
October 1977

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Citation Information

Belobaba, Edward P. "Disputed "Emergencies" and the Scope of Judicial Review: Yet Another Implication of the Anti-Inflation Act Reference." *Osgoode Hall Law Journal* 15.2 (1977) : 406-417.

DOI: <https://doi.org/10.60082/2817-5069.2120>

<https://digitalcommons.osgoode.yorku.ca/ohlj/vol15/iss2/6>

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**Disputed "Emergencies" and the Scope of Judicial Review: Yet Another
Implication of the Anti-Inflation Act Reference**

*Disputed "Emergencies" and the Scope of
Judicial Review:
Yet Another Implication of the
Anti-Inflation Act Reference*

By EDWARD P. BELOBABA*

Not surprisingly, the decision of the Supreme Court of Canada in the *Anti-Inflation Act Reference*¹ has attracted considerable scholarly comment.² By and large, these commentaries have focused upon the more controversial aspects of the plurality, concurring and dissenting judgments, *viz.*, the scope and content of the federal general power to legislate for the "peace, order and good government of Canada,"³ and the admissibility of the extrinsic economic evidence to support or contest the submission that the federal *Anti-Inflation Act*⁴ was indeed legislation enacted in response to what Parliament perceived to be a national economic crisis. It is not my intention in this brief comment to re-till plowed ground. My concern is a limited one and relates solely to a matter that, in my view, has not been sufficiently explored in the literature to date.

It is my contention that one of the major implications of the *Anti-Inflation Act Reference* may well stem from the Court's hurried and uncertain treatment of the question of judicial review of impugned federal "emergency" legislation enacted during a peacetime "crisis" whose very existence

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

² See, for example, the case comments by R. B. Buglass (1977), 9 Ottawa L.R. 183; F. Chevrete and H. Marx (1976), 54 Can. Bar Rev. 732; N. Lyon (1977), 9 Ottawa L.R. 176; J. A. MacKenzie (1977), 9 Ottawa L.R. 169. Several major articles have also appeared in the literature: see, for example, A. Abel, *The Anti-Inflation Judgment: Right Answer to the Wrong Question*, (1976), 26 U.T.L.J. 409; P. Hogg, *Proof of Facts in Constitutional Cases* (1976), 26 U.T.L.J. 386; P. Russell, *The Anti-Inflation Case: The Anatomy of a Constitutional Decision* (forthcoming in Can. Pub. Admin., Dec., 1977).

³ The opening paragraph to s. 91 of the *British North America Act* (1867), 30 & 31 Vict., c. 3 (U.K.). The leading article analyzing the scope and content of the P.O.G.G. clause is still B. Laskin, "Peace, Order and Good Government" *Re-examined* (1947), 25 Can. Bar Rev. 1054. Also see W. Lederman, *Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation* (1975), 53 Can. Bar Rev. 596. The "emergency" jurisdiction of Parliament and its basis in the federal general power has been explored in two articles by Professor H. Marx: *The Emergency Power and Civil Liberties in Canada* (1970), 16 McGill L.J. 39, and *The "Apprehended Insurrection" of October 1970 and the Judicial Function* (1972), 7 U.B.C.L.R. 55.

⁴ S.C. 1975-76, c. 75. For a discussion of the extrinsic economic evidence and its admissibility see R. B. Buglass, *supra*, note 2 and P. Hogg, *supra*, note 2 at 399-407.

is being vigorously contested by responsible litigants. What should be the nature and extent of judicial review when the Court is confronted with the argument that the federal government's suggestion of a peacetime "crisis" is seriously disputable? To what extent should the traditional presumption of constitutional validity immunize Parliament's perception or apprehension of a "national crisis"? In the case of an alleged *peacetime* emergency whose very existence is subject to serious contest or disputation, is it justifiable to impose upon the litigant-opponent the burden of submitting "very clear evidence that the emergency had not arisen"⁵ or, indeed, of establishing that Parliament "did not have a rational basis"⁶ for regarding the impugned enactment as a crisis measure? The Supreme Court of Canada evidently answered this latter question in the affirmative. Professors Marx and Chevrette, and perhaps others, are of the view that this aspect of the *Reference* was only a "minor" point, being nothing more than a "logical and necessary conclusion to a long line of Judicial Committee and Supreme Court precedents."⁷ I disagree. It is my respectful submission that the imposition of the "very clear evidence" or "no rational basis" hurdles in the context of a vigorously contested crisis perception, as was the case in the *Anti-Inflation Act Reference*, may well rest on precarious constitutional foundations.

To re-acquaint the reader with the relevant analyses undertaken in the Court's reasons for judgment, perhaps a brief review is in order. All three of the written opinions had something to say about the question of disputed emergencies and judicial review. Unfortunately (or perhaps fortunately) no clear majority for any of the views emerges. Each of the Justices writing reasons — Laskin, Ritchie, and Beetz — easily recognized the two basic questions that, in my view, had to be resolved:

- (1) When a "national crisis" argument is being advanced in support of federal legislation, what should be the required degree of legislative jurisdictional explicitness?
- (2) Once the requisite parliamentary "signal" of crisis-motivation has been satisfactorily ascertained, what should be the nature and the extent of judicial review?

These two questions suggest a two-step analysis of federal "crisis" legislation. First, the Court should satisfy itself that the legislation before it was *in fact* intended by Parliament as a crisis measure. Second, where the very existence of this suggested "national crisis" is being seriously contested, the Court should articulate and apply the appropriate standard of judicial review. How compelling were the analyses proffered by their Lordships in the instant *Reference* on either of these points? Each will be considered in turn.

The Beetz Opinion

Of the three judgments, that of Beetz J., with whom de Grandpré J. concurred, was the least deferential to Parliament. Described by some as a

⁵ Ritchie J., *supra*, note 1 at 509 adopting what was said by Lord Wright in *Co-operative Committee on Japanese Canadians v. A.-G. Canada*, [1947] A.C. 87 at 101-102. This test is discussed *infra*.

⁶ Laskin C.J., *supra*, note 1 at 498.

⁷ F. Chevrette and H. Marx, *supra*, note 2 at 744.

"classical federalist,"⁸ Mr. Justice Beetz required that any recourse by Parliament to its emergency jurisdiction under the P.O.G.G. clause must be "explicit."⁹ While his Lordship readily agreed that Parliament was justified in taking preventative measures in response to even an "apprehended crisis,"¹⁰ and further, that in doing so no particularly ritualized form or style of expression was required, he nonetheless emphasized that some unambiguous "indication,"¹¹ whether in the statute's title, preamble, or text, which would remove any doubt that Parliament was in fact purporting to act on the basis of its emergency power, was a constitutional prerequisite. This "unmistakable signal"¹² would not, of course, conclude the question of constitutionality, but its absence would be fatal.¹³

In reviewing the title, preamble, and text of the *Anti-Inflation Act*, Beetz J. was unable to find the requisite legislative "signal." The preamble's references to "serious national concern" did not impress him.¹⁴ Nor did the extrinsic materials. Indeed, having considered these materials, Beetz J. then proceeded to refer to various passages from *Hansard* to support his conclusion that Parliament, in its enactment of the *Anti-Inflation Act*, "did not rely upon its extraordinary power."¹⁵ Having satisfied himself that the requisite "signal" of a national crisis was not sufficiently explicit, Beetz J. properly refrained from proceeding to the second stage of our two-step analysis.¹⁶

The Ritchie Opinion

The reasons for judgment given by Ritchie J., with whom Martland and Pigeon JJ. concurred, were substantially more deferential to Parliament both on the strength of the "signal" that was required and the scope for judicial review. While Ritchie J. agreed with Beetz J. that the federal government's recourse to its emergency jurisdiction was a highly exceptional measure resulting in a *de facto* invasion of provincial areas of legislative competence,¹⁷ his Lordship did not require the degree of explicitness demanded by Beetz J. It was enough for Ritchie J. that the preamble spoke of "serious national concern" and that certain excerpts from the federal White Paper¹⁸ substantiated his conclusion that the *Anti-Inflation Act* was passed by Parlia-

⁸ P. Patenaude, *The Anti-Inflation Case: The Shutters are Closed but the Back Door is Wide Open* (1977), 15 Osgoode Hall L.J. at 397. *Accord*, N. Lyon, *supra*, note 2 at 181-182.

⁹ Beetz J., *supra*, note 1 at 529.

¹⁰ *Id.* at 525.

¹¹ *Id.* at 530.

¹² *Id.* at 529.

¹³ *Id.* at 529.

¹⁴ *Id.* at 531.

¹⁵ *Id.* at 534.

¹⁶ *Id.* at 534.

¹⁷ Ritchie J., *supra*, note 1 at 508.

¹⁸ Ritchie J. noted at 508 that "[t]he 'Introduction' and the 'Conclusion' of the White Paper appear to me to be descriptive of the conditions with which Parliament purported to cope in enacting the legislation."

ment "in recognition of the existence of a national emergency."¹⁹ Although Ritchie J. did not require as clear a signal as did Beetz J., his Lordship nonetheless re-affirmed the relevance of the first step in our two-step analysis: the Court must be satisfied that Parliament intended the enactment as a crisis measure.²⁰

Having so found, Ritchie J. was then able to proceed to the second step: the appropriate scope of judicial review. His Lordship unhesitatingly adopted what was said by Lord Wright in *Co-operative Committee on Japanese Canadians v. Attorney-General for Canada*:²¹

. . . very clear evidence that an emergency has not arisen, or that the emergency no longer exists, is required to justify the judiciary, even though the question is one of ultra vires, in overruling the decision of the Parliament of the Dominion that exceptional measures were required or were still required.²²

It was Ritchie J.'s opinion that the evidence presented to the Court by the various intervenors opposed to the validity of the *Anti-Inflation Act* "did not meet the requirements set by Lord Wright."²³ No further analysis or explanation was offered.

The Laskin Opinion

The Chief Justice, writing for himself and for Judson, Spence, and Dickson JJ., delivered a judgment that was unequivocally the most deferential on questions of both "signal" and judicial review. Taking the view that "a Constitution designed to serve this country in years ahead ought to be regarded as a resilient instrument capable of adaptation to changing circumstances,"²⁴ Laskin C.J. urged an "approach of caution"²⁵ in the Court's exploration of the scope and content of the federal general power.²⁶ A similar cautionary admonition is reflected in his Lordship's approach to the questions being discussed in this comment.

For Laskin C.J., the two-step analysis undertaken by Beetz and Ritchie JJ. was easily telescoped into one question: "whether there [was] a rational basis for the governmental and legislative judgment exercised in the enactment of the *Anti-Inflation Act*."²⁷ The Chief Justice considered the extrinsic materials before the Court²⁸ and concluded the following:

¹⁹ *Id.* at 509.

²⁰ Ritchie J. was satisfied "that . . . the Parliament of Canada was motivated by a sense of urgent necessity created by highly exceptional circumstances . . . (at 509).

²¹ *Supra*, note 5.

²² *Id.* at 101-102.

²³ Ritchie J., *supra*, note 1 at 509.

²⁴ Laskin C.J., *supra*, note 1 at 487.

²⁵ *Id.* at 487.

²⁶ In the opinion of the Chief Justice the "national dimensions" and "emergency" doctrines were not parallel lines of authority rigidly rooted in precedent but were strands in a "weave" of Privy Council decisions. The two doctrines were different only in "degree" and not in "kind": see Laskin C.J., *supra*, note 1 at 474 and 486.

²⁷ Laskin C.J., *supra*, note 1 at 497-98.

²⁸ *Id.* at 496-497. In particular, his Lordship referred to the Consumer Price Indices from Statistics Canada and the Lipsey Economic Factum.

In my opinion, this Court would be unjustified in concluding, on the submissions in this case and on all the material put before it, that the Parliament of Canada did not have a rational basis for regarding the *Anti-Inflation Act* as a measure which, in its judgment, was temporarily necessary to meet a situation of economic crisis imperilling the well-being of the people of Canada as a whole and requiring Parliament's stern intervention in the interests of the country as a whole.²⁹

A close reading of the Chief Justice's reasons for judgment will reassure the reader that the first step of the proposed two-step analysis, that is, some legislative "signal" of crisis-motivation, was not omitted. Laskin C.J. did satisfy himself that the far-reaching anti-inflation program was indeed "prompted" by what in Parliament's view was "a serious national condition."³⁰ For the Chief Justice, the preamble to the legislation was "sufficiently indicative"³¹ of Parliament's intention — the same preamble, of course, which had left Beetz J. "unimpressed."³²

In sum, the following conclusions can be drawn from the judgments delivered in the *Anti-Inflation Act Reference*. First, all of the Court agreed that *some* kind of indication that Parliament's recourse to its emergency jurisdiction was a purposeful legislative acknowledgement of national crisis was a prerequisite for legislative validity. Second, at least seven members of the Court concluded that even when confronted with a seriously disputed allegation of "crisis," the Court should defer to Parliament, intervening only if the opponents could show either very clear evidence of no emergency or that Parliament had no rational basis for its legislative judgment. Two members of the Court did not have to reach this second conclusion. It is likely, however, that had Beetz and de Grandpré JJ. agreed with their brethren that the *Anti-Inflation Act* was indeed intended as a crisis measure, they would also have imposed a "very clear evidence" burden upon those contesting constitutional validity.³³

* * * * *

Given this brief recapitulation of the three alternative opinions with respect to the strength and clarity of the requisite legislative "signal" and of the two alternative opinions relating to the nature and extent of judicial review, several fundamental questions arise immediately. First, if indeed it is indisputable that some jurisdictional directional signal is a pre-condition for federal legislative recourse to the emergency power at least in circumstances of dubious national crisis, how clear should this signal be? Does our federal structure and the concomitant judicial regard for constitutional integrity require an unequivocal explicitness as demanded by Beetz J.? Or, is the judicial flexibility of Ritchie J. or Laskin C.J. more reasonable? Second, where the requisite signal has been discerned, is it justifiable to impose upon the litigant-opponents the "very clear evidence" or "no rational basis" burdens? To what extent is the latter different from the former? To what extent are both

²⁹ *Id.* at 498.

³⁰ *Id.* at 495.

³¹ *Id.* at 495.

³² Beetz J., *supra*, note 1 at 531.

³³ *Accord*, J. A. Mackenzie, *supra*, note 2 at 173-174. Also see Beetz J., *supra*, note 1 at 534.

wholly inappropriate in the context of a peacetime "crisis" whose very existence or apprehension is seriously disputable?

The Strength and Clarity of the Necessary Jurisdictional "Signal"

One's perception of the appropriate degree of clarity or explicitness for the requisite Parliamentary signal will undoubtedly be affected by one's understanding of Canadian federalism and "the way in which the emergency doctrine operates in the Canadian Constitution."³⁴ If one takes the view that any exercise of the federal emergency power results in a dramatic alteration of the distribution of powers and "amounts to a temporary *pro tanto* amendment of a federal Constitution by the unilateral action of Parliament,"³⁵ then the insistence that the federal government's intention to utilize its emergency jurisdiction to invade areas of provincial exclusivity be explicit, indeed unmistakably clear, is understandable. On the other hand, if the emergency doctrine is seen as nothing more extraordinary than a jurisdictional trigger which can be conveniently activated to allow federal concurrency in respect of subject matters otherwise within provincial competence that have unfortunately acquired a "new and special aspect"³⁶ requiring federal supervision, then a somewhat weaker indication of jurisdictional intention would be acceptable.

These two perspectives of the operation of the emergency doctrine in the context of the Canadian constitution figure prominently in the approaches taken by Beetz J. and by Laskin C.J. in their effort to explain Parliament's emergency jurisdiction. The Beetz opinion provides the reader with an eloquent exposition of what some have described as a classically federalist³⁷ model of the distribution of powers in a confederation. His Lordship's concern for constitutional integrity is evident. The Laskin opinion, on the other hand, articulates what could be described as a "centralist-concurrency model"³⁸ of Canadian federalism. Is either model analytically more accurate than the other? Both, of course, have deep historical roots. In my view, however, it is possible to attempt an evaluation of each of the models at least in the context of contested peacetime "emergencies."

Logically, the Laskin model seems to make more sense. The federal government's recourse to its emergency jurisdiction and its consequent enactment of "crisis legislation" will undoubtedly affect, perhaps even inhibit, otherwise valid provincial efforts in controlling certain aspects of a crisis that may have local dimensions. There is, however, no structural alteration of legislative jurisdictions — the provincial legislatures are not structurally precluded from utilizing their local capacities to augment or complement federal

³⁴ Beetz J., *supra*, note 1 at 525.

³⁵ *Id.* at 528.

³⁶ *Fort Frances Pulp and Power Co. Ltd. v. Manitoba Free Press Co. Ltd.*, [1923] A.C. 695 at 704 *per* Viscount Haldane.

³⁷ P. Patenaude, *supra*, note 8; N. Lyon, *supra*, note 2 at 181-182.

³⁸ N. Lyon, *supra*, note 2 at 182.

legislative efforts.³⁹ The provincial areas of legislative competence are "suspended"⁴⁰ but only to the extent that existing federal legislation may have rendered the former inoperative.⁴¹ To speak, then, of "*pro tanto* amendment"⁴² may be analytical over-statement.

Functionally, however, and particularly in the context of contemporary federalism, the Laskin model is less attractive as an explanation for the federal emergency jurisdiction. The reality of Parliament's decision to utilize its emergency jurisdiction is not congenial concurrency but unabashed jurisdictional "invasion."⁴³ This elementary fact has not been lost on the judiciary which has consistently described the federal emergency doctrine as an "extraordinary" one⁴⁴ resulting in "exceptional interference"⁴⁵ with provincial powers.

These profound constitutional implications of Parliament's recourse to its emergency jurisdiction persuade me that the Beetz requirement for an unambiguous jurisdictional directional signal is the more reasonable one. The demand for legislative explicitness is particularly important in those cases where the suggestion of national crisis is seriously disputable.

. . . In cases where the existence of an emergency may be a matter of controversy, it is imperative that Parliament not have recourse to its emergency power except in the most explicit terms indicating that it is acting on the basis of that power.⁴⁶

Whether the "signal" is contained in the title,⁴⁷ preamble,⁴⁸ or the text of the legislation is unimportant. What is important is that the elected members

³⁹ . . . 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." *A.-G. Ontario v. Canada Temperance Federation*, [1946] A.C. 193 at 206 per Viscount Simon. Also see *In the Matter of a Reference as to the Validity of the Wartime Leasehold Regulations*, [1950] S.C.R. 124 at 154 per Kellock J.

⁴⁰ Beetz J., *supra*, note 1 at 529. Also see *Wartime Leasehold Reference*, *supra*, note 39 at 140 per Taschereau J.

⁴¹ "If . . . it be legislation in relation to the emergency . . . it must be held to override or suspend the provincial legislation, and, indeed any Dominion legislation with which it may be in conflict." *Wartime Leasehold Reference*, *supra*, note 39 at 159 per Estey J. (emphasis added)

⁴² Beetz J., *supra*, note 1 at 528.

⁴³ This point was emphasized by both Ritchie J., *supra*, note 1 at 508, and Beetz J. at 529. Also see Taschereau J. in the *Wartime Leasehold Reference*, *supra*, note 39 at 140.

⁴⁴ Beetz J., *supra*, note 1 at 528.

⁴⁵ Viscount Haldane, *supra*, note 36 at 706.

⁴⁶ Beetz J., *supra*, note 1 at 528.

⁴⁷ E.g., the long title of the *Energy Supplies Emergency Act*, S.C. 1973-74, c. 52 which reads as follows: "An Act to provide a means to conserve the supplies of petroleum products within Canada during periods of national emergency caused by shortages or market disturbances affecting the national security and welfare and economic stability of Canada." And see F. Chevrette and H. Marx, *supra*, note 2 at 742.

⁴⁸ See, for example, the explicit preambles to the *National Emergency Transitional Powers Act*, 1945, S.C. 1945, c. 25 and the *Continuation of Transitional Measures Act*, 1947, S.C. 1947, c. 5. The language of these preambles were noted and discussed in the *Wartime Leasehold Reference*, *supra*, note 39 at 133 per Kerwin J.; at 135-36 per Taschereau J.; at 146 per Rand J.; at 152 per Kellock J. Also see Beetz, J. *supra*, note 1 at 530.

of Parliament, and not the courts, should assume the political responsibility for advising Canadians that (1) a national crisis is brewing and (2) the federal government intends to temporarily occupy normally forbidden areas of provincial jurisdiction through its utilization of the emergency power. Professor Abel has suggested that the Beetz requirement for explicitness is an "illusory protection,"⁴⁹ being nothing more than an easy hurdle for an alert legislative draftsman. With respect, I disagree. The instant *Reference* is particularly apposite as an illustration of intentionally ambiguous legislative draftsmanship. The explanation for the less than forthright statutory preamble to the *Anti-Inflation Act* is demonstrably political: the government of the day was somewhat embarrassed and, consequently, reluctant to openly concede the existence of a national inflationary crisis.⁵⁰ To increase its jurisdictional manoeuvrability it resorted to statutory ambiguity. Yet this is the very kind of case in which the Court should have demanded a more explicit indication of jurisdictional intention from the federal draftsman. The Beetz plea for more vigorous judicial scrutiny of statutory purposiveness is, ironically, more faithful to the tradition of judicial self-restraint than is the more flexible attitude displayed by Ritchie J. or by Laskin C.J. The former requires nothing more than that the elected representatives in the federal legislature assume the responsibility of suggesting "national crisis" even though the price of this explicitness may be political embarrassment. "The courts should not be asked to second guess Parliament as to whether or not it intended to suspend the distribution of powers in its own favour."⁵¹ It is my contention that the Beetz requirement for explicitness, particularly in circumstances of disputable national crises, is eminently sensible. The costs are few — greater care with statutory language; but the benefits are many — a Parliament that is responsible to the people and a Court that truly becomes "the guardian of constitutional integrity."⁵²

The Scope of Judicial Review: The Appropriateness of the "Very Clear Evidence" and "No Rational Basis" Tests

Once the Court has satisfied itself that the federal enactment before it was indeed intended as crisis legislation, what should be the nature and extent of judicial review? As noted earlier,⁵³ at least seven members of the Court in the instant *Reference* adopted a fairly severe posture of judicial restraint. The Ritchie and Laskin opinions would have permitted judicial intervention to upset Parliament's perception of "crisis" only where those opposing validity could adduce "very clear evidence that an emergency had not arisen,"⁵⁴ or could establish that Parliament "did not have a rational basis"⁵⁵ for regarding the *Anti-Inflation Act* as a necessary crisis measure.

⁴⁹ A. Abel, *supra*, note 2 at 416.

⁵⁰ This point is explored by Russell, *supra*, note 2.

⁵¹ F. Chevette and H. Marx, *supra*, note 2 at 743.

⁵² Laskin C.J., *supra*, note 1 at 481.

⁵³ *Supra*, notes 21 to 29, and accompanying text.

⁵⁴ Ritchie J., *supra*, note 1 at 509.

⁵⁵ Laskin C.J., *supra*, note 1 at 498.

My first concern in this part of the comment is whether the imposition of the "very clear evidence" or "no rational basis" burdens in a litigational context where the very existence of the alleged emergency is subject to dispute is jurisprudentially appropriate.

1. The "Very Clear Evidence" Test

I would argue that it is not at all clear that the "very clear evidence" test is or should be the appropriate standard. In the *Japanese Canadians*⁵⁶ case, Lord Wright did, of course, suggest that "very clear evidence *that an emergency has not arisen* . . . is required to justify the judiciary . . . in overruling the decision of the Parliament of the Dominion that exceptional measures were required."⁵⁷ (emphasis added) In the instant *Reference*, Ritchie J. referred to this *dictum* and concluded that the evidence presented to the Court by those opposing validity "did not meet the requirements set by Lord Wright."⁵⁸ But the requirements set by Lord Wright, *viz.*, very clear evidence that an emergency has not arisen, were wholly unnecessary to his decision in the *Japanese Canadians* case and can fairly be described as sheerest *dicta*. The issue before the Privy Council was not whether an emergency had arisen, but whether a judicially noticed national emergency had wholly disappeared. Indeed, in each of the "emergency doctrine" cases — *Pt. Frances*,⁵⁹ *Japanese Canadians*,⁶⁰ and *Wartime Leasehold*⁶¹ — the single issue before the Judicial Committee or the Supreme Court of Canada was the validity of certain federal postwar transitional regulations or Orders-in-Council. In each of these cases the original existence of a wartime emergency was beyond dispute and the Court readily took judicial notice of this fact.⁶² Its only concern, then, was whether those opposing validity could show that the pre-condition for federal legislative competence, that is, the wartime emergency, had disappeared. To impose, in those circumstances, the "very clear evidence" requirement is not at all unreasonable.

Where a war emergency has existed and Parliament has enacted legislation declaring that the national emergency arising out of war, in certain aspects, has continued and is continuing, the subject matter of the legislation must be left to Parliament if it decides that the interests of the Dominion are to be protected. 'No authority other than the central government is in a position to deal with the problem which, is essentially one of statesmanship' . . .⁶³

Where, however, the existence of an alleged national crisis is disputable *in the first place*, and where the Court is consequently unable to take judicial notice of the necessary legislative facts and must perforce consider a wide

⁵⁶ *Supra*, note 5.

⁵⁷ *Id.* at 101-102.

⁵⁸ Ritchie J., *supra*, note 1 at 509.

⁵⁹ *Supra*, note 36.

⁶⁰ *Supra*, note 5.

⁶¹ *Supra*, note 39.

⁶² In the *Wartime Leasehold Reference*, *supra*, note 39, for example, the existence of a wartime emergency was said to be a matter of "common knowledge" (*per* Taschereau J. at 142). Also see Kellock J. at 150 and 154.

⁶³ *Id.*, *per* Kerwin J. at 135.

range of extrinsic evidence, does it still make sense to apply Lord Wright's *obiter*? I tend to share, in part at least, the view expressed in the preceding comment by my colleague, Pierre Patenaude. The Court in the instant *Reference* was *not* compelled to apply the standards for judicial review that were elaborated by the Judicial Committee in the context of war-time or post-war transitional circumstances where the original pre-condition for legislative validity was beyond dispute. This is not to say, however, that Ritchie J.'s adoption of Lord Wright's requirement was wholly unjustified. Given that Parliament may legitimately resort to its emergency jurisdiction for preventive as well as remedial purposes,⁶⁴ the appropriate test for disproving an alleged apprehension of crisis might well be something like "very clear evidence." My concern, then, is not Ritchie J.'s adoption of Lord Wright's standard for judicial review *per se*, but the total absence of any judicial evaluation of appropriateness. Ironically, the unquestioning enthusiasm with which the Court imposed the "very clear evidence" burden upon those opposing validity in circumstances of dubious emergency provides yet another reason why Parliament's recourse to its emergency jurisdiction should be signalled explicitly.

2. The "Rational Basis" Test

The point has already been made that Laskin C.J.'s "no rational basis"⁶⁵ test as a guideline for judicial intervention even in cases of seriously disputed "emergencies" is analytically the most deferential to Parliament's legislative judgment. His Lordship's concern for an appropriate degree of judicial self-restraint in the instant *Reference* can be readily appreciated.

In the utilities, tax, and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The Legislature after all has the affirmative responsibility. The Courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events — self-limitation can be seen to be the path to institutional prestige and stability.⁶⁶

The question, however, is whether the "rational basis" test articulated by the Chief Justice should be the appropriate standard for judicial self-limitation in the context of a Canadian federal structure.

The first point to be made is that the "rational basis" test is not a novel concept in Canadian constitutional law. It has been employed by the Court in several Canadian *Bill of Rights* decisions⁶⁷ where "rational basis"

⁶⁴ This point was conceded by the dissent as well: see Beetz J., *supra*, note 1 at 525.

⁶⁵ The Chief Justice required that those opposing validity satisfy the Court that the Parliament of Canada "did not have a rational basis" for regarding the *Anti-Inflation Act* as a necessary crisis measure: *supra*, note 1 at 498.

⁶⁶ J. Tussman and J. tenBroek, *The Equal Protection of the Laws* (1949), 37 Cal. L.R. 341 at 372.

⁶⁷ See, for example, *Regina v. Miller and Cockriell* (1976), 70 D.L.R. (3d) 324 at 336 *per* Laskin C.J.; *A.-G. Canada v. Canard*, [1976] 1 S.C.R. 170 at 187 *per* Martland J., and Beetz, J. at 206; and *A.-G. Canada v. Lavell*, [1974] S.C.R. 1349 at 1386-87 *per* Laskin J. (as he then was). The test was alluded to in *The Queen v. Burnshine*, [1975] 1 S.C.R. 693 at 707-08 *per* Martland J., and at 716 *per* Laskin J. (as he then was).

or "reasonable classification" were thought to be helpful analytical tools in the resolution of conflicting federal laws. In many respects, the Court's willingness to embark upon analyses of rationality or reasonableness, particularly in the context of *Bill of Rights* litigation, was heavily influenced by American thinking. In the U.S., the courts have long employed the "rational basis" or "reasonable classification" tests to deal with constitutional arguments under the "due process" and "equal protection" clauses of the Fifth and Fourteenth Amendments. The American judiciary has developed a two-tiered model of judicial review of constitutionally impugned legislation: legislation employing a "suspect classification" such as race, national origin, or alienage, or affecting a fundamental interest such as voting rights, receives intense judicial examination under a "strict scrutiny" standard of review; however, all other legislation virtually escapes review under the "rational basis" rule.⁶⁸ The latter requires that the opponent establish to the satisfaction of the court that the impugned legislation has no conceivable rational basis and is essentially arbitrary.⁶⁹ Needless to say, the burden of the "rational basis" test as employed by American judges is significantly more severe than the "very clear evidence" test.

Why should Laskin C.J.'s preference for the "rational basis" standard be of concern to Canadian constitutional lawyers? Apart from the suggestion that it reflects an overly restrictive view of judicial self-restraint, there are at least two other criticisms that could be made. The first is that the rationale of judicial deference that may well be justifiable in the context of *Bill of Rights* litigation, i.e., state versus citizen, is wholly unjustifiable in the context of a federal-provincial jurisdictional dispute, i.e., state versus state. In the former, it is appropriate that some leeway be given by the judiciary to the elected representatives' *bona fide* legislative efforts, viz., so long as the legislation has a reasonable basis and does not involve a "suspect classification," the court will not interfere. In the latter situation, where one democratically elected legislature is attempting to encroach upon areas of legislative competence reserved for another democratically elected legislature, the unmitigated judicial deference that is elemental to the "rational basis" test is neither appropriate nor justifiable. Any unilateral realignment of the division of powers in a federal structure of government, however temporary the realignment, surely requires a more rigorous constitutional safeguard.

The second criticism is even more fundamental: how meaningful is the "rational basis" test as a guideline for judicial review? As a caution to the judiciary that they should hesitate to substitute their own judgments for those of the legislature, the "rational basis" test is superficially attractive. The

⁶⁸ Although the American periodical literature abounds with scholarly analysis of the "rational basis" test and its application to the equal protection clause, a recent and very instructive article is R. Kwasnick, *A Question of Balance: Statutory Classification Under the Equal Protection Clause* (1973), 26 *Stanford L.R.* 155. Also see the unsigned Note, *Legislative Purpose, Rationality, and Equal Protection* (1972), 82 *Yale L.J.* 123.

⁶⁹ "[T]he test does not require an *existent* sustaining state of facts but only one *conceivable* . . . the proponents [of the legislation] had only to make out hypothetical factual support. . . ." J. Kohn, *Social Psychological Data, Legislative Fact and Constitutional Law* (1960), 29 *Geo. Wash. L.R.* 136 at 142.

danger, however, is that this test could become a means by which the judiciary could slide into a total abdication of their responsibility as constitutional umpires, and worse, would render the division of powers in our federal structure a dead letter. We only have to look to the American experience for a confirmation of this prognosis. The "rational basis" test as a method of constitutional adjudication has been indicted by several scholars as a "meaningless and confusing exercise."⁷⁰ Increasingly the argument is being made that the "rule of reasonableness" should be unequivocally abandoned.

The Rule of Reasonableness in all of its variations is nothing more than a spurious rationalization by which the power of judicial review is covertly abdicated or concealed . . . the Supreme Court owes the nation fully reasoned and analytically sound judicial review through a rejection of the Rule of Reasonableness.⁷¹

Conclusion

The proper scope for judicial review of federal "crisis" legislation is an issue that cannot be resolved in the course of a brief comment. Both the nature and the extent of the judicial reviewing function in the case of a "disputed emergency" are matters of some constitutional complexity. Their exploration and analysis would undoubtedly take one back to first principles of Canadian constitutional law. Yet, in the *Anti-Inflation Act Reference*, an overwhelming majority of the Court was content with a hurried, and in my respectful opinion, an unprincipled discussion of these fundamental questions. Neither the matter of legislative explicitness nor the problem of evidentiary burden was explored with the required analytical care. Instead, their Lordships reverted to formula phrases such as "very clear evidence" and "no rational basis." I have argued that the former guideline is not necessarily an appropriate one and that the latter could prove completely dysfunctional.

In sum, this comment is yet another plea for reasoned judicial analysis. The need for principled decision-making is particularly acute in matters involving the constitution of our country. The Court, after all, plays a crucial role in the maintenance and preservation of our federal structure of government. Recently the Court acknowledged its "high duty . . . to ensure that Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power."⁷² Indeed, in the instant *Reference* there was mention of the Supreme Court of Canada as the "guardian of constitutional integrity."⁷³ Perhaps on another occasion this ideal will be realized.

⁷⁰ Unsigned Note, *supra*, note 68 at 154.

⁷¹ J. Shaman, *The Rule of Reasonableness in Constitutional Adjudication: Toward the End of Irresponsible Judicial Review and the Establishment of a Viable Theory of the Equal Protection Clause* (1975), 2 Hastings Con. L.Q. 153 at 178.

⁷² *Amax Potash Ltd. v. Government of Saskatchewan* (1976), 71 D.L.R. (3d) 1, per Dickson J., writing for the Court at 10. The Chief Justice has noted extra-judicially that "there are no more important public issues submitted to [the Court's] adjudication than those that arise out of alleged conflicts of legislative authority." See *Address of the Chief Justice of Canada: The Role and Functions of Final Appellate Courts, in Celebrations of the Centenary of the Supreme Court of Canada (1875-1975)*, at 27.

⁷³ Laskin C.J., *supra*, note 1 at 481.