THE EMERGENCY DOCTRINE AND THE ANTI-INFLATION CASE: PRYING PANDORA'S BOX

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'Emergency, emergency,' I cried, 'give us emergency,
This shall be the doctrine of our salvation.
Are we not surrounded by emergencies?
The rent of a house, the cost of food, pensions and health,
the unemployed,
These are lasting emergencies, tragic for me.'[1]

After more than twenty-five years, F.R. Scott's prayers have finally been answered by the Supreme Court of Canada in its recent decision, *Reference Re Anti-Inflation Act*[2]. What had appeared to Scott as a panacea for the country's ills, however, may like Pandora's box conceal hidden dangers.

The Case

In the fall of 1975 the Parliament of Canada recognized that,

> . . . inflation in Canada at current levels is contrary to the interests of all Canadians and that the containment and reduction of inflation has become a matter of serious national concern.[3]

To accomplish these objectives, Parliament introduced the *Anti-Inflation Act*[4] which provided for the supervision, control and regulation of prices, profits, wages, salaries, fees and dividends by monitoring and limiting increases. Had these measures been limited to the federal public service and enterprises or undertakings which were within exclusive federal legislative authority, the Act would unquestionably have been constitutionally valid. The Act was not, however, confined to the federal public and private sector but also embraced sectors of industry and of services which were ". . . admittedly subject in respect of their intra-provincial operation to provincial regulatory authority."[5] Could these provisions also be constitutionally upheld?

The federal position in support of the Act was based on two alternate grounds. First, it was argued that the subject matter of the Act, the containment and reduction of inflation, was of such a nature as to go beyond local provincial concern or interest and

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1. Scott, F.R., 'Some Privy Counsel' (1950), 28 *The Canadian Bar Review* 780.
2. *Reference Re Anti-Inflation Act* (1976), 68 D.L.R. (3d) 452 (S.C.C.)
3. *The Anti-Inflation Act*, S.C. 1974-75, c. 75, The preamble.
4. *Id.*
5. *Supra*, n. 2, at 47.

was, from its inherent nature, the concern of Canada as a whole, thus falling within the competence of Parliament as a matter affecting the peace, order, and good government of Canada. Although both Mr. Justice Ritchie and Mr. Justice Beetz discussed this 'national dimensions' approach, neither was prepared to support the Act on this basis.[6] Alternatively, it was argued that the existing inflationary situation was such as to constitute a national emergency of the same significance as a war, pestilence, or insurrection and that there was, in Parliament, an implied power to deal with this emergency for the safety of Canada as a whole. This approach, which is commonly referred to as the emergency doctrine[7] was used by the majority of the Court to establish the constitutionality of the Act.[8]

Although both of these positions raise numerous constitutional issues, this article focuses only on the second. For, in supporting the constitutionality of the *Anti-Inflation Act*, the Supreme Court not only reaffirmed its belief in the emergency doctrine, but, and perhaps even inadvertently, redefined its very shape. One of the tasks undertaken by the Court was to determine what conditions were necessary for the emergency doctrine to be applied. In so doing, the Court may have gently nudged the lid off Pandora's box.

The Alternatives

In deciding this issue, the court faced at least four possible alternatives. It might have decided:

(1) that Parliament's decision that an emergency existed was conclusive, or;
(2) that Parliament's decision was conclusive unless there was very clear evidence that an emergency did not exist, or;
(3) that Parliament must first show that it had a rational basis for the legislation, or;
(4) that unless Parliament demonstrated that an emergency existed, the legislation was *ultra vires*.

6. *Id.* at 507 and 525.
7. The emergency doctrine was 'defined' by Viscount Haldane in *Fort France Pulp and Power Co.* v. *Manitoba Free Press Co.*, [1923] A.C. 695 at 705 in the following way:
> **"... however the wording of ss. 91 and 92 may have laid down a framework under which, as a general principle, the Dominion Parliament is to be excluded from trenching ... yet in a sufficiently great emergency, such as that arising out of war, there is implied the power to deal adequately with the emergency for the safety of the Dominion as a whole."**

The emergency doctrine, it is submitted, is in no way undermined or qualified by the later decision, *Attorney General of Ontario* v. *Canada Temperance Federation*, [1946] A.C. 193. In that case, the subject matter of the Act was not such as to fall within the enumerated heads of s.92. The case, therefore, merely confirmed the previous categorization of this subject matter established in *Russell* v. *The Queen*, [1882] 7 App. Cas. 829. The Act, therefore, could properly be maintained under the peace, order and good government power.
8. *Supra*, n. 2 at 499 and 509.

Chief Justice Laskin preferred the third alternative,[9] while Mr. Justice Ritchie chose the second.[10] But which option, on the basis of previous constitutional cases *should* have been chosen? To answer this question, the jurisprudence surrounding each of these four alternatives will be examined.

(1) *Parliament's decision that an emergency exists is conclusive*

In his factum, the Attorney General of Canada stated that, "when Parliament has determined that . . . an emergency has arisen, it is not appropriate for the courts to go behind that determination." "These determinations" he submitted, "are conclusive."[12] In support of this proposition, he cited the wartime case, *Reference Re Regulations (Chemicals) Under War Measures Act.*[13] This case concerned the constitutional validity of regulations relating to chemicals necessary for the war effort which had been enacted by an order in council pursuant to the *War Measures Act.*[14] In the course of his judgment, Chief Justice Duff stated that it was not, ". . . competent to any Court to canvass the considerations which have, or may have, led him (the Governor-General in Council) to deem such regulations necessary or advisable . . ."[15] On its face, this statement provides strong support for the Attorney General's position. On closer examination of the case, however, the forcefulness of the argument diminishes considerably.

In the *Chemical Regulations* case, Chief Justice Duff was deciding on the validity of orders in council made pursuant to the *War Measures Act* not the validity of the *War Measures Act* itself. As stated by Mr. Justice Rinfret, "no question of constitutionality under the BNA Act is raised with regard to the *War Measures Act.*"[16] Rather, the case turned on whether or not the orders in council fall within the provisions of the Act. In fact, what prevented the court from examining the conditions under which the orders had been made was not an established doctrine of constitutional law but rather the application of Section Two of

9. *Reference Re Anti-Inflation Act*, *supra* n. 2 at 498.

10. *Id.* at 509. As Mr. Justice Beetz concluded that Parliament did not purport to enact the *Anti-Inflation Act* under its emergency powers, the evidence necessary to use this power was not discussed by him. He did state, however, that in using this power, Parliament would have to give "an unmistakable signal that it is acting pursuant to its extraordinary power." The Act also would have to be of a temporary nature.

11. *Factum* of the Attorney General of Canada for the *Anti-Inflation* case at 10. It should be noted that in his introductory comments (page 5), the Attorney General also suggests a 'rational basis' test. His argument, however, does not refer to this test.

12. *Id.* at 22.

13. *Reference Re Regulations (Chemicals) Under War Measures Act*, [1943] 1 D.L.R. 248 (S.C.C.). (Re Chemicals Regulations)

14. *War Measures Act*, R.S.C. 1927, c. 206.

15. *Re Chemicals Regulations*, *supra* n. 13, at 255.

16. *Id.* at 258.

the *War Measures Act*. This Section provides that:

> The issue of a proclamation by His Majesty, or under the authority of the Governor in Council shall be conclusive evidence that war, invasion, or insurrection, real or apprehended exists . . .

By failing to distinguish between the permissible scope of regulations made under the Act and Parliament's power to bring the Act into effect in the first place, the Attorney General was led to base his 'test' on inappropriate case law, and consequently proposed an inappropriate test. For, when the courts have considered the latter question, they have reserved to themselves the power of judicial review. In considering the validity of the *War Measures Act* itself, for example, Viscount Haldane stated in the *Fort Frances* case:

> It may be that it has become clear that the crisis which arose is wholly at an end and that there is no justification for the continued exercise of an exceptional interference which becomes *ultra vires* when it is no longer called for. But very clear evidence that the crisis had wholly passed away would be required . . .[17]

Similarly, in the *Insurance Act* reference case of 1913,[18] Anglin, J. stated that, when Parliament declares the existence of a state of facts,

> . . . whatever might be the awkwardness, inconvenience and difficulty of inquiring into and passing upon the truth of such a declaration . . . the declaration of Parliament could not be taken as conclusive upon the question of jurisdiction.[19]

And, in the Judicial Proceedings of the Privy Council re the *Snider* case,[20] Viscount Haldane stated that if an act attempted to deal with something which did not in fact exist, ". . . it can be questioned."[21]

The Attorney General's position therefore rests on shaky foundation, unsupported by *relevant* case law. Not surprisingly, the judges deciding the *Anti-Inflation Act* case failed to adopt his position.

(2) *Parliament's decision that an emergency exists is conclusive unless there is very clear evidence to the contrary*

In the course of his judgment in the *Anti-Inflation Act* case, Mr. Justice Ritchie cited with approval Lord Wright's

17. *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.*, [1923] A.C. 695 at 706.
18. *In the Matter of Sections Four and Seventy of the Canadian 'Insurance Act, 1910' (1913), 43 S.C.R. 261.*
19. *Id.* at 311.
20. *Toronto Electric Commissioners* v. *Snider*, [1925] A.C. 396.
21. Canada Department of Labour, *Judicial Proceedings Respecting Constitutional Validity of the Industrial Disputes Investigation Act, 1907 and Amendments of 1910, 1918 and 1920*, Ottawa, 1925 at 188. (Snider Proceedings)

statement in the *Japanese Canadian* case:

> Again, if it be clear that an emergency has not arisen, or no longer exists, there can be no justification for the exercise or continued exercise of the exceptional powers. The rule of law as to the distribution of powers . . . comes into play. But very clear evidence that an emergency has not arisen or that the emergency no longer exists, is required to justify the judiciary . . . in overruling the decision of the Parliament of the Dominion . . .[22]

As in the *Chemical Regulations* case, Lord Wright was here concerned with orders in council initially made pursuant to the *War Measures Act*. Unlike the *Chemicals* case, however, Lord Wright did not confine his remarks to the constitutionality of the orders, but turned his attention to the emergency legislation itself. He looked to the *Fort Frances* case for guidance.[23] It is therefore essential to determine exactly what the *Fort Frances* case established.

Basically, the case focused on orders in council made pursuant to the *War Measures Act* and a Dominion Act[24] passed after the cessation of hostilities controlling the supply and price of newsprint. In considering the constitutionality of the *War Measures Act*, Viscount Haldane stated,

> When war has broken out it may be requisite to make special provisions to ensure the maintenance of law and order in a country . . . The question of the extent to which provision for circumstances . . . may have to be maintained is one which a Court of law is loath to enter . . . It may be that it has become clear that the crisis which arose is wholly at an end and there is no justification for the continued exercise of an exceptional interference which becomes *ultra vires* when it is no longer called for . . . But very clear evidence that the crisis had wholly passed away would be required to justify the judiciary . . . in overruling the decision of the Government that exceptional measures were still requisite.[25]

Viscount Haldane then stated that this was in accord with the view taken under analogous circumstances by the Supreme Court of the United States in *Hamilton* v. *Kentucky Distilleries*,[26] the only authority he cited. What then had this case decided?

The *Hamilton* case examined Congress's power to prohibit the liquor traffic as a means of increasing war efficiency ten days after the armistice with Germany had been signed in 1918. The Court's first task was to find the source of Congress's power in time of war. Mr. Justice Brandeis looked to what he referred to

22. *Co-Operative Committee on Japanese Canadians* v. *Attorney General of Canada*. [1947] A.C. 87 at 101.
23. *Id.*
24. An Act to Provide for the completion after the declaration of peace of work began and the final determination of matters pending before the Commissioner and Controller of Paper and the Paper Control Tribunal, or either of them, at the date of such declaration. 9 & 10 Geo. 5, c. 63.
25. *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.*, *supra* n. 17 at 706.
26. *Hamilton* v. *Kentucky Distilleries Co.*, 251 U.S. 146.

as the "implied war powers": "the power 'to make all laws which shall be necessary and proper for carrying into execution' the war powers expressly granted"[27] in the American Constitution.[28] He then stated that in the exercise of these war powers, it would require ". . . a clear case to justify a court in declaring that such an act, passed for such a purpose, had ceased to have force because the (war) power of Congress no longer continued."[29] It is essential to note here that Justice Brandeis's statements were made only in reference to war powers in a wartime situation. The sections of the Constitution concerned were referred to as "the war powers" by Brandeis. The implied powers which the Court was prepared to grant Congress were based solely on this provision and were, therefore, also restricted to war.

That this 'very clear evidence' doctrine related only to war is implicit in Viscount Haldane's later discussion of the *Fort Frances* case when he stated,

> I know in the *Manitoba Pulp* case, their Lordships decided that war overrides everything . . . we had to consider peace, order and good government under the circumstances of the presence of war which are outside political heads, and when that has once been done, the point at which the legislation is to cease must be a matter of statesmanship; it is impossible for us to say as well as the Government can when that is to stop . . .[30]

It is crucial to appreciate the full implication of this statement. In the emergency cases, beginning with the *Board of Commerce* case,[31] Viscount Haldane clearly envisaged emergency situations arising in times of peace as well as war. He talked of "exceptional situation(s)",[32] cases of "war or famine"[33], and cases of "necessity in highly exceptional circumstances".[34] However, in introducing the test of very clear evidence in the *Fort Frances* case, Viscount Haldane referred only to the case of war. His remarks began with the words, "When war has broken out"[35]. His sole authority was a case which dealt only with Congress's war powers. His discussion in the *Snider* proceedings emphasizes this distinction.

What is the significance of this distinction? The answer lies in a practical rather than legal consideration. A later American case, *Woods* v. *Miller*,[36] provides the key. Here, the United States Supreme Court was faced with the problem of deciding whether

27. *Id.* at 155.
28. The 'war powers' are contained in Article 1, Section 8 of the Constitution of the United States.
29. *Hamilton* v. *Kentucky Distilleries Co.*, *supra* n. 26 at 163.
30. Snider Proceedings, *supra* n. 21 at 93.
31. *In Re the Board of Commerce Act, 1919 and the Combines and Fair Prices Act, 1919*, [1922] 1 A.C. 191.
32. *Id.* at 198.
33. *Id.* at 200.
34. *Id.* at 197.
35. *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.*, *supra* n. 17 at 706.
36. *Woods* v. *Miller* Co., 333 U.S. 138.

Congress's war powers ended after a Presidential proclamation terminating hostilities had been made. In discussing the nature of the war power and the evidence needed to support it, Mr. Justice Jackson stated,

> No one will question that this power is the most dangerous one to free government . . . It is usually invoked in haste and excitement when calm legislative consideration of constitutional limitations is difficult. It is executed in a time of patriotic fervor that makes moderation unpopular. And, worst of all, it is interpreted by judges under the influence of the same passions and pressures. Always . . . the government urges hasty decision to forestall some emergency . . . and pleads that paralysis will result if its claims to power are denied or their confirmation delayed . . . (but) when the war power is invoked to do things . . . (that) do not relate to the management of the war itself, the constitutional basis should be scrutinized with care.[37]

Implicit in this statement is the recognition of different degrees of emergency, even in a war situation. To define these degrees, Mr. Jackson looked to the urgency of the situation. In those cases where the matter is critical to the war effort, fear of paralysis and defeat will prevent a court from closely scrutinizing the situation. Then, only if there is very clear evidence to the contrary will the courts take the time to consider the constitutional implications. But, when the situation is a little less immediate, when it does not relate to the management of the war itself, judges, like their fellow countrymen, will not be seized with the same fear of paralysis in case of delay. They will then, according to Justice Jackson, be prepared to examine the constitutional basis of the case with more care.

It has been stated that, " . . . the limits of the defence power . . . are bounded only by the requirements of self-preservation".[38] This philosophy was central to Viscount Haldane's concept of the Constitution. Consistent with his Hegelian philosophy of the State, Viscount Haldane felt that if a hostile force was invading the country. ". . . notwithstanding its constitution, the people of that country will resist."[39] Even Chief Justice Laskin, it is submitted, recognized that in the case of war, 'something' was different, for, in commenting on the *Fort Frances* case, he said, "There was no need of extrinsic evidence to show exceptional circumstances where war was concerned."[40] Does this not imply that where war is not concerned, the rule may be different?

Similar distinctions have in fact been recognized in coun-

37. *Id.* at 146.
38. Tarnopolsky, W., 'Emergency Powers and Civil Liberties' (1972), 15 *Canadian Public Administration* 194 at 195 — quoting from *Farey* v. *Burvett* (1916), 21 C.L.R. 433.
39. Snider Proceedings, *supra* n. 21 at 82.
40. *Reference Re Anti-Inflation Act*, *supra* n. 2 at 483.

tries having a fully written constitution. The Indian Constitution, for example, provides for three different types of emergency situations: financial emergencies, state emergencies, and national emergencies threatening the security of the country. The powers granted the President in each situation increase progressively, the most limited powers being conferred in the case of a financial emergency, the most extensive in the case of a national one threatening the very life of the country.[41]

It is submitted that the Canadian constitution, as developed by caselaw, also provides for such distinctions, the weight of evidence needed to support emergency legislation in peacetime being significantly different from that needed to support such legislation in time of war. The Canadian cases discussed thus far have demonstrated the test used in time of war and immediately thereafter: only very clear evidence that war no longer exists will permit the courts to overrule Parliament's decision, the onus falling clearly on those who contest the legislation. But, what has been the Canadian experience in peacetime emergency situations?

The first case that falls within this second category is the *Snider* case which examined the constitutionality of *Industrial Disputes Investigation Act.*[42] Here, federal counsel pleaded that, "emergency was inherent in the situation,"[43] and that although the legislation would normally be considered to be in relation to property and civil rights, because of the emergency it came within Parliament's power to make laws for the peace, order, and good government of Canada. Counsel presented evidence establishing that if the legislation which made strikes and lockouts unlawful for a limited period was not passed, Parliament faced the serious threat of major strikes throughout the country, ". . . labor being very much agitated."[44] It was established that the militia had been called out to control strikes which had already plagued the Maritime provinces and that there was a resulting shortage of militia "to cope with the public"[45] in the rest of the country. If the threatened electrical strike in Toronto materialized, counsel argued that hundreds of thousands of men would be "thrown out of employment", depriving the country of "great purchasing power."[46] It was estimated that the loss of revenue resulting from such a strike would be at least $58.8

41. The Constitution of India, Part XVIII.
42. *Industrial Disputes Investigation Act, 1907*, 6 & 7 Edw. 7, c. 20, Dom.
43. Snider Proceedings, *supra* n. 21 at 170.
44. *Id.* at 170.
45. *Id.* at 206.
46. *Id.* at 205.

million per annum.[47] The dispute, according to counsel "was critical".[48] How then did the Privy Council decide that this was not an emergency situation?

It is true that the legislation as drafted was permanent and not temporary. This, however, was not the decisive factor. Rather,

> It is what it (the legislation) really does, and the means used, that determine whether the purpose has been achieved in a constitutional manner. If it passes over the line and invades provincial jurisdiction, then to that extent it must be invalid unless . . . there is shown to have transpired such a Dominion-wide condition of affairs as would necessarily compel the conclusion that the Peace, Order and Good Government of the whole country requires its enactment . . .[49]

Hodgins, J.A. then concluded by saying, "The special and exceptional conditions of national emergency do not seem to exist in fact."[50] . . . On appeal to the Privy Council, Viscount Haldane stated,

> Their Lordships have examined the evidence produced at trial. They concur in the view taken of it by Hodgins, J.A. They are of the opinion that it does not prove any emergency putting the national life of Canada in unanticipated peril . . .[51]

This 'test' is in sharp contrast to that used in considering the wartime legislation referred to above. The onus now appears to lie on those propounding the legislation to show that an emergency does in fact exist, rather than on those challenging it to provide very clear evidence that it does not.

When the constitutional validity of the "Bennett New Deal" legislation was questioned in the 1930's, this principle again became evident. The *Re Employment and Social Insurance Act* case,[52] for example, examined the validity of a federal Unemployment Insurance Act that provided for compulsory contributions from employers and employees as well as a contribution from the federal treasury. In the course of the pleadings, federal counsel maintained that the unemployment problem had reached such dimensions as to become a threat to the body politic of the Dominion. To emphasize the seriousness of the situation, the annual and monthly unemployment rates over the past decade were presented. In March of 1933, for example, it was shown that the unemployment rate had reached an alarming thirty-two per cent. It was also shown that the federal govern-

47. *Id.* at 205.
48. *Id.* at 171.
49. *Toronto Electric Commissioners* v. *Snider* (1924), 55 O.L.R. 454 at 480 (S.C.C.). Hodgins, J.A.'s judgment was a dissenting judgment in the case.
50. *Id.* at 480.
51. *Toronto Electric Commissioner* v. *Snider*, *supra* n. 20 at 416.
52. *Attorney General of Canada* v. *Attorney General of Ontario*. [1937] A.C. 355.

ment had spent over $192,291,600. between 1930 and 1935 to alleviate the situation.[53] "The danger to the body politic of the Dominion" counsel pleaded, "can arise from an internal situation just as it can from a foreign enemy."[54] . . . Nor was there evidence presented by any of the parties opposing the legislation contradicting these statistics. Still, the Supreme Court found that, ". . . in this particular matter, there is no evidence of an emergency amounting to national peril."[55] This finding was later upheld in the Privy Council:

> There is agreement between all the members of the Supreme Court that it (the legislation) could not be supported upon the suggested existence of any special emergency. Their Lordships find themselves unable to disagree with this view.[56]

Again, there is not the slightest mention in either of these judgments of the 'very clear evidence' test referred to by Mr. Justice Ritchie in the *Anti-Inflation* case. For, while that test may be applicable in a wartime situation when delay may mean paralysis and defeat, it clearly has not been adopted by Canadian courts in peace-time crises.[57]

(3) *Parliament must first show that it has a rational basis for the legislation*

or

(4) Unless Parliament demonstrates that an emergency exists, the legislation will be found to be *ultra vires*.

What then is the test that has been adopted? Basically, two choices remain to be considered. The first, that Parliament need show only that it had a rational basis for exacting the legislation, was the test chosen by Chief Justice Laskin in the *Anti-Inflation* case. The second, that Parliament must demonstrate

53. *Factum* of the Attorney General of Canada to the Supreme Court of Canada at 8.

54. *Attorney General of Canada* v. *Attorney General of Ontario*, *supra* n. 52 at 359.

55. *In the Matter of a Reference as to whether the Parliament of Canada had Legislative Jurisdiction to Enact the Employment and Social Insurance Act, Being Chapter 38 of the Statutes of Canada, 1935*,[1936] S.C.R. 427 at 451.

56. *Attorney General of Canada* v. *Attorney General of Ontario*, *supra* n. 52 at 366.

57. Before considering either of the remaining two choices, the effect of an age-old presumption, the presumption of constitutionality must be mentioned. In *Severn* v. *The Queen*, [1878] 2 S.C.R. 70, the Supreme Court was faced for the first time with the problem of construing Section 92 of the B.N.A. Act. In the Course of his judgment, Strong J. adopted what has since become known as the presumption of constitutionality: "It is, I consider, our duty to make every possible presumption in favor of such legislative Acts, and to endeavour to discover a construction of the British North America Act which will enable us to attribute an impeached statute to a due exercise of constitutional authority . . ." (*Id.* at 130). This presumption, which appeared in the factums of several of those who appeared in the *Anti-Inflation* case, tends on first sight to provide ample support for those defending the Act. However, it must be noted that the effects of the presumption have been significantly restricted since *Severn*. In the *Insurance Act* case (*supra* n. 18), for example, Justice Anglin stated, "If such an assumption should be made — if indeed the Parliament of Canada could by an appropriate declaration conclusively establish the existence of a state of facts upon which such a transfer of legislative jurisdiction would occur — the autonomy of the province would be entirely at its mercy and there would be few subjects of civil rights upon which it might not displace the provincial power of legislation." (pp. 311-312). In the light of this statement, it appears that the presumption so modified provides little, if any, support for the federal position. The subject matter of the *Anti-Inflation Act* falls within s.92. A mere presumption with no supporting evidence clearly will not be sufficient. The question which must, therefore, now be answered is how much evidence will be required?

that an emergency did, in fact, exist when the legislation was enacted, was not chosen by any of the judges. To decide which of these two alternatives should be chosen, previous case law will again be referred to.

The first case which provides some indication of the Canadian position is the *Snider* case. As was discussed above, the Privy Council there supported Hodgins, J.A.'s conclusion that the legislation was invalid unless,

> . . . there is shown to have transpired such a Dominion-wide condition of affairs as would necessarily compel the conclusion that the peace, order and good government of the whole country required its enactment in the interest of the whole Dominion.[58]

Surely this requirement amounts to more than that of showing a 'rational basis' for the legislation?

Similarly, when the "Bennett New Deal" cases are examined, there is no mention of the need to demonstrate a 'rational basis'. As was discussed above, in the *Employment and Social Insurance Act* case, a rational basis was indeed established by federal counsel: an unemployment rate of 32.9%. Yet, the Court found that the Act could not be supported upon the suggested existence of any special emergency.

Finally, in one of the most recent cases falling within this category, *Swait v. Board of Trustees of Maritime Transportation Union*,[59] the appellants, members of the Union, attacked the constitutionality of the Act by which management and control of a number of unions was vested in a Board of Trustees appointed under the Act. The preamble to the Act stated that,

> . . . an emergency situation has developed that endangers navigation and shipping in the St. Lawrence Seaway with a consequent threat to the economy of Canada, the international relations of Canada and the Peace, Order and Good Government of Canada.[60]

The Court accepted as evidence of the emergency the complete Report of an independent body which concluded that the country was in fact facing a potentially paralyzing situation. The court found that, "*in the absence of any evidence to the contrary*,"[61] both the Act and Report demonstrated *prima facie* the existence of a state of emergency. This statement, then, implies that had evidence to the contrary been provided, as was the case in the *Anti-*

58. *Toronto Electric Commissioners* v. *Snider*, *supra* n. 49 at 480.
59. *Swait* v. *Board of Trustees of Maritime Transportation Unions* (1967), 61 D.L.R. (2d) 317 (Que. C.A.)
60. *Maritime Transportation Unions Trustees Act*, S.C. 1963, c. 17.
61. *Swait* v. *Board of Trustees of Maritime Transportation Unions*, *supra* n. 59 at 332.

Inflation decision, the court would have demanded more than this *prima facie* evidence, evidence which, it may be argued, demonstrated appreciably more than a mere rational basis for Parliament's actions. Again there is no mention in this case of the 'rational basis' test.

The Final Choice

These cases tend to show that Justice Laskin's test that Parliament need show only that it had a rational basis for the legislation, has little if any basis in relevant Canadian case law, especially when evidence denying the existence of an emergency is also presented. Not surprisingly, in formulating this 'test' in the course of his judgment, Chief Justice Laskin failed to refer to a single Canadian or foreign precedent.

What, then, is the 'true' test in light of Canada's previous peacetime emergency cases? On the basis of the cases examined here (excluding the *Anti-Inflation case)*, it can only be concluded that unless Parliament demonstrates that an emergency exists, the legislation under consideration will be held to be *ultra vires.*

And so it should. The emergency power, it must be remembered, is a drastic one. Its implementation amounts to ". . . a temporary *pro tanto* amendment of a federal Constitution by unilateral action of Parliament."[62] It permits Parliament to enter ". . . the normally forbidden area of provincial jurisdiction,"[63] and, if its exercise is not carefully controlled, the autonomy of the provinces will most certainly be endangered. A rational basis was not a sufficient criterion when unemployment was over thirty per cent or when the country stood on the brink of a crippling strike. Why should it be adopted now? Proof of the existence of an emergency is but a small price to ask of Parliament.

Failure to do so, like failure to leave the lid sealed on Pandora's box, leaves only Hope to the provinces.

62. *Reference Re Anti-Inflation Act, supra* n. 2 at 528 per Beetz, J.
63. *Id.* at 529.

It is regretted that through oversight the numbering of pages in this issue did not revert to 1 - etc. However, the numbering system now in effect will continue throughout Vol. 8, and Vol. 9 Number 1 will see page numbering revert to pages 1 and following.

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