THE USE OF EXTRINSIC EVIDENCE AND THE ANTI-INFLATION ACT REFERENCE

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One of the more novel aspects of the *Anti-Inflation Act Reference* [1] relates to the discussion of the use of extrinsic evidence. The extrinsic materials filed included:

(a) the White Paper entitled *Attack on Inflation*,
(b) the monthly bulletin of Statistics Canada for October, 1975 containing, inter alia, various consumer price indices,
(c) a study by Professor Richard G. Lipsey on
    (1) the harm caused by inflation,
    (2) Canadian inflationary experience,
    (3) the state of the Canadian economy in 1975 and
    (4) various policy options in dealing with inflation,
(d) telegrams from a large number of economists supporting Professor Lipsey's analysis,
(e) the transcript of the speech delivered on September 22, 1975 by the Governor of the Bank of Canada,
(f) a comment prepared by the Ontario Office of Economic Policy on the need for national action and including a critique of Professor Lipsey's study. [2]

Both the Chief Justice and Ritchie J. [3] referred to the material in the course of characterizing the impugned legislation. The Chief Justice also took judicial notice of the fact that the collective bargaining process in Canada is conducted by and under the policy umbrella of trade unions with Canada-wide operations and affiliations. [4] In addition to these matters, Beetz J. [5] in his dissenting judgment referred to the debates on the Act in the House of Commons and statements made by Ministers both in the House and in Committee.

Ritchie J. appears to have restricted his use of extrinsic material to the Minister of Finance's White Paper which enabled him to interpret the phrase "serious national concern" in the preamble to the Act as an expression of

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[1] Reference Re Anti-Inflation Act, 9 N.R. 541, 68 D.L.R. (3d) 452 (S.C.C. 1976).

[2] *Id.* at 555-56, 68 D.L.R. (3d) at 466-67.

[3] *Id.* at 587-91 and 600-601, 68 D.L.R. (3d) at 495-99 and 508-509.

[4] *Id.* at 590-91, 68 D.L.R. (3d) at 499.

[5] *Id.* at 629-30, 68 D.L.R. (3d) at 534-35.

opinion by Parliament that the Act was passed in relation to an economic emergency. [6] In contrast, Laskin C.J. made use of extrinsic material not only to ascertain the opinion of Parliament but also to determine whether it had a rational basis and satisfied the constitutional requirements of the emergency doctrine. [7]

Beetz J., like Ritchie J., did not use extrinsic material for this purpose because he did not accept that Parliament had intended to express an opinion that there was an emergency or crisis justifying the use of its extraordinary constitutional power to legislate in relation to the provincial private and public sectors. He reached his conclusion by comparing the language of the Anti-Inflation Act with other legislative statements declaring an emergency. However, he did examine speeches in the House of Commons and in Committee to support his conclusion. [8] Thus, although Beetz J. and Ritchie J. referred to different material and reached different conclusions their approaches are similar. Both used extrinsic evidence to determine whether Parliament considered that there existed an economic emergency in the constitutional sense.

Ritchie J. did not adopt Laskin C.J.'s "rational basis" test to scrutinize Parliament's declaration of an emergency, but he did find that there was in fact an economic crisis transcending the normal division of legislative powers between the Legislatures and Parliament. [9] He then characterized the statute as being in relation to the economic emergency by referring to the preamble of the statute and the White Paper on Inflation. Thus, while Ritcrie J.'s reference to extrinsic materials is not explicitly made the basis for his opinion, the conclusion is inescapable that he was relying on the extrinsic materials or judicially noticed facts.

The conduct of the *Anti-Inflation Reference* and the use of extrinsic materials by the members of the Court represent a clear rejection of the views expressed by Rinfret C.J. in *Reference Re Validity of Wartime Leasehold Regulations.* [10] Rinfret C.J. took the position that because the answers given by the Court in a Reference were only opinions and not judgments binding persons in a contested case, they ought to be "given on the material which appears in the Order of Reference and the Court is not expected to look to outside evidence". [11] But in the *Anti-Inflation Act Reference*, the Supreme Court allowed the Attorney-General of Canada to use extrinsic materials and gave other parties leave to file additional materials "subject to reserve by the Court as to their relevancy and as to their weight". [12] The extrinsic materials in the *Anti-Inflation Act Reference* were addressed to the constitutional characterization of the Anti-Inflation Act, not to the construc-

[6] *Id.* at 601, 68 D.L.R. (3d) at 508-509.
[7] *Id.* at 590-91, 68 D.L.R. (3d) at 498.
[8] *Id.* at 629-30, 68 D.L.R. (3d) at 534-35.
[9] *Id.* at 599-601, 68 D.L.R. (3d) at 507-509.
[10] [1950] S.C.R. 124, [1950] 2 D.L.R. 1.
[11] *Id.* at 126, [1950] 2 D.L.R. 1 at 3.
[12] *Id.* at 556, 68 D.L.R. (3d) at 467.

tion of its terms. [13] This use must be distinguished from the use of extrinsic evidence to interpret the B.N.A. Act or to construe a statute other than for the purpose of characterizing it under the B.N.A. Act. [14] In addition, the extrinsic materials did not relate to the purpose or effect of the Act, but to the "social and economic conditions under which it was enacted". [15]

Laskin C.J. was the only judge to discuss the use of extrinsic evidence in general terms and, as he noted, the use of facts judicially noticed or established by extrinsic materials for the purpose of characterizing statutes has generally been restricted to cases where the nature of the problem demands their use by the Court. Such cases arise either where the issue is one of colourability and the real effect of a statute is not revealed by its words, or where the relevant head of power is described in terms of a purpose, such as section 92(2) of the B.N.A. Act. [16] In a constitutional case the purpose of the statute allows the Court to determine its dominant effect, or pith and substance, when choosing between possible subject matter classifications. [17] The Chief Justice referred to the *Alberta Bank Taxation* case, [18] where Lord Maugham stated that an issue of colourability may involve the need to examine the effect of the legislation for the purposes of characterizing it. "For that purpose the court must take into account any public general knowledge of which the court may take judicial notice, and may in a proper case require to be informed by evidence as to what the effect of the legislation will be." [19] In that case the court was concerned with a statutory scheme which the province argued came within the accepted power of the provinces to tax banking institutions which in other respects were, of course, within the regulatory power of Parliament. [20] The Court was of the view that the level of taxation was so onerous that it constituted a colourable attempt to legislate in relation to banks by putting them out of business. Both the Supreme Court and the Privy Council employed a combination of legislative history and judicially noticed facts to reach that conclusion. Laskin C.J. pointed out that the admissibility of extrinsic evidence will depend on the constitutional question in issue not on any general principle of admissibility. As he said, "[i]t may well be that in most situations it is unnecessary to go beyond the terms of the impugned legislation". [21] But, in the *Anti-Inflation Act Refer-*

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[13] *Supra* note 1, at 556-59, 68 D.L.R. (3d) at 467-470.

[14] See the discussion in B. STRAYER, JUDICIAL REVIEW OF LEGISLATION IN CANADA 161-62 (1968).

[15] *Supra* note 13.

[16] So far as the use of extrinsic evidence is concerned, these types of law are similar: both involve examination of the purpose of legislation in order to determine its effect.

[17] The Chief Justice described the process as "an adaptation to constitutional purposes of the rules in Heydon's Case" (3 Co. Rep. 6a, 7 E.R. 637), *supra* note 1, at 556, 68 D.L.R. (3d) at 467.

[18] [1939] A.C. 117, [1938] 4 D.L.R. 433 (1938), and the Lower Mainland Dairy Products Bd. v. Turner's Dairy Ltd., [1941] S.C.R. 573, [1941] 4 D.L.R. 209.

[19] *Id.* at 130, [1938] 4 D.L.R. 433 at 438-39.

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

[21] *Supra* note 1, at 556, 68 D.L.R. (3d) at 467.

ence, as Ritchie J. said, it was "not only permissible but essential to give consideration to the material which Parliament had before it at the time when the statute was passed for the purpose of disclosing the circumstances which prompted its enactment". [22] The only apparent guide for counsel appears to be that the relevance and weight of extrinsic evidence depend on whether the evidence bears "any relation to the ambit of the legislative authority relied on". [23] The meaning of the Chief Justice's succinct phrase may best be understood by a brief reference to certain basic propositions governing the definition of evidence and the concept of relevance.

Wigmore notes that a fundamental characteristic of evidence is its relative nature: "Evidence is always a relative term. It signifies a relation between two facts, the 'factum probandum' or proposition to be established and the 'factum probans', or material evidencing the proposition." [24] The concept of relevance is fundamental to the determination of whether the material offered is to be admitted in proof of the proposition to be established. However, the propositions to be proved are determined by the pleadings and the substantive law, not by the law of evidence. [25] In a constitutional case involving the division of legislative power, the material propositions will be found mainly in the pertinent case law.

The importance of extrinsic evidence arises in part from the fundamental role which factual elements play in the analytical technique which the courts apply to constitutional questions. As Strayer has stated:

> Facts . . . have an important role . . . in the constitutional assessment of an impugned statute. Facts can help to establish the effect of an impugned statute, and the relative significance of its various effects if it has more than one. "Effect" is used here in its broadest sense. A study of effect should embrace a study of the context in which the statute is passed and is likely to operate. Such a study will aid the court in finding whether in fact (and not merely in form) the statute is within the scope of its legislative author. It may also clarify for the court the policy issue which it must face. Suppose, for example, that in a period of beef surpluses Parliament enacted legislation establishing a comprehensive quota system for sale of beef cattle. Suppose that the system could have the effect of preventing sales made solely within a province, between a local producer and a local consumer. Appropriate evidence here might show that previous surpluses had endangered interprovincial and international markets and caused a serious national problem. It might also show the curative effect which the impugned federal statute would have. Such evidence would enable the court to see that the most significant effect of the legislation would be, not interference with local contracts (suggesting to them "property and civil rights"), but rather the protection of an important area of interprovincial and international commerce (suggesting to them "regulation of trade and commerce" and perhaps "peace, order, and good government"). This evidence would also point to the policy issue. That is, is it more important

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[22] *Id.* at 600, 68 D.L.R. (3d) at 508.
[23] *Id.* at 559, 68 D.L.R. (3d) at 470.
[24] J. WIGMORE, 1 THE LAW OF EVIDENCE 6 (3d. ed., 1940).
[25] R. CROSS, EVIDENCE 4-5 (4th ed. 1974).

> to permit the national protection of this commercial activity, or to preserve intact local control over local contracts? [26]

While the intention of the government is logically relevant to the meaning, purpose or effect of an Act, the weight which could be given to the statements of appropriate Ministers on such issues is of such limited probative value in the context of brief statements in the House and in public that no useful purpose would be served by admitting them. It is apparent that the meaning or purpose referred to by Ministers will be characterized by political considerations. Where effect is important the demonstration of "intent" will not be the best evidence of the actual operation of an Act. [27]

In determining the meaning and constitutional validity of a statute, its actual words, the institutional framework in which it is to operate and the probable effect of the provisions are all logically relevant and highly probative. However, it should be noted that there are situations where the provisions of the substantive law may control the materiality of evidence as to its effect. If the ambit of the relevant heads of power is defined in such a way as to make the evidence of the probable effect immaterial, the effect of the impugned legislation will have no bearing on its constitutional validity. It is in this sense that Strayer's analysis is incomplete.

A classic example to which the Chief Justice refers is *Attorney-General of Saskatchewan v. Attorney-General of Canada* (the Farm Security Case), [28] where the Privy Council held that the Farm Security Act [29] was not a law in relation to agriculture. Even though the probable effect of the Act was to aid a certain class of farmers in a province whose main industry and principal source of revenue was agriculture, the ambit of that head of power was defined so as to make that particular effect irrelevant or immaterial to the issue of the constitutional validity of the Act. There was, of course, no issue as to the admissibility of extrinsic evidence in that case, but the case does illustrate the relevance of the evidence received and explains why the Court did not consider it in characterizing the law. The issue of admissibility is always a relative one and the substantive law with respect to the ambit of the individual heads of power will often determine the admissibility or materiality of the evidence submitted by counsel.

The same proposition may be illustrated by reference to the relationship between the provisions of section 92(2) of the B.N.A. Act and the admissibility of the evidence of economists on the question of direct taxation, which arose in the *Cairns* case. [30] Once it became settled that the term "direct" used in the section was to be interpreted in a particular way the opinions of economists were no longer material to that issue. Although *Cairns* probably concerned the use of extrinsic evidence to determine the ambit of the head of

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[26] B. STRAYER, *supra* note 14, at 156-57.

[27] See the discussion in STRAYER, *id.* at 147-49.

[28] [1949] A.C. 110, [1949] 2 D.L.R. 145 (P.C. 1948).

[29] S.S. 1944 (2d Sess.) c. 30, *as amended*, S.S. 1945 c. 28, s. 2.

[30] Cairns Construction Ltd. v. Gov't of Saskatchewan, 27 W.W.R. 297, 16 D.L.R. (2d) 456 (Sask. C.A. 1958), *aff'd* [1960] S.C.R. 619, 24 D.L.R. (2d) 1.

power in question and not to characterize a statute, it does illustrate the effect of legally defining that head of power. The extrinsic evidence of economists will only become material again if the Supreme Court is prepared to review its definition of "direct". However, the opinion of an economist may still be relevant in determining the "general tendency" of the particular piece of legislation, provided it has sufficient probative value.

It is important, therefore, to examine the definition and operation of Parliament's emergency power. All members of the Court were prepared to accept that the Parliament of Canada under the head of Peace, Order, and Good Government has the power in a peacetime emergency or in circumstances leading to such an emergency to pass laws which transcend the normal division of powers. [31] In addition, they recognized that Parliament has some function to perform in deciding whether there exists a state of emergency or apprehended emergency. It is in this context that the first issue concerning the relevance of extrinsic evidence becomes apparent.

The law relating to the operation of the emergency doctrine requires a court to ascertain Parliament's opinion as to the existence of the emergency or crisis and the need for extraordinary legislation. [32] The first issue in the *Anti-Inflation Act Reference* was the extent to which extrinsic evidence may be used to ascertain the opinion of Parliament.

The Chief Justice examined both internal and external evidence and arguments based upon them. One argument was based on the limited scope of the Anti-Inflation Act, which exempted certain areas of the economy and allowed the provincial public sector to join by agreement. It was also contended that the fact that the Act was not passed to deal with the problem when it first arose was some indication that Parliament did not perceive the situation as an emergency or crisis. The Chief Justice rejected the first argument by pointing out that the limited application of the Act was a reasonable administrative procedure given the complexity of the problem. [33] He rejected the second argument on the basis that the delay came within Parliament's discretion to apply or not to apply a remedy. [34]

Ritchie J. reached a similar conclusion by reference to the preamble, the existing emergency and the White Paper tabled in the House by the Minister of Finance. [35]

Beetz J. ascertained Parliament's opinion by referring to the preamble, to other legislative acts of Parliament, to the Act itself and to the statements of Ministers in the House of Commons and in Committee and reached the conclusion that Parliament had not acted in the belief that there was an emergency. [36]

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[31] *Per* Beetz J., *supra* note 1, at 619-20, 68 D.L.R. (3d) at 525-26.
[32] *See* STRAYER, *supra* note 14, at 157.
[33] *Supra* note 1, at 584-86, 68 D.L.R. (3d) at 493-95.
[34] *Id.* at 588-89, 68 D.L.R. (3d) at 496-97.
[35] *Id.* at 600-601, 68 D.L.R. (3d) at 508-509.
[36] *Id.* at 623-30, 68 D.L.R. (3d) at 528-35.

It is apparent that for the purposes of the operation of the emergency doctrine all members of the Court were prepared to examine extrinsic evidence to interpret the words "serious national concern" in the preamble of the Act. This is clearly contrary to the established principle, at least as regards the White Paper and the statements of the Ministers. In the *Reader's Digest Case* [37] the Ministers' statements were rejected unanimously by the Supreme Court, Ritchie and Martland JJ. noting that when royal commission reports were used in constitutional cases it was for purposes other than proof of legislative intention. As Lord Wright stated in *Assam Railways and Trading Company v. Commissioners of Inland Revenue*, [38] if the issue before the Court is legislative intention, the proceedings in the House and the statements made by Ministers during debate have greater probative value than a royal commission report or a White Paper. The importance of the debates become even more apparent for this issue when one considers that the purpose of determining Parliament's opinion is to determine whether the onus to prove the existence of the emergency will be placed on those challenging the legislation in a situation where it is prima facie ultra vires. [39] The Court ought to examine the record to determine whether the government has taken political responsibility for declaring an emergency. Such an argument operates as some justification of the position taken by Beetz J. Presumably, such evidence will not be needed in future cases as the Law Officers will have the wit to advise Parliament to make an express declaration which will bring a presumption of constitutionality into operation.

The second issue concerning the use of extrinsic evidence in the *Anti-Inflation Act Reference* necessarily arises from the finding that the crisis or emergency was only temporary. The very definition of the emergency power puts in issue the existence of the emergency and the connection between the emergency and the legislation in issue. To what extent may extrinsic evidence be used to establish a sufficient connection between the emergency and the impugned legislation? The majority appear to have disagreed about the effect of extrinsic evidence on the presumption of constitutionality and the operation of the burden of proof.

The Chief Justice tended not to distinguish between the use of extrinsic evidence directed to the issue of Parliament's opinion as to the existence of the emergency and its use in connection with the issue of proof of a rational basis for the emergency legislation. He moved from the statement in the

[37] Attorney-General of Canada v. Reader's Digest Assoc'n. (Canada) Ltd., [1961] S.C.R. 775, 30 D.L.R. (2d) 296.

[38] [1935] A.C. 445 at 458, [1934] All E.R. Rep. 646 at 655 (P.C. 1934).

[39] In Australian and United States constitutional cases, the legal issue is formulated in terms of the presumption of constitutionality and the force of its application depends upon the particular type of case. For a discussion of these matters and others related to the problems of extrinsic evidence see: Australia: Holmes, *Evidence in Constitutional Cases*, 23 A.L.J. 235 (1949-50); Lane, *Facts in Constitutional Law*, 37 A.L.J. 108 (1963-64); Brazil. *The Ascertainment of Facts in Australian Constitutional Cases*, 4 FED. L. REV. 65 (1970-71). United States: Annotation—*Consideration of Extrinsic Evidence on Questions of Constitutionality of a Statute*, 82 L. Ed. 1244 (1938).

preamble to the Act with respect to the situation being one of "serious national concern" and it being "necessary to restrain profit margins, prices, dividends, and compensation" to bring in extrinsic evidence to assess the gravity of the circumstances upon which Parliament's opinion was based. [40] This is, of course, the core of the Court's power of judicial review. Although Laskin C.J. stated that the existence or non-existence of the emergency is not a question of fact, [41] it is apparent that he examined extrinsic evidence to determine whether to apply the presumption of constitutionality. [42] The extrinsic evidence conflicted but Laskin C.J. held that it demonstrated that there was a rational basis for concluding both that the crisis situation existed and that the policy embodied in the statute represented a rational attempt to deal with the situation as a logical extension of Parliament's power under other heads of jurisdiction. [43] His reference to the temporary nature of the legislation and to the *Margarine Reference* [44] indicate that the conclusions arrived at with the aid of extrinsic evidence were open to challenge. However, by defining the test of validity in terms of whether there exists a "rational basis for the governmental and legislative judgment", [45] the onus on those challenging the Act would seem to be proof of its invalidity beyond a reasonable doubt.

The focus of Ritchie J.'s judgment was the same two issues dealt with by the Chief Justice—the existence of exceptional circumstances and the necessity of the exceptional powers. But having found, with the aid of extrinsic evidence, that Parliament was of the opinion that there existed a national economic emergency, he had, in his view, only to determine whether the Anti-Inflation Act was a law which related to that emergency. And, as he stated, "it had not been seriously suggested that these provisions were colourably enacted for any other purpose". [46]

Ritchie J. did not discuss the role of extrinsic evidence explicitly but he did reject the evidence of those opposing the Act as not being "very clear evidence that an emergency had not arisen". [47] His judgment appears to leave open the nature of the burden of proof on those challenging the validity of the Act. The need to present "very clear evidence" may well involve more than proof on the balance of probabilities, but perhaps something less than proof beyond a reasonable doubt.

What is abundantly clear from this case is that it was absolutely necessary for the Attorney-General of Canada to present some evidence to justify the extensive interference with provincial jurisdiction as defined by the

[40] *Supra* note 1, at 587, 68 D.L.R. (3d) at 495.
[41] *Id.* at 559, 68 D.L.R. (3d) at 470.
[42] *Id.* at 587, 68 D.L.R. (3d) at 496.
[43] *Id.* at 589-90, 68 D.L.R. (3d) at 497-98.
[44] Canadian Fed'n. of Agriculture v. Attorney-General of Quebec, [1951] A.C. 179, [1950] 4 D.L.R. 689 (P.C.).
[45] *Supra* note 1 at 589, 68 D.L.R. (3d) at 497-98.
[46] *Id.* at 601, 68 D.L.R. (3d) at 509.
[47] *Id.*, referring to Cooperative Comm. on Japanese Canadians v. Attorney-General of Canada, [1947] A.C. 87, 101, [1947] 1 D.L.R. 577, 585-86 (P.C.) (Lord Wright).

jurisprudence. The extrinsic evidence was material because the formulation of the rule of law with respect to the operation of the emergency doctrine in the Constitution was based on the existence of a temporary situation which could only be dealt with by legislative action in Parliament. It is apparent that the less probative judicially noted facts are in establishing an emergency, the more important extrinsic materials become. The existence of war or some other emergency of a fundamental nature is not likely to require an examination of extrinsic materials but the farther one moves from such obvious emergencies the more necessary extrinsic evidence becomes to make the connection between the actual circumstances and the head of power.