Peace, Order and Good Government: The Laskin Court in the Anti-Inflation Act Reference

Patrick N. MacDonald*

Prior to the decision of the Supreme Court of Canada in the *Anti-Inflation Act Reference*[1] it could have been confidently predicted that the emergency doctrine was "unlikely to be a factor in future constitutional decisions".[2] The notion that the federal general power may be exercised only in exceptional circumstances had been severely criticized by our present Chief Justice,[3] and subsequent decisions of the Supreme Court seemed to indicate that some criterion other than emergency would be employed in giving content to the power.[4] However, a majority of the Supreme Court has since upheld the *Anti-Inflation Act*[4a] for the very reason that it may be characterized as "crisis legislation".[5] Even the dissenting judges, Beetz and de Grandpré JJ., employed the emergency doctrine, but found that the legislation did not meet its exacting standard.

There was, as well, universal acceptance of the emergency doctrine among the parties to the reference. While those who supported the legislation relied primarily on *A.G. Ontario* v. *Canada Temperance Federation*[6] (claiming that the *Anti-Inflation Act* was valid because it dealt with a matter that went beyond local or provincial concern) they nevertheless argued in the alternative that the Act could also be supported under the general power as a measure designed to deal with an economic crisis amounting to an emergency. Even those opposed were inclined to concede that it would be valid if it were crisis legislation. As a result, the lines of

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* Associate Professor of Law, University of Alberta.

1 *Re Anti-Inflation Act* [1976] 2 S.C.R. 373, (1976) 68 D.L.R. (3d) 452.

2 Gibson, *Measuring "National Dimensions"* (1976) 7 Man.L.J. 15, 23.

3 *"Peace Order and Good Government" Re-Examined* (1947) 25 Can.Bar Rev. 1054, 1067. Ten years later, he was hopeful that the emergency doctrine would be displaced: (1957) 35 Can.Bar Rev. 101, 104.

4 These were *Johannesson* v. *West St Paul* [1952] 1 S.C.R. 292 and *Munro* v. *National Capital Commission* [1966] S.C.R. 663.

4a R.S.C. 1974-75-76, c.75.

5 Concurring with Chief Justice Laskin in this opinion were Judson, Spence and Dickson JJ. Mr Justice Ritchie, with Martland and Pigeon JJ. concurring, reached the same conclusion.

6 [1946] A.C. 193 (P.C.).

battle were drawn around the limits of the emergency doctrine. Two issues assumed principal importance: Did Parliament, in fact, believe there to be a crisis, and if so, was there a rational basis for the belief that inflation constituted a crisis.[7] The Chief Justice, with six other members of the Court, found that both conditions were met and upheld the Act accordingly.

The absence of any suggestion that the emergency doctrine had been superseded by any new test of the federal general power[8] made it necessary for those who argued the case to deal with *Munro* v. *National Capital Commission*[9] and *Johannesson* v. *West St Paul.*[10] In *Munro,* the Supreme Court had allowed, under the general power, expropriation controlling the development and use of land surrounding the City of Ottawa. In *Johannesson,* the Court had brought within the general power the regulation of aeronautics and all matters related to it. In neither case was there any emergency or crisis. In both cases, the test applied was that articulated in the *Canada Temperance Federation* case: they involved matters going beyond local or provincial concern. These decisions were interpreted in a number of ways.

The factums of the Attorneys-General of Alberta and Saskatchewan present a bifurcated picture of the federal general power. It is viewed as functioning "normally"[11] where the lines of provincial jurisdiction are so clearly drawn as patently to exclude some area of legislative action. It functions "abnormally" in circumstances where the legislative provisions in question would otherwise fall within provincial jurisdiction. Here emergency is the "criterion... developed for the application of the general power to matters which

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[7] In a separate judgment, Ritchie J. looked not for a rational basis but for "clear evidence that an emergency had not arisen", *supra,* note 1, 439.

[8] This is attributable perhaps to the tactical exigencies facing those who argued the case. It would not have made sense for the Attorney-General of Canada to forego capitalizing on the positive premise of the emergency doctrine. For the provincial Attorneys-General, circumstances seemed to favour a battle fought over the limits of the emergency doctrine, a battle which, win or lose, would put traditional areas of provincial jurisdiction in the least jeopardy. The factum of the Attorney-General of Ontario in support of the legislation did rely exclusively on the test put forward in the *Canada Temperance Federation* case, *supra,* note 6, but Beetz J. reports that in argument counsel for Ontario explained the difference between that test and the emergency doctrine as one of semantics or form only, *supra,* note 1, 460.

[9] *Supra,* note 4.

[10] *Supra,* note 4.

[11] I have borrowed this description from Abel, *Laskin's Canadian Constitutional Law* 4th rev. ed. (1975), 191.

were originally or *prima facie* within provincial jurisdiction".[12] Thus the cases which applied the general power in the absence of an emergency, particularly *Johannesson* and *Munro*, are distinguished by describing them as instances of the normal, "residual" application of the general power. In this, the provinces are supported by Gerald LeDain who says that the two cases did not reject the test of exceptional necessity for matters that would ordinarily fall within provincial jurisdiction because the statutes in question did not involve matters assumed to have been originally or *prima facie* within section 92.[13]

In dealing with *Munro* and *Johannesson* the Canadian Labour Congress and the Public Employees organizations adopted a different tack. Apparently conceding some scope for the purely residual application of the general power, they argued that the emergency doctrine and the *Canada Temperance Federation* test can be reconciled on the basis of a theory originally put forward by W.R. Lederman.[14] If, as in *Johannesson* and *Munro*, the federal power is asserted over a topic which has "a natural unity that is quite limited and specific",[14a] then the test is whether the subject- matter of the legislation "goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole".[14b] But where the topic is diverse and the legislation pervasive, the test is the more demanding one of emergency. It is the emergency that supplies "the concern of the Dominion as a whole".

A majority of the Supreme Court of Canada, speaking through Mr Justice Beetz, adopted part of both explanations. They decided that in the absence of any emergency, the general power has residual application only, and that the effect of *Munro* and *Johannesson* was merely to add new federal subjects to this residual area "where a new matter was not an aggregate but had a degree of unity that made it indivisible, an identity which made it distinct from provincial matters and a sufficient consistence to retain the bounds of form".[15] The containment and reduction of inflation did not qualify and the emergency doctrine was applied.

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[12] LeDain, *Sir Lyman Duff and the Constitution* (1974) 12 Osgoode Hall L.J. 261, 277-78.

[13] *Ibid.*

[14] *Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation* (1975) 53 Can.Bar Rev. 597.

[14a] *Ibid.*, 610.

[14b] *Supra*, note 6, 205.

[15] *Supra*, note 1, 458.

The Attorney-General of Canada made no attempt to reconcile the conflicting lines of authority, other than by presenting them as *alternative* grounds for the exercise of the federal general power. This approach appealed to Chief Justice Laskin and since he was able to sustain the *Anti-Inflation Act* as crisis legislation, he found it "unnecessary to consider the broader ground advanced in its support".[16]

The above approaches are characterized by the acceptance of the emergency doctrine as *one* possible constitutional basis for the exercise of the general power.[17] The *Canada Temperance Federation* test, by giving scope to the general power beyond or apart from conditions of emergency, is simply another proper basis. It follows that use of the emergency doctrine to *uphold* federal legislation, as in the *Anti-Inflation Act Reference,* does nothing to impeach the test used in *Munro* and *Johannesson* (hereafter referred to as the "national concern" test).[17a]

However my argument is that there is an essential incompatibility between the emergency doctrine and the national concern test. One cannot be invoked without denying the essential components of the other. Consequently, the *Anti-Inflation Act Reference* involves necessarily a rejection, or at least a transformation, of the national concern test. The incompatibility is manifest in three aspects: property and civil rights, gravity of circumstances and the notion of a residue.

Property and civil rights

Two very different views of the property and civil rights power have prevailed in Canadian constitutional law. One forms an essential part of the emergency doctrine, and the other seems to be reflected in cases applying the national concern formula. The Supreme Court could not favour either submission in support of the *Anti-Inflation Act* without giving its *imprimatur* to an interpretation of section 92(13) which would undermine the other.

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[16] *Ibid.,* 419.

[17] LeDain, *supra,* note 12, 291, cites *Co-operative Committee of Japanese Canadians* v. *A.G. Canada* [1947] A.C. 87 (P.C.) as an indication "[t]hat the notion of emergency was not to be rejected as *one* possible constitutional justification for the exercise of the general power ...". Lederman, *supra,* note 14, 607, says that Viscount Haldane went too far when he said "that national emergency of some sort was the *only* subject that could qualify for status as a new subject under the federal general power".

[17a] The only real objection to the emergency doctrine in the reference is that it treats as necessary what is merely sufficient for a valid exercise of the general power.

The emergency doctrine mitigates a singularly broad conception of the provincial property and civil rights power. In the line of emergency cases commencing with the *Board of Commerce* decision,[18] the Privy Council took the view that the characteristic feature of property or civil rights legislation is interference with freedoms associated with property, contract or the conduct of business. In the *Board of Commerce, Fort Frances*[19] and *Snider*[20] cases the legislation in question was initially assigned to section 92(13) on the bare finding that the statutes interfered with what Viscount Haldane called "the property and civil rights of inhabitants of the provinces".[21] For Viscount Haldane the liberty to charge what the market will bear, to lock-out one's employees, or to strike, are civil rights. Since the liberty itself was regarded as a civil right, it could make no difference for what purpose it was restricted. Thus the purpose of a law, which had assumed so much importance for Sir Montague Smith in *Russell* v. *The Queen*,[22] became quite irrelevant.

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[18] *In re the Board of Commerce Act, 1919, and the Combines and Fair Prices Act, 1919* [1922] 1 A.C. 191 (P.C.).

[19] *Fort Frances Pulp & Power Co.* v. *Manitoba Free Press Co.* [1923] A.C. 695 (P.C.).

[20] *Toronto Electric Commissioners* v. *Snider* [1925] A.C. 396 (P.C.).

[21] The argument presented to the Court in *Switzman* v. *Elbling and A.G. Quebec* [1957] S.C.R. 285, as repeated by Rand J., is a faithful expression of the Haldane view: "by [s.92(13)] the Province is vested with unlimited legislative power over property; it may, for instance, take land without compensation and generally may act as amply as if it were a sovereign state, untrammeled by constitutional limitation. The power being absolute can be used as an instrument or means to effect any purpose or object. Since the objective accomplishment under the Statute here is an Act on property, its validity is self-evident and the question is concluded" (at p.302).

[22] (1882) 7 App.Cas. 829 (P.C.). In upholding *The Canada Temperance Act*, 1878, R.S.C. 1878, c.106 under the general power, Sir Montague Smith said that legislation restricting freedom of property falls outside s.92(13) if the restriction is in the interests of public order, safety or morals. What paved the way for the eclipse of the *Russell* case was the decision of Lord Watson in the *Local Prohibition* case, *A.G. Ontario* v. *A.G. Canada* [1896] A.C. 348. His Lordship held that *The Temperance Act of 1864*, R.S.O. 1877, c.182, which was identical in all material respects to *The Canada Temperance Act, 1878*, could be supported under s.92(13) as it concerned "property in the province which would be the subject matter of the transactions if they were not prohibited, and also the civil rights of persons in the province" (at pp.364-65). This was a direct contradiction of *Russell*. Lord Macnaghten saw the contradiction in *A.G. Manitoba* v. *Manitoba Licence Holders Association* [1902] A.C. 73 (P.C.) and held that Manitoba's prohibition statute (*The Liquor Act*, 63-64 Vict., c.22 (Man.)) was supportable only under s.92(16): "Indeed if the case is to be regarded as dealing with matters within the class of subjects enumerated in No.13, it might be questionable whether the Dominion Legislature

The first disarming blow to Viscount Haldane's interpretation of the property and civil rights power came with the recognition in *Reference re Alberta Statutes*,[23] *Saumur* v. *Quebec and A.G. Quebec*,[24] and *Switzman* v. *Elbling*[25] that these liberties are not rights at all, civil or otherwise. They are residual freedoms. Property rights and civil rights "arise from positive law"; they are created by circumscribing the liberty of others.[26]

In addition, these cases established that not every law which circumscribes the liberty of individuals creates civil rights in others. Regard must be had for the purpose of the restriction, and on that basis laws were perceived to fall into two distinct classes: those which protect the claims and interests of individuals and those which protect the community as a whole.[27]

Laws of the first kind, relating as they do to the public interest indirectly, may alone be characterized as legislation in relation to

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could have authority to interfere with the exclusive jurisdiction of the province in the matter" (at p.78). Professor Laskin, as he then was, criticized the *Manitoba* case for driving a wedge between s.92(16) and the other enumerations of s.92 and for giving the general power a "hollow paramountcy" over s.92(16) alone, *supra*, note 3, 1065. Lord Macnaghten might rather have been congratulated for re-affirming that a statute concerned with public order and safety is not a property and civil rights law. The acceptance by the Chief Justice of Lord Watson's decision would make it necessary for him to look outside legislation at the circumstances leading to its enactment, for the purpose of characterizing it as peace, order and good government law or property and civil rights law. See *infra*, "Gravity of circumstances", p.445.

[23] [1938] S.C.R. 100.

[24] [1953] 2 S.C.R. 299.

[25] *Supra*, note 21.

[26] In *Saumur* v. *Quebec and A.G. Quebec*, *supra*, note 24, 329, Rand J. rejected the argument that a law prohibiting the distribution of religious tracts in the streets is a civil rights law: "Strictly speaking, civil rights arise from positive law; ... [i]t is in the circumscription of these liberties [freedom of speech, religion and the inviolability of the person] by the creation of civil rights in persons who may be injured by their exercise, and by the sanctions of public law, that the positive law operates."

[27] In *Reference re Alberta Statutes*, *supra*, note 23, 144, Cannon J. found the Alberta Press Bill to be outside provincial power on the basis of a distinction drawn between public and private interests: "this bill deals with the regulation of the press of Alberta, not from the viewpoint of private wrongs or civil injuries resulting from any alleged infringement or privation of civil rights which belong to individuals, considered as individuals, but from the viewpoint of public wrongs or crimes *i.e.*, involving a violation of the public rights and duties to the whole community, considered as a community, in its social aggregate capacity".

property and civil rights.[27a] Section 92(13) is a power to be exercised only for the protection of private or individual interests.[28] This distinction between private and community interests has been at work in defining the respective boundaries of the property and civil rights power and the federal powers in relation to criminal law[29] and trade and commerce.[30]

[27a] The public interest in laws of the first kind is derivative, in laws of the second kind it is direct and immediate.

[28] The disorderly house legislation in *Bedard* v. *Dawson* [1923] S.C.R. 681, was sustained under s.92(13) because its purpose was to protect the individual property interests of neighbouring inhabitants. Though the operation of a disorderly house is a public nuisance, it may interfere with the use and enjoyment of land and so have a private or civil aspect with which the province may deal. "The essence of this aspect", said Rand J. in *Switzman, supra,* note 21, 304, "is its repugnant or prejudicial effect upon the neighbouring inhabitants and properties". Similarly, in *Re D. & G. Barclay Builders Ltd and St Jane Plaza Ltd* (1973) 37 D.L.R. (3d) the Ontario Court of Appeal sustained under s.92(13) provincial legislation which gave a right of re-entry to a landlord whose tenant kept premises as a disorderly house. The legislation did not seek to punish a public wrong; it was designed for the protection of the landlord, other tenants and indeed, the neighbourhood in which the premises were located.

[29] In the *Margarine* case, *Reference as to the Validity of Section 5(a) of the Dairy Industry Act* [1949] S.C.R. 1, Rand J. could find no "public purpose" to support the federal prohibition on the manufacture and sale of butter substitutes because it was conceded that the substitutes were substantially as free from deleterious effects as butter itself. The individual or private interests of butter producers were the legislature's concern. The legislation in *A.G. B.C.* v. *A.G. Canada (Reference re Section 498A of the Criminel Code)* [1937] A.C. 368 (P.C.), prohibiting a vendor from discriminating against competitors of the purchaser, was distinguishable because its essential nature "was not the equalization of civil rights between competitors or promoting the interest of one trade as against another; it was the safe-guarding of the public against the evil consequence of certain fetters upon free and equal competition" ([1949] S.C.R. 1, 51). In adopting the distinction between individual and community interests for the purpose of measuring the scope of s.91(27), Rand J. necessarily eschewed the notion of an historical "domain of criminal jurisprudence", being the test put forward by Viscount Haldane in the *Board of Commerce* case, *supra,* note 18. As the object or purpose of legislation could not take it out of s.92(13), Viscount Haldane had turned to history for a guide to what did not belong there.

[30] In *MacDonald* v. *Vapour Canada Ltd* (1976) 66 D.L.R. (3d) 1, the Supreme Court was asked to sustain under s.91(2) the provisions of subs.7(e) of the *Trade Marks Act,* R.S.C. 1970, c.T-10. That subsection provides that "no person shall ... do any other act or adopt any other business practice contrary to honest industrial or commercial usage in Canada". Laskin C.J. might have upheld the legislation were it not for the fact that the only means of enforcement provided for was by civil suit at the instance of persons injured by breach of the subsection. This made patent the federal intrusion upon pro-

There is another important aspect of this limited view of section 92(13). When asserted in relation to contractual relationships, the property and civil rights power will support only laws of an adjectival nature that are directed to security, certainty or fair play and within the bounds of which persons are free to conduct business on such substantive terms as they choose. Thus substantive trade regulation is outside section 92(13).

This distinction between the contractual and trade aspect of transactions first appeared at the Supreme Court level in the *Parsons* case[31] and has re-emerged in the form of a basis for provincial jurisdiction over local transactions in commodities bound for export from the province.[32] The contractual aspect of transactions falls properly within section 92(13) and has been recognized as including laws concerned with equality of bargaining position[33] and the entire residual area of commercial law.[34] The

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vincial legislative power. When forbidden predatory practices "are left to merely private enforcement as a private matter of business injury" (at p.20), there is lost the support in s.91(2) that might have been present "if the legislation had established the same prescriptions to be monitored by a public authority irrespective of any immediate private grievance as to existing or apprehended injury" (at p.20).

[31] *Citizens Insurance Co.* v. *Parsons* (1881) 4 S.C.R. 215; aff'd (1881) 7 App.Cas. 96 (P.C.). The Court upheld *The Fire Insurance Policy Act*, R.S.O. 1877, c.162 which required that any policy departures from prescribed statutory terms be printed in red ink. The object of the Act was "to protect parties from being imposed upon" (at p.245 *per* Ritchie C.J.). This was a matter of fairness in the contractual dealings between parties, and it formed no part of trade and commerce legislation. Such legislation would fall nicely within Professor Abel's description of property and civil rights law as including rules "aimed at keeping conduct while contracting within the bounds of decency", *The Neglected Logic of 91 and 92* (1969) 19 U.of T.L.J. 487, 519.

[32] In *Reference re the Farm Products Marketing Act* [1957] S.C.R. 198, three judges of the Court broke new ground in holding that Parliament may regulate certain aspects of local transactions in commodities bound for export. They distinguished from trade regulation and preserved for exclusive provincial jurisdiction the contractual aspect of such local transactions.

[33] The provincial legislation involved in *Carnation Company Ltd* v. *Quebec Agricultural Marketing Board* [1968] S.C.R. 238, was upheld, notwithstanding the extra-provincial destination of the commodity, because the concern of the legislation was not the price of milk but rather fairness in the contractual dealings between the producers and Carnation. The legislature was prepared to accept any price so long as it was arrived at fairly. For this prupose it was necessary, as Laskin J. said in *A.G. Manitoba* v. *Manitoba Egg and Poultry Association* [1971] S.C.R. 689, 710, to "improve the bargaining position" of the local producers in their dealings with the processor.

[34] This was recognized from the beginning. Fournier J. said in the *Parsons* case, *supra*, note 31, 276-77: "In our constitutional Act I cannot find anywhere that commercial law is under the juridiction of the Dominion; it

most definitive statement in this respect is that of Rand J. in the *Ontario Farm Products Reference*.[34a] Trade, he said, does not take place by virtue of positive law or civil right, and is accordingly not within section 92(13). The language of the section is directed to

> ... laws relating to civil status and capacity, contracts, torts and real and personal property in the common law provinces, jural constructs springing from the same roots, already more or less uniform, and lending themselves to more or less permanence.[35]

These, then, were the competing views of the property and civil rights power. In the *Anti-Inflation Act Reference* the judges of the Supreme Court chose between them while making it appear that no choice was necessary. They applied Viscount Haldane's broad emergency view and found that the Act was in relation to property and civil rights. The judgment of the Chief Justice, with whom three others concurred, simply states that the Act "embraces sectors of industry and of services, including employers and employees therein, which are admittedly subject in respect of their intra-provincial operations to provincial regulator authority", in which sectors "it would have been open to each province to impose price and wage restraints".[36] Mr Justice Beetz, apparently speaking for the five re-

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seems to me, on the contrary, that the Act, by assigning specifically to the Dominion legislative control over a part of the commercial law, such as any law on navigation, banking, bills of exchange, promissory notes and insolvency, has left the residue to the jurisdiction of the several provinces as coming under the head 'civil law' ". While the province may not apply substantive trade regulation to commodities bound for export, those commodities are clearly subject to such provincial statutes as the *Sale of Goods Act*. This example was given by Kerwin C.J. in the *Ontario Farm Products Reference, supra,* note 32. With this "commercial significance" maintained, the property and civil rights clause is accorded that "very broad significance" which a reference to neglected history is said to demand, see Lederman, *supra,* note 14, 601-604.

[34a] *Supra,* note 32. In this case Rand J. assigned laws concerned with local trade regulation to s.92(16).

[35] *Ibid.,* 211-12. The distinction being drawn here was used by Laskin C.J. in his *Vapour Canada* judgment, *supra,* note 30. He found subs.7(e) of the *Trade Marks Act* unsupportable under s.91(2), not only because it provides for private enforcement by civil action, but also because "the provision is not directed to trade but to the ethical conduct of persons engaged in trade or in business" (at 26). Subs.7(e) established an adjectival rule of fairness not unlike that involved in the *Parsons* case, *supra,* note 31.

[36] *Supra,* note 1, 392. Although Laskin C.J. did not expressly assign the legislation to s.92(13), his acceptance of the emergency doctrine in its positive aspect left no room for the kind of close analysis that is involved in the narrow view of that power. This is all the more remarkable in view of Laskin C.J.'s early recognition of the substantial error in Viscount Haldane's approach: "Viscount Haldane does not treat the phrase 'property and civil

maining members of the Court,[37] cited, *inter alia*, the emergency cases, along with the *Carnation* case[37a] and *MacDonald* v. *Vapour Canada Ltd*[37b] as authority for the proposition that the regulation of prices, profits and wages is a matter falling within section 92(13). There was no mention of the fact that the latter cases involved legislation prescribing how bargains should be made and not what their terms should be. It seems that since the legislation interfered with freedoms associated with property and contract, it was irrelevant that its admitted purpose was to combat inflation.

Unfortunately, in opting for the emergency doctrine's conception of property and civil rights, the Supreme Court gave no indication that this view was exceptional. Rather, the judges suggested that there was but one assessment to section 92(13) and that it was common to both the emergency doctrine and the national concern formula. Chief Justice Laskin implied that the emergency cases involved statutes that were property and civil rights legislation by any standard. He perceived differences more of degree than of kind emerging from the line of cases that includes both *Russell*, and *Board of Commerce* and *Fort Frances*.[38] What separated Sir Montague Smith and Viscount Haldane, he said, was the difference, if any, between "an evil of nation-wide proportions"[39] and "exceptional circumstances".[40]

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rights in the province' ... as a class of subject for the exertion of provincial legislative power, but rather as relating to attributes of the citizenry of the Dominion which are beyond the reach of provincial legislation. It is this unusual conception of section 92(13) which has produced the paralysis in the Dominion power to legislate for the peace, order and good government of Canada ...", *supra*, note 3, 1078.

[37] I say "apparently" because Ritchie J., who wrote for himself and three others, said only that the *Anti-Inflation Act* could be supported on no basis other than emergency, and his expressed agreement with Beetz J. went no further than his assessment of the national concern doctrine.

[37a] *Supra*, note 33.

[37b] *Supra*, note 30.

[38] See *supra*, note 1, 392. *Russell* was presented to the Supreme Court in the *Anti-Inflation Act Reference* not as authority for a narrow construction of s.92(13), but as an instance in which no emergency was required to support federal legislation because the legislative subject-matter (liquor) "has an identity and a unity that is quite limited and particular in its extent", see Factum of the Canadian Labour Congress, relying on Lederman, *supra*, note 14.

[39] *Supra*, note 1, 397.

[40] *Ibid.*, 406. Implicit in the opinion of Beetz J. is the converse proposition that the *Munro* and *Johannesson* cases involved statutes that were not property and civil rights laws even by emergency standards.

This notion of compatibility in these cases is quite remarkable. It is my opinion that the statutes involved in the emergency cases, the *Anti-Inflation Act* included, would not be classified as property and civil rights legislation under any interpretation of section 92(13) other than that which sustains the emergency doctrine.

It is clear that the purpose of the *Board of Commerce* legislation was to offset an imbalance in the economic order and not simply to establish some equity in the relationship of vendors and purchasers. Profiteering and hoarding were manifestations of a larger economic disorder, to which they in turn contributed. They constituted a public or community evil, not a private, interpersonal evil. As Professor Abel said in his analysis of the case:

> [T]he legislation did clearly address itself to contracts, specifying that and on what terms persons must in certain circumstances contract .... Unlike the unconscionable transaction Acts aimed at keeping conduct while contracting within the bounds of decency, the challenged acts involved a substantive contract term and one, the price term, which lies at the very heart of marketing theory and practice. Designed to tilt the workings of supply and demand, they were out-and-out economic controls. Hence, the class of subjects they came within was plainly 'The Regulation of Trade and Commerce' (economics) rather than 'Property and Civil Rights' (personal conduct) ... .[41]

An even clearer case is *Snider,* which, incidentally, like the *Anti-Inflation Act Reference,* involved federal legislation applicable only to industries of major consequence. Here, it was Mr Justice Ferguson of the Ontario Court of Appeal who defined the essential character of the legislation:

> Industrial disputes are not now regarded as matters concerning only a disputing employer and his employees. It is common knowledge that such disputes are matters of public interest and concern, and frequently of national and international importance.[42]

He found in the *Russell* decision direct support for the legislation because the Act[42a] was not intended to control or regulate contractual or civil rights but rather to authorize an inquiry into conditions or disputes. The prevention of crime, the protection of public safety, peace and order, and the protection of trade and commerce were of its "pith and substance" and "paramount purpose".

The emergency doctrine may have been given credibility in the *Fort Frances* case because it provided a basis for wartime controls on the price of newsprint. What appears to have escaped notice, however, is that the controls, whenever enacted, were not of a pro-

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[41] *Supra,* note 31, 519.

[42] [1924] 2 D.L.R. 761, 786.

[42a] *The Industrial Disputes Investigation Act, 1907,* S.C. 1907, c.20.

perty and civil rights character, and this is so even apart from the fact that they involved substantive trade regulation. In this instance Parliament was not concerned with protecting the interests of newspaper publishers against gouging by paper manufacturers, or conversely with subsidizing the manufacturers. Rather, the purpose of the legislation, as Viscount Haldane remarked, was to protect the public against "want of uninterrupted information in newspapers".[43] Price controls were simply a vehicle to ensure for the community a continued discussion of public affairs in the press.[44]

The *Anti-Inflation Act Reference* also involved legislation which applied substantive trade regulation, not in the interests of either of the parties to the transactions regulated, but in the interests of the public generally. In fact, Chief Justice Laskin mentioned that the Act might have been sustained as a "general regulation of trade affecting the whole dominion" under section 91(2)[45] and this indicates that for him the legislation truly did not have the characteristic features of property and civil rights legislation; it is clear that section 91(2) will not sustain legislation that is designed to safeguard private or individual interests or that imposes standards of ethical conduct as opposed to substantive trade controls.[46] In both the *Fort Frances* and *Anti-Inflation Act* cases, it was only the exceptional view of property and civil rights embodied in the emergency doctrine that made it necessary to rely on emergency to uphold the legislation.

There was no inquiry into the real nature of the property and civil rights power in the *Anti-Inflation Act Reference,* possibly

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[43] *Supra,* note 19, 706.

[44] Surely Parliament is competent to adopt such measures if, as Cannon J. said in *Re Alberta Statutes, supra,* note 23, 146, "[t]he federal Parliament is the sole authority to curtail, if deemed expedient and in the public interest, the freedom of the press in discussing public affairs ...". Rand J. said as much in *Switzman* v. *Elbling, supra,* note 21, 306: "[P]ublic opinion ... demands the condition of a virtually unobstructed access to and diffusion of ideas ... . The freedom of discussion in Canada, as a subject matter of legislation, has a unity of interest and significance extending equally to every part of the Dominion". See also Kirsh, *Film Censorship: The Ontario Experience* (1970-71) 4 Ottawa L.R. 312, 314-15. The Supreme Court of Canada recently affirmed the *Alberta Statutes* philosophy by denying leave to appeal from the decision of the Ontario Court of Appeal in *Re C.F.R.B. and A.G. Canada* (1974) 38 D.L.R. (3d) 335, holding that "the exclusive legislative authority of Parliament with respect to radio communication extends to the control and regulation of the intellectual content of radio communication" (at p.340).

[45] *Supra,* note 1, 426.

[46] *MacDonald* v. *Vapour Canada Ltd, supra,* note 30, 26.

because the Court did not view the principal submission in support of the Act, that is, the national concern test, as itself an expression of the narrow view of the property and civil rights power. My thesis is, of course, that the national concern test *does* involve a narrow view of section 92(13); the national concern test is incompatible with the interpretation of section 92(13) which forms the basis of the emergency doctrine.

In *Munro*, Justice Cartwright was not disturbed by the circumstance that the *National Capital Act*[46a] would "affect the civil rights of residents of ... the National Capital Region",[46b] for the object or purpose of the legislation was a public one: to give to the national capital a physical setting befitting its status. This is quite unlike the purpose of typical provincial planning legislation, which merely seeks to ensure the compatibility of neighbouring land uses with the interests of the respective users. For Viscount Haldane, the immediate effect of the legislation, its impact upon property, would have been determinative against validity.[47] The legislation in *Munro* involved a matter ordinarily or *prima facie* within provincial jurisdiction, but the narrow view of the property and civil rights power left the legislation outside section 92(13).

Although I agree with Professor Abel that there was little pretence of analysis in the *Johannesson* case,[48] it is clear that it too involved a significant departure from the Haldane view of provincial power. This departure becomes obvious when one compares the *Johannesson* judgment with the views expressed by the Supreme Court in the *Aeronautics* case.[49] It is evident that in the latter case the Court laboured under the influence of the emergency doctrine. Mr Justice Dnff, with Rinfret and Lamont JJ. concurring, said:

> The provincial jurisdiction under heads 10 to 16 extends through the air space above ... and the control of the Province over its own property is as extensive in the case of aerodromes and aircraft as in the case of garages and automobiles .... Primarily the matters embraced within the subject of aerial navigation fall within s.92.[50]

[46a] S.C. 1958, c.37.

[46b] *Munro* v. *National Capital Commission, supra,* note 4, 671.

[47] See *supra,* note 21. Lyon and Atkey, *Canadian Constitutional Law in a Modern Perspective* 2d ed. (1970), 698-99, agree that Viscount Haldane would have decided the *Munro* case differently.

[48] *What Peace, Order and Good Government?* (1968) 7 West.Ont.L.Rev. 1, 5. Save in the judgment of Locke J.

[49] *Re Aerial Navigation* [1931] 1 D.L.R. 13.

[50] *Ibid.,* 22.

Newcombe J. said:

> [T]he right of way exercised within a Province by a flying machine must, in some manner be derived from or against the owners of the property traversed; and the power legislatively to sanction such a right of way appertains *prima facie* to property and civil rights in the Province ... .[51]

Perceptions such as these formed no part of the national concern test applied in *Johannesson.* How, in light of them, can LeDain suggest, with a view to reconciling the emergency doctrine and the national concern test, that,

> the decision in respect of aeronautics did not involve the application of the general power to a matter assumed to have been originally under provincial jurisdiction but claimed to have changed in relative importance and concern so as to take it out of such jurisdiction and place it under the general power.[52]

The national concern test applied a narrow view of the property and civil rights power and, in so doing, it denied the very foundation of the emergency doctrine. Statutes such as those involved in the *Munro* and *Johannesson* cases, which are not property and civil rights legislation by national concern standards, must, for the purposes of the emergency doctrine, meet the test of exceptional necessity because they involve matters ordinarily or *prima facie* within provincial jurisdiction.

The dissenting judgment of Mr Justice Beetz disguises this essential incompatibility. For reasons noted earlier,[53] he held that the *Anti-Inflation Act* did not satisfy the national concern test. This was preceded by the conclusion that the restraint of profits, prices and wages is a matter of property and civil rights, a conclusion drawn from nothing other than a series of cases that includes *Board of Commerce* and *Snider.* Thus, the national concern test is seen as working from basically the same assessment of section 92(13) as does the emergency doctrine. Mr Justice Beetz is prepared to embrace the notion of national concern, but only on terms making it indistinguishable in a critical respect from the emergency doctrine. "National concern" merely describes that area of legislative action in which under the emergency doctrine, the test of exceptional necessity need not be applied.

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[51] *Ibid.*, 37.

[52] LeDain, *supra,* note 12, 292. In fairness, LeDain may be saying that aeronautics was recognized as never having been otherwise than of concern to the Dominion as a whole, and not that no elements of jurisdiction over property could be discerned in its regulation. The fact remains, however, that the Haldane analysis of aeronautics regulation was in terms of its impact upon property rights.

[53] See text, *supra,* p.433.

Gravity of circumstances

It should be recalled that the Supreme Court was offered two ways in which to reconcile the national concern and emergency doctrines. The first said that "national concern" describes what is excluded *prima facie* from provincial jurisdiction while emergency operates as a companion principle in relation to matters not so excluded.[54] The second said that national concern and emergency operate in the same area of legislative action as different expressions of the same principle, emergency being an instance of national concern.[55] In my view, neither reconciliation is acceptable.

The national concern test, its foundation in a particular view of section 92(13) aside, will not accommodate the emergency doctrine, either as a companion principle or as a narrower expression of the same principle. The test originated in the judgment of Viscount Simon in the *Canada Temperance Federation* case. He rejected the emergency doctrine, not because it treated as necessary what is merely sufficient for a valid exercise of the general power,[56] but because it sought the character of legislation in the wrong place. He said:

> [T]he British North America Act nowhere gives power to the 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 .... .
>
> 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.[57]

These, I think, are the key words in the opinion. The gravity of circumstances leading to the enactment of legislation cannot alter its constitutional character.

In the very manner of its expression the emergency doctrine had distracted attention from its critical flaw. Surely, the doctrine said, Parliament may enact property and civil rights legislation only in exceptional circumstances. Viscount Simon was the first to say that under no circumstances may Parliament enact property and civil rights legislation. As has been demonstrated, this brought attention back to the real question: what is property and civil rights legislation. It also established the national concern test as one quite incompatible with any notion of power arising in extraordinary circumstances.

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[54] See text, *supra*, p.432.
[55] See text, *supra*, p.433.
[56] See *supra*, note 17.
[57] *Supra*, note 6, 205-206.

Thus the national concern test had positive and negative implications for federal power. It offered a limited view of the provincial power in section 92(13) and, in an aspect of the test to be examined below, provided a new understanding of what is otherwise local or private in nature. But the price exacted was abandonment of the idea that extreme circumstances alone could give a federal character to legislation. Generally, there has been a refusal to accept the Simon formula on those terms. The price apparently was too high.

Professor Laskin, as he then was, indicated in 1947 that he would prefer not to have Viscount Simon taken at his word.[58] Emergency, he thought, should continue to function as "not only the occasion but also the justification for the legislation".[59] Professors Lederman and LeDain were also unwilling to accept the negative implications of Viscount Simon's formula. "[S]urely", Professor LeDain said, "where emergency exists, it is the emergency which gives the matter its dimension of national concern or interest".[60]

The *Anti-Inflation Act Reference* supports these academic opinions. Emergency was permitted to function as the justification for the legislation; seven members of the Supreme Court found the legislation valid because there was nothing to contradict Parliament's assessment of the circumstances as exceptional. In this, there is necessarily a rejection of the *Canada Temperance Federation* formula. Having reached that particular conclusion about legislation which under the emergency doctrine calls for exceptional circumstances, namely, that the legislation relates to property and civil rights, Viscount Simon would insist that Parliament has no authority to enact it.

Of course, Viscount Simon's formula might have been given full application without sacrificing the *Anti-Inflation Act*. As in the *Fort Frances* case, the Court missed an opportunity to hold that the legislation did not relate to property and civil rights. If the Court is unwilling to accept the negative implications of Viscount Simon's formula, it is unable to profit fully from its positive aspects.

However, while the Supreme Court was prepared to say that federal power may arise in extraordinary circumstances it was not prepared to deny that federal power may exist in the absence of

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[58] *Supra*, note 3, 1082-83.

[59] *Ibid.*, 1082. Earlier on, at 1074, there is criticism of the *Board of Commerce* case for its failure to consider "the actual circumstances and conditions which induced the legislation".

[60] *Supra*, note 12, 291.

such circumstances. The Court wanted something of what it considered Viscount Simon to be offering. The *Canada Temperance Federation* case, as Professor Laskin pointed out in 1947, allowed scope for the general power "beyond conditions of emergency".[61] And although reliance on "crisis" as a constitutional support for the *Anti-Inflation Act* is not compatible with the strict terms of Viscount Simon's formula, he nonetheless left that formula open as a possible alternative basis for the decision, as a "broader ground advanced in its support".[61a] This suggests that for the Chief Justice the formula has a definite role to play but it must be a role consistent with the acceptance of emergency circumstances as justification for legislation. It must also be a role which would allow federal power to arise where the legislation relates to property and civil rights, for that was the conclusion which preceded Chief Justice Laskin's analysis of the two arguments advanced in support of the *Anti-Inflation Act*. What could that role be?

It seems that for Laskin the Simon formula would allow federal power to arise in a range of circumstances which includes, but is not limited to, emergency situations. In his 1947 article, Professor Laskin criticized the emergency doctrine, but only in terms which called for an examination of "the actual circumstances and conditions which induced ... legislation"[62] and of "facts and circumstances which give rise to some social pressure for legislation".[63] He saw the *Canada Temperance Federation* formula as a vehicule for that kind of analysis, and his only concern was that the Supreme Court might try "to assess the term 'inherent nature' abstractly or artificially instead of functionally".[64] In writing his *Anti-Inflation Act* judgment,[65] the feature of the *Russell* case that troubled him was the absence of any extrinsic evidence that could establish the circumstances which prompted the enactment of *The Canada Temperance Act, 1878*.[66] Nonetheless he was able to say that the case did not establish that "Parliament's assessment of circumstances calling for the exercise of its general power"[67] was immune from judicial review. Indeed, he had earlier seen some connection between the language in the *Russell* case and "data which

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[61] *Supra*, note 3, 1083.
[61a] *Supra*, note 1, 493.
[62] *Supra*, note 3, 1074.
[63] *Ibid.*, 1069.
[64] (1957) 35 Can.Bar Rev. 101, 105.
[65] *Supra*, note 1, 396.
[66] R.S.C. 1878, c.106.
[67] *Supra*, note 1, 398.

would support the existence of a temperance problem on a national scale",[68] language which would permit the aspect doctrine to "reflect the social facts of Canadian life".[69]

Once one concludes that the national concern formula calls for an examination of social and economic circumstances which attend the enactment of legislation, that formula is readily reconciled with the emergency doctrine. It may be said that "where emergency exists, it is the emergency which gives the matter its dimension of national concern or interest".[70] It remains to be seen whether Chief Justice Laskin will adopt the refinement suggested by Professor Lederman and presented in the factum of the Canadian Labour Congress, namely, that the standard of exigency lower than emergency is to be applied only where the legislation is not sweeping or pervasive in its impact.

The lack of any extrinsic evidence in the *Russell* case demonstrates that for Sir Montague Smith, as for Viscount Simon, the gravity of circumstances is immaterial for constitutional purposes. It made no difference whether intemperance was an emergency "putting the national life of Canada in unanticipated peril",[71] as Viscount Haldane later said it must have been, or merely a garden variety disruption of public order and safety. One needs to know only the meaning of the word "intoxicating" in order to characterize the legislation. Viscount Simon called for no evidence of mass murder or widespread carnage to support the enactment by Parliament of legislation prohibiting the carrying of arms. Nor was there any evidence in *Munro* that the City of Ottawa suffered from a lack of concerted effort at beautification. This aspect of the case might well evoke from Chief Justice Laskin the same criticism as has been directed at it by Whyte and Lederman, namely, that the federal general power should have come into play "only in cases where provincial regulatory enactments were failing to meet a social or economic problem which threatened to undermine peace, order or good government in Canada".[72]

If the inherent nature of legislation is determinative there is no cause for examination of circumstances and conditions except for the purpose of discovering the object of the statute. The suggestion that the court ought to apply a constitutional standard of exigency

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[68] *Supra*, note 3, 1058-59.
[69] *Ibid.*, 1059.
[70] LeDain, *supra*, note 12, 291.
[71] *Supra*, note 1, 411.
[72] *Canadian Constitutional Law* (1975), 336.

to circumstances and conditions necessarily involves a compromise of the notion that "judges are not the most competent people to determine high matters of State".[73] If, in its enabling aspect, the emergency doctrine involves an abdication of judicial function,[74] in its restrictive aspect it involves an appropriation of legislative function.

The state of the law appears to be that what is otherwise property and civil rights legislation may take on a different and federal character if regard is had to the circumstances and conditions attending its enactment. The irony of the situation is that this conclusion is *supported* by a case which says categorically that even the most exceptional circumstances do not give a federal character to legislation which relates to property and civil rights![75]

The Notion of a Residue

There is a third element of discordance between the emergency doctrine and the national concern formula. This element is really a product of the differences already examined, and it is exposed by the efforts made to reconcile the two notions. If the emergency doctrine is accepted as valid, the effect is either to bury the national concern formula or to give it a role quite unlike the one it is intended to perform. Mr Justice Beetz chose to bury it, and Chief Justice Laskin to transform it.

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[73] Jennings, *Constitutional Interpretation — The Experience of Canada* (1937) 51 Harv.L.Rev. 1, 39, quoted in Laskin, *supra,* note 3, 1087.

[74] The abdication was expressed in these words in the *Japanese Canadians* case, *supra,* note 17, 101: "[T]he Parliament of the Dominion in a sufficiently great emergency, such as that arising out of war, has power to deal adequately with that emergency for the safety of the Dominion as a whole. The interests of the Dominion are to be protected and it rests with the Parliament of the Dominion to protect them. What those interests are the Parliament of the Dominion must be left with considerable freedom to judge".

[75] What Lyon in *The Anti-Inflation Act Reference: Two Models of Canadian Federalism* (1977) Ottawa L.Rev. 176, 178-82 described as the fundamental difference between the judgments of Laskin C.J. and Beetz J., may be viewed as a product of Viscount Simon's influence. Beetz J. held that the existence of an emergency may justify federal legislation, not because an emergency alters the character of legislation, but because in an emergency the distribution of powers is itself altered. He is in complete accord with Viscount Simon in saying that "the control of property and civil rights for purposes other than normal purposes ... remains a control of property and civil rights in the Provinces", *supra,* note 1, 462. Parliament, however, acquires a concurrent and paramount jurisdiction over property and civil rights for all purposes necessary to deal with the emergency. Because Beetz J. does not agree with the Chief Justice that the character of laws tends "to take its

The emergency doctrine is a criterion for the application of the general power *beyond or outside* what is called its purely residual application. The doctrine recognizes what Laskin has called a "closely confined scope of normal operation".[76] It recognizes, for example, that exceptional circumstances are not required to sustain federal legislation which provides for the incorporation of companies with other than provincial objects. This residual area is closely confined for the very reason that an essential part of the emergency doctrine is a very broad conception of the property and civil rights power. If the Supreme Court was to accept the emergency doctrine, it also had to accept that broad interpretation of section 92(13). Faced then with cases such as *Johannesson* and *Munro* that had, in the absence of any crisis, described matters as federal because of national concern, Mr Justice Beetz could preserve the emergency doctrine intact only by describing the two cases as instances of the purely residual application of the general power. "National concern" is merely a new name for an area of residual federal power that is recognized in any event by the emergency doctrine. Thus we are left with the anomalous situation that the decisions in *Munro* and *Johannesson* still stand but their interpretation of section 92(13) does not.

Chief Justice Laskin was also attracted to the emergency doctrine but what appealed to him was its enabling aspect only. He saw the national concern formula as a vehicle for extending the scope of the general power but since he had embraced the emergency doctrine in its positive aspect, he was also bound by its assessment of section 92(13). He was thus forced to say that the national concern cases were based on the same interpretation of section 92(13) as that which sustains the emergency doctrine. This in turn required him to say that the statutes involved in *Munro* and *Johannesson* were *prima facie* within provincial jurisdiction. If he had described them as instances of the residual application of the general power it would have to have been on the basis that the emergency cases would characterize them in a similar fashion, in which event national concern would add nothing to the emergency doctrine. As a result, Chief Justice Laskin would say that the same characterization of legislation that under the emergency doctrine calls for crisis may

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colour from the circumstances of the day" (Lyon, *supra*, 179) he has, of course, quite a different perception of the national concern doctrine. Tied as it is, however, to the same assessment of s.92(13) that sustains the emergency doctrine, it adds nothing to federal power.

[76] *Supra*, note 11, 191.

invoke the more liberal standard of the national concern formula. That formula applies, if at all, to laws which do *not* fall within the residue recognized by the emergency doctrine.

This conclusion also made it possible to give some credibility to the positive aspect of the emergency doctrine. National concern, no less than emergency, will sustain legislation that on an analysis divorced from attendant social and economic circumstances, is properly characterized as being in relation to property and civil rights. The two doctrines work in harmony outside the area of purely residual application; the only difference between them is that national concern does not "limit the possibility of matters attaining national dimensions ... to the emergency of war".[77]

His opinion in *Jones* v. *Attorney General of Canada*[78] confirms, I think, that Laskin C.J. considers the general power to have a residuary application beyond what is provided for by either of the tests. In *Jones,* he upheld the *Official Languages Act*[78a] ("limited as it is to the purposes of the Parliament and Government of Canada and to the institutions of that Parliament and Government")[79] "on the basis of the purely *residuary character* of the legislative power" conferred by the peace, order and good government clause.[80] He did not apply the formula articulated in the *Canada Temperance Federation* case. It would seem that the Chief Justice considers this formula to be something other than a description of residuary power.

It cannot escape notice that there is no common ground whatever between Laskin C.J. and Beetz J. in their understanding of the national concern formula. For Beetz it describes the area of purely residual application that is recognized by the emergency doctrine. For Laskin it includes only those laws that fall outside the residue and to which some standard of national exigency must be applied.

In my view, the national concern test is not one to be applied in conjunction with any residual notion of the general power for the test is itself the measure of the residuary scope of the power. It is true that the test put forward in the *Canada Temperance Federation* case makes no reference to "property and civil rights" or, indeed, to any other words used in section 92. In what way then is it residuary in nature?

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[77] *Supra,* note 1, 407-408.
[78] [1975] 2 S.C.R. 182, (1974) 45 D.L.R. (3d) 583.
[78a] S.C. 1968-69, c.54.
[79] *Supra,* note 78, 189.
[80] *Ibid.* (emphasis added).

The answer is that the words "local or provincial concern or interest", beyond which the real subject-matter of legislation must go, are intended to describe collectively everything that is included in section 92. Viscount Simon expressed in his own words what Clement has called "the cardinal principle of allotment"[81] applied in the *British North America Act, 1867*.[82] The jurisdiction of the provinces extends over all matters of merely local or private concern and that of the Dominion over all matters of common concern to the provinces. Each of the first fifteen heads of section 92 describes a specific kind of local or private legislation, and the sixteenth brings within provincial jurisdiction all matters which are local or private in nature but not covered by the preceding specific language.[83] The definition of federal power in terms of matters going beyond local or provincial concern calls for an assessment of the scope of each of the heads of legislative power in section 92.[84] To assert, for example, that the incorporation of companies with other than provincial objects is outside section 92, is to say that it is not of local or provincial concern.

In the *Munro* case, the Supreme Court of Canada certainly treated the national concern formula as an expression of residuary power. The Court determined that the real subject-matter of the legislation was not "property and civil rights" but rather the conservation and improvement of the seat of the Government of Canada. As this was a matter going beyond local or provincial interests, the legislation "[did] not come within any of the classes of subjects enumerated in section 92".[85] The question whether legislation is of local or provincial concern is asked when legislation is found not to be within any of the fifteen specific heads of section 92. If legislation is found to be within one of those heads, for example, the property and civil rights power, then by definition the legislation is of local or provincial concern and no further

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[81] Clement, *The Law of the Canadian Constitution* 3d ed. (1916), 448.

[82] 30-31 Vict., c.3 (U.K.).

[83] See Lord Watson in *A.G. Ontario* v. *A.G. Canada, supra,* note 22; Anglin J. in the *Board of Commerce* case (1920) 60 S.C.R. 456; Rand J. in the *Ontario Reference, supra,* note 32, 212.

[84] Professor Gibson suggests, *supra,* note 2, that the method of inquiry is to begin with the general question whether legislation deals with a problem having "national dimensions". I agree with Professor Abel, *supra,* note 48, that one first assesses the legislation in terms of the specific heads of power in s.92, and failing characterization in terms of any such power, the legislation is then assessed in terms of its relation to a national matter or a local matter.

[85] *Munro* v. *National Capital Commission, supra,* note 4, 672.

question remains. To this extent, the factums of the Attorneys-General for Saskatchewan and Alberta seem to me to be correct. The cases which have involved an application of the test formulated in *Canada Temperance Federation* are instances of "residuary matters of national concern". The statutes involved fall within federal power on precisely the same basis as does legislation for the incorporation of companies with objects other than provincial.

A new approach

To express federal power in terms of matters going beyond local or provincial concern poses an obvious threat to the maintenance of a reasonable area of provincial jurisdiction; it can result in a problem being conceived of in terms of prevalence or public importance. Mr Justice Duff was the first to set himself against an easy expansion of the federal general power in this way. The dissenting judges in the *Insurance Reference*[86] had invoked the general power on the basis that the insurance business was one of "enormous if not colossal"[87] dimensions. Duff J. said: "I do not think that the fact that the business of insurance has grown to great proportions affects the question in the least".[88] Similarly, in the *Board of Commerce* case the fact that "[t]he scarcity of necessaries of life, the high cost of them, the evils of excessive profit taking, are matters affecting nearly every individual in the community and affecting the inhabitants of every locality and every province collectively as well as the Dominion as a whole"[89] failed to persuade Duff J. that this was a matter going beyond local or provincial concern.

In the Privy Council, refuge was taken in the emergency doctrine which perpetuated the "mistaken preoccupation with the importance of the subject in question"[90] and effectively eliminated any residuary by exaggerating section 92(13). The national concern test has also been affected by this preoccupation; Professor Lederman now asserts that legislation may satisfy the less demanding test of national concern only where the topic is relatively unimportant, or at least "quite limited and specific".[91]

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[86] *A.G. Canada* v. *A.G. Alberta* (1913) 48 S.C.R. 260.
[87] *Ibid.*, 274.
[88] *Ibid.*, 304.
[89] *Supra*, note 83, 512.
[90] Gibson, *supra*, note 2, 31.
[91] *Supra*, note 14, 610.

All this need not have happened. There is a workable formula for distinguishing local from national matters, and it does not involve either the criteria rejected by Mr Justice Duff as irrelevant or the severity of conditions prompting the enactment of legislation.

This formula recognizes, first, that legislation is of local or provincial concern by definition if it falls within any of the specific heads of power in section 92. It accepts what Duff C.J. said in the *Natural Products Marketing Act Reference*;[92] if legislation relates, for example, to amendment of the provincial constitution or to local works and undertakings or to solemnization of marriage, there can be no suggestion that it is not of local and provincial concern. The same logic applies to what is properly characterized as property and civil rights legislation. The general question, whether a statute is of national or local concern, arises only when it has been determined that the legislation does not fall within any of the specific heads of power in section 92.[93] However, the scope of this general question becomes considerable when combined with the narrow view of section 92(13) expressed in the *Canada Temperance Federation* formula. If prevalence or public importance is still the criterion applied to statutes falling outside the specific heads of power this aspect of the new approach will offer little solace to the provinces. Therefore, a new conception of "local or provincial" is required.

In my view, a matter is local in nature if it does not relate to or jeopardize what may be called a "national institution". To indicate the meaning and scope of this term, reference may be made to the opinions of Mr Justice Rand who felt that the fundamental freedoms are institutions or conditions of national life. In *Switzman* v. *Elbling* he described the freedom to discuss public affairs as a matter having "a unity of interest and significance extending equally to every part of the Dominion".[94] In the *Saumur* case,[95] he thought it self-evident that legislation in relation to religion and its profession is not a local or private matter. He said:

> [t]he dimensions of this interest are nation-wide; it is even today embodied in the highest level of the constitutionalism of Great Britain; it appertains to a boundless field of ideas, beliefs and faiths with the deepest roots and loyalties; a religious incident reverberates from one end of the country to the other, and there is nothing to which the "body politic of the Dominion" is more sensitive.[96]

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[92] *Reference re The Natural Products Marketing Act, 1934, and its Amending Act, 1935* [1936] S.C.R. 398.

[93] See *supra*, note 84.

[94] *Supra*, note 21, 306.

[95] *Supra*, note 24.

[96] *Ibid.*, 329.

For Mr Justice Rand a fundamental freedom, such as freedom of speech, is embodied in the status of citizenship.[97] In the *Winner* case[98] he generalized to the extent of saying that all constituent elements of citizenship status are beyond provincial jurisdiction and within the federal general power.

Under this formula it is not the generality or public importance of a matter that determines whether or not it is local in nature. In the *Margarine* case, Mr Justice Rand acknowledged the size and importance of the dairy industry, but claimed that there was nothing "from which it can be inferred that the industry has attained a national interest as distinguished from the aggregate of local interests".[99] A matter may be local in nature though it prevails in every province. Conversely, the mere lack of a broad geographic dimension does not deprive a matter of national character if it threatens a national institution. Mr Justice Rand's "religious incident"[99a] is an example, as is the October crisis in Quebec. No one would deny that the democratic system of government, involving the right of representative institutions to govern, is a condition of national life, a matter going beyond local or provincial concern.[100] No evidence of the prevalence or intensity of the menace to a national institution is required.

Chief Justice Laskin's understanding of the words "local or provincial concern" is quite different. In 1947, while criticizing the emergency doctrine reflected in the *Board of Commerce* case, he had this to say:

> [I]f the necessity for restrictive legislation rests on the existence of a condition which is not local or provincial *but general,* and the legislation enacted to cope with it is predicated on the *generality* of the evil to be struck at, a federal "aspect" may well be found in such legislation.[101]

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[97] *Supra,* note 21. See also Cannon J. in *Reference re Alberta Statutes, supra,* note 23, 146: "Every inhabitant in Alberta is also a citizen of the Dominion. The province may deal with his property and civil rights of a local and private nature within the province; but the province cannot interfere with his status as a Canadian citizen and his fundamental right to express freely his untrammelled opinion about government policies and discuss matters of public concern."

[98] *Winner* v. *S.M.T. (Eastern) Ltd and A.G. Canada* [1951] S.C.R. 887.

[99] *Supra,* note 29, 52.

[99a] *Supra,* note 24, 329.

[100] See the *C.F.R.B.* case, *supra,* note 44. See also *Re North Perth, Hessin* v. *Lloyd* (1891) 21 O.R. 538, 542 (Ch.Div.), quoted in Abel, *supra,* note 11, 407 and 900.15.

[101] *Supra,* note 3, 1070.

In my opinion, there is a national interest in those "general" evils only if they jeopardize a national institution.

Support for this view can be found in the *Canada Temperance Federation* case. The presence of the words "from its inherent nature" in the test employed in that case reflects a similar approach to the problem of how one decides whether a statute is of national or local concern. The seat of the government of Canada, provided for in section 16 of the *British North America Act, 1867*[102] is, by its inherent nature, a national institution and it is beside the point that the legislation considered in *Munro* extended the National Capital Region beyond the limits of a single province, embracing both Ottawa and Hull.[103] Similarly, the fact that a federally incorporated company confines its activities to a single province does not undermine the validity of its incorporation under the general power.[104] A company with objects other than provincial has a national presence by its inherent nature.

If the seat of the government of Canada is a national institution by law, aeronautics is, I think, a national institution in fact. Like other means of transportation, aerial navigation may function both locally and interprovincially but as Professor Lederman observes, "technologically and industrially aviation has a factual unity as a transportation system".[105] It is impossible to separate intraprovincial flying from interprovincial flying.[106] Considered as a single institution, aeronautics must be either local or national in nature. Its national character, like its factual unity, derives from its inherent nature. It is essentially an instrument of long-distance transportation. Mr Justice Locke described it as "essential to the opening up of the country and the development of the resources of the nation".[107] It serves a national purpose and not an aggregation of local purposes.

The limitation of the federal general power to subjects which, "from their inherent nature", go beyond local or provincial concern leaves no room for the suggestion that matters local or provincial may with changes in time and circumstance assume national dimen-

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[102] 30-31 Vict., c.3 (U.K.).

[103] It is upon this basis that Professor Gibson considers the case to be a proper application of the "national dimensions" formula, *supra*, note 2, 27, 35.

[104] *Colonial Building Investment Association* v. *A.G. Quebec* (1883) 9 App. Cas.157 (P.C.), cited in *Laskin's Canadian Constitutional Law, supra*, note 11, 552.

[105] *Supra*, note 14, 607.

[106] *Johannesson* v. *West St Paul, supra*, note 4, 314 *per* Kellock J.

[107] *Ibid.*, 326.

sions, unless the change is such as to alter the essential character of an institution. Indeed, this is a necessary consequence of refusing to characterize legislation by reference to the urgency of the circumstances which prompted its enactment. This is not generally understood. Often the national concern test is associated with the statement put forward by Lord Watson in the *Local Prohibition* case:

> [S]ome matters, in their origin local and 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.[108]

It is true that these words, taken alone and *ex facie*, "make allowance for a social and economic development of Canada which might transform local problems into national ones, so that they might require federal rather than provincial solutions".[109] On this understanding of the words, Viscount Haldane's only mistake was to "limit the possibility of matters attaining national dimensions ... to the emergency of war".[110] It is my opinion, however, that Lord Watson did not mean to suggest that legislation may "take its colour from the circumstances of the day".[111] He meant only that *from a particular point of view* a matter may become of national concern. This is clear from the examples given immediately following the words quoted above:

> 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.[112]

These were examples of matters "originally" local or provincial only in the sense that they may be viewed as such from one perspective

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[108] *Supra*, note 22, 361.

[109] Laskin, *supra*, note 3, 1068.

[110] *Supra*, note 1, 407-408 *per* Laskin C.J.C. Thus, for Laskin C.J., the positive application of the emergency doctrine in the *Fort Frances* case was merely "a particular application of what Lord Watson said in the *Local Prohibition* case" (at p.407).

[111] Lyon, *supra*, note 75, 179.

[112] *Supra*, note 22, 361-62.

or for certain limited legislative purposes. Possession for seditious purposes is a matter which, from its inherent nature, must be the concern of the Dominion as a whole. It may well be that at any given point in time circumstances are not such as to signal the need for legislative action from the federal point of view. But this does not mean that at such a time possession for seditious purposes is a local or provincial matter.

As a result, I cannot agree with Professor LeDain who, after noting that Viscount Simon's formula is reminiscent of the test articulated by Lord Watson, goes on to say that the formula may "involve the application of the general power to a matter assumed to have been orginally under provincial jurisdiction but claimed to have changed in relative importance and concern so as to take it out of such jurisdiction and place it under the general power".[113] If the word "orginally" has temporal connotations, he is right, of course, in saying that neither *Munro* nor *Johannesson* involved such an application.[114]

This "national institution" approach to the federal general power was not taken in the *Anti-Inflation Act Reference.* Unfortunately, the factum of the Attorney-General of Canada sought to characterize inflation as a matter of national concern from two distinct points of view. Reference was made to the fact that it "touches all Canadians",[114a] that it exists in Canada as a whole, that it is an "evil of national proportions".[114b] With this as its foundation, the national concern argument was an easy target. For Mr Justice Beetz it was essentially identical to the argument that federal jurisdiction should arise in respect of such things as the insurance business or labour relations whenever they have become national in scope. He had only to refer to the various opinions of Duff J. to show that the prevalence of an evil is not a constitutional touchstone. Nothing in the argument suggested any affinity with the subject matters involved in *Johannesson* and *Munro,* each of which had "a degree of unity that made it indivisible, an identity which made it distinct from provincial matters and a sufficient consistence to retain the bounds of form".[115] Indeed, the more prevalent and pervasive a legislative

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[113] *Supra,* note 12, 292.

[114] Aeronautics may have become a national institution over the course of time, but having become such, the immediate circumstances attending the enactment of aeronautics legislation are not pertinent.

[114a] See the Factum of the Attorney-General of Canada, 9.

[114b] *Ibid.,* 12.

[115] *Supra,* note 1, 458.

subject matter, the less likely it is to possess those characteristics of unity, identity and consistency.

Since attention was focused on the generality and intensity of the evil, the second and proper basis for invoking the general power in terms of the *Canada Temperance Federation* formula escaped proper judicial attention. Nevertheless, it was contained in the factum's description of inflation as a matter of *inherent* national concern because of its effect on the Canadian economic system "including the erosion of the purchasing power of *the national monetary unit*".[115a] Characterized in this way, there is a strong similarity between inflation and problems associated with the national capital or aeronautics, which, like the dollar, are national institutions having, if you like, a unity, an identity and a consistency.

That legislation with the object of protecting the national monetary unit is not local or provincial in nature would seem to follow from the decision of the Supreme Court of Canada in *Reference re Alberta Statutes*,[116] which, however, was not cited. There the Supreme Court stated that the object of *The Alberta Social Credit Act*[117] was "to provide increased purchasing power" by "the substitution generally in internal commerce of Alberta credit for bank credit and legal tender as the circulating medium ...".[118] The legislation was found *ultra vires*, there being nothing in section 92 to support "the introduction, maintenance and regulation of this novel apparatus for all commercial, industrial and trading operations".[119] Equally, I think, there is nothing in section 92 to support legislation which seeks to maintain the purchasing power of the dollar. This is not to say that enactments such as provincial rent controls are necessarily invalid. If these are designed to protect particular interests from the ravages of inflation, they are clearly distinguishable from legislation such as the *Anti-Inflation Act* which seeks to control inflation itself.[120]

[115a] *Supra*, note 114a.

[116] *Supra*, note 23.

[117] S.A. 1937, c.10.

[118] *Supra*, note 23, 113.

[119] *Ibid.*, 115.

[120] Viscount Simon recognized in the *Canada Temperance Federation* case, *supra* note 6, 206, that "the validity of legislation, when due to its inherent nature, [is not] 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 unfortunate that the Chief Justice did not fully address himself to the principal submission, for it is clear from his description of the submission that he did, at least, see in it this proper basis for invoking the general power:

> [The Attorney-General of Canada] relied, primarily, on the *Canada Temperance Federation* case, contending that the Act, directed to containment and reduction of inflation, concerned a matter which went beyond local or private or provincial concern and was of a nature which engaged *vital national interests*, among them *the integrity of the Canadian monetary system* which was unchallengeably within exclusive federal protection and control.[121]

Canadian constitutional law is the poorer for the absence of any consideration of that argument.

Conclusion

What is remarkable about the *Anti-Inflation Act Reference* is the disposition of the Supreme Court to effect a reconciliation of previous decisions. This may be nothing more than strict adherence to precedent, a refusal to depart from prior cases either by choosing one of two conflicting lines of authority or by rejecting both in favour of some new doctrine. A more provocative conclusion, however, would be that reconciliation of mutually incompatible doctrines allowed the Court to fashion a new departure without being labelled revolutionary.

The previous cases are made compatible, but at the expense of any consensus among the members of the Supreme Court. Justice Beetz achieves harmony by making the national concern formula include, to the exclusion of anything else, those matters that fall within the residue recognized by the emergency doctrine, and Chief Justice Laskin by making it include, to the exclusion of anything else, those matters that do not fall within that residue. The absence of any common ground emphasizes for me how recondite is each interpretation. The task of reconciliation was difficult and divisive because it was not meant to be performed. The previous cases contained two totally divergent conceptions of the distribution of powers. These have been replaced by new doctrines which borrow from their predecessors but are true to neither.

The consequence, in terms of both doctrine and outcome, was a clear victory for the provinces. Doctrinally, the provinces have secured from all nine judges a wide interpretation of their property

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[121] *Supra*, note 1, 417 (emphasis added).

and civil rights power, and from a majority of five judges (Ritchie, Martland, Pigeon, Beetz and de Grandpré,JJ.) an interpretation of the national concern formula that looks for a legislative subject-matter having dimensions that are narrow and specific. In terms of outcome, the *Anti-Inflation Act* was sustained on a basis that numbers its days; sustained as it was on the basis of a crisis it was designed to dispatch, the Act is self-destructive. Success will undermine its constitutional validity, and failure its political acceptability.

As different as they are in point of view, Laskin C.J. and Beetz J. do share this philosophy: measured against federal power, freedom of contract is the general rule and regulation the exception. The contractual terms upon which business is conducted are matters falling *prima facie* within the property and civil rights power. The exceptional case is to be recognized either by application of a standard of exigency which looks at the generality and severity of the problem being tackled, or by gauging the extent and scope of the interference with freedom of contract. One is almost reminded of the substantive due process limitation on the police power of the American states.