THE GOODYEAR TIRE AND RUBBER COMPANY OF CANADA LIMITED, DOMINION RUBBER COMPANY LIMITED, DUNLOP TIRE AND RUBBER GOODS COMPANY LIMITED, GUTTA PERCHA AND RUBBER LIMITED, THE B. F. GOODRICH RUBBER COMPANY OF CANADA LIMITED .....APPELLANTS;

1955
*Oct. 14, 17, 18
1956
*Feb. 10

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law—Prohibition—Validity of s. 31 of the Combines Investigation Act, R.S.C. 1927, c. 26, as re-enacted by 1952, c. 39, s. 3.

Section 31 of the *Combines Investigation Act* (R.S.C. 1927, c. 26, as re-enacted by 1952, c. 39, s. 3) empowers the court to order in addition to any other penalty the prohibition of the continuation or repetition of the offence of which the person has been convicted.

The appellants pleaded guilty to a charge of conspiracy under s. 498(1)(*d*) of the *Criminal Code* and were fined. Upon application by the Crown, the trial judge directed that an order of prohibition issue under s. 31 of the *Combines Investigation Act*. The appellants appealed against that order and contended that s. 31 was *ultra vires* the Parliament of Canada in whole or in part. The appeals were dismissed by the Court of Appeal for Ontario, with a variation in the terms of the order.

Held: The appeals should be dismissed. The portion of s. 31 invoked by the trial judge is *intra vires*.

Per Kerwin C.J., Taschereau, Kellock, Locke and Fauteux JJ.: Even though the offence for which the prohibitory order was made is prohibited by s. 498 of the *Criminal Code* and penalties are provided by the *Code* and by the *Combines Investigation Act*, the power of Parliament to deal with the matter under s. 91(27) of the *B.N.A. Act* is not exhausted. Whether the portion of s. 31, giving the power to make the order of prohibition, was intended to define a new crime or to provide the means of preventing the commission of the offence, it is within the power of Parliament under s. 91(27) (*Provincial Secretary of Prince Edward Island* v. *Egan* [1941] S.C.R. 396 and *A.G. for Ontario* v. *Canada Temperance Federation* [1946] A.C. 193 referred to).

The words in s. 31 "any other person" should be construed in the case of corporations as meaning their directors, officers, servants and agents.

Per Rand J.: The scope and object of s. 31 are to provide additional means for suppressing a public evil of the order of those cognizable by Parliament under s. 91(27) of the *B.N.A. Act*. The section is not

*PRESENT: Kerwin C.J., Taschereau, Rand, Kellock, Estey, Locke and Fauteux JJ. Estey J. died before the delivery of the judgment.

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concerned with the civil aspect of the relations involved in the agreement condemned, but solely with their harmful effects upon the economic life of the public.

The incidental objection that the order is unlimited as to time, that it is aimed against "any other person", that the act seized upon is one "directed towards", that it may be made at any time within three years of the conviction, that it may affect intra-provincial trade and that the procedure of civil courts is to apply, do not go to the matter of jurisdiction.

The part of the section dealing with mergers, trusts or monopolies has no relevancy to the proceedings taken here. In any event, the clause is severable.

APPEAL from the judgment of the Court of Appeal for Ontario (1), affirming with a variation an order of prohibition and holding that s. 31 of the *Combines Investigation Act* was *intra vires.*

J. J. Robinette, Q.C. and *P. B. C. Pepper* for the Goodyear Tire & Rubber Co. of Canada Ltd.

J. D. Arnup, Q.C. and *P. B. C. Pepper* for Dominion Rubber Co. Ltd.

A. J. MacIntosh and *M. Hay* for Dunlop Tire & Rubber Goods Co. Ltd., Gutta Percha & Rubber Ltd. and B. F. Goodrich Rubber Co. of Canada Ltd.

F. P. Varcoe, Q.C. and *D. H. Christie* for the respondent.

The judgment of Kerwin C.J., Taschereau, Kellock, Locke and Fauteux JJ. was delivered by:—

LOCKE J.:—These are appeals pursuant to leave granted by this Court from a judgment of the Court of Appeal for Ontario (1) affirming, with a variation, an order made by Treleaven J. under the provisions of s. 31 of the *Combines Investigation Act* (c. 26, R.S.C. 1927 as amended).

The appellants were indicted together on the charge that they:—

during the period from 1936 to the 31st day of October, 1952, both inclusive, within the jurisdiction of this Honourable Court, did unlawfully conspire, combine, agree or arrange together and with one another and with BARRINGHAM RUBBER & PLASTICS LIMITED; G. L. GRIFFITH & SONS, LTD.; VICEROY MANUFACTURING COMPANY LIMITED; FIRESTONE TIRE & RUBBER COMPANY OF CANADA, LIMITED and CANALCO LIMITED to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply in the City of Toronto, in the County of York,

(1) [1954] O.R. 377.

and other places throughout the Province of Ontario, and in the City of Montreal, in the Province of Quebec, and other places throughout the Province of Quebec and elsewhere in Canada where the articles or commodities hereinafter mentioned are offered for sale, of articles or commodities which may be the subject of trade or commerce, to wit,

(then followed a description of the commodities)

contrary to the provisions of the Criminal Code, Section 498, subsection 1(*d*).

S. 31 of the *Combines Investigation Act* reads:—

31. (1) Where a person has been convicted of an offence under section thirty-two or thirty-four of this Act or under section four hundred and ninety-eight or four hundred and ninety-eight A of the *Criminal Code*

(*a*) the court may at the time of such conviction, on the application of the Attorney General of Canada or the attorney general of the province, or

(*b*) a superior court of criminal jurisdiction in the province may at any time within three years thereafter, upon proceedings commenced by information of the Attorney General of Canada or the attorney general of the province for the purposes of this section,

and in addition to any other penalty imposed on the person convicted, prohibit the continuation or repetition of the offence or the doing of any act or thing by the person convicted or any other person directed towards the continuation or repetition of the offence and where the conviction is with respect to the formation or operation of a merger, trust or monopoly, direct the person convicted or any other person to do such acts or things as may be necessary to dissolve the merger, trust or monopoly in such manner as the court directs.

(2) Where it appears to a superior court of criminal jurisdiction in proceedings commenced by information of the Attorney General of Canada or the attorney general of the province for the purposes of this section that a person is about to do or is likely to do any act or thing constituting or directed towards the commission of an offence under section thirty-two or thirty-four of this Act or section four hundred and ninety-eight or four hundred and ninety-eight A of the *Criminal Code,* the court may prohibit the commission of the offence or the doing of any act or thing by that person or any other person constituting or directed towards the commission of such an offence.

(3) A court may punish any person who contravenes or fails to comply with a prohibition or direction made or given by it under this section by a fine in the discretion of the court, or by imprisonment for a term not exceeding two years.

(4) Any proceedings pursuant to an information of the Attorney General of Canada or the attorney general of a province under this section shall be tried by the court without a jury, and the procedure applicable in injunction proceedings in the superior courts of the province shall, in so far as possible, apply.

(5) This section applies in respect of all prosecutions under this Act or under section four hundred and ninety-eight or four hundred and ninety-eight A of the *Criminal Code* whether commenced before or after

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the coming into force of this section and in respect of all acts or things, whether committed or done before or after the coming into force of this section.

(6) In this section "superior court of criminal jurisdiction" means a superior court of criminal jurisdiction as defined in the *Criminal Code*, 1952, c. 39, s. 3.

All of the appellants pleaded guilty to the charge and Crown counsel, representing The Attorney General of Canada and the Attorney General of Ontario, then applied for an order under the provisions of s. 31 and, on September 24, 1953, the learned trial judge imposed a fine of $10,000 upon each of the accused and directed that an order of prohibition issue, as permitted by the section.

On September 25, 1953, an order issued out of the Supreme Court of Ontario which, after reciting the convictions, read:—

1. This Court doth prohibit the continuation or repetition of the said offence by the persons convicted.

2. This Court doth further prohibit the doing of any act or thing by the persons convicted or by any other person directed towards the continuation or repetition of the said offence.

The appellants obtained leave to appeal to the Court of Appeal and contended before that court that s. 31 was *ultra vires* of Parliament. That appeal was dismissed, the court, however, directing that para. (2) of the order be altered so that it reads:—

This Court doth further prohibit the doing of any act or thing by the persons convicted, and/or their directors, officers, servants and agents, directed towards the continuation or repetition of the said offence.

While, pursuant to the direction of this Court, all of the provincial attorneys general were notified of the questions to be raised on the appeal, none were represented before us, the argument in support of the validity of the legislation being made on behalf of the Attorney General of Canada.

Stated shortly, the contention of the appellants is that s. 31 is either wholly or partially *ultra vires* of Parliament, being a colourable attempt, under the guise of enacting legislation in relation to criminal law, to trench upon the field of property and civil rights in the province assigned exclusively to the legislature by head 13 of s. 92 of the *British North America Act*. A subsidiary point is that the Court of Appeal erred in interpreting the reference in s-ss. 1 and 2 of s. 31 to "any other person" as meaning only those

who stood in such a relation to the accused that a prohibitory order against them would affect the accused and be a penalty on the accused.

Counsel for the Attorney General supports the legislation as a valid exercise of the powers of Parliament under head 27 of s. 91 as criminal law, and under head 2 as the regulation of trade and commerce.

Since 1888 there has been legislation in Canada prohibiting the offences referred to in s. 498 of the Code. In substantially the same form, that section appeared as s. 520 when the Code was first enacted in 1892 (c. 29).

Following the decision of the Judicial Committee finding the *Board of Commerce Act* and the *Combines and Fair Prices Act,* enacted in 1919, to be *ultra vires* (1), the *Combines Investigation Act, 1923* (c. 9), which repealed the said statutes, was enacted.

In 1929 the Governor General in Council referred to this Court the question as to whether that Act, either in whole or in part, and s. 498 of the *Criminal Code* were *ultra vires.* Both the statute and the section were held to be within the power of Parliament (2) and that decision was upheld by the Judicial Committee in *Proprietary Articles Trade Association* v. *Attorney General of Canada* (3). In dealing with the argument that s. 498 of the *Criminal Code* could not be supported under head 27, Lord Atkin, who delivered the judgment of the Board, said in part (p. 323):—

> In their Lordships' opinion s. 498 of the Criminal Code and the greater part of the provisions of the Combines Investigation Act fall within the power of the Dominion Parliament to legislate as to matters falling within the class of subjects, "the criminal law including the procedure in criminal matters" (s. 91, head 27). The substance of the Act is by s. 2 to define, and by s. 32 to make criminal, combines which the legislature in the public interest intends to prohibit. The definition is wide, and may cover activities which have not hitherto been considered to be criminal. But only those combines are affected "which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers, or others"; and if Parliament genuinely determines that commercial activities which can be so described are to be suppressed in the public interest, their Lordships see no reason why Parliament should not make them crimes. "Criminal law" means "the criminal law in its widest sense": *Attorney General for Ontario* v. *Hamilton Street Ry. Co.* 1903

(1) [1922] 1 A.C. 191. (2) [1929] S.C.R. 409.
(3) [1931] A.C. 310 at 319.

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A.C. 524. 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.

As to ss. 29 and 30 of the Act, he said (p. 325):—

> It is, however, not enough for Parliament to rely solely on the powers to legislate as to the criminal law for support of the whole Act. The remedies given under ss. 29 and 30 reducing customs duty and revoking patents have no necessary connection with the criminal law and must be justified on other grounds. Their Lordships have no doubt that they can both be supported as being reasonably ancillary to the powers given respectively under s. 91, head 3, and affirmed by s. 122, "the raising of money by any mode or system of taxation," and under s. 91, head 22, "patents of invention and discovery."

It had been contended also before the Board that the legislation could be supported by reference to head 2 of s. 91 but, after saying that it was unnecessary to discuss this matter in view of their conclusion previously expressed, Lord Atkin said that their Lordships desired to guard themselves from being supposed to lay down that the legislation could not be supported on that ground.

S. 31 was not part of the Act in 1929, having been first enacted by c. 39 of the Statutes of 1952. It is not a valid objection, in my opinion, to that portion of the section which has been invoked in the present matter that, since, the offence is prohibited by s. 498 of the *Criminal Code* and penalties are provided both by the Code and by the *Combines Investigation Act*, the power to deal with the matter under head 27 is exhausted. It is to be noted that the making of a prohibitory order is authorized "in addition to any other penalty", being thus treated as a penalty. The power to legislate in relation to criminal law is not restricted, in my opinion, to defining offences and providing penalties for their commission. The power of Parliament extends to legislation designed for the prevention of crime as well as to punishing crime. It was, apparently, considered that to prohibit the continuation or repetition of the offence by order, a breach being punishable under s-s. 3 of s. 31, would tend to restrain its repetition. As to the language:—

> or the doing of any act or thing by the person convicted . . . directed toward the continuation or repetition of the offence,

this appears to me to be properly construed as forbidding the taking of any step by the person to whom the order is directed, looking to the continuation of the offence dealt with by the conviction or its repetition by forming another

combine, and I do not think it is intended to deal only with attempts to commit the offence. The language appears to me to permit the prohibition of any act such as a preliminary proposal to others regarding the formation of a combine which, in itself, might not fall within the definition of an attempt under s. 72. As Parliament apparently considered that such an order might be of use in preventing the formation of such combines, I think the matter to be wholly within its powers.

This view is supported, in my opinion, by a passage from the judgment of Sir Lyman Duff C.J. in *Provincial Secretary of Prince Edward Island* v. *Egan* (1). S. 285(7)(*a*) of the Code provides that, where a person is convicted of an offence defined by s.-ss. (1), (2), (4) or (6) of that section, the court may:—

> in addition to any other punishment provided for such offence, make an order prohibiting such person from driving a motor vehicle or automobile anywhere in Canada during any period not exceeding three years.

Dealing with the argument that the making of such a prohibitory order did not fall under head 27, the Chief Justice said (p. 400):—

> I may say at once I cannot agree with this view . . . It appears to me to be quite clear that such prohibitions may be imposed as punishment in exercise of the authority vested in the Dominion to legislate in relation to criminal law and procedure.

In *Attorney General for Ontario* v. *Canada Temperance Federation* (2), Viscount Simon, referring to and rejecting an argument that Parliament was without power to reenact provisions with the object of preventing a recurrence of a state of affairs which had been deemed to necessitate the passage of an earlier statute, said that to legislate for prevention appears to be on the same basis as legislation for cure.

Whether or not it can properly be said that the language referred to was intended to define a new offence, or whether it should be construed as merely providing the means of preventing the commission of the offence, it is, in my opinion, equally within the power of Parliament under head 27 of s. 91.

It is further contended that the power to make a prohibitory order directed to the person convicted "or any other

(1) [1941] S.C.R. 396 (2) [1946] A.C. 193.

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person" is not legislation authorized by head 27. While, literally construed and divorced from the context, these words would permit the making of an order against persons quite unconnected with those against whom a conviction has been made, it is impossible that this was the intention of Parliament and I agree with the learned judges of the Court of Appeal that it should properly be construed as meaning, in cases such as this where the accused are corporations, the directors, officers, servants and agents of the various companies.

The appellants further submitted that that part of s-s. 1 which reads:—

> and where the conviction is with respect to the formation or operation of a merger, trust or monopoly, direct the person convicted or any other person to do such acts or things as may be necessary to dissolve the merger, trust or monopoly in such manner as the court directs.

is *ultra vires.*

This power was not exercised by the court in the present case and as, in my opinion, this portion of the subsection is clearly severable from that portion which has been invoked, the point as to whether this is within the powers of Parliament should not, in my opinion, be determined. This is not a reference to the court in which we are asked to determine the validity of s. 31 as a whole, but rather that portion of it purporting to give to the court the powers which have been exercised in making the order complained of.

In view of my conclusion that the impugned legislation is *intra vires* of Parliament under head 27, it is unnecessary to consider the question as to whether it might not also fall within head 2.

I would dismiss the appeals.

RAND J.:—The appellants were charged before the Supreme Court of Ontario with conspiracy unduly to prevent or lessen competition in the production, manufacture, sale, etc. in Canada of certain specified rubber products contrary to s. 498, s-s. (1)(*d*) of the *Criminal Code,* to which a plea of guilty was entered. Upon this, counsel on behalf of the Attorneys-General of Canada and of Ontario applied for and obtained an order of prohibition under s-s. (1) of s. 31 of the *Combines Investigation Act* which, in part reads:

31. (1) Where a person has been convicted of an offence under section thirty-two or thirty-four of this Act or under section four hundred and ninety-eight or four hundred and ninety-eight A of the Criminal Code

(*a*) the court may at the time of such conviction, on the application of the Attorney General of Canada or the attorney general of the province, or

(*b*) a superior court of criminal jurisdiction in the province may at any time within three years thereafter, upon proceedings commenced by information of the Attorney General of Canada or the attorney general of the province for the purposes of this section,

and in addition to any other penalty imposed on the person convicted, prohibit the continuation or repetition of the offence or the doing of any act or thing by the person convicted or any other person directed towards the continuation or repetition of the offence and where the conviction is with respect to the formation or operation of a merger, trust or monopoly . . .

S-s. (3) provides that:

A court may punish any person who contravenes or fails to comply with a prohibition or direction made or given by it under this section by a fine in the discretion of the court, or by imprisonment for a term not exceeding two years.

What is challenged is the power of Parliament within its jurisdiction over criminal law to enjoin a continuation or repetition or the doing of any act "directed towards" the continuation or repetition of such an illegal combination and its enforcement by fine or imprisonment. It is accepted that head 27 of s. 91 of the Confederation statute is to be interpreted in the widest sense, but that breadth of scope contemplates neither a static catalogue of offences nor order of sanctions. The evolving and transforming types and patterns of social and economic activities are constantly calling for new penal controls and limitations and that new modes of enforcement and punishment adapted to the changing conditions are not to be taken as being equally within the ambit of parliamentary power is, in my opinion, not seriously arguable.

What has called for the device of injunction and punishment for its contravention is undoubtedly the experience in dealing with these offences. The burden of proving the combination and its operation is, for obvious reasons, complicated and time consuming and the procedure of enforcement by conviction and fine has tended to exhibit a course of things bearing a close likeness to periodic licensing of illegality. That sanctions cannot be made more effective, that an offence by its nature continuing cannot be dealt with as criminal law by an enjoining decree that will facili-

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tate enforcement, might go far towards enabling self-confessed lawlessness to set the will of Parliament at defiance.

Mr. Robinette stressed language used by members of this Court and in the reasons given by Viscount Haldane in the Judicial Committee in *In re The Board of Commerce Act, 1919,* and *The Combines and Fair Prices Act* (1) and (2). I do not think it necessary to say more than that the statutes there challenged were found by the Judicial Committee to have been in substance enactments for the regulation in a civil aspect of the production and distribution of the necessaries of life throughout the Dominion and the penal measures authorized were necessarily bound up with that primary object. The essence of the judgment is stated at p. 199:

> It is quite another thing, first to attempt to interfere with a class of subject 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 of their application.

So far as the language of Viscount Haldane at p. 198 on the scope of head 27 appears to require the subject matter of criminal law to be such as "by its very nature belongs to the domain of criminal jurisprudence" it must be taken to have been rejected by the Committee in *Proprietary Articles Trade Association* v. *Attorney General for Canada* (3), where the validity of the *Combines Investigation Act,* R.S.C. (1927) c. 26 and of s. 498 of the *Criminal Code* was in issue. In the reasons there given, Lord Atkin at p. 324 buries any lingering notion that acts denounced as criminal by law possess any special taint or quality in themselves which places them in that category:

> The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: is the act prohibited with penal consequences?

This view was affirmed by the Judicial Committee in the *Margarine case* (4).

As it has so many times been reiterated, the first and fundamental question in these matters is whether the real purpose and object of the enactment is a legislative accomplishment within one or other of the heads of s. 91 or s. 92.

(1) (1920) 60 Can. S.C.R. 456.
(2) [1922] 1 A.C. 191.
(3) [1931] A.C. 310.
(4) [1951] A.C. 179.

Here it is whether the purpose and object are to provide additional means for suppressing a public evil of the order of those cognizable by Parliament under head 27. To this my answer is unhesitatingly yes. The section is not concerned in the slightest degree with the civil aspects of the relations involved in the agreements condemned; it is concerned solely with the harmful effects upon the economic life of the public of the control and the exactions for which they provide.

The incidental objections that the order is unlimited as to time, that it is aimed against "any other person", that the act seized upon is one "directed towards", that it may be made at any time within three years of the conviction, that it may affect purely intra-provincial trade and that the procedure of civil courts is to apply, do not go to the matter of jurisdiction; and their wisdom or unwisdom is not a question for the courts. The interpretation to be given them will be determined when the appropriate situation arises.

The last clause of s-s. (1), s. 31 dealing with mergers, trusts or monopolies was brought into the argument, but it has no relevancy to the proceedings taken. The most that could be contended is that the subsection must be treated as an entirety and that the invalidity of the clause debases the whole. I do not find it necessary to examine the contention of invalidity because I take it to be clear that the clause is severable: it is one of a number of cumulative measures towards eliminating what Parliament has declared to be criminal activity; and from the purpose and object of the subsection I have no doubt that the intention was to authorize the several steps each independently of the others.

I would, therefore, dismiss the appeals.

Appeals dismissed.

Solicitor for the Goodyear Tire & Rubber Co. of Canada, Ltd.: *J. J. Robinette.*

Solicitors for Dominion Rubber Co. Ltd.: *Mason, Foulds, Arnup, Walter & Weir.*

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Solicitors for Dunlop Tire & Rubber Goods Co. Ltd.: *Blake, Cassels & Graydon.*

Solicitors for Gutta Percha & Rubber Ltd.: *Blake, Cassels & Graydon.*

Solicitors for B. F. Goodrich Rubber Co. of Canada Ltd.: *Edmonds, Maloney, Nelligan & Edmonds.*

Solicitor for the respondent: *F. P. Varcoe.*

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*PRESENT: Rand, Kellock, Estey, Locke and Cartwright JJ. Estey J. died before the delivery of the judgment.

(1) [1955] 2 D.L.R. 823; 37 M.P.R. 284.