

MEASURING "NATIONAL DIMENSIONS"

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INTRODUCTION

The Parliament of Canada has enacted several measures in recent years which depend for their constitutional validity at least to some extent on Parliament's power under the *British North America Act* to "make laws for the peace, order, and good government of Canada."¹ The latest and most controversial of these measures is the *Anti-Inflation Act*.² Federal pollution-control legislation has also relied in part on the "P.O. & G.G." power,³ and no one would be surprised to see it invoked again in the near future to justify federal initiatives in the energy field.

It is becoming increasingly important, therefore, to understand the precise meaning of the "P.O. & G.G." clause and the scope of the jurisdiction it confers on Parliament. Although much has been written on the subject, both judicially and academically,⁴ some crucial questions remain unresolved. The most important of these is the meaning of the "national dimensions" concept, which, despite widely varied judicial treatment over the years, seems to remain the test for determining when the "P.O. & G.G." power may properly be invoked. The purpose of this comment is to examine the "national dimensions" notion.

The "P.O. & G.G." clause is embedded in the opening words of section 91 of the *B.N.A. Act*, which is the source of most of the federal Parliament's legislative jurisdiction:

"91. It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces . . ."⁵

If the drafters of the *B.N.A. Act* had ended section 91 at this point,

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1. 30 & 31 Vict., c. 3, s.91.

2. S.C. 1974-75, c.75.

3. Eg: *Canada Water Act*, R.S.C. 1970, 1st Supp., c.5; *Arctic Waters Pollution Prevention Act* R.S.C. 1970, 1st Supp., c.2; *Northern Inland Waters Act*, R.S.C. 1970, 1st Supp., c.28; *Clean Air Act*, S.C. 1970-72, c.47. For differing views of the validity of using the power in such contexts, compare the writer's earlier papers, "The Constitutional Context of Canadian Water Planning," (1969) 7 Alta. L.R. 71 and "Constitutional Jurisdiction Over Environmental Management in Canada," (1973) 23 U.T.L.J. 54, with H. Landis, "Legal Control of Pollution in the Great Lakes Basin". (1970) 48 Can. Bar Rev. 66.

4. Eg: B. Laskin, "Peace, Order & Good Government Re-Examined," (1947) 25 Can. Bar Rev. 1054; A. Abel, "What Peace, Order & Good Government?" (1968) 7 West. Ont. L.R. 1; G.L'Ecuyer, "Les 'Dimensions Nationales' et la Gestion de l'Eau," (1972) 13 Cahiers de Droit 231; W.R. Lederman, "Unity & Diversity in Canadian Federalism: Ideals & Methods of Moderation" (1975) 53 Can. Bar Rev. 597.

5. Emphasis added.

and had proceeded directly to the list of provincial legislative powers set out in section 92, a plausible and relatively simple scheme of federalism would have resulted. The "P.O. & G.G." clause would have been the sole source of federal jurisdiction, and disputes over legislative powers could have been resolved by simply deciding whether the matter in question fell within one of the listed sources of provincial jurisdiction. If so, the province would have jurisdiction; if not, the matter would be federal.

However, the drafters were not content with giving the Federal Parliament a mere unspecified residue of legislative power. They also wanted to assure that certain specific matters would be indisputably within federal competence, even if they might otherwise be thought to fall within the scope of one of the provincial powers listed in section 92.⁶ Accordingly, the following provision was added to section 91:

"... and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next herein-after enumerated; that is to say ..."

Then came a list of 29 enumerated sub-sections specifying matters that were to be unquestionably within federal jurisdiction: "regulation of trade and commerce", "banking...", "the criminal law...", and so on. Finally, to make absolutely certain that these specified matters would be federal, the following concluding words were added:

"... and any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

It can be seen that section 91 bestows two different categories of legislative power on the federal Parliament: (a) the specific powers listed in the 29 enumerated subsections, and (b) the general residue of jurisdiction contained in the opening "P.O. & G.G." clause. It seems clear that these two categories of federal power were intended to be given different priorities in any competition for jurisdiction with the provincial legislatures. Since the specific enumerated powers of Parliament were stated to be exercisable "notwithstanding" provincial powers, and were deemed by the concluding words not to fall within provincial powers,⁷ they must be accorded first priority. The

6. This was probably because some of the powers bestowed on the provinces ("property and civil rights in the province," for example) were capable of extremely broad interpretations which would leave little for federal control if not limited in some way. See: W.R. Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation," (1975) 53 Can. Bar Rev. 597.

7. The language employed in the section created certain small interpretative problems. It has been necessary to construe the words "shall not be deemed" as if they read "shall be deemed not," and some expenditure of judicial energy was also required to avoid the possible interpretation that the enumerated federal heads have priority over the final provincial enumerated head only, rather than over all provincial powers. See: F.P. Varcoe, *The Constitution of Canada*, 1965, p.20-21.

"P.O. & G.G." power on the other hand, is stated to exist only "in relation to . . . matters not coming within the classes of subjects . . . assigned exclusively to the Legislatures of Provinces," and must accordingly rank third in priority, after the enumerated provincial powers.

This means that a court faced with disputed legislative jurisdiction should look first to the list of enumerated federal powers. If the subject matter of the legislation can be found within that list, the question is settled. If not, the list of provincial enumerated powers should be examined, and only if the subject matter cannot find a home within that list does the "P.O. & G.G." power become significant. It is for this reason that the latter provision is often referred to as the "residual" power.⁸

Sometimes "P.O. & G.G." is said to have two different aspects: one being residual in nature and the other bestowing "first priority" powers on Parliament. Those who hold that view would draw a distinction, for example, between the *Citizenship Act*⁹ and the *Anti-Inflation Act*.¹⁰ While both are federal statutes passed in reliance on the "P.O. & G.G." power, only the former would be seen as a "residual" use of the power. Since there is nothing in any of the enumerated sub-sections of sections 91 or 92 that could apply to citizenship in general, legislative jurisdiction in that field must lie within the unspecified federal residue. Controls on prices and wages, on the other hand, could be said to involve the enumerated provincial heading of "property and civil rights." Since by definition a "residual" federal power cannot be invoked if there is an appropriate head of provincial jurisdiction available, the conclusion is reached that if the federal anti-inflation legislation is valid it must be based on a use of the "P.O. & G.G." power which is other than residual in nature. This aspect of the power arises, they contend, when a subject-matter of legislation attains "national dimensions". In those circumstances, it is argued, the "P.O. & G.G." power supersedes every enumerated head of provincial jurisdiction.

This is a mistaken view. The language of sections 91 and 92 simply does not permit "P.O. & G.G." to be given priority over the enumerated provincial powers in any circumstances. Both the *Citizenship Act* and the *Anti-Inflation Act* involve *residual* reliance on the "P.O. & G.G." clause. If the latter Act should be upheld by the

8. This order of priority has been challenged by some observers, most notably by W.F. O'Connor, who argued in his famous 1939 report to the Senate on constitutional questions that the "P.O. & G.G." power is not residual, but is the sole grant of legislative jurisdiction to the federal Parliament, and takes priority in its entirety over all provincial powers: Senate of Canada, *Report by Parliamentary Counsel on B.N.A. Act, 1939*. A third approach, to the effect that there are two residual powers, one federal and one provincial, will be found in A. Abel, "What Peace, Order & Good Government?", (1968) 7 West. Ont. L.R. 1. However, the approach outlined in the text seems to command the support of most judicial and scholarly authorities: see G.P. Browne, *The Judicial Committee and the British North America Act, 1967*.

9. R.S.C. 1970, c. C-19.

10. Note 2 above.

courts it will not be because "P.O. & G.G." take precedence over "property and civil rights", but because the controls in question are found not to fall within the "property and civil rights" clause. The reason they might be found not to fall within that clause is that it relates only to "property and civil rights *in the Province*"¹¹ while the federal control scheme purports to deal with a *national* matter. Those who support the legislation argue that because the problem of inflation control is one of "national dimensions", it cannot be said to involve "property and civil rights *in the Province*", and that since there is no other appropriate enumerated head of federal¹² or provincial jurisdiction, the matter must fall within Parliament's residual powers.

Because every bestowal of provincial legislative jurisdiction in the *B.N.A. Act* is qualified by words like "in the Province", "for provincial purposes", "with provincial objects", etc., the "P.O. & G.G." clause offers considerable scope for federal legislation dealing with the "national dimension" of problems which, in their local and provincial dimensions are within provincial competence. The key to understanding the limits of this important source of federal power is the concept of "national dimensions". Regrettably the courts have not been as helpful as they might have been in explaining this central notion.

THE CASES

Although the confusing treatment which the "P.O. & G.G." and "national dimension" concepts have received from the courts over the years is a familiar story to students of Canadian constitutional law — too familiar to justify exhaustive re-iteration here — a review of the cases is essential to an understanding of the issues to be discussed.

*Russell v. The Queen*¹³

Much of the confusion is attributable to this early, and probably mistaken decision of Sir Montague Smith on behalf of the Privy Council. It provides some authority for a "national uniformity" interpretation of the "P.O. & G.G." power.

A federal local-option temperance scheme for all of Canada was held to be within the legislative jurisdiction of the Federal Parliament. Sir Montague Smith reached this conclusion by holding that the legislation did not fall within any of the enumerated provincial powers in section 92, and so must be covered by either an emunerat-

11. Section 92(13), emphasis added.

12. The federal "trade and commerce" power under section 91(2) is a possibility, however.

13. [1882] 7 A.C. 829 (P.C.)

ed federal power or by the residual jurisdiction given to the Federal Parliament by the "P.O. & G.G." clause.

In rejecting all possible sources of provincial jurisdiction Sir Montague considered three in particular: the power to license saloons and taverns;¹⁴ the "property and civil rights" clause¹⁵; and the final enumerated provincial power, "generally all matters of a merely local or private nature in the Province"¹⁶. The first two were rejected rather easily by holding that the legislation had only an incidental effect on licensing and property rights, and did not concern those subjects "in pith and substance", and that the rights involved were more "criminal" than "civil" in nature. Rejection of the third possible basis of provincial jurisdiction was much more difficult to justify, however. Sir Montague Smith dealt with it as follows:

" . . . The declared object of Parliament in passing the Act is that there should be uniform legislation in all the provinces respecting the traffic in intoxicating liquors, with a view to promote temperance in the Dominion. Parliament does not treat the promotion of temperance as desirable in one province more than in another, but as desirable everywhere throughout the Dominion. The Act as soon as it was passed became a law for the whole Dominion and . . . took effect and might be put in motion at once and everywhere within it. It is true that the prohibitory and penal parts of the Act are only to come into force in any county or city upon the adoption of a petition to that effect by a majority of electors, but this conditional application . . . does not convert the Act itself into legislation in relation to a merely local matter. The objects and scope of the legislation are still general, viz., to promote temperance by means of a uniform law throughout the Dominion.

The manner of bringing the prohibitions and penalties of the Act into force, which Parliament has thought fit to adopt, does not alter its general and uniform character. Parliament deals with the subject as one of general concern to the Dominion, upon which uniformity of legislation is desirable, and the Parliament alone can so deal with it . . . The present legislation is clearly meant to apply a remedy to an evil which is assumed to exist throughout the Dominion, and the local option, as it is called, no more localizes the subject and scope of the Act than a provision in an Act for the prevention of contagious diseases in cattle that a public officer should proclaim in what districts it should come in effect, would make the statute itself a mere local law for each of these districts. In statutes of this kind the legislation is general, and the provision for the special application of it to particular places does not alter its character."¹⁷

It should be noted that this case did *not* hold that the legislation in question fell within the residual power in the opening words of section 91. Although Sir Montague did use the term "peace, order & good government" to describe the federal jurisdiction, it may well have been in reference to section 91 *in its entirety*. All that the case did hold was that since no enumerated provincial power was appropriate, the legislation must have fallen within *some* federal power. In

14. Section 92(9).

15. Section 92(13).

16. Section 92(16).

17. P.841-2.

18. P.838-9.

19. P.842.

fact, two *enumerated* federal powers were suggested as being possibly relevant: "criminal law"¹⁸ and "trade and commerce"¹⁹. Therefore the *Russell* case does not, strictly speaking, lay down any binding principles about the federal residual power.

It should also be noted that Sir Montague Smith did *not* say that every federal statute imposing a uniform law for all of Canada on matters otherwise within provincial jurisdiction would be valid. His comments about uniformity were directed only to the question of whether the law was *local* within the meaning of section 92(16). He had held previously that no other head of provincial jurisdiction was applicable to the case. He might not have regarded his remarks as germane to situations where some other enumerated head of provincial power was available.

The question of whether Sir Montague's "uniformity" approach, to whatever extent applicable, was correct, will be discussed at a later stage.²⁰

*Local Prohibition Case*²¹

In this case the Privy Council upheld an Ontario statute establishing a local-option temperance scheme which differed in some respects from the still-operative federal scheme, but was of the same general nature. The basis of the decision was a finding that the provincial statute involved "property & civil rights" and "local & private matters in the province", and did not contradict or otherwise conflict with the federal statute because it merely offered the voters of each municipality a choice of local option schemes to adopt.

Lord Watson, who wrote the Privy Council opinion, studiously avoided overruling the *Russell* case. In fact, he purported to follow it so far as the validity of the federal legislation was concerned. The case is usually explained as an example of the "dual aspect" principle, according to which both federal and provincial legislation on a problem may exist side by side, dealing with the national and local aspects of the problem respectively, unless they come into actual conflict with each other (in which case the federal Act would prevail).

In many respects, however, Lord Watson rejected ideas expressed by Sir Montague Smith in the *Russell* case. He held, for example, that this type of legislation involved either "property and civil rights in the province" or "local and private matters in the province"²², a view which had been rejected by Sir Montague Smith in the *Russell* case in order to reach the result he did. It is very difficult to see how

20. See text accompanying note 73, ff., below.

21. *Attorney-General Ontario v. Attorney-General Canada*, [1896] A.C. 348 (P.C.)

22. P.364-5.

these cases can be logically reconciled. Looked at realistically, the *Local Prohibition Case* accepted the *result* of the *Russell* case (that the federal legislation was valid) while rejecting its reasoning and holding that provincial legislation on the same subject would also be valid.

Lord Watson contributed further to the confusion about the *Russell* case by appearing to treat it as if it were based solely on the residual clause,²³ when in fact it was simply based on the fact that there was no applicable provincial power. The possibility that the "trade & commerce" power might have supported the *Russell* case was rejected by Lord Watson,²⁴ but the suggestion in *Russell* that the "criminal law" power might also have been involved was entirely ignored. Subsequent cases which have treated *Russell* as an example of the "residual" use of "P.O. & G.G." have their genesis in these misrepresentations of the case by Lord Watson.

The most significant feature of the *Local Prohibition Case* in the present context is Lord Watson's discussion of the federal "P.O. & G.G." power, which presented a somewhat more restricted view of the power than that of Sir Montague Smith in the *Russell* case:

"The general authority given to the Canadian Parliament by the introductory enactments of s.91 is "to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces"; and it is declared, but not so as to restrict the generality of these words, that the exclusive authority of the Canadian Parliament extends to all matters coming within the classes of subjects which are enumerated in the clause. There may, therefore, be matters not included in the enumeration, upon which the Parliament of Canada has power to legislate, because they concern the peace, order, and good government of the Dominion. But to those matters which are not specified among the enumerated subjects of legislation, the exception from s.92, which is enacted by the concluding words of s.91, has no application; and, in legislating with regard to such matters, the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by s.92. These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in s.91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in s.92. To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by s.91, would, in their Lordship's opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces."²⁵

Then, after a passage taking issue with the "uniformity" approach²⁶, Lord Watson launched what has come to be called the "national dimensions" concept:

"... Their Lordships do not doubt that some matters, in their origin local and

23. P.359 and p.362.

24. P.363.

25. P.360-1.

26. See text accompanying note 75, below.

provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada. An Act restricting the right to carry weapons of offence, or their sale to young persons, within the province would be within the authority of the provincial legislature. But traffic in arms, or the possession of them under such circumstances as to raise a suspicion that they were to be used for seditious purposes, or against a foreign State, are matters which, their Lordships conceive, might be competently dealt with by the Parliament of the Dominion.”²⁷

In spite of numerous swings of the judicial pendulum since this case was decided, Lord Watson’s description of the federal “P.O. & G.G.” power remains the classic definition.

The “Emergency” Cases

Interpretation of the “P.O. & G.G.” clause took a long and tortuous detour between 1922 and 1946. The cause was the development by Viscount Haldane of the notion that this power is exercisable by Parliament only to deal with grave but temporary national emergencies.²⁸

The emergency doctrine was impossible to reconcile with the text of the *B.N.A. Act*, which contains no reference to emergencies or to temporary powers. Sometimes even common-sense was abandoned, as in Viscount Haldane’s hilarious attempt to explain the *Russell* decision in terms of his theory:

“Their Lordships think that the decision in *Russell v. The Queen* can only be supported today, not on the footing of having laid down an interpretation, such as has sometimes been invoked of the general words at the beginning of s.91, but on the assumption of the Board, apparently made at the time of deciding the case of *Russell v. The Queen*, that the evil of intemperance at that time amounted in Canada to one so great and so general that at least for the period it was a menace to the national life of Canada so serious and pressing that the National Parliament was called on to intervene to protect the nation from disaster.”²⁹

This explanation became even more ludicrous in the light of subsequent decisions that unemployment insurance legislation and other federal measures passed to alleviate the extreme economic hardships caused by the “Great Depression” of the 1930’s did not concern emergencies of the sort that would justify resort to the federal “P.O. & G.G.” power.³⁰

This fascinating chapter of Canadian constitutional history has

27. P.361-2.

28. The cases are well reviewed in Laskin’s classic article, note 4 above.

29. *Toronto Electric Commissioners v. Snider* [1925] A.C. 396, at 412 (P.C.)

30. The most significant decision in this regard was the *Unemployment Insurance Reference* [1937] A.C. 355 (P.C.) It should be noted that even counsel for the Government of Canada conceded during the course of argument that the legislation did not concern “an emergency in the strict sense”: p.358. The *Labour Conventions Reference* [1937] A.C. 326 (P.C.), another of the same series of decisions, also weakened the “P.O. & G.G.” power by seeming to reject an earlier decision in the *Radio Reference* [1932] A.C. 304 (P.C.) which had used the residual power to justify federal legislation to implement international treaties.

been well described elsewhere,³¹ and it is not necessary to repeat the story here, because the emergency doctrine was rejected by the next case to be described, and is unlikely to be a factor in future constitutional decisions.

*Attorney-General of Ontario v. Canada Temperance Federation*³²

With this case the "emergency doctrine" detour ended, and interpretation of the "P.O. & G.G." power returned to the "national dimensions" highway.

The case involved an attempt by the Ontario government to set aside the federal *Canada Temperance Act*, which was in substantially the same form as the legislation upheld in *Russell v. The Queen*. The attack was two-pronged: (a) that the *Russell* case had been shown by subsequent decisions to have been wrongly decided, and (b) that even if it had been correctly decided, the emergency which was thought to exist had long since disappeared. The Privy Council, speaking through Viscount Simon, rejected both arguments, and upheld the legislation.

On the first argument, Viscount Simon did not go so far as to say that the *Russell* case was correct. He simply held that it would be inexpedient to overrule the decision after so many years:

"The appellants' first contention is that *Russell's* case was wrongly decided and ought to be overruled. Their Lordships do not doubt that in tendering humble advice to His Majesty they are not absolutely bound by previous decisions of the Board, as is the House of Lords by its own judgments. In ecclesiastical appeals, for instance, on more than one occasion, the Board has tendered advice contrary to that given in a previous case, which further historical research has shown to have been wrong. But on constitutional questions it must be seldom indeed that the Board would depart from a previous decision which it may be assumed will have been acted on both by governments and subjects. In the present case the decision now sought to be overruled has stood for over sixty years; the Act has been put into operation for varying periods in many places in the Dominion; under its provisions businesses must have been closed, fines and imprisonments for breaches of the Act have been imposed and suffered. Time and again the occasion has arisen when the Board could have overruled the decision had it thought it wrong. Accordingly, in the opinion of their Lordships, the decision must be regarded as firmly embedded in the constitutional law of Canada, and it is impossible now to depart from it. Their Lordships have no intention, in deciding the present appeal, of embarking on a fresh disquisition as to relations between ss.91 and 92 of the British North America Act, which have been expounded in so many reported cases; so far as the Canada Temperance Act, 1878, is concerned the question must be considered as settled once and for all."³³

In dealing with the second argument, Viscount Simon first rejected the "emergency" interpretation of "P.O. & G.G.":

"The first observation which their Lordships would make on this explanation of *Russell's* case is that the British North America Act nowhere gives power to the

31. See Laskin's article, note 4 above, for example.

32. [1946] A.C. 193 (P.C.)

33. P.206-7.

Dominion Parliament to legislate in matters which are properly to be regarded as exclusively within the competence of the provincial legislatures merely because of the existence of an emergency. Secondly, they can find nothing in the judgment of the Board in 1882 which suggests that it proceeded on the ground of emergency; there was certainly no evidence before that Board that one existed. The Act of 1878 was a permanent, not a temporary, Act, and no objection was raised to it on that account. In their Lordship's opinion, the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as for example, in the *Aeronautics* case and the *Radio* case), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures. War and pestilence, no doubt, are instances; so, too, may be the drink or drug traffic, or the carrying of arms. In *Russell v. The Queen*, Sir Montague Smith gave as an instance of valid Dominion legislation a law which prohibited or restricted the sale or exposure of cattle having a contagious disease. Nor is the validity of the legislation, when due to its inherent nature, affected because there may still be room for enactments by a provincial legislature dealing with an aspect of the same subject in so far as it specially affects that province.

It is to be noticed that the Board in *Snider's* case nowhere said that *Russell v. The Queen* was wrongly decided. What it did was to put forward an explanation of what it considered was the ground of the decision, but in their Lordships' opinion the explanation is too narrowly expressed. True it is that an emergency may be the occasion which calls for the legislation, but it is the nature of the legislation itself, and not the existence of emergency, that must determine whether it is valid or not.³⁴

Viscount Simon then denied that a change in the social problem to which the original legislation was addressed would invalidate a continuation of the legislation. His reason for so holding was that if Parliament could legislate to deal with a particular existing problem, it could also pass preventative legislation to make a future recurrence of the problem impossible:

"... if the subject matter of the legislation is such that it comes within the province of the Dominion Parliament that legislature must, as it seems to their Lordships, have power to re-enact provisions with the object of preventing a recurrence of a state of affairs which was deemed to necessitate the earlier statute. To legislate for prevention appears to be on the same basis as legislation for cure. A pestilence has been given as an example of a subject so affecting, or which might so affect, the whole Dominion that it would justify legislation by the Parliament of Canada as a matter concerning the order and good government of the Dominion. It would seem to follow that if the Parliament could legislate when there was an actual epidemic it could do so to prevent one occurring and also to prevent it happening again. Once it has been decided that the Act of 1878 was constitutionally valid, it follows that an Act which replaces it and consolidates therewith the various amending Acts that have from time to time been enacted must be equally valid. It is to be noted that in 1896 Lord Watson's judgment appears to take it for granted that the position was in no way affected by the fact that the Act of 1878 had been repealed and replaced by the Act of 1886".³⁵

Most of Viscount Simon's remarks about "P.O. & G.G." and the emergency doctrine in this case were *obiter dicta*. Having refused to overrule the *Russell* case, the only further finding he was compelled to make was whether a change in social conditions had removed the

34. P.205-6.

35. P.207-8.

basis for federal jurisdiction. His decision that permanent legislation designed to prevent a recurrence of the same circumstances was valid therefore formed part of the *ratio decidendi*, but his other observations about "P.O. & G.G." were *obiter*. However, in view of the general approval that his words have received in subsequent cases, such formal distinctions are not very useful. Most observers treat this decision as having buried the emergency doctrine and resurrected the "national dimensions" approach.³⁶

Viscount Simon should not be regarded as approving the approach to "P.O. & G.G." adopted in the *Russell* case, however. His reasoning was much closer to that of Lord Watson in the *Local Prohibition Case*. The only part of the *Russell* opinion that he seemed to approve was Sir Montague Smith's example about contagious diseases,³⁷ a matter to which we will return at a later point in this comment.³⁸

Post-1949 Supreme Court Cases

Decisions of the Supreme Court of Canada since the abolition of Privy Council appeals in 1949 have consistently followed the "national dimensions" line when dealing with the "P.O. & G.G." power.

The first of these was *Johannesson v. West St. Paul*,³⁹ which involved a constitutional challenge to a municipal by-law prohibiting the creation of an airfield within a certain part of the municipality. The Supreme Court held that the by-law was invalid because it related to "aeronautics", which is within the exclusive jurisdiction of Parliament. Although it is not easy to find a precise *ratio decidendi* for this decision among the multiple opinions of the judges, it seems clear that at least a majority of the judges based their conclusion at least in part on the "P.O. & G.G." clause. And six judges⁴⁰ quoted with approval Viscount Simon's statement that the "P.O. & G.G." power comes into play whenever "the real subject-matter of the legislation . . . goes beyond local or private concern or interests and must from its inherent nature be the concern of the Dominion as a whole."

36. It is true that apparent support for the emergency doctrine was expressed in *dicta* of Lord Wright in the subsequent case of *Co-operative Committee on Japanese Canadians v. Attorney-General Canada* [1947] A.C. 87, at 101-2 (P.C.). It would not be justified to attach much significance to these remarks, however. They were not necessary to the conclusions reached, and they made no reference to the earlier views of Viscount Simon, (who also sat on this case). Moreover, Lord Wright, who wrote the reasons, had *dissented* in the *Unemployment Insurance Reference* and other depression legislation cases. His remarks about the "P.O. & G.G." power in this case probably amount to nothing more than careless expression. In any event, subsequent decisions of the Supreme Court of Canada have laid to rest any likelihood that the emergency doctrine will be revived.

37. P.206.

38. See text accompanying note 85, ff., below.

39. [1951] 4 D.L.R. 609 (S.C.C.).

40. Kerwin, J., at p.616; Estey & Taschereau, J.J., at p.619-20; Kellock & Cartwright, J.J., at p.623; and Locke, J., at p.635.

Because the grounds for the *Johannesson* case were so diffuse, some doubts about its significance persisted. However, any doubt that the "emergency" approach had been abandoned was removed by the Court's subsequent decision in *Munro v. National Capital Commission*,⁴¹ the most significant "P.O. & G.G." case yet to be decided by a Canadian court. The *National Capital Act*,⁴² a federal statute, conferred expropriation powers on a federal commission with a view to beautifying the national capital. When the commission sought to expropriate Munro's property for this purpose he resisted on the ground that the statute concerned "property and civil rights" and "local matters", over which the provinces have exclusive jurisdiction. The Supreme Court unanimously upheld the statute on the basis of the "P.O. & G.G." power. The opinion of the Court was written by Cartwright, J., who unequivocally adopted Viscount Simon's "national dimensions" *dictum*.⁴³ Then, turning to the question of whether the *National Capital Act* could be said to transcend provincial concerns, Cartwright, J. commented:

"I find it difficult to suggest a subject-matter of legislation which more clearly goes beyond local or provincial interests and is the concern of Canada as a whole than the development, conservation and improvement of the National Capital Region in accordance with a coherent plan in order that the nature and character of the seat of the Government of Canada may be in accordance with its national significance. Adopting the words of the learned trial Judge, it is my view that the Act "deals with a single matter of national concern".

There is no doubt that the exercise of the powers conferred upon the Commission by the *National Capital Act* will affect the civil rights of residents in those parts of the two Provinces which make up the National Capital Region. In the case at bar the rights of the appellant are affected. But once it has been determined that the matter in relation to which the Act is passed is one which falls within the power of Parliament it is no objection to its validity that its operation will affect civil rights in the Provinces. As Viscount Simon, adopting what had been pointed out by Rand, J., said in *A.-G. Sask. v. A.-G. Can.*, [1949] 2 D.L.R. 145 at p.149, [1949] 1 W.W.R. 742, [1949] A.C. 110:

Consequential effects are not the same thing as legislative subject-matter. It is "the true nature and character of the legislation" – not its ultimate economic results – that matters."⁴⁴

Some observers regard this decision as bringing the interpretation of "P.O. & G.G." full circle back to the approach taken in *Russell v. The Queen*, and permitting the Federal Parliament to seize jurisdiction over any subject matter it chooses so long as some national objective can be propounded. If expropriation of land to beautify a particular urban area of Canada does not relate in pith and substance to "property and civil rights" and "local matters", they ask, then what can? It is submitted that such a view is not justified.

41. (1966) 57 D.L.R. (2d) 753 (S.C.C.).

42. S.C. 1958, c.37.

43. P.758-9.

44. P.759.

The legislation considered in the *Munro* case was unique, and involved a very special type of "national dimension". The national capital is the focal point of world attention on Canada, and the administrative centre for all governmental matters that concern Canada as a whole. Moreover, section 16 of the *B.N.A. Act* gives the power of selecting the site of the capital to the Queen, a power which the Court held "would now be exercisable by Her Majesty in the Right of Canada", and could be exercised by means of an Act of Parliament "in which Her Majesty acts with the advice and consent of the Senate and House of Commons of Canada."⁴⁵ Finally, it should be noted that the Act extended the National Capital Region beyond the limits of a single province — embracing both Ottawa and Hull. Since the need to treat all parts of the region uniformly is obvious, and since uniformity of treatment would not be certain, or even probable, if the matter were left to the two provincial legislatures, there was clearly a dimension to the matter that exceeded the ability of the provinces to treat. It is far from certain that the Supreme Court would be as ready to find a national dimension with respect to matters less uniquely national than the national capital.

Since the *Munro* decision, the Supreme Court of Canada has invoked the "P.O. & G.G." power on three occasions in widely varied contexts. In each case, however, it was used to supplement some other federal power.

In *Reference Re Ownership of Offshore Minerals*,⁴⁶ the Supreme Court unanimously invoked the "P.O. & G.G." clause as a basis for the power of Parliament to make laws with respect to mines and minerals off the shores of British Columbia. After finding that the territory in question lies outside the geographic boundaries of the province and is therefore owned by the Crown in the right of Canada, the Court stated that the federal Parliament has the power to make laws on the subject, either because of its jurisdiction under section 91(1A) to make laws concerning its own property, or under the "P.O. & G.G." clause.⁴⁷

The validity of the federal *Official Languages Act* was upheld in *Jones v. A.G. Canada*⁴⁸ on the basis of several federal powers, one of which was "P.O. & G.G." In fact, "P.O. & G.G." was invoked in two different ways. First, it was held to justify federal language legislation respecting departments and agencies of the federal government, since such institutions are clearly outside provincial competence. Second, it was also invoked, together with the federal "criminal law" power, to justify such laws with respect to criminal

45. P.758.

46. (1968) 65 D.L.R. (2d) 353 (S.C.C.).

47. P.375-6.

48. (1974) 45 D.L.R. (3d) 583 (S.C.C.).

proceedings in provincially created courts, and together with section 101 to justify such laws with respect to federally created courts and other tribunals.

In *Interprovincial Co-operatives Ltd. v. The Queen*⁴⁹ "P.O. & G.G." was relied on by a majority of the Court as one ground (the other being the federal "fisheries" power) for asserting federal jurisdiction with respect to the pollution of interprovincial rivers.

Some Lower Court Cases

Courts below the level of the Supreme Court of Canada have relied on the "P.O. & G.G." clause on several occasions to support decisions that were not appealed higher. Not all of these cases are easy to reconcile with previous decisions of the Supreme Court and Privy Council.

The decision of the Exchequer Court of Canada in *Angers v. Minister of National Revenue*⁵⁰ which upheld the constitutional validity of the federal *Family Allowances Act*⁵¹ accorded a very generous interpretation to "P.O. & G.G.". The federal *Income Tax Act* provided for a reduced tax exemption with respect to any child of a taxpayer who was qualified for family allowances. Mr. Angers' children were so qualified, but he refused on principle to register them under the *Family Allowances Act*, and therefore claimed a full tax exemption for them. When he was given only the reduced tax exemption he appealed to the courts, arguing that the *Family Allowances Act* and the income tax provisions related to that Act were beyond the competence of the Federal Parliament. Dumoulin, J. of the Exchequer Court of Canada ruled against Mr. Angers, holding that the legislation in question was valid. Two grounds were given: the federal right to impose "any mode or system of taxation", and the "P.O. & G.G." power. While the decision may well be justifiable on the former ground, the latter is very questionable. So far as the latter was concerned, no significant explanation was offered by Dumoulin, J. — he simply asserted that the "P.O. & G.G." clause was relevant. In the absence of some satisfactory explanation to why the question of Family Allowances has a "national dimension", it is difficult to see how this conclusion is justified by previous "P.O. & G.G." cases.

Another Exchequer Court decision on "P.O. & G.G.", even more difficult to explain than the last, is *Porter v. The Queen*⁵². It concerned the validity of a federal statute, the *Government Annuities*

49. (1975) 53 D.L.R. (3d) 321 (S.C.C.).

50. [1957] Ex. C.R. 83 (Ex. C.C.).

51. S.C. 1944-45, c.40.

52. [1965] 1 Ex. C.R. 200 (Ex. C.C.).

Act,⁵³ which authorized the federal Crown to sell annuities to individuals and groups with a view to encouraging saving and promoting old age security. Porter was a policeman in S u d b u r y. As part of his employment contract with the City of Sudbury he was required to participate in a retirement benefit scheme involving federal government annuities. When he left his employment as a policeman Porter wanted a refund of the contributions he had made to the scheme, but this was refused because he was entitled only to a paid-up retirement benefit to take effect when he reached the age of retirement. He therefore attacked the constitutionality of the federal legislation. Jackett, P. upheld the legislation and dismissed Porter's action. The decision seems to have been based on the "P.O. & G.G." power, although it was not referred to expressly, and the reasoning was not altogether clear. After commenting that Parliament may make laws about any matter not assigned to the provinces,⁵⁴ Jackett, P. found that the arrangement "is not an insurance scheme, nor does it affect the civil rights of any person,"⁵⁵ and held that although neither the federal jurisdiction with respect to public property, nor to taxation was involved, Parliament has the power to authorize the Crown "to enter into contracts with individuals . . . where the dominating reason for the scheme is the 'public interest' ".⁵⁶ If this can be construed as an application of the "P.O. & G.G." power, it must be wrong. To say that matters of "property and civil rights" or "local and private matters" were not involved is even more difficult to understand in this situation than in the *Russell* case.

Less controversial are two decisions of the Ontario High Court upholding the federal *Atomic Energy Control Act* on the strength of "P.O. & G.G.". In the first case, *Pronto Uranium Mines v. Ontario Labour Relations Board*,⁵⁷ McLennan, J., after adopting Viscount Simon's "national dimensions" approach, stated two reasons for holding the legislation to be beyond local or provincial concern:

" . . . that it is essential in the national interest to control and supervise atomic energy, and also to enable Canada to participate in measures for the international control of that energy."⁵⁸

Sixteen years later the same Act was again challenged in *Denison Mines Ltd. v. A.-G. Canada*⁵⁹ on the ground that since the unique importance of atomic energy for military purposes had diminished, the subject should no longer be regarded as outside provincial com-

53. R.S.C. 1952, c.132.

54. P.210-11.

55. P.213.

56. P.213.

57. (1956) 5 D.L.R. (2d) 342 (Ont. H.C.).

58. P.348.

59. (1973) 32 D.L.R. (3d) 419 (Ont. H.C.).

petence. Again the challenge failed. Donnelly, J., held that even if the military importance to Canada of atomic energy had been reduced, federal jurisdiction based on the "P.O. & G.G." power continued because of:

"... the necessity for international controls and the active and important contribution by Canada. If it is to continue to effectively participate in international control it must have internal control."⁶⁰

Strictly speaking, this finding was a mere *dictum*, since Donnelly, J. held that he did not have jurisdiction to decide the matter. However, it would be surprising if any court reached a different conclusion on the question.

The Ontario Court of Appeal employed the "P.O. & G.G." power in *Re C.F.R.B. and A.-G. Canada*⁶¹ as one basis for upholding federal jurisdiction over radio broadcasting. After finding that the subject was within federal competence by reason of involving both "telegraphs" and "undertakings... extending beyond the limits of the Province",⁶² the Court held that broadcasting like aeronautics, has also "attained such dimensions as to affect the body politic in Canada," and therefore falls within the "P.O. & G.G." power.⁶³ Unfortunately, the Court did not describe the yardstick used in arriving at its opinion about the dimensions of the subject. It cannot be fairly faulted for failing to do so, however, since no other court has ever provided a satisfactory description of the "national dimension" yardstick either.

THE YARDSTICK

The foregoing survey leaves little doubt that the federal "P.O. & G.G." power will be invoked when the courts are persuaded that a subject matter of legislation has attained "national dimensions", even where the same subject has an aspect which is within provincial competence. What it does not settle is the criterion to be applied by the courts in deciding whether or not the subject has "national dimensions". This unresolved question is of great importance. If the yardstick employed is too long, the central government will be unduly hampered in its ability to deal with problems of national importance; if it is too short, provincial autonomy over local matters will be threatened.

Several possible yardsticks suggest themselves, each with different implications for the future balance of federal and provincial powers. They will be examined separately.

60. P.430.

61. (1974) 38 D.L.R. (3d) 335 (Ont. C.A.).

62. P.337.

63. P.339.

Importance

The "P.O. & G.G." clause is often described in terms which make it seem that a subject of legislation can fall within its scope purely by reason of being very important. Such a view is encouraged by some of the language used by Lord Watson in his classic explanation of "P.O. & G.G." in the *Local Prohibition Case*. He said, for example:

"... the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in s.91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and *importance* . . ."64

and the term "dimensions", which he was the first to use in this context, implies that size and presumably importance, are relevant criteria.

If importance of the subject matter is the measure of "national dimensions", there can be little hope for federalism in Canada's future. Since there are very few functions of government which are not of great importance, to grant federal jurisdiction over all such functions would be to make the supposedly autonomous provincial legislatures mere "tenants at sufferance" of the federal Parliament.

In my submission, importance is not a valid yardstick. The various enumerated heads of legislative jurisdiction under the *B.N.A. Act* do not appear to have been distributed on the basis of importance. Is "criminal law"⁶⁵ more important than "property and civil rights"⁶⁶; "seacoast and inland fisheries"⁶⁷ more than "management and sale of . . . public lands"⁶⁸; "beacons, buoys, lighthouses and Sable Island"⁶⁹ more than "municipal institutions"⁷⁰? Few subjects are more important than education, which was placed under provincial jurisdiction.⁷¹

By saying that a subject falls within the "P.O. & G.G." power when it is "unquestionably of Canadian interest and importance . . ."72, Lord Watson surely meant only that it must be of national scope in a *geographic* sense — of import or significance to all parts of Canada. It is not the *degree* of importance that counts, but the *extent* of the area affected by the subject in question. "National dimension" is a measurement of breadth, not depth.

It was Viscount Haldane's mistaken preoccupation with the importance of the subject in question that led to his formulation of the

64. [1896] A.C. 348 at 360. Emphasis added.

65. S.91(27).

66. S.92(13).

67. S.91(12).

68. S.92(5).

69. S.91(9).

70. S.92(8).

71. S.93.

72. Note 64 above.

ill-fated "emergency" approach to "P.O. & G.G.", and it is to be hoped that the courts' rejection of the "emergency" doctrine has eliminated future use of the "importance" yardstick.

Uniformity

Another possible method for deciding whether a subject of federal legislation has "national dimensions" is to ask whether the legislation attempts to provide a uniform treatment of the subject for all parts of Canada. This approach had its origin in some of Sir Montague Smith's words in the *Russell* case:

"The objects and scope of the legislation are still general, viz., to promote temperance by means of a uniform law throughout the Dominion . . . Parliament deals with the subject as one of general concern to the Dominion, upon which uniformity of legislation is desirable, and the Parliament alone can so deal with it . . ."73

The "uniformity" yardstick probably constitutes an even greater threat to provincial autonomy than the "importance" test. As Lord Watson pointed out in the *Local Prohibition Case*:

"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 s.92 upon which it might not legislate, to the exclusion of the provincial legislatures."74

That Lord Watson rejected the "uniformity" test suggested in the *Russell* case was made even more clear by the next paragraph of his opinion:

"In construing the introductory enactments of s.91, with respect to matters other than those enumerated, which concern the peace, order, and good government of Canada, it must be kept in view that s.94, which empowers the Parliament of Canada to make provision for the uniformity of the laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick does not extend to the province of Quebec; and also that the Dominion legislation thereby authorized is expressly declared to be of no effect unless and until it has been adopted and enacted by the provincial legislature. These enactments would be idle and abortive, if it were held that the Parliament of Canada derives jurisdiction from the introductory provisions of s.91, to deal with any matter which is in substance local or provincial, and does not truly affect the interest of the Dominion as a whole."75

Since these words were written there has been very little support, either judicial or scholarly, for the "uniformity" approach.

International Aspect

Although the courts have never stressed the fact, most of the cases in which "P.O. & G.G." has been involved have had an inter-

73. [1882] 7 A.C. 829, at 841.

74. [1896] A.C. 348, at 361.

75. P.361.

national aspect of some sort. The *Munro* case,⁷⁶ for example, was concerned with legislation designed at least in part to give Canada a national capital that would favourably impress the rest of the world, and therefore contribute to a sense of national pride by Canadians. Aeronautics⁷⁷ and a radio transmission⁷⁸ are subject to international controls, and the *Fort Frances*⁷⁹ and *Japanese-Canadian*⁸⁰ cases both involved external wars. Both atomic energy cases stressed the international aspect.⁸¹ The only major exceptions are the *Russell*⁸² case, which is undoubtedly an historical anomaly, and the *Angers*⁸³ and *Porter*⁸⁴ cases, which are probably wrong. It is possible, therefore, that a subject of legislation possesses "national dimensions" only when it involves Canada's face to the outside world.

If this is how "national dimensions" are to be measured, the provinces have no reason to fear a serious threat to their autonomy from the "P.O. & G.G." power. On the contrary, such an approach might unduly fetter the federal government's ability to deal directly with problems such as inter provincial pollution which though internal to Canada, are national in scope. For that reason it is unlikely that the courts could be persuaded to take so narrow a view of the "P.O. & G.G." power. The dimension we seek extends beyond the limits of individual provinces, but not necessarily beyond the boundaries of Canada.

Provincial Inability to Act

The true meaning of "national dimension" can best be found by returning to first principles. In particular, it is important to remember that the "P.O. & G.G." power is merely residual in nature; it can operate only in the absence of relevant provincial jurisdiction. This, it is submitted, is the key to the puzzle: *a matter has a national dimension to the extent only that it is beyond the power of the provinces to deal with it.*

The international aspect of any matter would unquestionably constitute a national dimension by this test, but so would many intra-national aspects. A good illustration is that of contagious diseases

76. Note 41 above.

77. *Johannesson v. West St. Paul*, Note 39 above.

78. *Re C.F.R.B. & Attorney-General Canada*, Note 61 above.

79. *Ft. Frances Pulp & Paper v. Manitoba Free Press* [1923] A.C. 695 (P.C.). This was one of the key cases in which Viscount Haldane's "emergency doctrine" was developed.

80. Note 36 above.

81. Notes 57 & 59 above.

82. Note 13 above.

83. Note 50 above.

84. Note 52 above.

used by Sir Montague Smith in the *Russell* case.⁸⁵ If the control of such diseases were left to local authorities there would be a risk that one province would fail to take the necessary measures, thereby endangering the residents of *other provinces*. A case can therefore be made for federal legislation aimed at the elimination or reduction of such a risk. It is true that such problems *could* be dealt with by co-operation among the provinces without federal involvement and that if they did so, there would be no national dimension. But while there remains a risk that such co-operation may not be forthcoming, there is a national dimension justifying federal legislation to deal with the risk.

Where Sir Montague Smith went wrong was in equating the local option temperance legislation he was considering with his example of contagious disease legislation. Whereas failure of a province to control contagion would endanger other provinces, failure to prohibit the sale of liquor in the province would not cause any problems in provinces where prohibition was in effect. In fact, by perhaps encouraging the migration of brewers, publicans and drinkers to the "wet" province, it might be regarded as benefiting the "dry" provinces.

Other examples could be found in the area of pollution control. If a lake or river lies between or runs through two or more provinces, pollution of its waters often cannot be effectively dealt with by a single province, since it cannot reach out to regulate polluters beyond its boundaries.⁸⁶ The inter provincial aspect of the problem accordingly has a national dimension. Even purely *intra*-provincial pollution might acquire a national dimension if Parliament perceived a risk that some provinces would try to attract industry by means of very tolerant laws on industrial pollution within the province, thus making it very difficult for *other* provinces to maintain satisfactory pollution standards without driving industry away.

By this approach, a national dimension would exist whenever a significant aspect of a problem is beyond provincial reach because it falls within the jurisdiction of another province or of the federal Parliament. It is important to emphasize however that the *entire* problem would not fall within federal competence in such circumstances. Only the aspect of the problem that is beyond provincial control would do so. Since the "P.O. & G.G." clause bestows only residual powers, the existence of a national dimension justifies no more federal legislation than is necessary to fill the gap in provincial powers. For example, federal jurisdiction to legislate for pollution of

85. [1882] 7 A.C. 829. Viscount Simon expressed approval of this illustration in the *Canada Temperance Federation* case, [1946] A.C. 193, at 206.

86. *Interprovincial Co-operatives Ltd. v. The Queen* (1975) 53 D.L.R. (3d) 321 (S.C.C.).

interprovincial waterways or to control "pollution price-wars" would (in the absence of other independent sources of federal competence) extend only to measures to reduce the risk that citizens of one province would be harmed by the non co-operation of another province or provinces. This might take the form for instance of a mechanism for resolving pollution disputes between the provinces or of prescribed pollution standards to apply until inter provincial agreement is reached. But if the provinces could demonstrate that they were in fact agreed on standards different than those imposed by the federal legislation (or that they had agreed on non-regulation) the national dimension would have disappeared. In that case the federal legislation could survive only on the basis of some source of federal jurisdiction other than the "P.O. & G.G." power.⁸⁷

Although the "provincial inability" test for identifying national dimensions has never been articulated in quite the manner suggested above, it is consistent with most of the important "P.O. & G.G." decisions of the past. The *Munro* case⁸⁸, for example can be explained on the basis that if the beautification of Canada's national were left to provincial co-operation, failure of Ontario or Quebec to participate would saddle all Canadians with an unattractive national capital, and failure of one or more provinces to contribute to the cost would place an undue financial burden on the citizens of the contributing provinces. The *Johannesson* decision⁸⁹ can be supported on the ground that refusal by one province to accept uniform air transport procedures would endanger other Canadians engaged in inter provincial and extraprovincial air traffic. The outcome of the atomic energy cases⁹⁰ is justified by the fact that a single province could frustrate Canada's international commitments in this field and by the possibility that the radiation hazards associated with atomic energy may be difficult or impossible to contain within one province. The *Radio Reference*⁹¹ could also be explained by the fact that failure by even one province to abide by international arrangements for the allocation of radio frequencies would place the entire country in default of its international obligations, as well as by the likelihood that such a violation would adversely affect reception in other provinces. Even the *Labour Conventions* case,⁹² which rejected federal jurisdiction with respect to certain proposed employment standards

87. Such alternative bases of federal jurisdiction are plentiful in the pollution field: "criminal law", "fisheries" etc. Where the pollution has a significant international aspect, as, for example, in the case of pollution of the St. Lawrence River or the Great Lakes, this aspect would constitute a national dimension in the writer's view.

88. Note 41 above.

89. Note 39 above.

90. Notes 57 & 59 above.

91. [1932] A.C. 304 (P.C.).

92. Note 30 above. See W.R. Lederman, "Legislative Power to Implement Treaty Obligations in Canada", in J.H. Atchison, *Political Process in Canada*, 1963, p.171.

regulations, despite Canada's signature to an international convention on the matter, can be reconciled with this approach, since the treaty involved did not obligate Canada to do more than propose legislation to the appropriate legislature, so failure of one or more provinces to pass such legislation would not have involved Canada in a breach of international law.

Interestingly, the *Unemployment Insurance Reference*,⁹³ which struck down important legislation designed to alleviate the effects of the economic depression of the 1930's, and which has been frequently criticized, would also fit the "provincial inability" approach. It would be entirely possible to operate an unemployment insurance scheme on a province-by-province basis. The refusal of one or more provinces to participate in the plan would not hamper its successful implementation in those provinces which chose to do so. It is possible, therefore, to justify the Privy Council's conclusion that the matter did not have a "national dimension."

It has to be admitted that a few of the "P.O. & G.G." cases cannot be reconciled with this theory. The *Russell*,⁹⁴ *Angers*⁹⁵ and *Porter*⁹⁶ cases do not accord with it. However, for the reasons indicated above these cases were probably wrongly decided. And after all, no theory has yet been propounded that can successfully explain all the "P.O. & G.G." cases.

CONCLUSION

It has been generally accepted since 1946 that the federal Parliament's power to make laws for the "peace order and good government" of Canada involves only matters, or aspects of matters, which possess a "national dimension". Having regard to the residual nature of the power, it is the writer's thesis that "national dimensions" are possessed by only those aspects of legislative problems which are beyond the ability of the provincial legislatures to deal because they involve either federal competence or that of another province. Where it would be possible to deal fully with the problem by co-operative action of two or more legislatures, the "national dimension" concerns only the risk of non-co-operation, and justifies only federal legislation addressed to that risk.

As this comment is being written, the Supreme Court of Canada is preparing to hear a challenge to the federal *Anti-Inflation Act*⁹⁷ which is likely to involve a thorough consideration of the "P.O. &

93. Note 30 above.

94. Note 13 above.

95. Note 50 above.

96. Note 52 above.

97. Note 2 above.

G.G." power. The Court's task is a difficult one. If it adopts too restrictive a view of the residual power, Canada's ability to respond effectively as a nation to serious external or internal challenges may be weakened. If, on the other hand, it treats the "P.O. & G.G." clause too generously, the autonomy of the provinces, which is essential to healthy federalism, and which is already under threat from various sources, may be seriously endangered. It is submitted that the method of measuring "national dimensions" advanced in this comment offers a possibility for avoiding these twin shoals.

