THREE COMMENTS ON THE A.I.B. REFERENCE

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THE ANTI-INFLATION ACT AND PEACE, ORDER AND GOOD GOVERNMENT

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In the *Anti-Inflation Act Reference*,[1] the Supreme Court of Canada was provided with yet another opportunity to attempt to give some substantive content to "Peace, Order, and Good Government", a task I have always thought to be comparable to that of Sisyphus. Now, perhaps an equally awesome task is to ponder the implications (if any) of the Supreme Court's decision. The decision consists of three judgments: that of Chief Justice Laskin, concurred in by Judson, Spence and Dickson JJ.; that of Ritchie J., concurred in by Martland and Pigeon JJ.; and finally, a dissenting judgment by Beetz J., concurred in by de Grandpré J. It is submitted that these judgments, despite the apparent differences among them, provide little, if anything, that is novel. Yet, with regard at least to the position taken by the Chief Justice, the resurrection of a concept that had at one time been almost buried may have disturbing implications for provincialists.

The Problem

There can be little doubt that the provisions of the Anti-Inflation Act involved a substantial incursion into the property and civil rights of Canadians,[2] a field of legislative competence which is reserved exclusively for the provinces under section 92(13) of the B.N.A. Act. The problem facing the majority of the Court was, therefore, how to justify and rationalize this interference with provincial powers.

The source of both federal and provincial legislative powers in Canada is found in sections 91 and 92 of the B.N.A. Act. The basic constitutional issue facing any Canadian court is simply what, if any, limitations do these two sections place upon the legislative powers of Parliament?

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[1] The legislation was sent to the Supreme Court of Canada by way of a Reference, the result being Re Anti-Inflation Act, 9 N.R. 541, 68 D.L.R. (3d) 452 (S.C.C. 1976).

[2] The judgment of Beetz J. indicates that this is so, both from first principles and from precedent: *id.* at 602, 68 D.L.R. (3d) at 510.

In the face of the word "exclusive" in section 92, even the most robust centralist would have to concede that Parliament cannot legislate with respect to the enumerated categories in that section, provided the legislation applies to a single province.[3] That, at least, must be the minimum limitation on Parliament's power.

The Judicial Committee of the Privy Council always assumed a further limitation on the power of Parliament, one connected to the allocation of exclusive legislative power over categories of matters.[4] It is of course very difficult, if not impossible, to allocate an exclusive power according to subject matter so as to vest in a single jurisdiction all aspects of a single phenomenon. The problem is particularly acute when dealing with the general power of Peace, Order, and Good Government. The central issue in the *Anti-Inflation Act Reference* thus involved two questions:

1. How does one decide whether a law of Parliament is for the Peace, Order and Good Government of Canada *or* whether it is in relation to a matter coming within one of the classes of subjects assigned exclusively to the provinces?

2. What are the consequences if one decides that a particular law of Parliament is in relation to a matter coming within one of the classes of subjects assigned exclusively to the provinces?

Clearly, the answer to question 2 is related to the primary question about limitations on the legislative powers of Parliament. If there are realistic limits to Parliament's power, then laws of Parliament, even those applicable to all of Canada, in some circumstances will be ultra vires. Those laws will be ultra vires when the court has concluded that a law is in relation to a matter coming within one of the classes in section 92 *and* not one for the Peace, Order, and Good Government of Canada.[5]

While nothing thus far indicates the answer to question 1, it does imply that whatever method of classification is used to make the initial allocation of power between sections 91 and 92, it cannot be one that, if carried to its logical conclusion, precludes the possibility of any limitations upon the legislative powers of Parliament.

Returning to the *Anti-Inflation Act Reference*, we find that it is in this very question of the initial allocation of power between sections 91 and 92 that Laskin C.J. differed from Ritchie and Beetz JJ. Whereas both Ritchie[6]

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[3] *See, e.g.*, Sir Montague Smith's discussion respecting the limits of s. 91(2), the regulation of Trade and Commerce, in Citizens Ins. Co. v. Parsons, 6 App. Cas. 96, at 112 (P.C. 1881-82).

[4] A close reading of the early decisions of the Supreme Court of Canada in relation to the B.N.A. Act will show that the same operative assumption was made; the concept of limitations on the legislative powers of Parliament was not foisted on Canadian courts by the Judicial Committee. *See, e.g.*, Sulte v. Three Rivers, 11 S.C.R. 25, at 37 (1885).

[5] This would be true even if the so-called enumerated powers in s. 91 were considered to be merely exemplary of the scope of Parliament's power.

[6] *Supra* note 1, at 600, 68 D.L.R. (3d) at 507.

and Beetz [7] held the legislation to be in relation to Property and Civil Rights under section 92(13), Laskin C.J. found the legislation to be for the Peace, Order, and Good Government of Canada, and not in relation to any of the enumerated provincial powers. [8] How did the Chief Justice reach this conclusion?

Laskin C.J.'s Judgment

In the course of his judgment, Chief Justice Laskin reviewed many of the landmark decisions of Canadian constitutional law. But it is in his discussion of one of the oldest and most notorious of these cases—the *Russell* [9] case—that one finds both the method of allocation he himself chooses to adopt and the cause of concern for provincialists.

Russell v. The Queen has always been treated by the centralists, most notably the present Chief Justice, as embodying the zenith of Parliament's legislative jurisdiction under Peace, Order, and Good Government. [10] Yet, as late as 1924, Lord Haldane said of the *Russell* case: "For a time no self-respecting counsel cited the Russell case before the Board; there was a gloomy silence whenever they did, but I think we have got over that now." [11]

The issue in *Russell* was the validity of a federal law prohibiting the traffic and sale of liquor in Canada. Although the legislation required for its implementation a local-option vote, the legislation was applicable to all of Canada or, what perhaps is more important, was applicable to a geographical area larger than the Province of New Brunswick, where the case originated.

The Judicial Committee held that the legislation was not in relation to a matter coming within one of the classes of subjects in section 92. Consequently, and correctly, the legislation was for the Peace, Order and Good Government of Canada. There is no fault in this result as such, and no succeeding judgment has criticized the *consequences* of the decision not to allocate the legislation to one of the heads in section 92.

But the question remains, what method of allocation had the Privy Council adopted in this case? Laskin C.J. searched subsequent judgments for an answer. He referred to and agreed with Duff J.'s statement in *In re Companies* [12] that "the mere desire for uniformity cannot be a support for an exercise of the federal general power. Uniformity is almost invariably involved in federal legislation but the Russell case was not founded on that alone". [13] What, then, was the other cornerstone of *Russell*?

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[7] *Id.* at 618, 68 D.L.R. (3d) at 524.

[8] *Id.* at 591, 68 D.L.R. (3d) at 499.

[9] Russell v. The Queen, 7 App. Cas. 829 (P.C. 1882).

[10] *See* Chevrette & Marx, Comment, 54 CAN. B. REV. 732, at 735 (1976).

[11] CANADA DEPT. OF LABOUR, JUDICIAL PROCEEDINGS RESPECTING CONSTITUTIONAL VALIDITY OF THE INDUSTRIAL DISPUTES INVESTIGATION ACT, 1907 88 (1925).

[12] 48 S.C.R. 331 (1913).

[13] *Supra* note 1, at 566, 68 D.L.R. (3d) at 477.

It would appear to lie in the following passage from the judgment of the Privy Council:

> It was not, of course, contended for the appellant that the Legislature of New Brunswick could have passed the Act in question, which embraces in its enactments all the provinces; nor was it denied, with respect to this last contention, that the Parliament of Canada might have passed an Act of the nature of that under discussion to take effect at the same time throughout the whole Dominion. [14]

The implication of this passage is clear though somewhat alarming. It provides the real basis, other than a desire for uniformity, for *Russell: if a law is beyond the competence of a province, for any reason, the law, according to the Russell case, will be intra vires Parliament.*

But all laws applicable to a geographical area greater than a single province are beyond the competence of a province. Therefore, all such laws, according to *Russell*, are intra vires Parliament, *regardless of subject-matter.* The logical conclusion is that so long as Parliament does not legislate with respect to a single province, there are no restrictions upon the competence of Parliament. Clearly, this is a method of allocation of legislative power inconsistent with the existence of limitations of substance on Parliament's power. [15]

Laskin C.J., referring again to Duff J., stated: "Duff J. did not think that *Russell v. The Queen* provided any principle applicable to the case before him [*In re Board of Commerce*], pointing out that the Provinces were not represented there and that it was largely an unargued case because of an admission that if there had been no local option provisions the legislation as immediately applicable throughout Canada would have been valid." [16]

But it is unfortunate that the Chief Justice did not pursue the point further, for in Duff J.'s judgment lies the key to why *Russell* should have been rejected:

> But it must be remembered that *Russell's Case* was in great part an unargued case. Mr. Benjamin who appeared for the appellant—the provinces were not represented upon the argument—conceded the authority of Parliament to enact legislation containing the provisions of the Canada Temperance Act to come into force at the same time throughout the whole of Canada and this Lord Herschell said in a subsequent case, was a "very large admission." The Judicial Committee proceeded upon the view that legislation containing the provisions of the Canada Temperance Act was not, from a provincial point of view, legislation relating to "property and civil

[14] *Supra* note 9, at 840.

[15] The implications of *Russell* had earlier been recognized by Henry J. in Sulte v. Three Rivers, *supra* note 4, at 38. Lord Haldane also denied that geographical scope was an acceptable test of Parliament's legislative competence. In Toronto Electric Commr's v. Snider, [1925] A.C. 396, at 401-402, [1925] 2 D.L.R. 5 (P.C.), he said: "it does not appear that there is anything in the Dominion Act which could not have been enacted by the legislature of Ontario, excepting one provision. The field for the operation of the Act was made the whole of Canada." As Lord Haldane went on to hold, that was insufficient to give Parliament jurisdiction, and the federal Lemieux Act was declared ultra vires.

[16] *Supra* note 1, at 569, 68 D.L.R. (3d) at 840.

> rights" within the province; it was, they said, legislation dealing rather with public wrongs, having a close relation to criminal law and on this ground they held that the subject matter of it did not fall within the exceptions to the introductory clause. [17]

It is submitted that Laskin C.J.'s apparent failure to realize that this was in fact the method of allocation used in *Russell* left the door open to the method's being inadvertently used again, as perhaps happened even in the course of his own decision. For unfortunately the Chief Justice does not, in the course of his judgment, articulate either how or why he concluded that the legislation was a law for the Peace, Order, and Good Government of Canada. He only *seems* to decide that the Act was not in relation to a matter coming wihtin one of the enumerations of section 92. This, too, is all that the *Russell* case, according to Laskin C.J., seemed to decide. This conclusion is also startling because it is consistent with a rationale which places no substantive limit on federal legislative power. [18]

The judgments of Ritchie and Beetz JJ.

Ritchie J. found that the Anti-Inflation Act would be ultra vires except in an emergency or crisis. There being, in his opinion, sufficient evidence that such a crisis did exist, he held the Act to be constitutional. However, Beetz J. took the view that there was no mysticism about "inflation", and that it was a word denoting a number of phenomena, many of which fell under specified heads of both sections 91 and 92. Consequently, the legislation was ultra vires because it swept within its ambit a great number of subject-matters exclusively within the legislative powers of the provinces. No head of power called "inflation" could be assigned to the federal government, short of an emergency, and Parliament had not sufficiently indicated that there was an emergency, or even a crisis facing the nation. [19]

As was mentioned in the first paragraph, none of the three approaches evident in the judgments was novel. Laskin C.J. appears to have used the *Russell* approach. Ritchie and Beetz JJ., it is submitted, applied the ideas of Viscount Haldane in the *Snider* case. [20]

However, Lord Haldane never said, either in *Snider* or in any other decision, that Parliament could only legislate under Peace, Order, and Good Government in time of emergency. What the Judicial Committee of the Privy Council did say, many times through Lord Haldane, was that large-

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[17] *In re* Board of Commerce, 60 S.C.R. 456, at 507-508 (1920). *See also* the observations of Henry J. regarding *Russell* in Sulte v. Three Rivers, *supra* note 4, at 38.

[18] *Supra* note 1, at 605, 68 D.L.R. (3d) at 513. For a search for alternative rationales for *Russell*, see Rempel, *Russell v. The Queen: A Critical Reappraisal*, 10 THÉMIS 205 (1975).

Of course, the traditional presumption in favour of the validity of legislation may have been responsible for the decision in *Russell*. This suggests that the order in which legislation has come before the courts has been one of the most influential factors shaping the development of the constitution.

[19] *Supra* note 1, at 623-631, 68 D.L.R. (3d) at 528-536.

[20] *Supra* note 15. For an interesting analysis of Lord Haldane's judicial philosoply, see Robinson, *Lord Haldane and the B.N.A. Act*, 20 U. TORONTO L.J. 55 (1970).

scale regulation of freedom of contract was exclusively a matter falling under section 92(13). Any time the court came to that conclusion, it held the federal legislation invalid. The allocation of legislative powers was never made on the basis of emergency.

Yet it troubled Lord Haldane that *deciding* that some of Parliament's laws were in relation to property and civil rights resulted in a denial of Parliament's jurisdiction. Perhaps because of the effects of World War I he was disturbed sufficiently to adopt a concept of emergency. Basically, what Lord Haldane said was that in some cases laws would be ultra vires Parliament because the courts would have *decided* those laws to be in relation to a matter coming within Section 92(13). However, in times of peril threatening the nation, temporary jurisdiction should, and would, be given to Parliament to deal with matters that the court would otherwise be prepared to hold were in relation to section 92(13). Thus, in *enlarging* the powers of Parliament, Lord Haldane chose the mechanism of Peace, Order, and Good Government. [21]

Nothing in Lord Haldane's concept of emergency [22] answers the initial question of the allocation of legislative power between Peace, Order, and Good Government and the heads of section 92, specifically section 92(13). The issue of emergency only arises *after* the allocation has been made to the provinces.

Therefore, the judgments of Ritchie and Beetz JJ. were proper applications of the Haldane doctrine of emergency. The only novel feature of the *Re Anti-Inflation Act* is the possible enlargement of the circumstances justifying the temporary transfer of jurisdiction of legislative power to Parliament under Peace, Order, and Good Government. What once took an emergency now takes a crisis, and it would appear that little evidence is needed to establish the existence of a crisis. [23]

Conclusion

Having examined the approaches used by each of the judges, it now remains to return to the critical question: what are the implications of the Court's decision? It is submitted that the judgments of Ritchie and Beetz JJ. are to be preferred, not because they represent a position of more or less centralized federalism but because, like Lord Haldane's many decisions, they are consistent with the preservation of the basic proposition of sections

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[21] He could have justified the doctrine under s. 91(7) of the B.N.A. Act.

[22] Nothing in the concepts of either "emergency" or "crisis" destroys the so-called residuary character of Peace, Order, and Good Government. Suggestions such as those of Lord Simon in Attorney-General for Ontario v. Canada Temperance Fed'n, [1946] A.C. 193, at 205 (P.C.), about "inherency" were directed only to the initial question of the allocation of legislative powers and do not relate necessarily to the concept of emergency. If something is inherently a matter of national concern, such as aeronautics, and, in the opinion of the Court, is not in relation to a matter within section 92(13), the emergency concept is irrelevant.

[23] *Supra* note 1, at 590, 68 D.L.R. (3d) at 498.

91 and 92: that there must be realistic limits on the legislative power of Parliament. As Lord Haldane once said in a different context:

> That sentence of Lord Watson marked the watershed. Up to then the trend had been in favour of the Dominion under the guidance of the Supreme Court. Then Lord Watson set up a new tendency, and then it followed almost as much the other way. Whether it has now got more equalized I do not know. [24]

Future courts may speculate similarly about the judgment of Laskin C.J. in the *Anti-Inflation Act Reference.*

[24] *Supra* note 11, at 111, referring to the following sentence: "If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject enumerated in section 92 upon which it might not legislate, to the exclusion of the provincial legislatures." Attorney-General for Ontario v. Attorney-General of Canada, [1896] A.C. 348, at 361 (P.C.) (Lord Watson).