THE SCOPE OF FEDERAL POWER IN RELATION TO CONSUMER PROTECTION

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I. INTRODUCTION

In dealing with a subject as broad as that of the federal power over consumer protection, one is faced with a problem somewhat analogous to that confronting the courts on a reference case: the difficulty of focusing the discussion without benefit of specific facts and proposals. One could, of course, solve the problem by discussing the constitutionality of specific consumer protection proposals that have already been made.[1] The number of such proposals, both those enacted and those under various stages of consideration for future enactment, would necessitate extensive research to collect and analyze them, and ultimately a difficult selection process in determining which proposals to discuss within an article of readable length. Such an approach would also risk diverting attention from the constitutional principles, with which the article is primarily concerned, to the specific problems of those particular proposals.

At the risk of being overly general and of being accused of failing to focus appropriate discussion on specific examples, this article will adopt an approach from which the courts shy away. Federal powers of potential relevance to the consumer protection area will be discussed in turn.[2] The principal areas of discussion are trade and commerce, criminal law, banking and credit, other federally regulated industries, and federal residuary power.

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[1] As a result of recent developments in federal legislation respecting unfair competition and provincial legislation respecting unfair trade practices, a body of literature has been developing on the constitutionality of specific proposals. *See* R. COHEN & J. ZIEGEL, THE POLITICAL AND CONSTITUTIONAL BASIS FOR A NEW TRADE PRACTICES ACT (1976); L. ROMERO, FEDERAL-PROVINCIAL RELATIONS IN THE FIELD OF CONSUMER PROTECTION 5-34 (1976); Hatfield, *The Constitutionality of Canada's New Competition Policy*, 26 U.N.B.L.J. 3 (1977); Hogg & Grover, *The Constitutionality of the Competition Bill*, 1 CAN. BUS. L.J. 197 (1976).

[2] The adoption of this approach is greatly facilitated by the recent publication of two major treatises on the Canadian constitution: P. HOGG, CONSTITUTIONAL LAW OF CANADA (1977) and W. MCCONNELL, COMMENTARY ON THE BRITISH NORTH AMERICA ACT (1977). Both works offer a basic outline of the current state of Canadian constitutional law.

II. TRADE AND COMMERCE

At first glance, the federal power with respect to "The Regulation of Trade and Commerce"[3] would seem to have the greatest potential as a source of power for federal consumer protection legislation. The objective of consumer protection measures is to protect one person, the consumer, from the effects of deficiencies in a good or service provided by another. Normally, therefore, there will have been a transaction between the parties involving the supply of the good or service, and this would appear to be a part of the subject matter of trade and commerce.

In a constitutional context, however, the federal trade and commerce power has been given a limited scope as a result of apparent concern by the Judicial Committee of the Privy Council that a wide interpretation would severely restrict provincial power over property and civil rights. In effect, the Judicial Committee devised a new formula for the division of powers over what might otherwise seem to be trade and commerce. Trade and commerce was said to encompass interprovincial trade, international trade, and general regulation of trade and commerce. Regulation of particular businesses or trades within a province, however, was held to be a provincial matter under property and civil rights.[4]

Since the abolition of appeals to the Judicial Committee in 1949, there have been some indications that the Supreme Court of Canada may eventually reject this formula. Although it is not yet clear whether they would do so categorically, there is reason to hope they may.

The Judicial Committee's formula embodies a view that federal and provincial powers are mutually exclusive, a view which has found little favour in recent years. Instead, the Supreme Court of Canada has made wide use of the double aspect doctrine. Under this doctrine, federal and provincial governments may, notwithstanding the exclusivity of their powers, enact similar legislation by dealing with the matter in question from different aspects. Had the double aspect doctrine achieved its current prominence before the Judicial Committee's formulation of the trade and commerce power, regulation of particular businesses or trades within a province would have been a prime candidate for its application.

In cases involving regulation of the grain trade during the late 1950's,[5] the Supreme Court, although it did not reject the Judicial Committee's formulation of the trade and commerce power, recognized a federal power to regulate local businesses as incidental to the regulation of interprovincial and international trade. Special factors in the grain trade, however, such as the heavy portion of extraprovincial trade in the total grain trade in Canada, and the existence of a declaration that most of the facilities involved were works for the general advantage of Canada, make these cases of uncertain application in other circumstances.

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[3] B.N.A. Act, s. 91(2).

[4] *See* HOGG, *supra* note 2, at 267-71, and the cases cited therein.

[5] *See id.* at 271-72, and the cases cited therein.

That the Judicial Committee's formula may yet be discarded, if not explicitly disapproved, by the Supreme Court is best evidenced in the attitude, if not in the actual statements, of that Court in the recent *Reference re the Agricultural Products Marketing Act, the Farm Products Marketing Agencies Act, & The Farm Products Marketing Act.*[6] Historically, the Judicial Committee's formula had its most frustrating impact on marketing legislation. It is practically impossible to subdivide trade in any commodity into intraprovincial trade under provincial jurisdiction on the one hand and extraprovincial trade under federal jurisdiction on the other hand. As a result, both federal and provincial marketing schemes frequently found themselves in constitutional difficulty.

In the past, the attitude of the courts often seemed to express a recognition of that difficulty, but as well, a feeling that the legislation must be carefully framed to avoid overstepping federal or provincial power, as the case may be. In the 1978 *Marketing Reference* decision, however, the Supreme Court appears to take a pragmatic approach, and indicates it is prepared to give presumptive validity to a scheme in which both federal and provincial legislatures evidence a common objective and a respect for the proper scope of their respective legislative authorities.

If the Judicial Committee's formulation of the trade and commerce power is still valid, its potential for federal consumer protection legislation may be limited. The federal government might regulate goods which cross provincial or national boundaries but, generally, not particular trades or businesses within a province. Regulation of the latter would be possible only if necessarily incidental to the regulation of the former. Such incidental legislation may be possible only where the regulation is part of a fairly comprehensive scheme of regulation of the trade in a commodity, and where a substantial portion of the commodity crosses provincial or national boundaries.

The boundary between regulation of extraprovincial trade, and regulation of particular trades and businesses within a province is uncertain. In the chain of production and distribution of most commodities, the commodity is handled by a number of business entities, many of which operate solely within a province. No clear legal guideline has been provided as to the circumstances in which regulation of such a chain of production and distribution falls on one side or the other of that boundary.

Federal schemes sufficiently comprehensive to be completely effective would be vulnerable to attack on the basis that they intruded on particular trades or businesses within a province. Since provincial schemes would also be vulnerable for encroaching on extraprovincial trade, effective regulation may not be possible without federal and provincial co-operation (as in the marketing case), which co-operation may be difficult to achieve.

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[6] [1978] 2 S.C.R. 1198, 84 D.L.R. (3d) 257.

On the other hand, if federal regulation of trade and commerce is now permitted, on the basis of a double aspect, to include regulation of particular trades and businesses within a province, the potential of the trade and commerce power to support federal consumer protection measures could be much broader. The extent of this potential would depend on the specific rationale for the wider interpretation. If that rationale rests on the incidental doctrine, the existence of a general scheme of regulation of extraprovincial trade in one or more commodities, with respect to which regulation of particular local trades could be regarded as incidental, is probably essential.

Moreover, insofar as such a general scheme were to affect trade in any particular commodity, one might question whether extraprovincial trade in that commodity is sufficient to support incidental federal legislation. The incidental doctrine grew out of cases involving the grain trade, where the validity of extensive federal regulation, based on substantial extraprovincial trade, has long been established.[7] It is open to doubt whether significantly lower levels of extraprovincial trade in a particular commodity would be sufficient to support incidental federal regulation of local trade in the commodity. Indeed, if minimal extraprovincial trade were sufficient, the incidental power would effectively resemble a plenary federal power to regulate local trade. Presumably the very reason for limiting the federal government to an incidental power in this area would be to avoid the intrusion upon provincial power implicit in such a plenary federal power. On the other hand, the necessity of anything but a minimal level of extraprovincial trade could require protracted litigation to determine the appropriate threshold level.

Alternatively, if the rationale for a broader interpretation of the trade and commerce power rests on full acceptance of the double aspect doctrine, the potential for federal consumer protection measures under this power is quite wide. Insofar as local trade is concerned, the federal aspect would seem necessarily to be one of trade, while the provincial aspect would be one of property and civil rights. On this view, an intention to regulate local trade would itself be a valid federal purpose. As with federal regulation of extraprovincial trade, no other justification would be required. Moreover, for the provincial government to regulate local trade, it would have to show some other justification—namely, a property and civil rights purpose. Precisely this logic, of course, may convince the courts to continue to avoid the full double aspect approach in this area.

Another possibility is that plenary federal power could be exercised over particular trades within a province under an aspect of the trade and commerce power recognized in *Citizens Insurance Co. v. Parsons*:[8] the power of general regulation of trade and commerce. The results of those

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[7] *See* HOGG, *supra* note 2, at 271-72, and the cases cited therein.

[8] 7 App. Cas. 96, 51 L.J.P.C. 11 (1881).

cases which suggest some scope to federal power in this area,[9] however, seem not to depend on this aspect of the trade and commerce power. If the courts remain unwilling to recognize a broader scope to the trade and commerce power on the basis of either the incidental power doctrine or a full double aspect doctrine, it is doubtful that they will give any real scope to the federal power over general regulation of trade. The recent decision of the Supreme Court in *MacDonald v. Vapor Canada Ltd.*,[10] where the Court refused to uphold a broad federal provision against dishonest business practices as a general regulation of trade, provides some reinforcement for that view.

In determining the extent of federal power over trade and commerce, the question arises as to what activities constitute trade and commerce. In the past this question has tended to be overshadowed by the question as to whether the scope of a particular trade was local or national, but it could be of critical importance in a consumer protection context.

In the marketing cases there is some support for the view that production and marketing regulation do not have a common constitutional basis. By way of example, the judgment of Mr. Justice Pigeon in the 1978 *Marketing Reference* takes this view. He states: "In my view, the control of production, whether agricultural or industrial, is *prima facie* a local matter, a matter of provincial jurisdiction."[11] If this is so, federal power over trade and commerce may be limited to regulation of the system of distribution.[12] While much can be done to protect consumers by regulating the system of distribution, inability to regulate the production process directly would be a major shortcoming. Moreover, attempts to regulate the production process indirectly through distribution controls might be seen as colourable.

Geographical limitations on the trade and commerce power may create problems for federal regulation with respect to services. By their nature, service transactions usually remain within provincial boundaries. Without extraprovincial trade to which regulation could attach, it would be difficult to support federal regulation under either the narrow Privy Council formulation of the trade and commerce power or the wider incidental power approach. Under a full double aspect approach, on the

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[9] *See* HOGG, *supra* note 2, at 272-73, and the cases cited therein.

[10] [1977] 2 S.C.R. 134, 66 D.L.R. (3d) 1 (1976).

[11] *Supra* note 6, at 1293, 84 D.L.R. (3d) at 324.

[12] The decision in Central Canada Potash Co. v. Government of Saskatchewan, [1979] 1 S.C.R. 42, 23 N.R. 481 (1978), by holding provincial controls over production *ultra vires*, may indicate that there is federal power in this area. On the other hand, it may simply illustrate that judicial insistence on carefully framed legislation in the trade and commerce context is still alive. Federal production controls might equally be struck down as an interference with local trade. The recent decisions in The Queen v. Dominion Stores Ltd., 30 N.R. 399 (S.C.C. 1979), and Labatt Breweries of Canada Ltd. v. Attorney-General of Canada, 30 N.R. 496 (S.C.C. 1979), seem to indicate rather emphatically that, even if change may have occurred in the judicial attitude toward marketing as trade and commerce, product controls are still exclusively provincial in respect of product destined for an intraprovincial market.

other hand, services might be more amenable than goods to federal regulation, since it would be difficult to separate a production phase and exclude it from the power to regulate.

Given that an activity being regulated falls within trade and commerce, are there any limitations on the ways in which the federal government may deal with that activity under this power? The decision in *MacDonald v. Vapor Canada Ltd.*[13] appears to hold that a regulatory agency is a necessary part of federal trade and commerce regulation.[14] This limitation is textually supportable since regulation does imply an administrative process. If an administrative process is a necessary feature of trade and commerce legislation, federal power to legislate regarding consumer protection under the trade and commerce power will depend on both extraprovincial trade characteristics and the establishment of an administrative process. Due to current concerns over proliferation of the federal bureaucracy, the latter requirement could impede the development of federal legislation under the trade and commerce power.

It is doubtful whether there are any other limitations upon the types of measure that can be enacted under the trade and commerce power. A wide variety of measures can be found in marketing legislation (particularly in the case of grain) enacted under the trade and commerce power, with no suggestion of any constitutional restrictions upon the types of measures employed.

The attitude of the courts in the trade and commerce area is likely to be analogous to that displayed in the criminal law area, which is discussed below. Some of the elements necessary to support the constitutionality of federal legislation may consist of particular methods of enforcement, as is the case with the penal requirement in the criminal law area, and as may be the case with the administrative process requirement in the trade and commerce area. If, however, the presence of such elements establishes that the purpose of the legislation is constitutional, additional methodology will probably be upheld even if normally associated with provincial powers.

It may be necessary that the methods used be integrated in some way with the required method of enforcement—in this case, the administrative process. Otherwise, the courts might test the provisions for such other methodology in isolation from those containing the constitutionally required elements, and might conclude that the former provisions cannot stand in the absence of the latter. For example, a set of consumer protection measures might combine provisions involving an administrative process with provisions for "enforcement" by the private civil legal

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[13] *Supra* note 10.

[14] *Id.* at 172, 66 D.L.R. (3d) at 31 (*per* Laskin C.J.C.). This proposition interprets the Chief Justice's comments as establishing the existence of a regulatory scheme as a necessary, rather than sufficient, condition for valid trade and commerce legislation. Some commentators, however, have interpreted his remarks as proposing a sufficient condition, and have then questioned their validity since such regulatory schemes have been struck down in the past. *See* HOGG, *supra* note 2, at 274.

process. Assuming that the former provisions were held valid, the latter provisions might nonetheless be struck down as an invasion of provincial power, unless tied to the administrative process. The administrative process requirement itself would seem sufficiently flexible, however, to allow for its integration with almost any other desired methodology. Such an integration would provide a strong argument that the methodology was merely incidental to the entire scheme, and therefore *intra vires* Parliament.

III. Criminal Law

Apart from the federal trade and commerce power, the federal power over "The Criminal Law"[15] has perhaps the greatest potential as a source for federal consumer protection legislation. The courts have not imposed any insurmountable limitations on the scope of the criminal law power. Moreover, it is in this area that the courts have allowed the greatest overlap with the major source of provincial power in the field of consumer protection—property and civil rights in the province.[16]

To support particular criminal legislation it is probably sufficient that Parliament regards the conduct being dealt with as a public wrong and attaches penal consequences as a result.[17] It should be possible to satisfy a court that legislation which penalizes conduct harmful to consumers is genuinely intended to deal with such conduct as a public wrong within the legitimate objectives of the criminal law. Some federal legislative efforts, however, which arguably fell within the criminal law power, have been held unconstitutional. Such cases have typically involved attempts to control business activity.[18] But concern that consumer protection measures may come under a special scrutiny, to which most exercises of the federal criminal power are not subject, seems unwarranted. These cases can be explained on the basis of elements of colourability: a finding that the federal government was attempting to accomplish some purpose falling within provincial jurisdiction, and not genuinely recognizing a particular conduct as a public wrong. While it is possible that the federal government could act in the area of consumer protection in such a way as to inspire similar judicial scepticism

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[15] B.N.A. Act, s. 91(27).

[16] *See* Arvay, *The Criminal Law Power in the Constitution and Then Came McNeil and Dupond*, 11 Ottawa L. Rev. 1 (1979).

[17] Proprietary Articles Trade Ass'n v. Attorney-General for Canada, [1931] A.C. 310, at 324, [1931] 2 D.L.R. 1, at 9 (P.C.). For a full discussion of judicial attempts to define the criminal law power, *see* Hogg, *supra* note 2, at 278-81.

[18] *See* Reference as to the Validity of S. 5(*a*) of the Dairy Industry Act, [1949] S.C.R. 1, [1949] 1 D.L.R. 433; Attorney-General for Ontario v. Reciprocal Insurers, [1924] A.C. 328, [1924] 1 D.L.R. 789 (P.C.); *In re* the Board of Commerce Act, 1919, & the Combines & Fair Prices Act, 1919, [1922] 1 A.C. 191, 60 D.L.R. 513 (P.C. 1921).

concerning its motives, the reluctance of courts to draw such inferences should make this an easy pitfall for the federal government to avoid.

The constitutional problem under the criminal law power is not whether the federal government can deal with the problem of consumer protection, but whether the methods available to deal with the problem under that power are sufficiently flexible. Criminal law implies penal enforcement. However, an important rationale for consumer protection is to compensate persons for injuries caused by other persons whom it is believed should more justly bear the loss. This compensatory objective normally suggests the provincial power over property and civil rights.

While it is established that federal legislation under the criminal law power can combine civil remedies with penal enforcement,[19] this combination may be unsound from a policy perspective. Any penalty exacted from the wrongdoer may tend to shift resources away from compensation of the injured persons into a public use which is unrelated. Moreover, imprisonment (unlikely in the consumer protection area) results in a net loss of productive resources to society. A more serious concern may be the inherent incompatibility of the traditions of the criminal legal process with the requirements of an effective system of civil remedies. The presumption of innocence and the burden of proof beyond a reasonable doubt, normally applicable to criminal law enforcement, would make a system of civil remedies ineffective. While, for the purposes of certain offences, federal legislation could presumably alter these rules, to do so would generate political resistance and could provide a basis for a judicial finding of colourability.

The question arises, therefore, whether the criminal law power can be used to provide a civil remedy, *separate and apart* from penal enforcement. The recent decision in *The Queen v. Zelensky*,[20] suggested that a civil remedy could only be provided under the criminal law power as an incidental part of the sentencing process to a penal enforcement proceeding. More recently still, the Federal Court of Canada, Trial Division, faced the issue squarely in *Rocois Construction Inc. v. Pilote Ready Mix Inc.*[21] In that case, the court struck down as *ultra vires* the recently added section 31.1 of the Federal Combines Investigation Act.[22] Under this section, where any person suffered loss or damage as a result of conduct which the Act made a criminal offence, he could sue the guilty party for that loss or damage in any court of competent jurisdiction. The court rejected, *inter alia*, the argument that the provision could be constitutionally valid as an exercise of the criminal law power:

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[19] The Queen v. Zelensky, [1978] 2 S.C.R. 940, 86 D.L.R. (3d) 179; Goodyear Tire & Rubber Co. of Canada v. The Queen, [1956] S.C.R. 303, 2 D.L.R. (2d) 11.

[20] *Supra* note 19. For a case comment on *Zelensky*, *see* MacPherson, Comment, 11 OTTAWA L. REV. 713 (1979).

[21] Unreported, F.C. Trial D., Dec. 4, 1979, no. T-4124-79.

[22] R.S.C. 1970, c. C-23, *as amended by* S.C. 1974-75-76, c. 76, s. 12.

> Here are provisions which were adopted to govern a purely civil action, benefitting only private parties and between private parties, the instituting of which remains completely independent of any criminal process. They are certainly not criminal provisions in themselves, and they cannot become so merely because the action to which they relate is one which may result from the commission of acts that have been declared to be criminal: the civil effects resulting from the commission of an act remain civil effects whether the act is prohibited as criminal or not.[23]

As *Rocois* is being appealed,[24] alternative possibilities in judicial attitude should perhaps be canvassed.

To give maximum scope to the federal power, one may argue that a civil remedy for a public wrong could be provided without *any* penal remedy. From the defendant's point of view, a civil remedy has punitive effect and could constitute the penal consequences requirement. By declaring the conduct in question to be an offence, Parliament could show its intention to treat it as a public wrong, and satisfy the other requirement to support legislation under the criminal law power. Since such a measure would be indistinguishable in its effect from a provincial property and civil rights statute provision creating a new civil wrong, it is most likely that the courts would characterize such legislation as a clear, or at least colourable, attempt to encroach on provincial power.

If federal legislation does create an offence with penal consequences, can provision be made for a civil remedy for the same offence that would be enforceable *independently* of any penal proceedings? The argument in favour of an affirmative answer is that the power to decide whether a crime should give rise to a civil cause of action is incidental to the criminal law power. Support for such a position can be drawn from the standard test of whether new penal legislation gives rise to a new civil cause of action. The courts traditionally look to the intent of the legislature which enacted the penal provision. This implies that the legislature with power to enact the penal provision has power to determine whether a civil wrong is being created.[25]

In light of the decision in *The Queen v. Zelensky*,[26] however, it seems unlikely that this implication would now find favour with the Supreme Court. While the issue did not really arise in the case, since the legislation in question closely tied the civil remedy to the penal proceeding, the emphasis that is placed upon this integration by the majority suggests that, without it, a different result would have been reached. Of particular significance is the following comment of Chief Justice Laskin:

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[23] *Supra* note 21, at 13.

[24] Notice of Appeal filed Dec. 12th, 1979.

[25] *See* HOGG, *supra* note 2, at 287-89; Direct Lumber Co. v. Western Plywood Co., [1962] S.C.R. 646, at 649-50, 35 D.L.R. (2d) 1, at 3-4.

[26] *Supra* note 19.

> The constitutional basis of s. 653 must, in my opinion, be held in constant view by a judge called upon to apply its terms. It would be wrong, therefore, to relax in any way the requirement that the application for compensation be directly associated with the sentence imposed as the public reprobation of the offence.[27]

Indeed, in *Rocois* Marceau J. approved of this limitation, noting that

> [the] remedy is independent of any criminal proceeding, it in no way implicates the Crown, and it is government by special rules different from those of criminal procedure: in my view any attempt to liken it to a new means of constraint or criminal penalty would be improper.[28]

Apart from the support given by the *Zelensky* and *Rocois* cases to the view that civil remedies under the criminal law power must be closely tied to penal enforcement, this position seems correct in principle. If the criminal law is not to have the potential to absorb provincial power over property and civil rights, the determination of what constitutes a civil wrong must be reserved to the province, and the federal power restricted to the creation of public wrongs. Considerations of convenience, justice and even necessity support a federal power to attach civil consequences to a penal prosecution as an incident of effective disposition of an admittedly criminal matter. A constitutional barrier to such a common sense approach would tend to call the law into disrepute.

On the other hand, in the absence of a criminal prosecution, there is no reason for federal legislation to govern the matter. Moreover, the fundamental elements of the criminal law power—a public wrong and penal consequences—are not directly involved. To make a crime into a civil wrong involves creating a civil wrong, a provincial, not a federal matter. The very fact that the civil and penal remedies operate independently shows that the civil remedy in such cases goes beyond what is incidental to the criminal power.[29] The power of the federal government to add civil remedies to the penal remedy is fairly broad, but such remedies must be integrated with the penal remedy.

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[27] *Id.* at 960, 86 D.L.R. (3d) at 193.

[28] *Supra* note 21, at 15.

[29] It may be noted that this view differs sharply from that of HOGG, *supra* note 2, at 287-89. He argues that, if a civil wrong can arise by implication from a federal criminal statute, then surely Parliament can accomplish the same result by express provision. The response to this is that the implied creation of a civil wrong is a matter of common law, and not an aspect of federal legislative power. The common law rule is a matter of civil rights, so that legislative power to change it lies with the provincial legislatures. Professor Hogg rejects this latter argument on the basis that "it is unlikely to be good constitutional law that Parliament can do indirectly what it cannot do directly". While there is judicial authority for this proposition, it is not a workable standard to test the constitutional powers of the federal government. By properly framed legislation, it is often constitutionally possible to achieve indirectly what cannot be done directly.

In addition to the flexibility allowed in joining civil remedies with the penal remedy, there may also be flexibility available as to what constitutes a penal remedy. As the distinction between penal and civil remedy has never been clearly defined, it is open to argument that some remedies which are commonly regarded as civil are also capable of standing by themselves as penal remedies.

The remedies most usually associated with the criminal law are fines, forfeitures and imprisonment. Damages and equitable remedies such as the injunction and specific performance are usually viewed as civil. However, remedies such as the injunction or specific performance might, in a particular case, be imposed for the protection of the public as a whole and not merely for the benefit of an individual. If this were done in a proceeding brought by a public prosecutor, a strong argument could be made that the proceeding is as properly within the criminal law power as one taken with a view to achieving a deterrent effect. The focus on the public interest would seem to satisfy the public wrong requirement, while the remedy would have the same penal character as other remedies already widely accepted under the criminal law power, such as conditional probation or the peace bond.

The difficulty is where, if at all, the line could be drawn between the type of provision hypothesized above and a provision under which a public prosecutor would initiate a proceeding seeking a penalty in the form of a financial exaction based on the loss suffered by one or more members of the public and distributed to those persons who suffered the loss. The courts can be expected to draw such a line of demarcation to prevent the criminal law power from supplanting provincial power over civil rights.

The approach of the courts will likely be to assess each measure in the consumer protection field by the general test of what is a criminal law. If the basic purpose of a federal law is found to be the treatment of certain conduct as a public wrong with penal consequences, the measure will be valid under the criminal law power. If, on the other hand, the basic purpose of such a measure is found to be the resolution of a private dispute, it will be struck down unless supportable under some other head of federal power. If the essential elements of the criminal law power are present, the federal government will be allowed to go further and deal with the private consequences, provided this can be conveniently done as part of a single proceeding in conjunction with enforcement of the penal consequences.

IV. Money and Credit

Since virtually every consumer transaction involves money or credit or both, the federal government's broad jurisdiction over money and credit enables it to legislate effectively in the area of consumer protection. Of particular relevance are powers in relation to "Bank-

ing",[30] "Bills of Exchange and Promissory Notes",[31] "Interest",[32] and "Bankruptcy and Insolvency".[33] Subsidiary jurisdiction in this area may be found under powers in relation to "Currency and Coinage",[34] "Incorporation of Banks, and the Issue of Paper Money",[35] "Savings Banks",[36] and "Legal Tender".[37]

Under the banking power, the federal government has virtually unlimited power to regulate both banking institutions and banking business, even though such legislation otherwise involves a matter of property and civil rights.[38] Since the bank as the lender is usually in a controlling position in fixing terms and conditions of credit transactions, the federal government could, using its power over banking institutions, effectively regulate most aspects of credit transactions involving banks. Using its control over the transactions themselves, the federal government could regulate terms and conditions of credit in a more direct fashion.

It is open to question whether transactions not usually within the scope of banking operations or institutions not generally regarded as banks are subject to this power. A large number of institutions engaged in bank-like activity have been established under provincial powers. The extent to which the federal government may regulate these institutions or their activities has yet to be tested. Banking legislation adopted in the past has generally been limited in its terms to the activity of federally incorporated banks.

Since the federal power in relation to banking in the B.N.A. Act is included under the same head as the incorporation of banks, it might be argued that the common root "bank" limits the scope of the banking power to the activities of federally incorporated banks. It seems more likely, however, that the scope of the banking power extends to all banking activity. It has been held that banking activity by provincially incorporated institutions is permissible in the absence of a federal statute to the contrary.[39] While holding that the activity of provincial institutions is not banking from a provincial point of view, so that applicable provincial law is *intra vires*, these decisions also support the view that the federal government could, if it so desired, regulate such activity from a federal point of view under the banking power.

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[30] B.N.A. Act, s. 91(15).
[31] B.N.A. Act, s. 91(18).
[32] B.N.A. Act, s. 91(19).
[33] B.N.A. Act, s. 91(21).
[34] B.N.A. Act, s. 91(14).
[35] B.N.A. Act, s. 91(15).
[36] B.N.A. Act, s. 91(16).
[37] B.N.A. Act, s. 91(20).
[38] *See* HOGG, *supra* note 2, at 365-68; Tennant v. Union Bank of Canada, [1894] A.C. 31 (P.C.).
[39] La Caisse Populaire Notre Dame Ltée v. Moyen, 59 W.W.R. 129, 61 D.L.R. (2d) 118 (Sask. Q.B. 1967); *In Re* Dominion Trust Co., 26 B.C.R. 339, [1918] 3 W.W.R. 1023 (S.C.). *See* HOGG, *supra* note 2, at 368.

Such regulation may also be supportable as being incidental to similar regulation of the activity of federally incorporated banks. This would seem a clear case where regulation of competing activities could be justified as essential to the effectiveness of regulation strictly within federal jurisdiction. While the lack of such regulation in the past may be said to demonstrate that incidental legislation is unnecessary, the better view is that it demonstrates that past regulation of banking has not been sufficiently onerous to be rendered ineffective by the operation of unregulated competing activity.

It is more difficult to assess whether the federal government might regulate the institutional aspects of these banking-related institutions under the banking power. Such a power could be useful to support consumer protection measures in relation to matters other than credit where credit is only one consumer service provided by a particular institution. While such regulation might only force business to further segregate credit operations from other operations, it is also conceivable that power to regulate an institution itself, as distinct from regulation of its activities, could assist in thwarting business efforts to artificially segregate elements of what is essentially a single consumer transaction. Such segregation is one of the common ways in which protection of consumer interests is frustrated.

It is doubtful whether the courts would allow such an extension of the banking power. Such legislation would significantly interfere with provincial power to incorporate companies having provincial objects. The federal government might accomplish much the same result, however, by using its power over banking-related activities to restrict such activities to federally incorporated banks. This would coerce provincially incorporated institutions into either accepting federal jurisdiction or abandoning bank-like activities.

While a similar effort to bring the insurance industry under federal control through the criminal law power was struck down in *Attorney-General for Ontario v. Reciprocal Insurers*,[40] this precedent may not be applicable in the case of an exercise of jurisdiction under the banking power. The decision in the insurance case followed an earlier unsuccessful attempt to regulate the industry under the trade and commerce power. Both attempts foundered on the frequently expressed suspicion of the courts towards the use of either of these heads of power to encroach upon property and civil rights in the province.

Banking, on the other hand, is a head of federal power limited by the range of activity involved, rather than by a comparison with competing provincial powers. Within the limited range of such activities, the courts tend to accept rather extensive encroachment upon matters which are otherwise provincial.[41] A federal prohibition of banking-related activity

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[40] *Supra* note 18.

[41] *Cf.* Attorney-General of Canada v. C.P.R., [1958] S.C.R. 285, at 290-91, 12 D.L.R. (2d) 625, at 627-29 (Railways); Tennant v. Union Bank of Canada, *supra* note 38, at 45 (Banking).

by provincially incorporated institutions would, therefore, probably be valid.

The range of activities that can be controlled under the banking power and the methods by which they may be regulated remain to be judicially determined. Likely to be included in the range of activities are any in which the recognized banking community commonly engages. That determination will probably be sufficiently open-ended that any elaboration in a particular case on what constitutes banking would not foreclose future expansion of the concept.[42] There are probably no limitations on the methods that the federal government can use under the banking power. Since its jurisdiction under this head is, analogously, as broad as the provincial power in relation to property and civil rights, there is no basis for implying any limitation.

While in the recent case of *Canadian Pioneer Management Ltd. v. Labour Relations Board of Saskatchewan*,[43] the Supreme Court of Canada considered the interpretation of "banking" as a "business" in the Canada Labour Code, it left unanswered the questions raised in the preceding discussion. Both Beetz J. and Laskin C.J.C. avoided any declarations as to the true scope of the federal power over "Banking" under section 91(15) of the B.N.A. Act.

In exploring the concept of banking as a business, Beetz J. had the following caution:

> [W]hat has to be decided is whether a given institution falls within the concept of banking as a business, and not whether a legislative enactment is constitutionally depending on its relationship to banking within the meaning of section 91.15 of the Constitution. The characterization of legislation and the characterization of a business are not identical processes . . . . The concept of banking as a business and the meaning of the word "banking" in section 91.15 are not necessarily co-extensive; the meaning of "banking" in the section might very well be wider than the concept of banking as a business.[44]

The federal power over bills of exchange and promissory notes complements Parliament's power over money and credit by bringing within federal control many of the legal instruments commonly used for monetary exchange or the granting of credit. By regulating these instruments, the federal government may also be able to affect the underlying exchange of goods and services.

To illustrate, under 1970 amendments to the Bills of Exchange Act,[45] the rights of a holder in due course of a bill of exchange involved in a consumer transaction are subject to claims of the purchaser against the vendor in the transaction. Consequently, in order to be able to offer

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[42] Attorney-General for Alberta v. Attorney-General for Canada, [1947] A.C. 503, at 516-17, [1947] 4 D.L.R. 1, at 8-10 (P.C.).

[43] Unreported, S.C.C., Mar. 3, 1980.

[44] *Id.* at 29.

[45] R.S.C. 1970, c. B-5, *as amended by* R.S.C. 1970 (1st Supp.), c. 4.

credit which will enable purchasers to buy from them, vendors are presumably under pressure from lending institutions to make adequate provision to either cover or prevent consumer losses. While this would not be the only pressure on vendors to make such provision, it may well be crucial in some cases.

Since specific federal power extends not only to banking, bills of exchange and promissory notes, but also to currency and coinage, the isssue of paper money and legal tender, it seems likely that the federal power extends to all monetary media of exchange. Like banking, the power over bills of exchange and promissory notes is probably open-ended, and expands according to commercial practice to cover other forms of commercial paper which serve the same purpose.

If this is so, the entire monetary system may be used by the federal government as a means of indirectly protecting consumers. By attaching conditions to use of media of exchange, just as use of the consumer bill is now effectively controlled under Part V of the Bills of Exchange Act, the federal government could have a regulatory impact on virtually all consumer transactions.

The only basis on which such measures would seem open to attack would be that of colourability. They may be characterized as a colourable attempt to legislate in relation to contract, as a provincial matter of property and civil rights. Since, however, it is recognized that the federal government has a power over property and civil rights in relation to its specific powers such as bills of exchange and promissory notes, the normal reluctance of the courts to find colourability should preclude the likelihood of judicial intervention with respect to federal legislation of the kind suggested.

The obstacles to actual use of federal power in this way are more likely to be practical than constitutional. The imposition of conditions upon monetary media of exchange would cause significant commercial inconvenience. Moreover, the effectiveness of such measures as a consumer protection device would be uncertain because of the indirect manner in which they operate.

The use of credit in consumer transactions is subject to federal control under the interest power, as well as through the powers over banking and the monetary system. There is some doubt whether interest includes any charge made for the use of money, or only a charge which accrues from day to day.[46] Although the issue has been somewhat

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[46] *Contrast* Reference as to the Validity of S. 6 of the Farm Security Act, 1944 (Sask.), [1947] S.C.R. 394, at 411, [1947] 3 D.L.R. 689, at 703, *aff'd sub nom.* Attorney-General for Saskatchewan v. Attorney-General for Canada, [1949] A.C. 110, [1949] 2 D.L.R. 145 (P.C.) (defining interest as any compensation for the use of money), *with* Attorney-General for Ontario v. Barfried Enterprises Ltd., [1963] S.C.R. 570, 42 D.L.R. (2d) 137 (defining interest as limited to a charge accruing from day to day).

clarified by *Tomell Investments Ltd. v. East Marstock Lands Ltd.*,[47] the full constitutional scope of the interest power is still uncertain.

The *Tomell* case makes clear that the narrow definition of interest as a daily accruing charge relates to the meaning of that term in existing federal legislation and does not necessarily limit the federal interest power under the constitution. The uncertainty arises because, although *Tomell* expressly upholds a federal provision prohibiting a bonus charge which does not accrue from day to day, the members of the Court differ as to the basis for this conclusion. Chief Justice Laskin, speaking for a minority, supports the legislation as related to the interest power *simpliciter*, implying acceptance of a broad definition of interest. Mr. Justice Pigeon, speaking for the majority, expressly acknowledges that the narrow definition of interest relates to the term "interest" as it is used in existing federal legislation, and not to the term as it is used in the B.N.A. Act. However, he then proceeds to uphold the federal legislation with respect to bonuses on the basis that it is ancillary to the federal interest power, rather than on the basis that such a charge falls within the interest power directly.

Now legislation which is based on ancillary, or incidental power is justified only when it is necessary to support other valid federal legislation. There would have to be regulation of interest as narrowly defined, in order to support regulation of other charges. If, on the other hand, all charges for the use of money fell within the interest power directly, the federal government could regulate charges that do not accrue from day to day independently of any regulation of charges that do so accrue.

Since the federal legislation was actually upheld in the *Tomell* case, it may be hoped that the wider definition of interest for constitutional purposes will yet prevail. In any event, it would appear from *Tomell* that the federal government can substantially regulate charges without a daily accrual character under the incidental power doctrine.

Since the compensation for the use of money is only one part of a credit transaction, the range of the federal interest power would appear to be relatively narrow. Moreover, transactions that do not involve credit would escape entirely from measures that were based solely on the interest power.

Within the area covered, however, the interest power will probably support any method of regulation. As with the other specific federal powers in this area, it brings within federal jurisdiction matters that affect property and civil rights. Apart from practical limitations, Parliament can probably regulate in ways that might otherwise be reserved to the provinces. The limitations on federal power are again practical ones. If, for example, such regulation becomes onerous to

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[47] [1978] 1 S.C.R. 974, 77 D.L.R. (3d) 145. *See also* Hanson v. Harbour Tax Servs. Ltd., [1978] 4 W.W.R. 704 (B.C.S.C.).

lenders, it may deny access to the legitimate credit market to the very persons most in need of protection, and force them to use the unregulated facility offered by loan sharks.

The bankruptcy and insolvency power is another potential source which Parliament may rely on to enact consumer protection legislation. To support federal legislation under this power, it will probably suffice that the operation of the legislation be contingent on the insolvency of at least one of the parties involved. Insolvency means either inability to pay current obligations as they fall due or inability to pay outstanding obligations in full if the party's affairs were wound up.[48]

Conceivably, measures designed to *forestall* a condition of insolvency might be supported on the basis of the bankruptcy and insolvency power, thereby giving the power an even wider scope. In view of the consequent potential for encroachment upon provincial power over property and civil rights, however, it is doubtful whether the courts would allow federal power to be exercised very far in this direction.

The potential of the bankruptcy and insolvency power to support federal legislation in areas otherwise closed to it is shown by *Attorney-General for Ontario v. Policy-holders of Wentworth Insurance Co.*[49] Federal attempts, under various other powers, to regulate the insurance industry had previously met uniform rejection. One primary objective of the legislation struck down was to protect policyholders in the event that the insurer experienced financial difficulty. In the *Wentworth* case, this objective was achieved in part under the insolvency power. A more important objective of prior insurance regulation was the prevention of the financial collapse of insurers. If the preventive aspect of an insolvency is recognized, this objective might also be accomplished under this power.

A further comment on the value of preventive legislation may be made here. By the time a condition of insolvency arises, whether the insolvent party be the consumer or the party dealing with a consumer, it is difficult, if not impossible, to set matters aright. In the context of consumer protection, this is of particular concern where the insolvent is the party dealing with the consumer, for at this stage, the resources to cover losses incurred by the consumer are lacking. Even where it is the consumer who becomes insolvent, adjustments to take account of consumer protection concerns are unlikely to rescue the individual from insolvency, although such adjustments at an earlier stage might have avoided the problem.

Once a condition of insolvency exists, the federal government can probably regulate all relations between the insolvent party and other persons.[50] This is substantially what has been done in the case of

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[48] Rae v. McDonald, 13 O.R. 352 (C.P. 1887).

[49] [1969] S.C.R. 779, 6 D.L.R. (3d) 545. *See* HOGG, *supra* note 2, at 301-02.

[50] Attorney-General for Ontario v. Attorney-General for Canada, [1894] A.C. 189 (P.C.).

bankruptcy, which involves the formal administration of the affairs of the insolvent party under public supervision. Insolvency, which extends to cover any informal arrangement to deal with the affairs of insolvents, is clearly parallel to bankruptcy and presumably gives equivalent authority to deal with any of the parties involved.

V. National Works and Undertakings and Specific Industries

The federal government has power to regulate all or part of a number of specific industries other than the banking and credit industries which have already been discussed. Much of this power derives from the jurisdiction to make laws in relation to "Such Classes of Subjects . . . assigned exclusively to the Legislatures of the Provinces".[51] More specifically, this includes:

> *a*. Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;
> *b*. Lines of Steam Ships between the Province and any British or Foreign Country;
> *c*. Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.[52]

In so far as the shipping industry is concerned, related powers may also arise by virtue of federal jurisdiction in relation to "Navigation and Shipping"[53] and "Ferries between a Province and any British or Foreign Country or between Two Provinces".[54]

Since the nature of the federal residuary power is similar to federal enumerated power, it is convenient to consider, at the same time, jurisdiction that the courts have accorded the federal government over specific industries by virtue of that power "to make Laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects . . . assigned exclusively to the Legislatures of the Provinces".[55] In some cases, federal power over those industries may also be justifiable under the category of national works and undertakings. The reasons for inclusion of those industries

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[51] B.N.A. Act, s. 91(29).

[52] B.N.A. Act, s. 92(10).

[53] B.N.A. Act, s. 91(10). The extent of any additional power conferred on the federal government to regulate the shipping industry for consumer protection purposes under s. 91(10) may be minimal in light of the decision in Agence Maritime Inc. v. Conseil Canadien des Relations Ouvrières, [1969] S.C.R. 851, 12 D.L.R. (3d) 722.

[54] B.N.A. Act, s. 91(13).

[55] B.N.A. Act, s. 91.

under the federal residuary power rather than under provincial property and civil rights power are not clear. Nonetheless, industries which appear to come under federal power on this basis are radio and television,[56] aeronautics,[57] and atomic energy.[58] "Agriculture"[59] and "Sea Coast and Inland Fisheries"[60] are industries also subject to federal jurisdiction by specific provision in the B.N.A. Act and may therefore be subject to analogous treatment.

Since the listing of works and undertakings that are subject to federal power is open-ended, it is potentially quite extensive. Since the listed industries all deal with transportation or communications, the inclusion of "other Works and Undertakings" would probably be interpreted to include only industries under those general rubrics. This point has not been clearly decided, although there is some judicial support for it.[61] In the modern integrated Canadian economy, the bulk of business is conducted by undertakings which cross provincial boundaries, and the courts are likely to give such a limited interpretation, for the protection of provincial powers.

Even within the area of transportation and communications, there is some limitation in the requirement that a work or undertaking cross provincial boundaries. Consequently, the federal power under the works and undertakings category does not extend to the regulation of each industry in its entirety, but only to those particular works or undertakings within the industry which cross provincial boundaries. The question of what constitutes a particular undertaking for this purpose appears to depend on whether in fact a single functionally-integrated operation is being carried on. If so, it is a single undertaking.[62]

Constitutionally, however, the gaps left in the federal power in relation to any industry by the existence of purely intraprovincial works or undertakings, and by any limitation of works and undertakings to the general area of transportation and communications, can be filled by virtue of the federal power to declare works to be for the general advantage of Canada. Notwithstanding the absolute encroachment upon provincial power which such a unilateral declaration permits, the courts have not limited this power. Moreover, when a work comes under such a

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[56] *Re* Regulation and Control of Radio Communication in Canada, [1932] A.C. 304, [1932] 2 D.L.R. 81 (P.C.).

[57] *Re* Regulation and Control of Aeronautics in Canada, [1932] A.C. 54, [1932] 1 D.L.R. 58 (P.C. 1931).

[58] Pronto Uranium Mines Ltd. v. Ontario Lab. Rel. Bd., [1956] O.R. 862, 5 D.L.R. (2d) 342 (H.C.).

[59] B.N.A. Act, s. 95.

[60] B.N.A. Act, s. 91(12).

[61] C.P.R. v. Attorney-General for British Columbia, [1950] A.C. 122, at 142, [1950] 1 D.L.R. 721, at 729-30 (P.C. 1949). *See* HOGG, *supra* note 2, at 324.

[62] *See* HOGG, *supra* note 2, at 327-29, and the cases cited therein.

declaration, any activity carried on in connection with the work is subject to wide federal power.[63]

In the case of industries which fall under the federal residuary power, and in the case of agriculture and fisheries, all operations within the industry are subject to federal regulation. Intraprovincial operations, as well as those which cross provincial boundaries, are subject to federal power.[64]

To what extent power to control a particular industry may include power over closely related industries is not clear. The cases of agricultural marketing[65] and railway hotels[66] suggest that the definitions of particular industries may be narrow. On the other hand, the experience with industries such as radio and television[67] and aeronautics[68] points to an expansive definition of each industry. It is probable that the scope of each industry is subject to the court's individualized elaboration either on the basis of the degree of integration between activity clearly subject to federal jurisdiction and related activity, or on the basis of judicial perceptions of the practical need for integrated regulation.

With respect to an industry, or that part of an industry which is subject to federal regulation, the federal government has the same plenary power as it has with respect to banking. This means that it can legislate, in the context of that industry, with respect to property and civil rights.[69] There would seem to be no restrictions on the ways in which the federal government can regulate those industries or parts of industries under its jurisdiction.

Some doubt may be cast on whether the power is a plenary one in the case of the fishing industry. It has been held that the fisheries power does not permit the conferring upon others of proprietary rights where the federal government itself does not possess such rights.[70] The basis for such a restriction might appear to be the provincial power in relation to property. Rights of contract, which would be involved in consumer protection measures, fall under the concomitant provincial power in relation to civil rights. Thus it might be argued that federal interference with such rights of contract should be similarly restricted. The real basis of the restriction on federal power in the fisheries cases, however, is the division of property between federal and provincial governments under the B.N.A. Act, not the division of legislative power. Crown property

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[63] Chamney v. The Queen, [1975] 2 S.C.R. 151, 40 D.L.R. (3d) 146 (1973); The Queen v. Thumlert, 28 W.W.R. 481, 20 D.L.R. (2d) 335 (Alta. C.A. 1959).

[64] Jorgensen v. North Vancouver Magistrates, 28 W.W.R. 265 (B.C.C.A. 1959).

[65] The King v. Eastern Terminal Elevator Co., [1925] S.C.R. 434, [1925] 3 D.L.R. 1.

[66] C.P.R. v. Attorney-General for British Columbia, *supra* note 61.

[67] *See* HOGG, *supra* note 2, at 336-42, and the cases cited therein.

[68] *See* HOGG, *supra* note 2, at 332-35, and the cases cited therein.

[69] Attorney-General of Canada v. C.P.R., *supra* note 41.

[70] Attorney-General for Canada v. Attorney-General for Quebec, [1921] 1 A.C. 413, 56 D.L.R. 358 (P.C. 1920); Attorney-General for Canada v. Attorney-General for Ontario, [1898] A.C. 700 (P.C.).

rights in resources were assigned to the provinces.[71] The restriction on federal legislative power is designed to prevent the federal government from effectively abrogating this property settlement by the exercise of its legislative power. Since no similar interest is involved in the area of contract rights, there is no ground for any similar restriction in that area.

Since agriculture and atomic energy are also resource-based industries, they would seem subject to the same considerations as fisheries. In the case of agriculture, of course, there is provincial power concurrent with the federal power,[72] but this would not affect the scope of the latter. Any restriction on federal power based on proprietary considerations should not affect other federally regulated industries where the division of government property under the B.N.A. Act is not involved.

Insofar as consumers deal directly with businesses in federally regulated industries, federal power over these industries has considerable potential as a basis for consumer protection measures. Moreover, where consumers do not deal directly with a federally regulated industry, the facilities of such industries will frequently be used in the course of the production of goods or services by other industries. By regulation of industries within federal jurisdiction, therefore, the federal government could indirectly affect consumer transactions involving industries outside federal jurisdiction.

There would be two problems with such indirect measures. Constitutionally, they might well be viewed as colourable attempts to regulate in areas outside the scope of federal power. Practically, the input of federally regulated industries will in many cases constitute a relatively small factor in the output of goods and services by other industries. Indirect regulation, therefore, may not have a very large impact. Nonetheless, specific measures—for example, the control of advertising on radio and television—could have a significant impact.

VI. Some Miscellaneous Matters

The federal government may be able to enact measures to deal with specific consumer protection problems under a number of other heads of power. In the absence of relevant jurisprudence on these heads of power, it would be highly speculative to survey such powers in full. Since their value, individually or collectively, as a basis for consumer protection, is unlikely to be large, only a brief comment on them is made here.

Under federal power in relation to the "Postal Service",[73] the federal government could control the use of the mails for purposes injurious to consumers. The gathering of data under the power over "The

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[71] B.N.A. Act, s. 109.
[72] B.N.A. Act, s. 95.
[73] B.N.A. Act, s. 91(5).

Census and Statistics''[74] could be used to influence business practices. Federal power over ''Weights and Measures''[75] might be used to set further standards for the protection of consumers. Conditions designed to prevent consumer injury might be attached to ''Patents of Invention and Discovery''.[76] Transactions involving native people might be regulated under the federal power with respect to ''Indians''.[77]

VII. The General Power

Some reference has already been made to the federal general power under section 91 of the B.N.A. Act[78] as a possible basis of federal jurisdiction over certain specific industries. Some other aspects of this power are also of relevance in the area of consumer protection.

It is not proposed to discuss at length the emergency doctrine. It seems unlikely that the federal government could justify declaration of a consumer emergency, so that any use of the emergency power in this area is likely to be incidental to some other emergency. Such incidental legislation is, however, not inconceivable. Given the potentially wide scope of the emergency power, consumer protection could be open to unlimited federal jurisdiction for the duration of the emergency.[79]

Neither is it proposed to deal at length with the national dimensions doctrine. Although it is possible that a national dimension could be the basis for bringing some particular industry under federal control—as is suggested by the reasoning in *Pronto Uranium Mines Ltd. v. Ontario Labour Relations Board*[80] in the case of atomic energy—the relevance of this doctrine for consumer protection seems minimal. The courts are obviously reluctant to expand the scope of the national dimensions doctrine, if indeed they are willing to accept its validity at all. In view of the provincial concerns in the consumer protection area, it is unlikely that a mere common concern throughout the country will support federal regulation based on the national dimensions theory of the general power.[81]

Of more significant potential as a basis of federal power in relation to consumer protection is the residual part of the federal general power. Two areas in particular seem worthy of note. First, there is the federal power with respect to incorporation of companies. Since the provinces

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[74] B.N.A. Act, s. 91(6).
[75] B.N.A. Act, s. 91(17).
[76] B.N.A. Act, s. 91(22).
[77] B.N.A. Act, s. 91(24).
[78] *See* text accompanying note 55, *supra*.
[79] *See* Hogg, *supra* note 2, at 252-57, and the cases cited therein.
[80] *Supra* note 58.
[81] *See* the judgment of Beetz J. in *Re* Anti-Inflation Act, [1976] 2 S.C.R. 373, at 440-74, 68 D.L.R. (3d) 452, at 510-36, which received majority support on this issue.

are restricted to incorporating companies with provincial objects, the federal government has a residuary power to incorporate companies with other than provincial objects.[82]

Beyond jurisdiction over the mere act of incorporation, the extent of the federal power is not clearly defined. It is established that, from the provincial point of view, federal corporations are subject to provincial regulation, and that, at least in the case of corporations outside those specific industries subject to federal jurisdiction, the provincial power is basically equivalent to that over any other person in the province.[83] What is not clear, however, is whether there is any real limit on federal power over such corporations.

In *John Deere Plow Co. v. Wharton*,[84] the view is expressed that the trade and commerce power gives the federal government authority to regulate federally incorporated companies. While this seems inconsistent with the Privy Council's general formulation of the trade and commerce power, it is arguable that jurisdiction to control a federally incorporated company is implicit in the very power to create the corporation. Since the federal government could deny incorporation, it would seem that it ought to be able to restrict or condition the rights of the incorporated body.[85]

The right of the federal government to regulate federally incorporated companies in some ways is not in doubt.[86] The question is whether such regulation must be limited to something classified as a corporate law purpose, with other purposes being treated as colourable, or whether, as a creature of federal power, a federally incorporated company is completely subjected to the federal will. Because of the double aspect doctrine, the latter possibility is not necessarily inconsistent with the recognized provincial regulatory power. Unlike the federal power in relation to specific industries—where regulation of the industry, being the core of federal power, implies a limit on provincial power—a federal power to regulate federally incorporated companies for non-corporate purposes would be an incidental matter and would imply no such limitation.

If, as seems possible, the federal government can regulate federally incorporated companies for any purpose, then, insofar as consumer

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[82] Citizens Ins. Co. v. Parsons, *supra* note 8.

[83] *See* HOGG, *supra* note 2, at 353-55, and the cases cited therein.

[84] [1915] A.C. 330, at 340 (P.C.). *See* HOGG, *supra* note 2, at 272-73.

[85] The ambivalence of judicial comments on this matter is illustrated in the decision of Beetz J. in Canadian Pioneer Management Ltd. v. Labour Rel. Bd. of Saskatchewan, *supra* note 43, at 15. In consecutive sentences, he suggests that the federal government could not regulate the fiduciary activities of federally incorporated trust companies, but could impose limitations on their corporate capacity. One must ask whether limitations on corporate capacity might not effectively regulate fiduciary activities.

[86] *See* Esso Standard (Inter-America) Inc. v. J.W. Enterprises Inc., [1963] S.C.R. 144, 37 D.L.R. (2d) 598; Reference *re* S. 110 of the Dominion Companies Act, [1934] S.C.R. 653, [1934] 4 D.L.R. 6.

transactions involve such corporations, consumer protection measures could be enacted at the federal level over a wide range of matters. While any particular business might evade such measures by incorporating provincially (or perhaps, if already federally incorporated, seeking a continuation under provincial jurisdiction), such measures could be particularly useful as a complement to similar provincial measures which federally incorporated companies on their part might be attempting to evade.

The other noteworthy area of possible federal residual power is also one where the need may be primarily for a federal complement to provincial legislation: the matter of property and civil rights outside the province and conflict of laws.

If it is not apparent from the wording of provincial power in respect of property and civil rights within the province,[87] it is established by *Royal Bank of Canada v. The King*[88] that provincial power over property and civil rights does not allow a province to deal with civil rights outside the province. Since, in the matter of conflict of laws, a distinction is drawn between substantive rights and remedial rights, this decision does not affect the question of provincial power to regulate the remedial right with respect to a substantive right arising outside its boundaries, insofar as its courts may be called upon to adjudicate the matter. The decision of the courts in the province would involve rules of conflict of laws, but these are arguably part of the law applicable to private disputes included in the provincial property and civil rights power.

The decision in *Interprovincial Co-Operatives Ltd. v. The Queen in right of Manitoba*[89] indicates that provincial power may be appreciably narrower, and opens up a significant area of federal power in relation to property and civil rights. Unfortunately, the three-to-one split in the majority decision leaves the exact nature of the federal power uncertain.

The rationale of Mr. Justice Pigeon, speaking for three of the majority judges, appears to be that, where parts of an overall transaction take place in different provinces, the transaction as a whole is outside provincial jurisdiction. On this basis, any interprovincial transaction would fall within federal residuary jurisdiction. While the total number of such transactions may not be large under ordinary circumstances, this decision could permit evasion of provincial consumer protection measures by the introduction of interprovincial elements into consumer transactions. Since federal legislation by itself would encounter the converse problem of evasion through the elimination of interprovincial elements from transactions, a need for complementary legislation is clearly indicated.

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[87] B.N.A. Act, s. 92(13).
[88] [1913] A.C. 283, 9 D.L.R. 337 (P.C. 1912).
[89] [1976] 1 S.C.R. 477, 53 D.L.R. (3d) 321 (1975).

The rationale of Mr. Justice Ritchie who, while agreeing in the result, gave separate reasons in the *Interprovincial Co-Operatives* case, suggests a lesser restriction on provincial power. As does the minority, he appears to acknowledge provincial power to legislate in relation to an interprovincial transacton insofar as the transaction gives rise to remedial rights within the province. However, he applies the rule in *Phillips v. Eyre*[90] to hold that, in this case, Manitoba could not create a tort from acts occurring outside Manitoba which were justifiable in the jurisdiction where they occurred. Since the Manitoba statute seemed designed to abrogate, for its purposes, the conflict rule in *Phillips v. Eyre*, the opinion of Mr. Justice Ritchie implies that conflict rules are not subject to provincial legislation. On this view, the residual federal power with respect to interprovincial transactions would extend only to the rules on conflict of laws. Again, complementary legislation would be indicated where existing conflict rules might allow evasion of provincial measures.

While perhaps of limited relevance to consumer protection, potential federal power over conflict rules is a significant inroad on the provincial property and civil rights power. This realization, combined with the inconclusive division of opinion of the Court, could result in reconsideration of the issue in a future case. The result in *Interprovincial Co-Operatives* would make more sense if interpreted simply as a judicial finding of a colourable attempt to regulate a substantive right outside the province. Under such an interpretation, the provinces would still have power to regulate remedial rights within the province and to alter the rules on conflict of laws as long as the legislation was general and non-discriminatory. The federal residuary power over rights outside the province would probably extend only to regulation for Canadian purposes of substantive rights outside of Canada. Rights inside Canada would be within the jurisdiction of one or another of the provinces, even if outside the jurisdiction of particularly concerned provinces in specific cases. Federal legislation over substantive rights, complementary to provincial legislation, would probably not be essential, since a province could achieve similar results by properly framed legislation in relation to conflict of laws and other remedial matters.

Moreover, the recent decision of the Supreme Court of Canada in *The Queen v. Thomas Equipment Ltd.*[91] indicates a narrowing of the gap in provincial power created by the *Royal Bank* and *Interprovincial Co-operatives* cases. This case concerned a New Brunswick manufacturer who sold farm equipment to an Alberta dealer under a dealer franchise agreement. The agreement provided that the law of New Brunswick should apply. At issue was the application of a penal provision in an Alberta statute requiring a manufacturer to accept a return of inventory upon the termination of such an agreement by either party.

The Supreme Court held the Alberta statute to be applicable to the New Brunswick manufacturer. The Court avoided the conflict of laws

[90] L.R. 6 Q.B. 1 (1870).
[91] [1979] 2 S.C.R. 529, 26 N.R. 499.

problem of the *Interprovincial Co-operatives* case by characterizing the Alberta legislation as business regulation, rather than contract law. Thus, any constitutional implications in altering the proper law of the contract did not arise. The Court then avoided the extraprovincial rights problem of the *Royal Bank* case by finding that the rights and obligations of the manufacturer under the dealer franchise agreement (which was a fairly typical such agreement) sufficiently satisfied the requirement that the manufacturer be doing business in Alberta, to subject it to Alberta business regulation.

If the objections to provincial regulation implicit in the *Royal Bank* and *Interprovincial Co-operatives* cases can be circumvented in the name of business regulation, with the obvious relevance of this type of regulation to consumer protection issues, the potential significance of federal residual power in this area is greatly reduced. When this is further combined with recent evidence in *The Queen v. Dominion Stores Ltd.*[92] and *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*[93] that the Supreme Court is revitalizing interference with intraprovincial trade as an obstacle to federal consumer laws, the predilection of the Court to characterize such measures as regulation of business may actually bar realistic federal attempts to employ residual power in this area.

VIII. Conclusion

A survey of this type does not readily admit of general conclusions. Moreover, the validity of any specific federal consumer protection measures must be assessed on the basis of considerations such as those set out under the relevant headings above, and not judged by any generalized comments that might be made here.

In summary, to the extent that the federal government is prepared to criminalize conduct giving rise to consumer complaints, it enjoys a wide-ranging jurisdiction to deal with consumer problems. Such an approach may, however, be neither appropriate nor sufficiently flexible to resolve the problem. In the case of industries subject to federal regulation, the federal government has a fairly comprehensive power to protect consumer interests. In particular, federal authority over the credit industry should enable the federal government to tackle most of the consumer problems that are credit-related. A comprehensive and sufficiently sensitive treatment of the entire consumer protection issue by the federal government, however, would depend on a further modification of the trade and commerce power. While such a modification seems possible, it would be overly optimistic to say that it is probable. Realistically, consumer protection is an area where federal-provincial co-operation and complementary legislation are needed.

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[92] *Supra* note 12.
[93] *Supra* note 12.