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Pierre Patenaude

Case Comments

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By PIERRE PATENAUDE*

At the dawn of Confederation, conflicting interpretations were given to the text of the new constitution. Sir John A. Macdonald insisted on the importance of the general power, while Sir Georges Etienne Cartier emphasized the sovereignty of the local states and federalism. Indeed, for the Québécois, the federal principle, with its division of exclusive legislative powers, could be seen as the realization of their political dream: national sovereignty over subject matters essential to the preservation of their identity. An excerpt from the July 1, 1867 edition of *La Minerve* illustrates this:

> The new Constitution recognized the French Canadians as a distinct and separate nationality. We constitute a state within a state. We enjoy the full exercise of our rights, and the formal recognition of our national independence.

Not everybody agreed with this opinion which was being presented to the Québécois. Indeed, Sir John A. Macdonald hoped for a unitary state and had described how the general clause would bring about such a system in a December 19, 1865 letter to Cameron, Grand Master of the Orange Lodge:

> If the Confederation goes on, you, if spared to the ordinary age of man, will see both local Parliaments and Governments absorbed in the General Power. This is as plain to me as if I saw it accomplished now — of course it does not do to adopt that point of view in discussing the subject in Lower Canada.

That last sentence clearly indicates that the new constitution was founded on a misunderstanding. This fundamental ambiguity has continued until now. One of the areas where it is most evident is in the interpretation of the "peace, order, and good government," or P.O.G.G., clause.

Rarely has there been as great a gap between the two political philosophies of federalism as in the *Reference Re Anti-Inflation Act*[1] case. Two diametrically opposed views of Canadian federalism and the "national dimensions" doctrine underlined the two principal judgments of the case: Chief Justice Laskin's judgment reflected a centralist political philosophy combined with a common law lawyer's empiricism and lack of limpidity, while Justice Beetz's classical federalist philosophy, more akin to the efforts of the Judicial

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* Pierre Patenaude is a Professor of Law at the University of Sherbrooke and was a Visiting Professor at Osgoode Hall Law School, York University, during 1977.

[1] [1976] 2 S.C.R. 373; 68 D.L.R. (3d) 452; 9 N.R. 541.

Committee of the Privy Council to protect the local states' autonomy and to K.C. Wheare's ideal of a pure federal state, was expressed with an effort at rationalization characteristic of one trained in the civil law system.

The *Anti-Inflation Act*[2] provides for price and income controls, in both the private and public sectors of the economy, in areas of provincial competence as well as federal jurisdiction. The preamble explains that "the Parliament of Canada recognizes that inflation in Canada at current levels is contrary to the interests of all Canadians and that the containment and reduction of inflation has become a matter of serious national concern."

To support the constitutionality of the Act, the Attorney-General of Canada relied on a concept known as the "national dimensions" doctrine, according to which a subject matter originally falling under s. 92 of the *British North America Act*,[3] and consequently of exclusive provincial jurisdiction, may attain such a national scope that it becomes a matter of federal jurisdiction. The central government had hoped for a judicial consecration of that sweeping power which could in the future have been used to camouflage constant federal invasions of provincial jurisdiction. This diffuse "national dimensions" doctrine may have been established by the long-contradicted case of *Russell* v. *The Queen*[4] and, in any case, was resurrected in *Attorney-General of Ontario* v. *Canada Temperance Federation*[5] which refused to overthrow the *Russell* judgment. Several years later, *Canada Temperance Federation* was impliedly disapproved in *Canadian Federation of Agriculture* v. *Attorney-General of Quebec*.[6] Had this doctrine not been accepted by the Court in the *Anti-Inflation* case, the Attorney-General of Canada urged, in the alternative, that an economic crisis amounting to an emergency warranted resort to the "national emergency" doctrine.

The Chief Justice's Judgment: A Centralist's View

In spite of the fact that the Chief Justice stated that he would give his judgment on the basis of the "national emergency" doctrine and that "it becomes unnecessary to consider the broader ground advanced in its support,"[7] there were some very important *obiter dicta* concerning the "national dimensions" doctrine in his judgment. For one who had commented on one of the most centralist judgments of the Judicial Committee in the following terms, "Viscount Simon's opinion in the *Canada Temperance Federation* case may be likened to the removal of shutters from a house which has been kept dark for many years,"[8] it must have been disappointing to see a majority of the Court close the shutters by rejecting the "national dimensions" doctrine.

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[2] S.C. 1975-76, c. 75.

[3] (1867), 30 & 31 Vict., c. 3 (U.K.).

[4] (1882), 7 A.C. 829.

[5] [1946] A.C. 193; [1946] 2 D.L.R. 1; [1946] 2 W.W.R. 1.

[6] [1951] A.C. 179.

[7] *Reference Re Anti-Inflation Act, supra,* note 1 at 419 (S.C.R.); 493 (D.L.R.); 584 (N.R.).

[8] Laskin, *"Peace, Order and Good Government" Re-examined* (1947), 25 Can. Bar Rev. 1054 at 1080.

Indeed, that is why the Chief Justice clearly stated that the "national dimensions" doctrine should not be nailed down, so as to be able to use it when necessary.[9]

One way still existed to preserve the right to infringe upon the exclusive powers of the provinces: it was to enlarge the applicability of the "national emergency" doctrine. The Chief Justice simply had to state, first, that there was no difference in nature between the "national dimensions" and the "emergency" doctrines, except one of degree,[10] then use the word "crisis" instead of "emergency," and finally, apply the same standards to a peacetime problem as those elaborated by the Judicial Committee for wartime legislation — thereby opening the back door instead of the shutters.

Having thus opened the back door by using the "emergency" doctrine for a peacetime situation, the Chief Justice then analyzed the use of extrinsic evidence. Its only application, according to him, was to prove that Parliament might have had certain reasons to believe that a piece of legislation would be useful to solve a serious national condition:

> In considering such material and assessing its weight, the Court does not look at it in terms of whether it provides proof of the exceptional circumstances as a matter of fact. The matter concerns social and economic policy and hence governmental and legislative judgment. It may be that the existence of exceptional circumstances is so notorious as to enable the Court, of its own motion, to take judicial notice of them without reliance on extrinsic material to inform it. Where this is not so evident, the extrinsic material need go only so far as to persuade the Court that there is a rational basis for the legislation which it is attributing to the head of power invoked in this case in support of its validity.[11]

According to that rule, the evidence submitted by the parties lost much of its effectiveness:

> The economic judgment can be taken into account as an element in arriving at an answer to the question whether there is a rational basis for the governmental and legislative judgment exercised in the enactment of the *Anti-Inflation Act.* It cannot determine the answer.
>
> In my opinion, this Court would be unjustified in concluding, on the submissions in this case and on all the materials 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.[12]

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[9] *Reference Re Anti-Inflation Act, supra,* note 1 at 412 (S.C.R.); 487 (D.L.R.); 578 (N.R.). "It is my view that a similar approach of caution is demanded even today, both against a loose and unrestricted scope of the general power and against a fixity of its scope that would preclude resort to it in circumstances now unforeseen." At 415 (S.C.R.); 489 (D.L.R.); 580 (N.R.). ". . . I emphasize again the point made earlier that it would be unwise to nail down any head of legislative power in such firm fashion as to make it incapable of application to situations as yet unforeseen."

[10] *Id.* at 411 (S.C.R.); 486 (D.L.R.); 577 (N.R.). "What emerges from the lines of cases up to the *Snider* case are differences more of degree than of kind about the scope of the federal general power."

[11] *Id.* at 423 (S.C.R.); 495-96 (D.L.R.); 587 (N.R.).

[12] *Id.* at 425 (S.C.R.); 497-98 (D.L.R.); 589-90 (N.R.).

The onus of proof imposed on the parties was tantamount to the creation of a quasi-irrebutable presumption of validity in favour of any federal law founded on an "emergency." Indeed, it is much more difficult to prove the absence of "a rational basis for the governmental and legislative judgment"[13] than to prove that there was no emergency. The facts in the present case demonstrate the extreme difficulty in proving the unconstitutionality of a federal law founded on an "emergency."

The fundamental question which should have been asked was whether the onus of proof should have rested on the shoulders of the government which had made a dramatic alteration to the division of powers in a peacetime situation. The Supreme Court of Canada was not compelled to apply to a peacetime problem the same rules as those formerly elaborated in wartime and postwar situations. *Stare decisis* exists only in similar cases: in the present instance, there was no situation as serious as war.[14]

One may agree that sometimes a peacetime crisis may become more important than war. In that case, the courts could take judicial notice of such an emergency. It was certainly not the case in the present situation; the law, on its face, was unconstitutional unless an emergency existed and the Court should not have used the "very clear evidence" test. It should have recognized that this exceptional rule had only been applied in wartime, a situation which then clearly created a presumption of emergency.

But in peacetime, would not the situation be different? What would be the extent of a "crisis" that would warrant the invocation of the "emergency" doctrine so as to destroy the autonomy of the local states? The federal structure of Canada, which rests on the respect for the sovereignty of local states within their jurisdictions[15] and, as a corollary, on the exclusivity of fields of jurisdiction,[16] has been too easily forgotten in this case. Instead, the concession of this exorbitant power to the federal authorities rested purely on political motives: the "necessity" of a powerful central authority to solve "serious national condition[s]."[17]

Indeed, the majority of the Court did not even require a clear declaration by Parliament that it intended to cure an emergency. In other words, Parliament did not have to state clearly that an emergency existed or was foreseen. It simply had to invade the provinces' jurisdiction, wait to see if this move would be contested, and, if it was, plead that a "crisis" or "excep-

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[13] *Id.*

[14] See, for example, *Fort Frances Pulp and Paper Co. Ltd.* v. *Manitoba Free Press Co. Ltd. et al.*, [1923] A.C. 69; *Co-operative Committee on Japanese Canadians et al.* v. *Attorney-General of Canada et al.*, [1947] A.C. 87; *In the Matter of a Reference as to the Validity of the Wartime Leasehold Regulations*, [1950] S.C.R. 124.

[15] *Maritime Bank* v. *Receiver General of New Brunswick*, [1892] A.C. 437.

[16] *Attorney-General of Canada* v. *Attorney-General of Ontario*, [1937] A.C. 326; [1937] 1 D.L.R. 673; [1937] 1 W.W.R. 299; *Attorney-General of Canada* v. *Attorneys-General of Ontario, Quebec, Nova Scotia*, [1898] A.C. 700.

[17] *Reference Re Anti-Inflation Act, supra*, note 1 at 423 (S.C.R.); 495 (D.L.R.); 587 (N.R.).

tional circumstances"[18] existed, thereby reversing the onus of proof. The onus would then be on the challengers to prove that Parliament could not have had a rational basis to intervene. In the future, the federal government, for more certainty, could accompany any similar law temporarily destroying the constitution with a White Paper stating that its law is not futile and send civil servants to give speeches on the necessity of the said law . . . ![19]

Beetz's Judgment: The Defence of Federalism

Beetz J. articulately conceptualized an interpretation of the "peace, order, and good government" clause which would respect the fundamental principle of the Canadian constitution — federalism. He emphasized the difference in nature between the "national dimension" doctrine and the "emergency" doctrine: while the first brings a permanent modification of the division of legislative powers, the second is, in essence, temporary.

Extrapolating the implications of an acceptance of the "national dimensions" doctrine, wherein the judiciary would permit the federal Parliament to trench upon exclusive provincial jurisdiction as soon as a problem attains more than a local dimension, Mr. Justice Beetz foresaw that "a fundamental feature of the Constitution, its federal nature, the distribution of powers between Parliament and the provincial legislatures, would disappear, not gradually but rapidly."[20]

Proceeding on this assumption, Beetz J. analyzed the earlier cases on the subject and concluded that they were totally incompatible with the existence of a "national dimensions" doctrine. He explained that this expression had been used in cases involving aeronautics,[21] radio communications,[22] and the national capital area[23] only because these cases had applied the "peace, order, and good government" clause in its residual character: each of these new subject matters "had a degree of unity that made it distinct from provincial matters and a sufficient consistence to retain the bounds of form."[24] Because of their distinctiveness and their unseverability, those new subject matters which had not been foreseen in 1867 fell under the residual power and, due to their extra-local dimension, under the federal residual power instead of that of the provinces.

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[18] *Id.*

[19] The Attorney-General of Canada, in the instant reference, relied on the federal government's White Paper entitled "Attack on Inflation" and on a speech delivered by the Governor of the Bank of Canada, Gerald Bouey.

[20] *Reference Re Anti-Inflation Act, supra,* note 1 at 445 (S.C.R.); 514 (D.L.R.); 607 (N.R.).

[21] *Re Aerial Navigation, Attorney-General of Canada* v. *Attorney-General of Ontario,* [1932] A.C. 54; [1932] 1 D.L.R. 58; [1931] 3 W.W.R. 625. *Sub nom. Re Regulation and Control of Aeronautics in Canada.*

[22] *Re Regulation and Control of Radio Communication, Attorney-General of Quebec* v. *Attorney-General of Canada et al.,* [1932] A.C. 304; [1932] 2 D.L.R. 81; [1932] 1 W.W.R. 563.

[23] *Munro* v. *National Capital Commission,* [1966] S.C.R. 663; 57 D.L.R. (2d) 753.

[24] *Reference Re Anti-Inflation Act, supra,* note 1 at 458 (S.C.R.); 524 (D.L.R.); 618 (N.R.).

As for inflation, Beetz J. considered that it did not have sufficient specificity and distinctiveness to become a new subject matter. Consequently, the *Anti-Inflation Act* could not be grounded on the federal residual clause.

Just as the Chief Justice's reluctance to repudiate the "national dimensions" doctrine could have been foreseen by reading the works he had published when he was an academic,[25] so, too, Beetz's judgment might have been predicted. Indeed, he had clearly stated the dangers of the national dimension doctrine in 1965.

> C'est ainsi, par exemple, qu'entre la notion d' "état d'urgence," qui est relative mais qui est susceptible d'une appréciation assez précise, et celle des "dimensions nationales," d'un problème, qui est purement relative et d'application toujours discutable, les Québecois auront une tendance à préférer celle d'état d'urgence à celle des dimensions nationales, tout simplement parce que la première se rationalise comme une suspension provisoire de la constitution, tandis que l'autre risque de se solder par une modification permanente, au profit du pouvoir fédéral, de l'aménagement des compétences. C'est ainsi que le juriste québecois ne peut se montrer que méfiant à l'endroit de la thèse selon laquelle, par exemple, la compétence législative doit être à la mesure du problème à résoudre. Il lui semble d'abord que ce n'est pas un argument juridique, mais une raison politique et fonctionnelle de modifier, s'il y a lieu, la constitution. Il lui paraît ensuite, d'un point de vue politique, que c'est là un argument permanent, favorable à la concentration fédérale des compétences, car il est évident que les problèmes à résoudre ne cesseront de croître en intensité, en complexité et par leurs ramifications. . . .
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> Enfin le juriste québecois ne peut que se troubler devant l'attitude de certains juristes canadiens qui ou bien se contentent de critères surtout quantitatifs pour déterminer la validité des lois dont la constitutionnalité est mise en doute ou bien prennent plaisir à souligner le degré considérable d'intuition qui entre en jeu dans l'interprétation judiciaire de la constitution. L'attitude de ces juristes . . . peut provoquer une confusion entre la science politique et le droit, et entraîner une démission de l'esprit d'analyse et une renonciation à la conceptualisation, tous deux indispensables à la fécondité du droit.[26]

If Beetz's interpretation of the "peace, order, and good government" clause is accepted in the future by the Supreme Court, and five out of nine judges have done so in the present reference, all subject matters which have a distinct nature, an unseverable character, a national scope, and which were overlooked or not foreseen in the enumerated heads of either ss. 91, 92, or 93, would fall under the federal residual clause. The privilege of paramountcy would also be attached to them.

But from now on, the question is how is one to separate the sheep from the goats?[27] What will be the norms used to distinguish the subject matters falling under the federal residual clause from other severable subject matters? Federal authorities may no longer have the capacity to legislate with respect to federal parks unless they are considered to be new subject matter. Would the declaratory statute called the *Holidays Act*,[28] which makes the

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[25] Laskin, *supra*, note 8.

[26] Beetz, "Les attitudes changeantes du Québec à l'endroit de la constitution de 1867" in P.A. Crepeau and C.B. MacPherson, eds., *The Future of Canadian Federalism* (Toronto: University of Toronto Press, 1965) at 120-21.

[27] On this point see A. Abel, *The Anti-Inflation Act Judgment: Right Answer to the Wrong Question* (1976), 26 U. of T.L.J. 409.

[28] R.S.C. 1970, c. H-7.

first day of July a legal holiday, be considered as falling under a new non-severable subject matter? If not, the Act is *ultra vires*! If the Supreme Court applies the *Munro*[29] rationale liberally to these cases and extends the possibilities of creating such new subject matters, then Professor Peter Russell would be correct in his contention that "[i]n the hands of a nationally minded court it may be surprising what turns out to be specific enough to come under the federal residual power."[30]

Analysis of the Two Different Approaches of Laskin C.J. and Beetz J.

The different approaches of these two Canadian constitutional law experts are interesting because they are good representatives of the two frames of mind which exist in Canadian law. Indeed, the two components of the Canadian federal state have conflicting visions of political structures and very distinct approaches to the concept and role of authority. While the French Canadians are subject to a law elaborated by the experts and approved by Parliament, the English common law has its roots in the customs of the people: the former is an institutional society, the latter an individualistic one. French Canadians generally either adhere to or have been moulded by the traditions and views of the Roman Catholic Church, a very structured monocentric organization; Anglo-Canadians, who are influenced by more religious diversity, are used to a polycentric religious structure. Even language is a mirror of this profound dichotomy: while English evolves according to its generally accepted use, the Académie Française dictates how French should be used.

These differences have tainted the evolution of Canadian constitutional law in recent years. While French Canadians have always insisted on formal modifications of the *British North America Act*, the federal authorities, controlled by English Canadians, have answered by administrative palliatives. Such temporary agreements seem adequate to common law lawyers used to a law that evolved according to the needs of the time but appear fragile to jurists influenced by a continental tradition established on fundamental principles.

In the same way, while Beetz's judgment clarifies the interpretation to be given to the P.O.G.G. clause, it also seems to determine its applicability for the future; Laskin C.J. prefers a pragmatic approach which gives no determined application to the clause so that it may be applied according to the needs of the moment.

Ritchie's Judgment: Ambiguity

There is little to say about Mr. Justice Ritchie's judgment except that it is incomplete and may create some ambiguity. Clearly he rejected the national dimensions theory:

> It is not difficult to envisage many different circumstances which would give rise

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[29] *Supra*, note 23.

[30] P. Russell, *The Anti-Inflation Case: The Anatomy of a Constitutional Decision*, paper presented to the Canadian Political Science Association, Fredericton, N.B., June, 1977 at 17.

> to national concern, but at least since the *Japanese Canadians* case, I take it to be established that unless such concern is made manifest by circumstances amounting to a national emergency, Parliament is not endowed under the cloak of the "peace, order and good government" clause with the authority to legislate in relation to matters reserved to the Provinces under s. 92 of the *British North America Act, 1867* . . . .[31]

Unfortunately, Ritchie J. did not indicate how he could have interpreted the *Aeronautics*,[32] *Radio*[33] and *Munro*[34] cases which were decided on the basis of the "peace, order, and good government" clause when there was no emergency. However, he stated that he was in agreement with the opinion of Beetz J.[35]

Ritchie J. then went on to imply that the fact that there was a "serious national concern" was synonymous with a "national emergency."[36] The line of demarcation between the rejected "national dimensions" doctrine and this "emergency" doctrine becomes very thin. Beetz J. had foreseen this when he asked:

> The *Canada Water Act*, . . . on the constitutionality of which, again I refrain from expressing any view, contains a preamble where it is stated that pollution of water resources of Canada has become "a matter of urgent national concern." Is the *Canada Water Act* an emergency measure in the constitutional sense? . . . How is a matter of serious national concern to be distinguished from a matter of urgent national concern?[37]

Has the Supreme Court of Canada really gathered to bury the "national dimensions" doctrine?[38] The answer is certainly not clear.

Conclusions

If Canada was a country with an unwritten constitution and with but a single national group, the Chief Justice's plea against a fixity of the scope of the federal Parliament's general power and its restriction to emergency situations would be reasonable. But that is not the case: some of the components of Canada, mainly Québec because of its special socio-cultural status, agreed to join in this federal scheme only on the assumption that they would retain *exclusive* legislative jurisdiction on matters which, at the time of Confederation, seemed essential to their cultural distinction — primarily education, property, and civil rights:

> C'est un fait historique indéniable que le Bas-Canada d'alors, l'actuelle province de Québec, accepta la Confédération parce que ses représentants étaient con-

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[31] *Reference Re Anti-Inflation Act, supra,* note 1 at 437 (S.C.R.) 507 (D.L.R.); 599-600 (N.R.).

[32] *Supra,* note 21.

[33] *Supra,* note 22.

[34] *Supra,* note 23.

[35] *Reference Re Anti-Inflation Act, supra, note* 1 at 437 (S.C.R.); 507 (D.L.R.); 600 (N.R.).

[36] *Id.* at 439 (S.C.R.); 509 (D.L.R.); 601 (N.R.).

[37] *Id.* at 467 (S.C.R.); 531 (D.L.R.); 626 (N.R.).

[38] F. Chevrette and H. Marx, *Comment* (1976), 54 Can. B. Rev 732.

> vaincus que cette quatrième Constitution lui conservait tous les droits que lui avaient donnés les Capitulations, le Traité de Paris et surtout l'Acte de Québec.[39]

The Québécois would not have accepted that the central authority would be permitted to invade provincial jurisdiction when one of the aspects of these fields of jurisdiction had attained a dimension of interest to the whole country. The letter from Macdonald to Cameron substantiates this fact. Surely, the Québécois would not have fought for centuries for their national independence on these subject matters to see it lost for a purely practical reason. Beetz's judgment may appear to be technical and restrictive, but it gives the only interpretation to "peace, order, and good government" which is compatible with federalism.

The federal constitution is a fundamental text, representing the agreement of the original states and of two nations to live together on certain basic principles. Such principles are ordinarily incorporated into the text so as to protect the weak against the strong, and in the Canadian structure, the national state of French Canadians is the weak component. The individual provinces are also weak in comparison to the central government's financial and political strength. If recognition were given to the possibility that the government of the majority would invade provincial jurisdiction by asserting that the subject matter extended beyond a local scope, then the federal government could achieve complete centralization and the two-hundred-year long combat by French Canadians to gain control of their fields of jurisdiction would fail. Perhaps Viscount Haldane "gave his decisions in terms of cold abstract logic, purporting to find its points of reference within the four corners of the *B.N.A. Act*, and uninformed and unnourished by any facts of Canadian living which might have afforded a rational basis for his constitutional determinations,"[40] but the result of his judgments was the consecration of a federally-based system.

It is not an acceptance of the "national dimensions" doctrine which would permit the constitution to be regarded "as a resilient instrument capable of adaptation to changing circumstances,"[41] or that would persuade the provinces to relinquish their sovereign powers. Indeed, the mere fact that this "instrument capable of adaptation to changing circumstances" would be so adapted according to the will of the most powerful political structure, would render aleatory the protection accorded to the Québec nation by the constitution.

Finally, when one realizes how the judgments of Laskin C.J.C. and Beetz J. are natural consequences of their prior writings and philosophy, one becomes aware of the importance of the choice of judges of the Supreme Court for the evolution of our constitution. This power of appointment is still exclusively in the hands of the federal executive, which is one of the litigants in most constitutional issues!

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[39] P.B. Mignault, *Nos problemes constitutionnels* (1937-38), 16 La Revue du Droit 577 at 587.

[40] Laskin, *supra*, note 8 at 487.

[41] *Reference Re Anti-Inflation Act*, *supra*, note 1 at 412 (S.C.R.); 487 (D.L.R.); 578 (N.R.).