THE ANTI-INFLATION ACT REFERENCE: TWO MODELS OF CANADIAN FEDERALISM

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The Supreme Court's opinion on the validity of the Anti-Inflation Act [1] and of the Canada-Ontario agreement making the Act and its guidelines applicable to the provincial public sector in Ontario establishes two important propositions:

1. that the emergency doctrine developed by the Privy Council to limit the generality of the "Peace, Order, and Good Government" power of Parliament is still alive and is responsive to a wider range of circumstances than war, famine and pestilence; [2]
2. that where it is necessary to co-ordinate or fuse federal and provincial legislative powers to achieve common purposes the arrangements used must have the sanction of both Parliament and the provincial legislatures.

The opinions given in the Reference also raise other interesting questions, including the use of extrinsic evidence such as economic briefs, and whether judges really do entirely ignore the wisdom of the method chosen to achieve an objective when determining the validity of legislation. This comment will be directed at the two propositions set out above, starting with the second. The reason for choosing this order is to underscore the point that the heavy emphasis on the division of legislative powers in Canadian constitutional law has led to neglect of systematic treatment of the structural implications of the British North America Act, 1867.

The relevant facts are simple. The Government of Canada had concluded that inflation in this country had reached a level that demanded drastic government intervention in the economic system. However, because the extent of federal competence to regulate the economy in peace time is not clear, [3] and because the past decade has seen the crystallization of an equilibrium based on cooperative federalism and diplomacy, the federal government decided to impose controls nationally only on the private sector, leaving it to the provinces to decide whether the controls and guidelines of the federal Act should apply to the provincial public sectors.

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[1] S.C. 1975-76 c. 75.

[2] *Re* Anti-Inflation Act, 9 N.R. 541, at 599, 68 D.L.R. (3d) 452, (1976) (Ritchie J.) at 507.

[3] *In re* Board of Commerce Act and Combines and Fair Prices Act, [1922] 1 A.C. 191, 60 D.L.R. 513 (P.C.).

The method for bringing provincial public sectors under the federal controls was provided by section 4(3) of the Anti-Inflation Act: [4]

> (3) The Minister may, with the approval of the Governor in Council, enter into an agreement with the government of a province providing for the application of this Act and the guidelines to
> (a) Her Majesty in right of the province,
> (b) agents of Her Majesty in that right,
> (c) bodies described in paragraphs (2)(b) and (c), and
> (d) bodies prescribed by the regulation pursuant to paragraph (2)(d),
> or any of such bodies, agents and Her Majesty in that right, and where any such agreement is entered into, this Act is binding in accordance with the terms of the agreement and the guidelines apply in accordance with the terms thereof with effect on and after the day on and after which the guidelines apply, by virtue of the operation of this Act, with respect to Her Majesty in right of Canada.

The government of Ontario, acting without any particular legislative authority, entered into such an agreement with the federal government, and the Supreme Court decided unanimously that the agreement was not effective to bring the provincial public sector under the controls. This effect could be achieved only if the legislature of Ontario so decided and either enacted a statute adopting the federal controls as its own, or delegated authority to the provincial executive to do so by way of agreement with the federal executive.

The significant fact, clearly emphasized by Chief Justice Laskin, was that the agreement did not simply involve the introduction of a discrete package of federal law which would take its place alongside complementary provincial laws. Rather, it involved a massive suppression of provincial law, which generally leaves the setting of prices and wages to the free play of market forces within regulatory frameworks, by superimposing a fairly comprehensive system of wage and price controls. That is, it was the effect of the agreement that was crucial, and since that effect was a large and significant change in the laws of the province, the agreement required the sanction of the provincial legislature. In the words of Laskin C.J.:

> It is one thing for the Crown in right of a Province to contract for itself; it is a completely different thing for it to contract for the application to its inhabitants, and to labour organizations in the Province, of laws to govern their operations and relations without statutory authority to that end. This would be, in effect, to legislate in the guise of a contract. [5]

Much more is at stake here than finding the right technique or form of words for achieving coordination of federal and provincial powers toward a common purpose. The real issue is whether these arrangements of cooperative federalism can serve to allow the executive branch of government to exercise, in effect, the plenary legislative powers of the democratically elected legislature.

Part of the fault here lies with the Supreme Court itself for yielding

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[4] S.C. 1975-76, c. 75.
[5] *Supra* note 2, at 598, 68 D.L.R. (3d) at 506.

in the *Coughlin* case [6] to the proposition that delegation by one legislature to another is not really delegation if it is clothed in the form of open-ended adoption by one legislature of the enactments, present and future, of another. *Coughlin* tried to come home to roost in the Anti-Inflation Act Reference when the Attorneys-General for Canada and Ontario argued that section 4(3) of the Act was conditional so far as provincial public sectors are concerned, and the condition set by Parliament for making the Act apply to those sectors is the making of an agreement between governments. This can be the case only if the Act can apply of its own force to provincial public sectors, and here the federal government obviously hoped that, by limiting its claim to supersede provincial authority in economic regulation and by respecting provincial autonomy in the public sector, it would improve its chances of persuading the Supreme Court, should a challenge arise, to characterize the Act as a law for the Peace, Order, and Good Government of Canada.

However, when Parliament then tried to return the inevitable grey area to provincial control at the executive level it began to tamper with the basic integrity of the constitutional arrangements entrenched in the B.N.A. Act.

More is involved here than form. First, there is the marginal nature of the federal claim to regulate provincial public sectors. Then there is the lack of clarity in the Act as to whether Parliament is claiming authority to go as far as regulating those sectors. Given these elements, it is not just a question of whether the technique looks like delegation, conditional legislation or adoption by one legislature of the enactments of another. Rather, it is the much more substantial question of whether the provincial executive, by whatever technique, can by itself make the decision that provincial laws relating to prices and incomes will be very substantially changed. One would have thought that this question was settled during the reign of Henry VIII.

The reader who has suffered through this lecture on the structural integrity of the federal system of government created by the B.N.A. Act is now entitled to something more exciting. I propose, then, to go to what I find to be one of the most exciting developments, not just in this case, but in the whole of our constitutional jurisprudence since Confederation: the clear exposition, in the judgments of Chief Justice Laskin and Mr. Justice Beetz, of two distinct approaches to the interpretation of the general power of the Parliament of Canada, which in turn reflect two distinct views of Canadian federalism. [7]

A reader of headnotes could easily conclude that the difference between these two judges went only to whether there existed an emergency as that term is defined in Privy Council decisions elaborating the scope of Peace,

[6] Coughlin v. Ont. Highway Transport Bd., [1968] S.C.R. 569, 68 D.L.R. (2d) 384.

[7] Judson, Spence and Dickson JJ. concurred with Laskin C.J.C. DeGrandpré J. concurred with Beetz J.'s dissent. Martland and Pigeon JJ. concurred with Ritchie J. in holding the legislation valid on the basis of national emergency.

Order, and Good Government. If this were the case, our understanding would be advanced but little. The real difference, however, is much more fundamental and goes to the manner in which our federal constitution responds to the real world.

Chief Justice Laskin prefers to say that the character of laws and the matters they relate to has something of a chameleon tendency to take its colour from the circumstances of the day. Thus, matters which on August 31, 1939, were clearly matters of property and civil rights became on September 1, 1939, matters going to the Peace, Order, and Good Government of Canada, enabling Parliament to occupy a massive new field of regulation and render inoperative any conflicting provincial legislation regulating the same general activities in their now-suspended character of property and civil rights. The Chief Justice seems to be using the theory of concurrency in order to reconcile the federal division of powers with the inevitable shift in real power that occurs in time of national emergency.

Mr. Justice Beetz, on the other hand, takes the view that an emergency has the effect of altering the division of powers, which means that he rejects the concurrency theory as a proper rationale and boldly asserts that some matters of property and civil rights move from section 92 to section 91 for the duration of the emergency. The logical consequence of this approach is that provinces lose temporarily some of their legislative potential and some existing provincial legislation might become ultra vires. Since the suspension of provincial power is temporary only, however, it is probably better to say that provincial laws become inoperative for the duration of the emergency. This latter problem may be largely academic since wartime controls are likely to be more comprehensive and coercive than existing provincial laws and thus more likely to occupy a field previously left largely unoccupied by provincial legislation. Many or most provincial laws may continue to operate within the larger regulatory framework imposed by Parliament. It is the federal interference with the economic freedom of action left by the absence of provincial laws and with economic rights created or protected by provincial law that will attract objections about federal invasion of provincial jurisdiction.

The theory of Beetz J. seems to be that the words "peace" and "order" in section 91 make our federal law governing division of legislative powers sensitive to conditions that demand strong action of the central government, so that the division of powers is different than during a national emergency it is in normal times.

While the theory of Beetz J. contains elements of the rather dangerous notion that national constitutions are suspended in wartime and lacks the logical consistency of Chief Justice Laskin's theory, it provides us for the first time with a clearly-stated alternative model. Also, it may have an historical and political consistency which outweighs the claim of logic. The question we must ask is which of these two theories is likely to serve best the purposes of Canadian federalism.

In order to pursue this enquiry, we need a summary of the basic elements of the Laskin and Beetz models.

The Laskin Model

1. In an emergency there arises a new aspect of the business of government, consisting of matters whose regulation is necessary to the Peace, Order, and Good Government of Canada in the face of the emergent situation. [8]
2. Courts of law should not ask whether, on the evidence, there is an emergency but whether there is a rational basis, in terms of Peace, Order, and Good Government, for the legislation before it. [9]
3. Extrinsic evidence (*e.g.*, economic briefs, government white papers) is admissible in determining whether such a rational basis exists, and the kind of extrinsic evidence admissible is not subject to general rules but depends on the constitutional issues on which it is sought to adduce evidence. [10]
4. The federal division of powers prescribed by sections 91 and 92 remains intact during an emergency but the range of concurrent federal powers is enlarged, subjecting provincial laws (not powers) to greater likelihood of inoperativeness under the doctrine of paramountcy. (While not expressly stated, this is implicit in the reasons of Laskin C.J.)

The Beetz Model

1. Absent an emergency, new matters can be added to those enumerated in section 91, on a national dimension rationale, only when they are distinct subject matters such as aeronautics, radio, and a national capital. [11] That is, there is an important difference between federal laws which interfere with provincial jurisdiction in an incidental or ancillary way and those which do so in a frontal way and on a large scale. [12]
2. The national dimension rationale applies only to genuinely new matters of national concern that do not fall within any of the heads of section 92, not to apparently new matters invented "by applying new names to old legislative purposes". This drive to invent is fuelled by the "notion that there must be a single, plenary power to deal effectively and completely with any problem". This latter notion is simply contrary to the federal principle. [13] "The containment and reduction of inflation

[8] *Supra* note 2, at 573, 68 D.L.R. (3d) at 483.
[9] *Id.* at 586, 68 D.L.R. (3d) at 496.
[10] *Id.* at 557, 68 D.L.R. (3d) at 468.
[11] *Id.* at 618, 68 D.L.R. (3d) at 524.
[12] *Id.* at 604, 621, 68 D.L.R. (3d) at 511, 526.
[13] *Id.* at 611-614, 68 D.L.R. (3d) at 518-520. The passages quoted are found in an extract, incorporated in the reasons of Beetz J., from an article of the Federal Court of Appeal, entitled "Sir Lyman Duff and the Constitution", 12 OSGOODE HALL L.J. 261 (1974).

does not pass muster as a new subject matter . . . . It is so pervasive that it knows no bounds." [14]

3. "The emergency doctrine operates as a partial and temporary alteration of the distribution of powers between Parliament and the provincial legislatures". Therefore, "the control of property and civil rights for purposes other than normal purposes may pass to Parliament, because of the emergency". The exercise of the general power in time of emergency "amounts to a temporary *pro tanto* amendment of a federal constitution by the unilateral action of Parliament". [15]
4. Legislation intended to respond to an emergency should not, given its constitutional significance, be enacted in an ordinary manner and form but must expressly declare the existence of an emergency. "It is the duty of the courts to uphold the Constitution, not to seal its suspension, and they cannot decide that a suspension is legitimate unless the highly exceptional power to suspend it has been expressly invoked by Parliament." [16]
5. Extrinsic evidence is admissible to ascertain the "constitutional pivot" of the legislation before the Court, including, in this case, Hansard. [17]

The Beetz model is set out in greater detail here because it is new, whereas the Laskin model is built on the familiar aspect doctrine and its companion theory of concurrency. Perhaps the most novel feature of the Beetz model is that it treats the B.N.A. Act as though it contains a kind of constitutional War Measures Act, authorizing the Parliament of Canada to amend, not just the Constitution of Canada, as section 91(1) authorizes, but the *federal* Constitution of Canada. There seems to be no basic objection to this theory of the emergency power since section 92(10)(c) authorizes Parliament to alter the division of legislative powers in relation to "works" even in the absence of special circumstances.

What, then, are the relative merits of these two theories as explanations of the emergency doctrine?

I suggest that the merit of the Laskin theory is that it enables judges to assert that in all cases they are simply interpreting the federal division of powers in the light of all surrounding circumstances, and giving to an apparently rigid legal document with its verbal framework of *exclusive* powers a flexibility that allows it to respond to changing circumstances of all kinds. In effect, it grafts a theory of concurrency onto sections 91 and 92 which makes it possible for judges to accommodate almost any reasonable assertion of power by either Parliament or a provincial legislature.

The major defect of this approach it that it blurs the legal boundaries between Parliament and the provinces which provide the ultimate base for the federal principle. As Beetz J. points out, a federal constitution contem-

[14] *Supra* note 2 at 618, 68 D.L.R. (3d) at 524.
[15] *Id.* at 621, 623, 68 D.L.R. (3d) at 527, 528.
[16] *Id.* at 623-24, 68 D.L.R. (3d) at 529.
[17] *Id.* at 629, 68 D.L.R. (3d) at 534.

plates many areas where neither legislature will have complete control and where the resulting tension will help to ensure that neither central nor regional interest will prevail completely at the expense of the other. Given the dominance of economic problems in current Canadian federalism, the concurrency of the Laskin Model looks like a one-way street in favour of central power and grand national schemes at the expense of local autonomy, distinctiveness and experience.

The main value of the Beetz model is that by calling a spade a spade, that is, by stating that our federal system in time of national emergency is in many respects really a unitary system dressed in federal clothing, it forces us to face up to the fact that federal government comes at a price. We have to work a bit harder at getting even essential things done in a federal system, but the alternative is no nation at all, since the diversity and local autonomy protected by the federal principle constitute the basic *sine qua non*, without which certainly Quebec and probably other provinces would be unwilling to participate in the federal endeavour.

The truth may be that the judgment of Mr. Justice Beetz is the first clear statement in a judicial decision of an alternative to the centralist-concurrency model of Canadian federalism that has been building up since the *O'Connor Report* [18] told us how the Privy Council had consistently misinterpreted the B.N.A. Act and emasculated the central government. In fairness to Mr. O'Connor, it should be said that he could not have foreseen the enormous centralizing effect of the Second World War, which was also a nice illustration of the tendency of the temporary to become permanent. Nor could Mr. O'Connor predict the extent to which the federal spending power would serve to centralize real power in this country.

There is great educational value in the reasoning of Mr. Justice Beetz, whether the reader accepts his analysis or not. Here is a judge who comes with strong credentials to explain how our federal system looks to legal minds trained in the province that has the greatest stake in preserving the federal principle. His analysis can help us understand the uneasiness of other provinces at Ottawa's growing catalogue of national problems that require global solutions.

However one may sympathize with the federal government's exasperation at the federalist fetters on its capacity to plan and execute long-term policy in important areas, the fact remains that the subtlety and ingenuity needed to orchestrate a federal system in response to important problems can be channeled through the framework created by our federal constitution if there is a will to do so. Mr. Justice Beetz has reminded us why it is important to find the will.

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[18] REPORT OF THE SENATE ON THE B.N.A. ACT (W. O'Connor, Chairman, 1939).