberta, *The Highway Traffic Act*, R.S.A. 1970, c.169, s.s. 232-35; Saskatchewan, *The Motor Dealers Act*, S.S. 1966, c.95 (Reg. 129/66); Manitoba, *The Highway Traffic Act*, R.S.M. 1970, c.H-60 (1971) Regs. H-60, R-12, R-3); Ontario, *Motor Vehicle Dealers Act*, R.S.O. 1970, c.473 as amended, (Reg. 98/71); Quebec, *The Highway Code*, R.S.Q. 1964, c.231, as amended, (O.C. 3306-72); New Brunswick, *Motor Vehicle Act*, R.S.N.B. 1973, c. M-17, as amended; Nova Scotia, *Motor Vehicle Act*, R.S.N.S. 1967, c.191 s.s. 19, 46-49, as amended; Prince Edward Island, *The Highway Traffic Act*, S.P.E.I. 1964, c.14 as amended, (see also 1975 Bill 15, *Vehicle Dealers and Salesman Act*); Newfoundland, *Highway Traffic Act*, R.S.N. 1970, c.152, as amended, s.s. 15–25.

[11] British Columbia, *Mortgage Brokers Act*, S.B.C. 1971, c. 36, as amended; Alberta, *The Mortgage Brokers Registration Act*, R.S.A. 1970, c. 242; Saskatchewan, *The Mortgage Brokers Act* S.S. 1967, c. 76, as amended; Manitoba, *The Mortgage Brokers And Mortgage Dealers Act*, S.M. 1971, c. 26, as amended; Ontario, *The Mortgage Brokers Act*, R.S.O. 1970, c. 278, as amended; Quebec, *The Real Estate Brokerage Act*, R.S.Q. 1964, c. 267, as amended; New Brunswick, *Real Estate Agents Licensing Act*, S.N.B. 1960-61, c. 16, as amended; Nova Scotia, *Mortgage Brokers And Lenders Registration Act*, R.S.N.S. 1967. c. 189; Prince Edward Island, *The Real Estate Trading Act*, S.P.E.I. 1968, c. 47, as amended; Newfoundland, *Real Estate Trading Act*, R.S.N. c. 326, as amended.

[12] British Columbia, *The Trade Practices Act*, S.B.C. 1974, c. 96 (Bill 88, 1975, sets out several defences which will be incorporated into the Act); Alberta, The *Unfair Trade Practices Act*,

1975, Bill 21; Manitoba, *Trade Practices Inquiry Act*, R.S.M. 1970, c. T-110, as amended (provisions for inquiry only); Ontario, *Business Practices Act 1974*, S.O. 1974, c. 131.

[13] Ontario, *The Travel Industry Act*, S.O. 1974, c. 115; Quebec, *The Travel Agents Act*, S.Q. 1974, c.53.

[14] R.S.C. 1970, c. B-1.

[15] *An Act to Amend the Bankruptcy Act 1966*, S.C., c.32, see now, *Bankruptcy Act*, R.S.C. 1970, c. B-3. For descriptions and discussion of the Orderly Payment of Debts Scheme see R.C.C. Cuming, *Consumer Credit Law* in G.L.H. Friedman (ed.), *Studies in Canadian Business Law*, Butterworths, Toronto, 1971 at pp. 93, 135-139, John D. Honsberger, *Part X of the Bankruptcy Act and the Overcommitted Consumer Debtor* in W.A.W. Neilson, *Consumer and the Law in Canada*, Toronto, 1970 (ed.) at page 137.

[16] *Bills of Exchange Act*, R.S.C. 1970, c. B-5, as amended, see also J.S. Ziegel, *Canada Regulates Consumer Notes* (1971) 26 Bus. Lawyer 1455; A. Bohemier, *Les Lettres et les billets du consommateur* (1973) 76 R. du Notariat 79-105,155-172.

[17] S.C. 1968-69, c. 116, *below note* 113.

[18] See footnote 113 *below.*

[19] *Motor Vehicle Safety Act*, R.S.C. 1970 (1st Supp.) c. 26.

[20] *Hazardous Products Act*, R.S.C. 1970, c. H-3.

[21] *Consumer Packaging and Labelling Act*, S.C. 1970-71, c. 41. *Textile Labelling Act*, 1970, R.S.C. c. 46 (1st Supp.).

[22] See J.S. Ziegel, *Consumer Credit Regulation: A Canadian Consumer Oriented Viewpoint* (1968) 68 Col. L. Rev. 488, at p. 488.

[23] J.S. Ziegel comments on this point in his article *Canadian Consumer Reporting Legislation: Trends and Problems* (1973) 11 O.H.L.J. 503, at pages 504-507.

[24] Economic Council of Canada, Interim Report, (1967), Queen's Printer, Ottawa, p. 1.

[25] As *above*, p. 19.

[26] Bill C-161, An Act to Establish a Department of Consumer and Corporate Affairs, this Bill was passed into Law in December, 1967, becoming Chapter 16, S.C. 1967. See also, J.S. Ziegel, *Retail Instalment Sales Legislation: A Historical and Comparative Survey*, (1962), 14 U. of T. Law J. 143. For a list of federal statutes dealing with consumer affairs see *Economic Council of Canada Interim Report, above* note 24, at page 51.

[27] See *Final Report of the Select Committee of the Ontario Legislature on Consumer Credit*, Sessional Paper No. 85, 1965.

[28] S.O. 1966, c.24.

[29] S.O. 1966, c.23.

[30] *Department of Consumer Affairs Act*, S.S. 1972, c.27; *Department of Consumer Services Act*, S.B.C. 1973, c.108; *Department of Consumer Affairs Act*, S.A. 1973, c.22; *Consumer Protection Act*, R.S.M. 1970, c. C-200.

[31] 1867, 30 & 31 Victoria, c.3 (U.K.), (hereinafter cited as the *BNA Act*).

[32] In this section I have been very much influenced by the writing of Professor W.R. Lederman, especially *The Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada*, McPherson and Crepeau (eds.), *The Future of Canadian Federalism*, Toronto, University of Toronto Press (1965) at page 91.

[33] D.V. Smiley, Documents of the Royal Commission on Bilingualism and Biculturalism, Vol. 4, *Constitutional Adaptation and Canadian Federalism Since 1945*, (1970) Information Canada at pages 1-2.

[34] *Final Report of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada*, (1972) Queen's Printer, Ottawa, at page 43.

[35] *Reference Re Regulation and Control of Aeronautics in Canada*, [1930] S.C.R. 663 at page 685. This Argument, based on efficiency, has often been advanced by the provinces. For example, in the case of *Burns Foods Ltd. v. A.G. of Manitoba* (1973), 40 D.L.R. (3d) 731, the Supreme Court of Canada was called upon to decide the constitutional validity of an order issued by the Manitoba Hog Producers' Marketing Board. The Board has forbidden Manitoba Packers to slaughter any hogs which had not been purchased from the Board. This order was necessary for the efficient implementation of a scheme aimed at the orderly marketing of hogs within the province. Without the order Manitoba Packers could have defeated the purpose of the scheme by buying hogs directly from Saskatchewan producers. The Supreme Court of Canada held that the order was unconstitutional as it amounted to an attempt by the province to regulate interprovincial trade. See also: *Interprovincial Cooperatives Ltd. and Dryden Chemical Ltd. v. The Queen* [1975] 5 W.W.R. 383.

[36] Subsections 1A and 2A amendments have been added subsequently.

[37] s. 91(2)

[38] s.s. 91(15) (16)

[39] s. 91(17)

[40] s. 91(18)

[41] s. 91(19)

[42] s. 91(21)

[43] s.s. 91(22) (23)

[44] s. 91(27)

[45] s. 92(23)

[46] s. 92(10)

[47] s.92(14)

[48] s. 92(16)

[49] *The Report of the Royal Commission on Dominion-Provincial Relations* (1940), Ottawa, Queen's Printer 1954, (hereinafter cited as the Rowell-Sirois Report). This Report stated at page 192 that:

> "There is much truth as well some exaggeration in the contention that the property and civil rights clause has become the real residuary clause of the constitution."

However, in *Reference Re Farm Products Marketing Act* (1957) 7 D.L.R. 237, Rand J. stated at pages 270-71 that:

> "... head (16) [of the BNA Act] contains what may be called the residuary power of the provinces."

See also: *The Report of the Royal Commission on the Cost of Borrowing Money, Cost of Credit and Related Matters in the Province of Nova Scotia.* (The Moreira Report) Final Report (1965), para. 462 at page 270.

[50] W.R. Lederman, *Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation*, a paper presented to the meeting of the Association of Canadian Law Teachers held in Edmonton, Alta., June, 1975. See (1975), 53 Can. Bar Rev. 597 at p. 601.

[51] 14 Geo.III. c. 83 (U.K.). See the discussion of this statute in *Citizens Insurance Co. v. Parsons* (1881-82), 7 A.C. 94 at pages 106-110.

[52] Rowell-Sirois Report, note 49 *above*, at page 35. See generally as to the nature of Confederation, pages 29-36 of the Report.

[53] See W.R. Lederman, *The Balanced Interpretation of Federal Distribution of Legislative Powers in Canada*, *above* note 32, at pages 93-100.

[54] S.S. 1943, c.18, as amended, s.s. 1949, c.31.

[55] *Canadian Banker's Association v. A.G. Saskatchewan*, [1955] 5 D.L.R. 736; [1956] S.C.R. 31.

[56] See generally: Laskin, *Canadian Constitutional Law*, ed. A. Abel, 4th ed. Toronto: Carswell Co., 1973, "Note on the Federal Insolvency Power and Provincial Moratorium Legislation" at page 621.

[57] S.O. 1966, c.142.

[58] R.S.C. 1970, c. C-34, s.358.

[59] W.R. Lederman, *above*, note 53, at pages 102-103.

[60] W.R. Lederman, *Some Forms of Co-operative Federalism* (1967) 45 *Can. B. Rev.* 409 at page 417.

[61] *Canadian Banker's Association v. A.G. Saskatchewan, above* note 55.

[62] [1960] S.C.R. 776; 25 D.L.R. (2d) 225.

[63] Que. Court of Appeal No. 09-000940-74, June 20, 1975, (unreported at time of writing).

[64] S.Q. 1971, c.74, general regulations, s.s. 11.51-11.55, O.C. 3268-72, s.1.

[65] This issue had already been canvassed by Ronald I. Cohen in *Advertising to Children: The Constitutional Validity of Quebec's Regulation*, (1974).

[66] *C.F.R.B. v. A.G. for Canada et al* (1973), 38 D.L.R. (3d) 335.

[67] *R.v. Telegram Publishing Co. Ltd.*, (1960), 25 D.L.R. (2d) 471; [1960] O.R. 518; *Benson and Hedges (Canada) Ltd. et al v. A.G. B.C.* (1972), 27 D.L.R. (3d) 257; [1972] 5 W.W.R. 32. See also: Cohen, *above*, note 65 at page 184; M. Gardiner, *Alcoholic Beverage Advertising on Radio and Television in Canada*, (1969) 1 Con. Comm. Law J. 107; R.G. Atkey, *The Provincial Interest in Broadcasting Under the Canadian Constitution, The Confederation Challenge* Ontario Advisory Committee on Confederation, Background Papers and Reports, vol. 2, at pages 189-225.

[68] *Re Regulation and Control of Radio Communication*, [1932] A.C. 3045; [1932] 2 D.L.R. 81.

[69] *Johannesson v. West St. Paul* [1952] 1 S.C.R. 292; [1951] 4 D.L.R. 609; *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd.* [1954] S.C.R. 207; *Commission du Salaire Minimum v. Bell Telephone Co.* [1966] S.C.R. 767, See: Professor P.W. Hogg, "The Constitutionality of Federal Regulation of Mutual Funds" in J.C. Baillie and W.M.H. Grover (eds.) *Proposals for a Mutual Fund Law for Canada*, Information Canada, Ottawa, 1974, vol. 1, p. 75; Paul C. Weiler, *The Supreme Court of Canada and the Law of Canadian Federalism*, (1973) 23 Univ. of Toronto L.J. 307 at pp. 324-325.

[70] *above*, note 69.

[71] Cohen, *above*, note 65.

[72] *above*, note 4.

[73] Speech from the Throne, Sept. 30, 1974, Canada House of Commons Debates, 1974, p. 6. See: *The Interest Act*, R.S.C. 1970, c. I-18, *The Small Loans Act*, R.S.C. 1970, c. S-11.

[74] An address by the Hon. André Ouellet to the Junior Chamber of Commerce of the Lower St. Lawrence, given at Rimouski, Quebec, April 28, 1975.

[75] S.C., 1906, c. 32. Ontario had adopted this type of legislation as early as 1912, see *Money-Lenders Act*, S.O. 1912, c. 30, s.s. 5-8; *The Unconscionable Transactions Relief Act*, R.S.O. 1960, c. 410; Newfoundland passed their *Unconscionable Transactions Relief Act* in 1962, see: S.N. 1962, Act No. 38.

[76] *Unconscionable Transactions Relief Act*, R.S.O. 1970, c. 472.

[77] *A.G. Ont. v. Barfried Enterprises*, [1963] S.C.R. 570; 42 D.L.R. (2d) 137.

[78] R.S.O. 1960, c. 410.

[79] (1962), 35 D.L.R. (2d) 449; [1962] O.R. 1103.

[80] *above*, note 77.

[81] See case comments at (1963) 21 U. of Tor. Fac. L. Rev. 117; (1964) 3 Alta. L. Rev. 312; (1965) 11 McGill L.J. 268; W.R. Lederman, *Some Forms and Limitations of Cooperative Federalism* (1967), 45 Can. B. Rev. 409 at pages 417-18, 434; W.R. Lederman, *The Balanced Interpretation of Federal Distribution of Legislative Power in Canada*, *above*, note 32, at page 97; Moreira Report, Vol. 1, *above*, note 49, at pages 232-35, 266, 281, 283, 286, 300, 301; *Proceedings of the Special Joint Committee of the Senate and House of Commons on Consumer Credit* at pages: 41-50, 371-72, 480; J.S. Ziegel, *Consumer Credit Regulation: A Canadian Consumer-Oriented Viewpoint*, *above*, note 22, at pages 496-97.

[82] *Above*, notes 59, 60.

[83] *Above*, note 73. For comments on the Interest Act see A.M. Sinclair, *Interest and Bonus Payments in the Law of Mortgages* (1964) 14 U.N.B. L.J. 35; R.C.C. Cuming, *Credit Law in Canada* in Friedman (ed.) Business Law in Canada at pp. 90, 91, 114; Leon Letwin, *Canadian Consumer Credit Legislation* B.C. Ind. and Com. L. Rev. 201 at 204; Moreira Report supra note 49 at pages 223, 226-228, 281-283; *Proceedings of the Special Joint Committee of the Senate and House of Commons on Consumer Credit* supra note 81 at pages 13-16; H. Turgeon, *Quelques problèmes sur la loi fédérale de l'intérêt* (1961) 64 R. du. Notariat 183; P. Martel, *L'Enigmatique loi sur l'intérêt* (1969) 71 R. du Notariat 421.

[84] Martland and Ritchie, J.J. [1963] S.C.R. 570 at page 580.

[85] *Above*, at page 575.

[86] *Above*, at pages 577-78.

[87] *Above*, at page 579.

[88] See note 3 *above*.

[89] See note 14 *above*.

[90] The cases dealing with conflict of federal and provincial statutes are discussed below. The test of conflict which could be applied to this legislation is the one discussed at page 33 under the head "Parliament's Intention", i.e., that by the enactment of a comprehensive disclosure code under the *Bank Act* Parliament intended to exclude any provincial legislation dealing with bank loans.

[91] *Tennant v. Union Bank of Canada*, [1894] A.C. 31 (P.C.).

[92] *Above*, note 91, at page 31.

[93] *Above*, note 73.

[94] See brief of J.S. Ziegel to the Proceedings of the Special Joint Committee, *above*, note 81, pages 480-81.

[95] See G. Le Dain, *Sir Lyman Duff and the Constitution*, (1974) 12 O.H.L.J. 261, at pages 268-76. Arguably the paramountcy doctrine cannot be invoked in this area as the Supreme Court of Canada seems to have held in the *Barfried* case that the Ontario Act there in question had a predominantly provincial purpose and therefore contractual unconscionability was an area of exclusive provincial jurisdiction. The paramountcy doctrine has been applied to make federal legislation prevail in a concurrent or common field, it does not invalidate provincial legislation dealing with an exclusively provincial matter. However, Cartwright J. stated at page 580 in the *Barfried* case: "Particular cases may arise in which the provisions of the Provincial Act will come into conflict with those of the Dominion Act. In such cases the Dominion Act will of course prevail."

[96] *Above*, note 73.

[97] Proceedings of Special Joint Committee, *above*, note 81, at page 19.

[98] For further discussion of this doctrine, see: Warren, *Regulation of Finance Charges in Retail Instalment Sales* (1959) 68 Yale L.J. 839, at pages 840-851; J.S. Ziegel, *The Legal Regulation of Consumer Credit*, Consumer Credit in Canada: Proceedings of a Conference on Consumer Credit, Ziegel and Olley (eds.) (1966), 31 Sask. B. Rev. 103; J.S. Ziegel, *Consumer Credit Regulation: A Canadian Consumer Oriented Viewpoint*, *above*, note 81 at pages 496-97; B.A. Curran, *Trends in Consumer Credit Legislation*, (1965), p. 13-14, 84-90; Harvin Pitch, *Consumer Credit Reform*, (1972) 5 Ottawa L. Rev. 324 at pages 327 and 335; J.S. Ziegel, *Retail Instalment Sales Legislation: A Historical and Comparative Study* (1962), 14 U. of T. Law J. 143 at page 153, note 67; R.C.C. Cuming, *Consumer Credit Law*, Studies in Canadian Business Law (1917), G.H.L. Fridman (ed.) 87 at page 89.

[99] *Beete v. Bigoode* (1827), 108 E.R. 792.

[100] *Above*, at page 793.

[101] *Above*, note 73.

[102] Harvin Pitch, *Consumer Credit Reform, above,* note 98.

[103] *Report of the Committee on Consumer Credit,* vol. 1, H.M. Stationery Office, London, Cmnd. 4596, at page 184.

[104] See *Mourning v. Family Publication Services, Inc.* (1973), 93 S.C.R. 1652 (U.S. Sup. Ct.) where the majority of the court held that an instalment sale of magazine subscriptions violated the cost of credit disclosure laws in that the cost of the subscription contained a "buried" credit charge.

[105] *Montreal v. Montreal Street Ry.* (1910), 43 S.C.R. 197 at page 232.

[106] Ontario, *Business Practices Act, above,* note 12. British Columbia, *Trade Practices Act, above* note 12.

[107] *The Unfair Trade Practices Act, above,* note 12. Proclaimed in force January 1, 1976.

[108] Ontario, *Business Practices Act, above,* note 12, s.6; British Columbia, *Trade Practices Act, above,* note 12, s. 16.

[109] Ontario, s. 9; British Columbia, s. 15.

[110] Ontario, s. 17; British Columbia, s. 25.

[111] Ontario, s. 2(c); British Columbia, s. 2(3)(s).

[112] R.S.C. 1970, c. C-23, as amended.

[113] *An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code.* Bill C-2, 1974-75; see in particular s.s. 36 "warranties and guarantees", 36.2 "double ticketing", 37(2) "bait and switch selling", 36.3 "pyramid selling", 37.2 "promotional contests."

[114] See Laskin, *above,* note 56, "Note on Provincial Regulation of Business", page 407.

[115] *B.N.A. Act,* s. 92(9).

[116] For a recent decision analysing the relationship between the conflicts of laws, rules and the territorial limitations of the provincial legislative power, see: *Interprovincial Cooperatives Ltd., and Dryden Chemicals Ltd. v. The Queen, above,* note 35.

[117] Le Dain, *above,* note 95, at page 268 and following.

[118] *Reference Re The Farm Products Marketing Act, above,* note 49 at page 204.

[119] R.S.O. 1970, c. 185.

[120] R.S.O. 1970, c. 296.

[121] *Above*, note 35.

[122] *Above*, at page 390.

[123] See Ontario Law Reform Commission, *Report on Consumer Warranties In the Sale of Goods*, (1972), Ontario Dept. of Justice, at page 28.

[124] *Above*, note 77.

[125] *Citizens Insurance Co. v. Parsons, above*, note 51; *In Re Insurance Act of Canada*, [1932] A.C. 41; *Canadian Indemnity Co. et al v. A.G. for B.C.* [1975] 1 W.W.R. 481; Williamson in *Securities Regulation in Canada* (1962) noted that the Canadian Supreme Court and the Privy Council seem to have been fascinated with the "contract theory of trade." Thus, the decision to give the provinces jurisdiction to regulate insurance was based on the concept of the insurance business as simply a series of contracts, each of which was made within some province and since the *Parsons* case the federal government has been denied the power to regulate the contracts of a particular trade, such as the contracts of fire insurance in a single province. See page 192, note 11. The Rowell-Sirois Report, *above*, note 49, recommended that the regulation of the incidents and conditions of contracts should remain with provincial power. See Book II at pages 59-62. See *Canadian Indemnity Co. et al. v. Attorney General of B.C.* [1976] 2 W.W.R. 499.

[126] *Above*, note 51, 1900, 63 & 64 Vict., c. 51, s. 1.

[127] *Above*, note 51.

[128] See Laskin *above*, note 56, Chapter 4, at page 221 and following. See the *Canadian Indemnity* case, *above*, note 125, where the British Columbia Court of Appeal upheld the validity of the *B.C. Automobile Insurance Act*, 1973.

[129] *In Re sections 4 and 70 of the Canadian Insurance Act* 1910 (1913), 48 S.C.R. 260; 5.W.W.R. 488 at page 277, 500.

[130] *Above*, at page 308.

[131] *A.G. for Canada v. A.G. for Alberta*, [1916] A.C. 588 at page 596.

[132] *Re Insurance Act of Canada*, [1932] A.C. 41; [1932] 1 D.L.R. 97.

[133] *Above*, [1932]1 D.L.R. 97 at page100; [1932] A.C. 41 at page 45.

[134] See cases cited below.

[135] *In Re Board of Commerce Act* and the *Combines and Fair Prices Act, 1919* [1922] 1 A.C. 191; 60 D.L.R. 513.

[136] *Above*, 1 A.C. 191 at pages 198-199.

[137] *P.A.T.A. v. A.G. Canada* [1931] A.C. 310; [1931] 2 D.L.R. 1 at pages 517-18.

[138] [1937] A.C. 368; [1937] 1 D.L.R. 688.

[139] *Above* [1937] A.C. 368 at page 375, [1937] 1 D.L.R. at page 689.

[140] *A.G. Ontario v. Reciprocal Insurers* [1924] A.C. 328, [1924] 1 D.L.R. 789.

[141] *Reference Re Validity of s. 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1; [1949] 1 D.L.R. 433.

[142] *Above*, S.C.R. 1 at pages 49-50, [1949] 1 D.L.R. 433 at pages 472-73.

[143] [1965] 2 O.R. 487; 46 D.L.R. (2d) 83.

[144] *Above*, note 113.

[145] *Above*, note 113, s. 31.1

[146] *Above*, note 141 [1949] S.C.R. 1 at page 49, [1949] 1 D.L.R., 433 at page 472.

[147] Bruce C. McDonald, *Constitutional Aspects of Canadian Anti-Combines Law Enforcement* (1969), 47 Can. B. Rev. 161, at pages 228.

[148] *Above*, at page 228.

[149] *In Re Combines Investigation Act and s. 498A of the Criminal Code* [1929] S.C.R. 409 at page 413.

[150] I will not discuss in this paper the possible use of the federal power to pass laws for the "peace, order, and good government of Canada" as the jurisdictional basis of the Combines Investigation Act. See Bruce C. McDonald, *above*, note 147 at page 192. See generally Le Dain, *above*, note 95 at pages 276-293; P. Weiler, *The Supreme Court and the Law of Canadian Federalism* (1973) 23 U. of T. Law J. 307, at page 323.

[151] *Above*, note 137.

[152] *Above*, at page 326.

[153] R. Gosse, *The Law of Competition in Canada*, (1962) The Carswell Co., at page 253.

[154] *Above*, note 51, at page 113.

[155] *Murphy v. C.P.R.* [1958] S.C.R. 626; *Caloil Inc. v. A.G. for Canada* [1971] S.C.R. 543; *A.G. of Man. v. Manitoba Egg & Poultry Assn.* [1971] S.C.R. 689.

[156] *Above*, note 155.

[157] (1959) 20 D.L.R. (2d) 406; 29 W.W.R. 369.

[158] *Above*, note 51, at page 113.

[159] A. Smith, *The Commerce Power in Canada and the United States* (1963) Toronto, at page 77. See also: *In Re Board of Commerce Act and the Combines and Fair Prices Act, 1919* (1920), 60 S.C.R. 456 at pages 498-99, per Duff C.J.C.; Professor P.W. Hogg, *above*, note 69.

[160] *John A. McDonald, Railquip Enterprises Ltd. v. Vapor Canada Ltd.* [1972] F.C.R. 1156.

[161] R.S.C. 1970, c. T-10.

[162] The Supreme Court of Canada may decide that Jackett, C.J. went further than necessary, and that the provision in question can be justified under the criminal law power; see *Consolidated Textiles Ltd. v. Central Dynamics Ltd. et al* [1974] 2 F.C.R. 814 at pages 819-20.

[163] LeDain *above*, note 95 at page 312.

[164] W.R. Lederman, *The Concurrent Operation of Federal and Provincial Law in Canada* (1963) 9 McGill L.J. 185; B. Laskin, *Occupying The Field: Paramountcy in Penal Legislation* (1963) 41 Can. B. Rev. 234; L.M. Leigh, *The Criminal Law Power: A Move Toward Functional Concurrency* (1967) 5 Alta. L. Rev. 237; P. Weiler, note 150 *above*, at p. 356; LeDain, note 95 *above* at p. 312; P.G. Barton, *Constitutional Law – Paramountcy, Suspension of Licences of Drinking Drivers – Administrative Chaos* (1975) 53 Can. B. Rev. 80. Donald McLean, *Provincial Suspension Licence v. Federal Prohibition from Driving* (1974) 23 U. of N.B.L.J. 59.

[165] [1960] S.C.R. 804; 25 D.L.R. (2d) 145.

[166] R.S.M. 1954, c. 412, s. 55(1).

[167] S.C. 1953-54, c. 51, s.s. 191(1) and 221(1).

[168] [1960] S.C.R. 823; 25 D.L.R. (2d) 296.

[169] R.S.M. 1954, c. 112, s. 157(1).

[170] S.C. 1953-54, c. 51, s. 221(2).

[171] [1960] S.C.R. 776, 25 D.L.R. (2d) 225.

[172] R.S.O. 1950, c. 351, s. 38(1).

[173] *Above*, note 165 at page 160.

[174] S.O. 1974, c. 131.

[175] S.B.C. 1974, c. 96.

[176] *Above*, note 113.

[177] Ontario, s. 2(a)(x); British Columbia s. 2(3)(j).

[178] *Above*, note 113 s. 36(1)(d).

[179] Ontario, s. 2(a)(viii); British Columbia, s. 2(3)(i)(n).

[180] Ontario, s. 17; British Columbia, s. 25.

[181] s.s. 36(5), 36.1(2), 36.3(3), 36.4(3), 37(4).

[182] M. Friedland, *Double Jeopardy and the Division of Legislative Authority in Canada* (1967) XVII U. of T. Law J. 44, at pages 75-76; see also, M. Friedland, *Double Jeopardy* Clarendon Press, Oxford (1969).

[183] *Above, Double Jeopardy*, c. 13.

[184] Laskin, *Occupying the Field: Paramountcy in Penal Legislation* (1963), XLI Can. B. Rev. 234 at page 245.

[185] *Above*, note 165.

[186] *Mann v. The Queen* (1966) 47 C.R. 400 at page 140; 56 D.L.R. (2d) 1 at pages 10-11.

[187] *Above*, note 171, [1960] S.C.R. 776, at page 800; 25 D.L.R. (2d) 225, at page 246.

[188] [1928] A.C. 187.

[189] S.C. 1920, c. 34.

[190] W.R. Lederman, *The Concurrent Operation of Federal and Provincial Laws in Canada* (1963), 9 McGill L.J. 185 at page 193.

[191] *Above*, note 165.

[192] *Above*, note 171.

[193] *Above*, note 172.

[194] *Above*, note 58.

[195] *Above*, note 186.

[196] R.S.O. 1960, c. 172, s. 60.

[197] LeDain, *above*, note 95, at page 314.

[198] Laskin, *above*, note 184, at page 243.

[199] *Above*, note 165, at page 5, 8, 11 and 160 respectively.

[200] *Ross v. Registrar of Motor Vehicles and A.G. Ontario* (1974), 1 N.R. 9; 42 D.L.R. (3d) 68 (S.C.).

[201] R.S.O. 1970, c. 202.

[202] *Above*, note 200, 1 N.R. 9 at page 13; 42 D.L.R. (3d) 68 at page 77.

[203] *Above*, note 200 at page 79.

[204] Judson and Spence JJ.

[205] *Above*, note 200.

[206] *O'Grady v. Sparling, above*, note 154; the test was reaffirmed in *Mann v. The Queen, above*, note 186.

[207] *Above*, note 200, 1 N.R. 9 at page 14; 42 D.L.R. (3d) 68 at page 34.

[208] This legislative device known as "conditional legislation" is discussed on page 50.

[209] A.H. Birch, *Federalism, Finance and Social Legislation*, Oxford, 1955 at p. 305.

[210] See, for example, Donald V. Smiley, *Canada in Question: Federalism in the Seventies*, McGraw-Hill Ryerson, Toronto 1972, Chapter 3; Richard Simeon, *Federal Provincial Diplomacy; The Making of Recent Policy in Canada*, Univ. of Tor. Press, Toronto, 1972, chapter 2. For an excellent collection of readings on intergovernmental relations in Canada see J. Peter Meekison, (ed.) *Canadian Federalism: Myth or Reality*, 2nd ed. Methuen of Canada, Toronto, 1971, Part 4 at pp. 254-337. This book also contains a useful bibliography on Canadian federalism at pp. 467-486.

[211] See Donald V. Smiley, *Constitutional Adaption and Canadian Federalism Since 1945*, Ottawa, Queen's Printer 1970, at p. 3. See also Smiley, D.V., footnote 210, *above*.

[212] The inter-provincial consumer affairs administrators' conferences are organized every year by a different province. In 1972 the meeting was held in Victoria, B.C., in 1973 in Charlottetown, P.E.I., in 1974 in St. John's, Nfld., and in 1975 in Saskatoon, Sask. Time and space limitations prevent me from discussing the problems of inter-provincial relations in the field of consumer protection. For general discussions of this subject in other fields, see: Richard H. Leach, *Interprovincial Cooperation: Neglected Area of Canadian Federalism* (1959) 2 Can. Pub. Adm. 83; J.H. Aitchison, "Interprovincial Co-operation in Canada" in J.H. Aitchison (ed.) *The Political Process in Canada: Essays in Honour of R. MacGregor Dawson*, Univ. of Tor. Press Toronto, 1963, at p. 153; Donald V. Smiley, *Constitutional Adaptation and Canadian Federalism Since 1945*, Documents of the Royal Commission on Bilingualism and Biculturalism, Information Canada, Ottawa at pp. 101-103; *The Machinery and Structure of Federal-Provincial and Interprovincial Relations in Canada.* The Confederation of Tomorrow Conference, Theme Papers, at p. 37; D.V. Smiley, *Canada in Question: Federalism in the Seventies*, McGraw Hill Ryerson, Toronto, 1972 at pp. 63-65; Richard Simeon, *Federal-Provincial Diplomacy, The Making of Recent Policy in Canada*, University of Toronto Press 1972 at p. 137.

[213] A ministers' meeting was held in Ottawa on May 25-26, 1971, and it was chaired by the then Minister of Consumer and Corporate Affairs, the Hon. Ron Basford. Ministerial meetings were held in May 1973 in Quebec City and in May 1974 in Jasper, Alta. No ministers' meeting has been held in 1975.

[214] Discussed in the following articles and books, I. and K. Feltham, *Retail Instalment Sales Financing-Rights of the Assignee-Endorsee-Identification of the Finance Company with the dealer to protect the buyer* (1962) 40 Can. B. Rev., 461; J.S. Ziegel, *above*, note 26 at pp. 146, 156; Goode and Ziegel, *Hire-Purchase and Conditional Sale: A Comparative Survey*, London, 1965 at pp. 111-113; R.C.C. Cuming, *Protection of Consumer-Borrowers-Limitations on the Remedies of Consumer-Lenders* (1968) 33 Sask. L. Rev. 58 at p. 100; J.S. Ziegel, *above*, note 23 at pp. 497-498; B. Crawford, *Consumer Instalment Sales Financing since Federal Discount Ltd. v. St. Pierre* (1969) 19 U. of Tor. L.J. 353; W.L. Dewar, *Rights of Assignees of Conditional Sales Contracts* (1969) Intramural L.J. 79; J.S. Zeigel, Range v. *Corporation de Finance Belvedere – Consumer Notes – Status of Subsequent Holders – Need for Legislative Intervention* (1970) 48 Can. B. Rev. 309.

[215] B.N.A. Act, s. 91(19).

[216] B.N.A. Act, s. 92(13).

[217] S.C. 1970 c. 48, see J.S. Ziegel, *Canada Regulates Consumer Notes* (1971) Business Lawyer 1455; A. Bohemier, *Les Lettres et les billets du consommateur* (1973) 76 Revue du Notariat 79-105, 155-172.

[218] See footnote 5, *above*.

[219] See *An Act Respecting Bankruptcy and Insolvency*, Bill C-60 tabled in the House of Commons on May 5th, 1975. See also *Background Papers for the Bankruptcy and Insolvency Bill*, Consumer and Corporate Affairs, Ottawa 1975.

[220] See footnote 15, *above*.

[221] Section 213 of the Bankruptcy Act, R.S.C. 1970 c. B-3 states:

> This Part [Part X, Orderly Payment of Debts], shall come into force in any province only upon the issue, at the request of the Lieutenant Governor-in-Council of that province, of a proclamation by the Governor-in-Council declaring it to be in force in that province.

[222] Edward Weidner's "Decision making in a Federal System" in Arthur W. McMahon (ed) *Federalism Mature and Emergent*, New York, 1955, at p. 368. See also Richard Simeon, footnote 212, *above*, at p. 184.

[223] These developments are described in Richard Simeon's book on federal-provincial relations, footnote 212, *above*, at p. 178 on and passim.

[224] See footnote 15, *above*.

[225] The purpose of Consumer Help Offices is explained as follows in a news release of the federal Department of Consumer and Corporate Affairs.

> Personal involvement through the neighborhood approach is the basis of Consumer Help Office activities. Consumer Help Offices are set up with existing groups such as the Human Rights on Welfare Association. Adding a consumer

service to an existing organization has been found to be an effective means of reaching specific population groups and of complementing the department's own consumer services which are designed to serve the population as a whole.

The Consumer Help Office concept is based on the belief that many consumers are unaware of the range of services available to them as consumers. The department hopes to reach these people through local Consumer Help Offices.
(NR-75-59)

[226] Simeon, footnote 212, *above*, at page 187.

[227] J.A. Corry, *Difficulties of Divided Jurisdiction*, a study prepared for the Royal Commission on Dominion-Provincial Relations, Ottawa, King's Printer, 1939, at pp. 9-10; Professor Corry's analysis has been criticized by Professor Donald V. Smiley as "a somewhat deterministic account of bureaucratic behaviour." See D.V. Smiley, *Public Administration and Canadian Federalism* (1964) 7 Can. Pub. Adm. 371 at pp. 375, 377.

[228] Richard Simeon, footnote 212, *above*, at p. 145.

[229] A.R. Kear, *Cooperative Federalism: A Study of the Federal Provincial Continuing Committee on Fiscal and Economic Matters* (1963) 6 Can. Pub. Adm. 43; Edgar Gallant, *The Machinery of Federal Provincial Relations I* (1965) 8 Can. Pub. Adm. 515; R.M. Burns, *The Machinery of Federal-Provincial Relations II* (1965) 8 Can. Pub. Adm. 527; Donald V. Smiley, "Canadian Federalism and the Resolution of Federal-Provincial Conflict" in *Contemporary Issues in Canadian Policies*, Frederick Vaughan, Patrick Kyba and O.P. Dwivedi, Editors, Prentice-Hall of Canada, Scarborough, 1970; Gérard Veilleux, *Les Relations intergouvernementales au Canada*, 1967-68, Les Presses de l'université du Québec, Montreal, 1971. Richard Simeon, footnote 212, *above*, at p. 415.

[230] See page 39, *above*.

[231] For the history of constitutional negotiations leading to the Victoria Charter, see Simeon, footnote 212, *above* at pp. 88-123.

[232] W.R. Lederman, *Cooperative Federalism: Constitutional Revisions and Parliamentary Government in Canada*, (1971) 78 Queen's Quarterly 7 at page 9. See also Lederman, footnote 56, *above*.

[233] See footnote 231, *above*.

[234] This reduction in the growth of the departments is almost certain since the announcement on October 13, 1975, of a new federal plan for price and wage controls to be implemented with the help of the provinces.

[235] See footnote 21, *above*. *Textile Labelling Act*, 1970, R.S.C. c.46 (1st Supp.), *Food and Drug Act* 1970 R.S.C. c. F-27, Quebec, *Official Languages Act* (Bill 22, 1975).

[236] At page 36.

[237] See generally, M.H. Gropper, *The Credit Card in Canada, Some Problems and Proposals*, Canadian Consumer Council, Ottawa, 1970; D.M. Paton, "The Chargex Credit Card Plan:

A Comment on Law and Policy" in W.A.W. Neilson (ed.) *Consumer and the Law in Canada*, Business Law Program, Osgoode Hall Law School, Toronto, 1970. Ronald C.C. Cuming, "Consumer Credit Law" in G.H.L. Fridman (ed.) *Studies in Canadian Business Law* Butterworth, Toronto 1971, 87 at pp. 107-110.

[238] See Howard R. Eddy, *The Canadian Payment System and the Computer: Issues of Law Reform*, Law Reform Commission, Ottawa, 1974; Canada Departments of Communications and Finance, *Towards an Electronic Payment System*, Information Canada, Ottawa, 1975. Canada Departments of Communications and Justice, *Privacy and Computers*, Information Canada, Ottawa 1972.

[239] Under the B.N.A. Act s.s. 91(14), Currency and Coinage; 91(15), Banking, Incorporation of Banks and the Issue of Paper Money; 91(18), Bills of Exchange and Promissory Notes.

[240] See page 39, *above*.

[241] See footnote 226, *above*

[242] See the general definitions of unfair trade practices in the B.C. and Ontario Trade Practices Acts, footnote 12, *above*, and the general prohibition of false and misleading advertising in the new section 36(1) of the Combines Investigation Act, reproduced at page 30, *above*.

[243] D.V. Smiley, footnote 227, *above*, at p. 46.

[244] See Simeon, footnote 212, *above* at page 143.

[245] See Simeon, footnote 212, at pp. 229-230.

[246] Footnote 227, *above*, at pp. 378-379.

[247] See Simeon footnote 212, *above* at p. 253.

[248] See Simeon footnote 212, *above*, at page 194.

[249] See, for example, *Upholstered and Stuffed Articles Act*, R.S.O. 1970 c. 474.

[250] S.C. 1971 c. 363 s. 27.

[251] See G.V. La Forest, *Delegation of Legislative Power in Canada* (1975) 21 McGill L.J. 131 at p. 137.

[252] At page 34, *above*.

[253] See footnote 221, *above*.

[254] P.L. 93-637, s. 111(c)(2).

[255] P.L. 90-321.

[256] See page 36, *above*.

[257] See page 44, *above*.

[258] R.S.C. 1970, c. H-3.

[259] R.S.C. 1970, c. 26 (1st Supp.).

[260] R.S.C. 1970, c. F-27.

[261] See generally, S.M. Waddams, *Products Liability*, Carswell, Toronto, 1974, chapter 6; A.M. *Linden, Canadian Negligence Law*, Butterworths, Toronto, 1972, chapter 4; E.R. Alexander, *Legislation and the Standard of Care in Negligence* (1964) 42 Can. B. Rev. 243. See also A.M. Linden, *A Century of Tort Law in Canada* (1967) Can. B. Rev. 381 at 387.

[262] See pages 24-25 *above*.

[263] See Linden, note 261, *above* at pp. 155-159. Professor Linden's remarks were made in the context of advocating the imposition of strict civil liability on violations of pure food legislation by Canadian courts. These remarks can be used to advocate the legislative imposition of the same doctrine on violation of health and safety standards.

[264] See p. 38, *above*.

[265] Ibid.

[266] D.V. Smiley, *Federal Provincial Conflict in Canada* (1974) 4 Publius, 19 at page 20.

BIBLIOGRAPHY

1. Articles

Aitchison, J.H., "Interprovincial Cooperation in Canada," in J.H. Aitchison (ed.) *The Political Process in Canada: Essays in Honour of R. MacGregor Dawson*, Univ. of Toronto Press, Toronto, 1973.

Alexander, E.R., *Legislation and the Standard of Care in Negligence* (1964) 42 Can. B. Rev. 243.

Atkey, Ronald G.,"The Provincial Interest in Broadcasting under the Canadian Constitution", in *The Confederation Challenge*, Ontario Advisory Committee on Confederation, Background Papers and Reports, vol. 2, p. 189.

Barton, Peter G., *Constitutional Law – Paramountcy, Suspension of Licences of Drinking Drivers – Administrative Chaos* (1975) Can. B. Rev. 80.

Bentley, Patrick M., *Constitutional Law – Division of Powers – Interest – Regulation of Contracts* (1964) 3 Alta. L. Rev. 312.

Bohémier, A., *Les Lettres et les billets du consommateur* (1973) Rev. du Notariat 79-105; 155-172.

Burns, R.M., *The Machinery of Federal-Provincial Relations* II (1965) Can. Pub. Admin. 527.

Cohen, Ronald I., *Advertising to Children: The Constitutional Validity of Quebec's Regulation* (1974) 12 Can. Patent Reporter (N.S.) 173.

Crawford, B., *Consumer Instalment Sales Financing since Federal Discount Ltd. v. St. Pierre* (1969) 19 Univ. of Tor. L.J. 353.

Cuming, Ronald C.C., *Protection of Consumer – Borrowers – Limitations on the Remedies of Consumer Lenders* (1968) 33 Sask. L. Rev. 58.

— "Consumer Credit Law," in G.H.L. Fridman (ed.) *Studies in Canadian Business Law*, Butterworth, Toronto, 1971, p. 87.

Dewar, W.L., *Rights of Assignees of Conditional Sales Contracts* (1969) Intramural L.J. 79.

Feltham, I. and K. Feltman, *Retail Instalment Sales Financing – Rights of the Assignee – Endorsee – Identification of the Finance Company with the Dealer to Protect the Buyer* (1962) 40 Can. B. Rev. 461.

Friedland, Martin L., *Double Jeopardy and the Division of Legislative Authority in Canada* (1967) 17 Univ. of T. L.J. 44.

Gallant, Edgar, *The Machinery of Federal Provincial Relations* I (1965) 8 Can. Pub. Adm. 515.

Gardiner, M., *Alcoholic Beverage Advertising on Radio and Television in Canada* (1969) 1 Canadian Communications L. Rev. 107.

Hogg, Peter W., "The Constitutionality of Federal Regulation of Mutual Funds", in J.C. Baillie and W.M.H. Grower, *Proposals for a Mutual Fund Law for Canada*, Information Canada, Ottawa, 1974.

Honsberger, John D., "Part X of the Bankruptcy Act and the Overcommited Debtor," in W.A.W. Neilson (ed.) *Consumer and the Law in Canada*, Business Law Program, Osgoode Hall Law School, Toronto, 1970.

Kear, A.R., *Cooperative Federalism: A Study of the Federal Provincial Continuing Committee on Fiscal and Economic Matters* (1963) 6 Can. Pub. Adm. 43.

LaForest, G.V., *Delegation of Legislative Power in Canada* (1975) 21 McGill L.J. 131.

Laskin, Bora, *Occupying the Field: Paramountcy in Penal Legislation* (1963) 41 Can. B. Rev. 234.

Leach, Richard H., *Interprovincial Cooperation: Neglected Area of Canadian Federalism* (1959) 2 Can. Pub. Adm. 83.

LeDain, Gerald, *Sir Lyman Duff and the Constitution* (1974) 12 Osgoode Hall L.J. 261.

Lederman, W.R., *The Concurrent Operation of Federal and Provincial Law in Canada* (1963) 9 McGill L.J. 185.

— "The Balanced Interpretation of the Federal Distribution of Legislative Power in Canada," in Macpherson and Crépeau (eds.) *The Future of Canadian Federalism*, Univ. of Toronto Press, Toronto, 1965.

— *Some Forms and Limitations of Cooperative Federalism* (1967) 45 Can. B. Rev. 409.

— *Cooperative Federalism: Constitutional Revisions and Parliamentary Government in Canada* (1971) 78 Queen's Quarterly 7.

— *Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation* (1975) 53 Can. B. Rev. 597.

Leigh, L.M. *The Criminal Law Power: A Move Toward Functional Concurrency* (1967) 5 Alta. L. Rev. 237.

Letwin, Leon, *Canadian Consumer Credit Legislation* (1967) 8 Boston College Ind. and Com. L. Rev. 201.

Linden, A.M., *A Century of Tort Law in Canada* (1967) Can. B. Rev. 381.

Martel, P., *L'Enigmatique loi sur l'intérêt* (1969) 71 Rev. du Notariat 421.

McLean, Donald, *Provincial Suspension License v. Federal Prohibition from Driving* (1974) 23 Univ. of N.B.L.J. 59.

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

Patton, D.M., "The Chargex Credit Card Plan: A Comment on Law and Policy," in W.A.W. Neilson (ed.) *Consumer and the Law in Canada*, Business Law Program, Osgoode Hall Law School, Toronto, 1970.

Pitch, Harvin, *Consumer Credit Reform: The Case for a Reviewed Federal Initiative* (1972) 5 Ottawa L. Rev. 324.

Shaffer, Howard B., *The Attorney General for Ontario v. Barfried Enterprises Ltd.* (1965) 11 McGill L.J. 268.

Sinclair, A.M., *Interest and Bonus Payments in the Law of Mortgages* (1964) 14 Univ. of N.B.L.J. 35.

Smiley, Donald V., *Public Administration and Canadian Federalism* (1964) 7 Can. Pub. Adm. 371.

— *Constitutional Adaptation and Canadian Federalism Since 1945*, Documents of the Royal Commission on Bilingualism and Biculturalism, Information Canada, 1970, volume 4.

— "Canadian Federalism and the Resolution of Federal Provincial Conflict," in Frederick Vaughan, Patrick Kyba and O.P. Dwivedi (eds.) *Contemporary Issues in Canadian Policies*, Prentice-Hall of Canada, Scarborough, 1970.

— *Federal Provincial Conflict in Canada* (1974) 4 Publius 19.

Turgeon, H., *Quelques Problèmes sur la loi fédérale de l'intérêt* (1961) 64 Rev. du Notariat 183.

Warren, W.R., *Regulation of Finance Charges in Retail Instalment Sales* (1959) 68 Yale L.J. 839.

Waterman, J.B., *In Defence of the Unconscionable Transactions Relief Act* (1963) 21 Univ. of T. Fac. L. Rev. 117.

Weidner, Edward, "Decision Making in a Federal System," in Arthur W. MacMahon (ed.) *Federalism Mature and Emergent*, New York, 1975.

Weiler, Paul C., *The Supreme Court of Canada and the Law of Canadian Federalism* (1973) 23 Univ. of T.L.J. 307.

Ziegel, Jacob, S., *Retail Instalment Sales Legislation: A Historical and Comparative Survey* (1962) 14 Univ. of T.L.J. 143.

— "The Legal Regulation of Consumer Credit" in J.S. Ziegel and R.E. Olley (eds.) *Consumer Credit in Canada*, Proceedings of a Conference on Consumer Credit, University of Saskatchewan, Saskatoon, 1966.

Ziegel, J.S., *Consumer Credit Regulation: A Canadian Consumer Oriented Viewpoint* (1968) 68 Col. L. Rev. 488.

— *Range v. Corporation de Finance Belvedere – Consumer Notes – Status of Subsequent Holders – Need for Legislative Intervention* (1970) 48 Can. B. Rev. 309.

— *Canada Regulates Consumer Notes* (1971) 36 Bus. Lawyer 1455.

— *The Future of Canadian Consumerism* (1973) 51 Can. B. Rev. 91.

— *Canadian Consumer Reporting Legislation: Trends and Problems* (1973) 11 Osgoode Hall L.J. 503.

2. Books and Government Publications

Aitchison, J.H. (ed.), *The Political Process in Canada: Essays in Honour of R. MacGregor Dawson.* Univ. of Toronto Press, Toronto, 1963.

Baillie, J.C. and W.M.H. Grover, *Proposals for a Mutual Fund Law for Canada,* Information Canada, Ottawa, 1974.

Birch, Anthony H., *Federalism Finance and Social Legislation in Canada, Australia and the United States*, Oxford, Clarendon Press, 1955.

Canada. Dept. of Communications and Dept. of Justice, *Privacy and Computers,* Information Canada, Ottawa, 1972.

Canada. Dept. of Communications and Dept. of Finance, *Towards an Electronic Payment System,* Information Canada, Ottawa, 1975.

Canada. Dept. of Consumer and Corporate Affairs, *Background Papers for the Bankruptcy and Insolvency Bill*, Ottawa, 1975.

Canada. Royal Commission on Dominion-Provincial Relations, *Report*, Queen's Printer, Ottawa, 1954.

Canada. Special Joint Committee of the Senate and House of Commons on Consumer Credit, *Proceedings*, Queen's Printer, Ottawa, 1967.

Canada. Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Final Report*, Information Canada, Ottawa, 1972.

Corry, J.A., *Difficulties of Divided Jurisdiction*, A Study Prepared for the Royal Commission on Dominion-Provincial Relations, King's Printer, Ottawa, 1939.

Curran, Barbara A., *Trends in Consumer Credit Legislation*, Univ. of Chicago Press, Chicago, 1965.

Economic Council of Canada, *Interim Report: Consumer Affairs and the Department of the Registrar General*, Queen's Printer, Ottawa, 1967.

Eddy, Howard R., *The Canadian Payment System and the Computer: Issues of Law Reform*, Law Reform Commission, Ottawa, 1974.

Fridman, G.H.L. (ed.), *Studies in Canadian Business Law*, Butterworth, Toronto, 1971.

Friedland, Martin L., *Double Jeopardy*, Clarendon Press, Oxford, 1969.

Goode, R.M. and J.S. Ziegel, *Hire-Purchase and Conditional Sales: A Comparative Study of Commonwealth and American Law*, The British Inst. of Int. and Comp. Law, London, 1965.

Gosse, Richard, *The Law of Competition in Canada*, Carswell, Toronto, 1962.

Gt. Brit. *Report of the Committee on Consumer Credit*, H.M. Stationery Office, London, 1971, Cmnd. 4596.

Gropper, M.H., *The Credit Card in Canada: Some Problems and Proposals*, Canadian Consumer Council, Ottawa, 1970.

Laskin, Bora, *Canadian Constitutional Law*, 4th ed. A. Abel, Carswell, Toronto, 1973.

Linden, A.M., *Canadian Negligence Law*, Butterworth, Toronto, 1972.

McMahon, Arthur W. (ed.), *Federalism Mature and Emergent*, New York, 1955.

Macpherson, C.B. and P.-A. Crépeau (eds.), *The Future of Canadian Federalism*, Univ. of Toronto Press, Toronto, 1965.

Meekison, J. Peter (ed.), *Canadian Federalism: Myth or Reality*, 2nd ed., Methuen of Canada, 1971.

Neilson, William A.W. (ed.), *Consumer and the Law in Canada*, Business Law Program, Osgoode Hall Law School, Toronto, 1970.

Nova Scotia. Royal Commission on the Cost of Borrowing Money, Cost of Credit and Related Matters, *Final Report*, Queen's Printer, Halifax, 1965.

Ontario. Legislative Assembly. Select Committee on Consumer Credit, *Final Report*, Toronto, 1965, Sessional Paper No. 85.

Ontario Advisory Committee on Confederation, *The Confederation Challenge*, Background Papers and Reports.

Ontario Law Reform Commission, *Report on Consumer Warranties in the Sale of Goods*, Ontario Dept. of Justice, 1972.

Simeon, Richard, *Federal Provincial Diplomacy: The Making of Recent Policy in Canada.* Univ. of Toronto Press, Toronto, 1972.

Smiley, Donald V., *Constitutional Adaptation and Canadian Federalism since 1945*, Queen's Printer, Ottawa, 1970.

— *Canada in Question: Federalism in the Seventies*, McGraw-Hill Ryerson, Toronto, 1972.

Smith, Alexander, *The Commerce Power in Canada and the United States*, Butterworth, Toronto, 1963.

Vaughan, Frederick, Patrick Kyba and O.P. Dwivedi (eds.), *Contemporary Issues in Canadian Policies*, Prentice-Hall of Canada, Scarborough, 1970.

Veilleux, Gérard, *Les Relations Intergouvernementales au Canada*, 1967-68, Les Presses de l'Université du Québec, Montreal, 1971.

Waddams, S.M. *Products Liability*, Toronto, Carswell, 1974.

Williamson, John P., *Securities Regulation in Canada*, Toronto, Univ. of Toronto Press, 1960.

Ziegel, Jacob S. and R.E. Olley, *Consumer Credit in Canada*, Proceedings of a Conference on Consumer Credit, University of Saskatchewan, Saskatoon, 1966.